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A Collection of Essays on Libertarian Jurisprudence

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A COLLECTION OF ESSAYS ON LIBERTARIAN JURISPRUDENCE

WALTER E. BLOCK*

EDITOR'S NOTE

Presented below are three articles authored or co-authored by Walter E. Block. They are as follows:

- I. SUNSHINE AND PROPERTY RIGHTS, WALTER E. BLOCK
- II. ALIENABILITY, ONCE AGAIN; A LIBERTARIAN THEORY OF CONTRACTS, WALTER E. BLOCK
- III. PROFESSOR LEVY ON THE *REAL* BLACKMAIL PARADOX: A RESPONSE, WALTER E. BLOCK AND DAVID GORDON

I. SUNSHINE AND PROPERTY RIGHTS

ABSTRACT

We attempt to demonstrate that while it should be against the law to interfere with any property owner from receiving sunlight from directly above, this should not at all apply to tall buildings, which place into shadow their neighbors, and thus deprive them of sideways sunlight.

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Who owns the rights to sunshine?

Mr. Burns, of *The Simpsons* fame, once placed a gigantic umbrella over Springfield, so as to keep the denizens of this town in the dark and force them to purchase more electricity at higher prices from his nuclear power plant.¹ Did he have a right to place his umbrella in such a manner? Absolutely not, we argue, as the townsfolk had long previously enjoyed the sun's rays; they, in effect, were the homesteaders of it. Mr. Burns, in sharp contrast, was a Johnny-come-lately, and therefore not the proper owner of this benefit, at least according to the libertarian theory of homesteading.²

But suppose, instead, that Mr. Burns had built a very wide 500-story building right at the edge of town. While this, of course, would not directly interfere with the citizenry receiving sunlight from directly above, it most certainly would cast most if not all of them into shadow for at least part of the day. Moreover, they would have received this sideways sunlight before the advent of the building; so they were "there first" for indirect sunlight from the side, not only for direct rays from straight above. Nevertheless, we shall argue that Mr. Burns has a right to erect his building adjacent to the town, but not to place his umbrella directly over it.

1. *The Simpsons, Who Shot Mr. Burns? (Part One)* (FOX television broadcast May 21, 1995).

2. See HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY* 332, 336 (1993); ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* 8–9 (1987); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* 47–48 (2d ed. 2006) (1973), available at <http://www.mises.org/rothbard/newliberty.asp>; Walter Block, *Earning Happiness Through Homesteading Unowned Land: A Comment on "Buying Misery with Federal Land" by Richard Stroup*, 15 J. SOC. POL. & ECON. STUD. 235, 235 (1990); Walter Block, *Homesteading City Streets: An Exercise in Managerial Theory*, 5 PLAN. & MARKETS 18, 19 (2002), available at <http://www-pam.usc.edu/volume5/v5i1a2s1.html>; Walter Block, *On Reparations to Blacks for Slavery*, 3 HUM. RTS. REV. 53, 53 (2002); Walter Block & Guillermo Yeatts, *The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's "Toward a Better Distribution of Land: The Challenge of Agrarian Reform"*, 15 J. NAT. RESOURCES & ENVTL. L. 37, 43 (1999–2000); Walter Block & Richard Epstein, *Debate on Eminent Domain*, 1 N.Y.U. J.L. & LIBERTY, 1144, 1149 (2005); Hans-Hermann Hoppe, *Of Private, Common, and Public Property and the Rationale for Total Privatization*, 3 LIBERTARIAN PAPERS 1, 3 (2011) [hereinafter Hoppe, *Of Private, Common, and Public Property*]; N. Stephan Kinsella, *A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability*, 17 J. LIBERTARIAN STUD. 11, 11 (2003); John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government*, in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU* 1, 17–18 (Oxford Univ. Press 1960); Per Bylund, *Man and Matter: A Philosophical Inquiry into the Justification of Ownership in Land from the Basis of Self-Ownership* 1 (unpublished manuscript), available at http://perbylund.com/academics_polsci_msc.pdf; Stephan Kinsella, *How We Come to Own Ourselves*, LUDWIG VON MISES INST. (Sept. 7, 2006), <http://www.mises.org/story/2291>; Michael S. Rozeff, *Original Appropriation and Its Critics*, LEW ROCKWELL (Sept. 1, 2005), <http://www.lewrockwell.com/rozeff/rozeff18.html>.

Before we discuss our reasons for harping on what may appear to many people as merely a tempest over a television cartoon show, let us discuss why this issue is of any importance whatsoever. It is of crucial moment for determining whether or not eminent domain laws are needed to trump possible holdouts against the creation of private highways.³ For, suppose there was a holdout in the planned path of the thoroughfare; how could the private builder create the roadway without resort to the government? Simple: by building a tunnel under⁴ the holdout's property or a bridge over it. However, the sunlight rights of the holdout, from above at least, must be respected. Therefore, the bridge must be made of translucent material.⁵

To return to our main point of interest, if the bridge builder over the holdout's land must respect the latter's right to direct sunlight, why must Mr. Burns be legally allowed to put anyone else's land in the shadows for *part* of the day, by juxtaposing a large dwelling next to it?

In order to answer this, picture the earth not as it is, a sphere, but as a cube, of roughly the same size as at present. And, while we are at it, let us suppose that instead of the sun rising in the east and setting in the west, there are now six suns beaming down at our cubed earth, one for each of its surfaces.⁶ But they each rise on the east side of the one of the six surfaces of the earth to which they are assigned, and set in the west. Now, if we were to ban buildings from being erected that cast shadows on their neighbor's territory, when the sun is very low in the sky in either direction, an edifice would place into relative darkness an area stretching the entire length and breadth of one sixth of the earth's surface. And this applies, not only to tall buildings, but, indeed, to *anything*. Consider a person who is six feet tall. He, *too*, would cast a gigantic shadow over a gargantuan swath of land; he would be "violating" not only his neighbor's rights to uninterrupted sunlight, but also that of people thousands of miles away! Suppose instead of standing up, he crawled around, and the top of him reached a height of only eighteen inches. He would *still* be a rights violator, since, assuming an exactly flat surface of the earth, when the sun was low enough in either direction, he would be casting a shadow the entire length

3. See WALTER BLOCK, *THE PRIVATIZATION OF ROADS AND HIGHWAYS: HUMAN AND ECONOMIC FACTORS*, at xv–xvii (2009), available at http://mises.org/books/roads_web.pdf.

4. We reject the ad coelum doctrine. According to this law, those who own a plot of land on the surface of the earth also have property rights in a decreasing share of territory below, or an increasing share above (think ice cream cone). But this doctrine is inconsistent with homesteading, as the typical landowner never mixed his labor with anything, say, 400 yards below his holdings, nor 40,000 feet above. The land below properly belongs to the first homesteader, which we presume will be the road builder. The right to utilize the air above is properly that of those who have first used it, namely the airline companies.

5. It must also have gaps in it, so as to allow the rain to reach the holdout's crops below.

6. We further posit that each of these six suns is "on" for twelve hours of the day, and "off" for an equal amount of time.

of the planet.⁷ However, presumably, there were people walking around, on their two feet, long before anyone built any edifice at all. People came before buildings, not the other way around. Thus, the human beings all homesteaded the rights to stand straight up, let alone crawl around on their bellies. The logical implication of this is that these individuals first had a *right* to do exactly that. If so, in this cubic world we are now considering, they cast gigantic shadows all over the place. We thus conclude that no property owner has any right to object to someone else casting a shadow on him from a sideways direction. There is still ownership in the sun's rays from directly overhead, but not from any other direction.

Now, let us return to the real world. We are again occupying a sphere, not a cube. The sun is now back in its proper revolution around the earth.⁸ People do not cast quite the giant sized shadows they did in our other scenario, but they do block out the sun's rays from the sideways direction over other people's property. Since people came first, the homesteading philosophy accords them the right not only to crawl around, but also to walk about on their hind legs and, by extension, to erect edifices that cast shadows onto the property of other people.

There is a problem, however. Note, that I am taking an *ad coelum* viewpoint with regard to sunlight. That is, I am claiming that the property owner has the right to continue to receive sunlight only from directly above, not from any sideways direction. However, I am on record⁹ critiquing this *ad coelum* perspective. I did so on the ground that it was incompatible with homesteading: no surface property owner, typically, mixed his labor with territory tens of thousands of feet below the surface of the earth—or above it, either, for that matter.

Why the difference? Why accept *ad coelum* above ground, but not below? And, to make matters even worse, cannot a claim be made by the first landowner-farmer that he had homesteaded the sun's rays for his crops not only from directly above, but also from the sideways directions for significant parts of the day?

My attempted reconciliation is based on recognition of the fact that there is a conflict of rights in rejecting *ad coelum* from above, but not from below. Yes, the farmer has utilized the sun's rays from all directions, not just directly above. But, in the flat world of our previous devising, this is incompatible with anyone else on earth so much as existing, let alone lying flat, and certainly not

7. Well, one-sixth of it in any case.

8. Do not tell me about Copernicus. I do not want to hear about this quack/charlatan. He was obviously wrong about what revolves around what. We are not interested in his silly theory. As any fool can see, the sun, rising in the east and setting in the west as it does every day, revolves around the earth, and not the other way around.

9. See BLOCK, *supra* note 3, at 296.

standing up. For, if anyone else does that, he blocks some of the sideways sunlight of our farmer. In the real world, which looks flat to the naked eye, when the sun is at its low point—either just rising or setting—a human being, say, six feet tall, casts a *gigantic* shadow. And this is to say nothing of a modest two- or three-story building, arguably necessary for human life. Thus, the farmer could in justice, if he were granted other than *ad coelum* sunlight rights, object to the existence of any other human being. But we take the existence of human beings, many of them, as a given. Certainly, the entire edifice of property rights is erected on the consideration that it is the only way to prevent *conflict* between members of our species. However, there cannot be conflict if there is only one person on the flat earth, or only a very, very few on our spherical planet. If the purpose of property rights is to prevent conflict,¹⁰ and conflict can only take place between *different* people, then, if we want to adhere to a system of property rights, it *logically cannot* preclude the very existence of more than one individual. But sideways sunlight property rights do precisely that. They make it impossible for anyone else except the one homesteader to exist. Therefore, that doctrine must be rejected.

If the farmer wants sideways property rights, he can homestead, say, 10,000 acres, and thus obtain for himself, for example, an inner 1,000 acres, assuming *de minimus* rules for very tall buildings nearby. That is, the more sideways sunlight he wants to guarantee for himself, the more land the farmer must homestead. No one, perhaps, can protect himself from a building 500 stories high, but at least at present, such heights are economically and architecturally unfeasible.

What of noise pollution? How does this figure into the present discussion?¹¹ There is a relevant difference between noise pollution, on the one hand, and sunlight on the other, so that the former is not directly related to our present considerations. How so? This is because sunlight is a benefit, while noise pollution is a harm or a rights violation—certainly if it exceeds certain norms. Consider the airport. The geographical limits of the homesteading for runways, buildings, and parking lots, we may suppose, is one square mile. But posit that the noise of its planes extends to cover nine square miles. The airport owner has not mixed his labor with surrounding territory in any way apart from perpetrating noise upon it. If the airport was there first, well and good: any homeowner who sets up shop later on any of the eight surrounding square miles has “[come] to the nuisance”¹² and must take the land as he finds it (noisy, in this case). Of course, if the homeowner has first homesteaded land in

10. Hoppe, *Of Private, Common, and Public Property*, *supra* note 2, at 9.

11. I am indebted to Rabbi Lipa Dubrawsky for bringing up this point.

12. Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2 CATO J. 55 (1982), reprinted in *ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION* 234, 249 (Walter Block ed., 1990).

the area surrounding the soon-to-be-built airport, then the latter must purchase the noise rights from the former. But, in any case, noise is like a projectile, or a bullet, or dust particles; it constitutes an invasion against private property.¹³ Another relevant difference between noise and sunlight is that the one is an act of God (or nature) while the other, apart from volcanoes, storms, etc., is manmade.

What about water?¹⁴ Let us divide this challenge into two categories: rain and rivers. As far as the former is concerned, it is identical to sunlight. The farmer owns the precipitation that comes down from above, but not that which emanates from a sideways direction. So, if someone erects a large building nearby, which blocks the rain that would otherwise reach his crops from that quarter, the farmer should have no recourse at law to demand damages or an injunction. However, if someone wants to build a bridge overhead,¹⁵ he must do so in the form of a grid, so as to allow the rain to fall below.¹⁶ Why? For the same reasons as sunlight. *Ad coelum* is justified above but not below ground¹⁷ for the sun's rays, since otherwise, the existence of only one human being would be justified. Sideways ownership of rain, therefore, follows the same legal and logical pattern as sunlight.

What of rivers? Suppose B has set up a watermill downstream, first. Whereupon A, located upstream, diverts the water, making already existing B's factory inoperable. One possible answer stems from the concept of optimal size or "Technological Unit." States Rothbard:

If A uses a certain amount of a resource, how much of that resource is to accrue to his ownership? Our answer is that he owns the technological unit of the resource. The size of that unit depends on the type of good or resource in question, and must be determined by judges, juries, or arbitrators who are expert in the particular resource or industry in question. If resource X is owned by A, then A must own enough of it so as to include necessary appurtenances. For example, in the courts' determination of radio frequency ownership in the 1920s, the extent of ownership depended on the technological unit of the radio wave—its width on the electromagnetic spectrum so that another wave would

13. *Id.* at 248.

14. I am indebted to Matthew A. Block for raising this point.

15. Walter Block & Matthew Block, *Roads, Bridges, Sunlight, and Private Property Rights*, 7 J. DES ECONOMISTES ET DES ETUDES HUMAINES 351, 359 (1996); Walter Block, *Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock*, 8 J. DES ECONOMISTES ET DES ETUDES HUMAINES 315, 319 (1998); BLOCK, *supra* note 3, at 307.

16. The construction materials must be translucent, so that the sun's rays can reach the ground.

17. However, the ownership of air paths for airlines belongs to air carriers, not farmers. The former, not the latter, have homesteaded them. As to the objection that an airplane can block a farmer's sunlight with its shadow, or block some rain from reaching below, this may be dismissed on *de minimis* grounds. In any case, most air travel nowadays occurs above the clouds, not below them.

not interfere with the signal, and its length over space. The ownership of the frequency then was determined by width, length, and location.

American land settlement is a history of grappling, often unsuccessfully, with the size of the homestead unit. Thus, the homesteading provision in the federal land law of 1861 provided a unit of 160 acres, the clearing and use of which over a certain term would convey ownership to the homesteader. Unfortunately, in a few years, when the dry prairie began to be settled, 160 acres was much too low for any viable land use (generally ranching and grazing). As a result, very little Western land came into private ownership for several decades. The resulting overuse of the land caused the destruction of Western grass cover and much of the timberland.¹⁸

In the river case, the point would be that B was not given ownership over enough of it to constitute the “technological unit.” Certainly, it is a “necessary appurtenance” of the water mill to ensure that the river is not diverted to a different path. If so, then B would be entitled, in law, to an injunction to prevent A from diverting the river’s waters from him.

II. ALIENABILITY, ONCE AGAIN; A LIBERTARIAN THEORY OF CONTRACTS ABSTRACT

We should be free to sell ourselves into slavery, if we wish. We should be free to sign ourselves into rehabilitation centers, and not be allowed to leave until the agreed upon time, even if we change our minds. We should be free to bind ourselves to specific performance contracts, even if we wish to renege. These contracts should be enforced against us, on the supposition that we entered in to them voluntarily. We should be compelled to live up to the letter and spirit of all such contracts. The present paper makes the case for these somewhat remarkable claims on both utilitarian and deontological grounds.

A. Introduction

The doctrine of alienability means that a person may sell, give away, or otherwise dispose of a possession.¹⁹ For example, shoes, books, and cars are alienable.²⁰ The law does not prohibit us from ridding ourselves of these objects; we may sell or give them away, and for “keeps.” That is, once they are alienated in such a manner, we are precluded by law from seeking back their possession once again against the will of their present owners.²¹

In some jurisdictions, sexual services and used body parts (such as kidneys, livers, hearts, lungs, and blood) may be donated to others but not sold

18. Rothbard, *supra* note 12, at 153–54.

19. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1854 (1987).

20. That is, there are no laws prohibiting the sale of mundane objects such as these.

21. Once a sale takes place, it is a permanent one, unless both parties change their minds. A buys a car from B for \$10,000. Once the sale is finalized, B may not take back the automobile, nor A the money, unless by mutual consent.

to them for pecuniary considerations.²² Thus, they are legally alienable for free but inalienable for money.

Inalienability is the opposite. Here, a good, service, benefit, or whatever, may not legally be disposed of. The U.S. Declaration of Independence, for example, declares: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”²³

This Article attempts to demonstrate that this doctrine is a malicious one, incompatible with a more correct libertarian theory of contracts. We do so by use of three examples. In Part B we consider the case of the alcoholic. The purpose of Part C is to analyze the example of the safety net. Voluntary slavery is the subject of Part D. We consider several objections in Part E and conclude in Part F.

B. *The Alcoholic*

A is an alcoholic. He has tried numerous cures for this debility. One that almost worked for him is a drying out program. This is an entirely closed facility that will provide room and board for him, but not a drop of alcohol. Previously, he had signed up for a six-month stint at such an establishment. But after only one month, he checked himself out; he could not tolerate being without his favorite beverage for a second longer. Would it be legal for A to sign himself in at such a facility for the entire six months²⁴ with the agreement that he could not again renege on this cure?

He could do so if he could legally alienate his will for that length of time. But the law as it stands²⁵ does not allow any such thing. At time t1 he agrees to

22. This is a bit of a legal anomaly. A gift of such goods and services is within the law. Payment for them is prohibited by legislative enactment. This implies that there is something problematic about money changing hands, not these goods and services. But why should that be? Presumably, such legislation reflects an anti-market bias. See LUDWIG VON MISES, *THE ANTI-CAPITALIST MENTALITY* (1956).

23. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). I use “inalienable” and “unalienable” as synonyms.

24. After which, he believes he will be cured of what he regards as his affliction.

25. The Thirteenth Amendment actually prohibits even private slavery (unlike most aspects of the Constitution): “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend XIII. Debtor’s prison, sometimes called “peonage,” is also precluded by this amendment. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 1661 (2d Sess. 2004). This is a very clear statement of the legal situation: “[T]he Thirteenth Amendment is also not limited to regulating action undertaken by state governments, since it bans even purely private slavery and involuntary servitude.” Ilya Somin, *The Scope of Federal Power Under the Thirteenth Amendment*, THE VOLOKH CONSPIRACY (Feb. 13, 2013, 10:44 AM), <http://www.volokh.com/>

be bound for the entire half-year period. But at time t_2 , after one month we may suppose, he will again change his mind. Present legislation will uphold his later decision, the one made at time t_2 , and will ignore his earlier one, the one made at the outset, at time t_1 . Were the establishment, such as the Betty Ford Center,²⁶ to hold our man A against his will, one month after he signed himself in, they would be considered kidnappers. Thus, substance abuse centers are fighting alcoholism with the proverbial “one hand tied behind their back.” When the going gets rough for the alcoholic, he can reject the treatment, be let go, and resume his previous addictive habits.

On the other hand, under the doctrine of alienability, not inalienability, the prognostication for Mr. A would be a better one. Assuming, *arguendo*, that the full six-month period of drying out would indeed cure him of his dependency, the clinic could indeed offer him this possibility. When he wants to check out after six months, the substance abuse emporium would point blank refuse. If Mr. A accuses them of kidnapping, the defendant in this case would have a signed statement from the complainant giving up his right to make any such charge.

C. *Safety Net*

Mr. B is a tightrope walker. He prances on a thin wire, perched 100 feet high in the air. If he falls to the ground, he will die. So he hires Mr. C to carry a safety net below him, and to move it so that it always remains directly below B. Then, if B stumbles, C will save him. But B is afraid that C will renege on the deal, and if he slips off the rope, he will perish. There are several considerations that make it unlikely that C will depart from this position of trust when B needs him most. First, reputation. If C does this, his reputation as a safety net holder will be reduced. Probably, he will never, ever land such a job again. Second, B could ask C to post a bond for a substantial amount of money. If the latter leaves the former hanging, so to speak, he would forfeit these funds. Third, B perhaps can rely upon the fact that if C deserts him, B's heirs can sue C for damages.

Despite all of these considerations, B is not fully content with them. He would like to offer C a different kind of contract: that if C leaves B in the lurch, B or one of B's supporters may shoot C dead.²⁷ This is in effect a

2013/02/14/the-scope-of-federal-power-under-the-thirteenth-amendment/. I owe this footnote to Stephan Kinsella.

26. THE BETTY FORD CENTER, <http://www.bettyfordcenter.org/index.php> (last visited Sept. 13, 2013).

27. This is similar to what the armed forces do with deserters: hang them or utilize the firing squad.

specific performance contract.²⁸ Most likely, B will have to pay C more than would otherwise be the case, given the enhanced risk undertaken by the latter. The doctrine of inalienability would rule such a contract per se invalid. On utilitarian grounds, the loss would be that we would have fewer tightrope walkers than would otherwise be the case. Certain contracts between consenting adults will not be supported by law. On deontological considerations, people shall be precluded from using their freedom exactly as they wish.

D. *Voluntary Slavery*

Mr. D has a son, E. The son has a grave life-threatening disease. It will cost five million dollars to cure E. D, a poor man, has nowhere anything like that amount of money. Mr. F, a rich man, has long wished he could have D as his slave at his beck and call, so much so that he would be willing to purchase the rights to own D, were they but alienable. D, for his part, values his son's (E's) life more than he does his own liberty. That is, a trade between D and F would be Pareto optimal. At least one person would gain in welfare, and no one would lose an iota of it. D would garner from this contract his son's life (he would use the five million dollars for that purpose), which he values more than his freedom. He would profit to the extent of the difference between these two values. The same would apply to F. He rates D as a slave more highly than the five million dollars he must give up in order to make this purchase. His profit, too, is the difference to him between these two values. As with *all* voluntary commercial interactions, this is *necessarily* beneficial to both parties, at least in the ex ante sense. If this voluntary interaction is allowed to take place, D, all things considered, *happily* becomes a slave, E lives, and F takes on the role of slave master. All this, under alienability. But with inalienability the law of the land, D stays from much to his dismay because his child E perishes from this dreaded disease, and F is deprived of his dream to own another person. The latter's discomfort will not weigh heavily to most men of good will. But these will have to pause, at least a bit, at the prospect of E dying, and D, his loving parent, being unable to save him at the cost of his own liberty.

What would voluntary slavery mean in such a context? This much and no more: after the deal was consummated, F would be, let us suppose, allowed by law to whip (kill? It matters not) D.²⁹ Suppose D were to protest such behavior

28. The law generally does not favor enforcing contracts by "specific performance," so at most the defaulting slave would owe money damages. See 81A C.J.S. *Specific Performance* § 1 (2013). I owe this point to Stephan Kinsella. See also JOHN NORTON POMEROY, JR. & JOHN C. MANN, A TREATISE ON THE SPECIFIC PERFORMANCES OF CONTRACTS 683 (3d ed. 1926).

29. It goes without saying, but I will say it anyway, given that this is such an emotionally charged issue. Despite some superficial similarities, this system of voluntary slavery is *very*

on F's part, even though it was a clear aspect of the slave contract that he signed.³⁰ D resorts to the libertarian law against initiatory aggression. He calls the police and asks them to stop F from whipping or even killing him. What should the cops do? If they follow that law that allows for alienability, the forces of law and order would do exactly what they would do if F, instead of brutalizing D, were doing so to his cow or chicken—namely, nothing whatsoever. F would be operating well within the bounds of the law. That is exactly what is meant by voluntary slavery: if the slave agrees to take on this role, he cannot object when his master avails himself of rights thereto. Nor may the slave run away, for then he would be stealing a valuable piece of his master's property—namely, himself.

E. *Objections*

We cannot end this discussion without considering, and then disposing of, a series of objections to our thesis.

1. Rothbard

According to Rothbard:

In contemporary America, outside the glaring exception of the armed forces, everyone has the right to quit his job regardless of whatever promise or "contract" he had previously incurred. Unfortunately, however, the courts, while refusing to compel specific personal performance of an employee agreement (in short, refusing to enslave the worker) *do prohibit* the worker from working at a similar task for another employer for the term of the agreement. If someone has signed an agreement to work as an engineer for ARAMCO for five years, and he then quits the job, he is prohibited by the courts from working for a similar employer for the remainder of the five years. It should now be clear that this prohibited employment is only one step removed from direct compulsory slavery, and that it should be completely impermissible in a libertarian society.

Have the employers, then, no recourse against the mind changer? Of course they do. They can, if they wish, voluntarily agree to blacklist the errant worker, and refuse to employ him. That is perfectly within their rights in a free society; what is *not* within their rights is to use violence to prevent him from working voluntarily for someone else. One more recourse would be

different than the one that existed in the United States before the War of 1861. In that latter case, *coercive* slavery was the order of the day. Innocent people were seized, kidnapped, bound, whipped, and killed in the complete absence of any agreement to be treated in so vicious a manner on their part. That type of slavery is not at issue in the present paper. All libertarians, even all non-libertarians of good will, would have nothing but revulsion and disgust for such an institution. Here we are discussing something quite different: *voluntary* slavery.

30. He did so, I repeat, in order to save his son's life, for those of you who have not been paying close attention to this little story.

permissible. Suppose that Smith, when making his agreement for lifelong voluntary obedience to the Jones Corporation, receives in exchange \$1,000,000 in payment for these expected future services. Clearly, then, the Jones Corporation had transferred title to the \$1,000,000 not absolutely, but *conditionally* on his performance of lifelong service. Smith has the absolute right to change his mind, but he no longer has the right to keep the \$1,000,000. If he does so, he is a thief of the Jones Corporation's property; he must, therefore, be forced to return the \$1,000,000 plus interest. For, of course, the title to the money was, and remains, *alienable*.

Let us take a seemingly more difficult case. Suppose that a celebrated movie actor agrees to appear at a certain theater at a certain date. For whatever reason, he fails to appear. Should he be forced to appear at that or at some future date? Certainly not, for that would be compulsory slavery. Should he be forced, at least, to recompense the theater owners for the publicity and other expenses incurred by the theater owners in anticipation of his appearance? No again, for his agreement was a mere promise concerning his inalienable will, which he has the right to change at any time. Put another way, since the movie actor has not yet received any of the theater owners' property, he has committed no theft against the owners (or against anyone else), and therefore he cannot be forced to pay damages. The fact that the theater owners may have made considerable plans and investments on the expectation that the actor would keep the agreement may be unfortunate for the owners, but that is their proper risk. The theater owners should not expect the actor to be forced to pay for their lack of foresight and poor entrepreneurship. The owners pay the penalty for placing too much confidence in the actor. It may be considered more *moral* to keep promises than to break them, but any coercive enforcement of such a moral code, since it goes beyond the prohibition of theft or assault, is *itself* an invasion of the property rights of the movie actor and therefore impermissible in the libertarian society.

Again, of course, if the actor received an *advance* payment from the theater owners, then his keeping the money while not fulfilling his part of the contract would be an implicit theft against the owners, and therefore the actor must be forced to return the money.³¹

I disagree with Rothbard about non-compete clauses. The ARAMCO engineer, presumably, was paid more for signing this contract that would otherwise have been the case, assuming *ceteris paribus* conditions. Rothbard might assent to forcing this employee to return these additional wages if he works elsewhere during that half decade time period. But, according to the *contract* they signed, the worker no longer owns the option to be employed elsewhere for this duration. If he wants this right returned to him, he must purchase ARAMCO's permission. This was a done deal. There should be no "backsies" in the law. If

31. MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 137–38 (New York Univ. Press 1998) (1982), available at <http://mises.org/rothbard/ethics.pdf> (citations omitted).

I purchase a newspaper for a dollar, I should not be able to return this item and get my money back unless the vendor *agrees* to this second deal. Why it should be any different in labor contracts is difficult for me to see.

What about recourse against the “mind-changer?” Rothbard is of course correct in all the options he mentions. But why not one additional one? That is, *compelling* the reneger to live up to the stipulations in the contract: every last jot and tittle of them. We commonly do that for the purchaser of the newspaper; why not in *all* cases?

The celebrated movie actor is not really a much more difficult case. The challenge to Rothbard’s non-alienability hypothesis is the *tightrope walker* who can plunge to his death when the safety net is removed out from under him by a fickle employee. But we have already dealt with that one.

2. People will take advantage of alienability and increasingly engage in kidnapping (real slavery)

Perhaps, maybe, who knows, it might come to pass. We have had very little experience with this sort of thing, so we cannot know whether and to what degree this is likely to be true. There are, nowadays, cases of kidnapping in the more benighted parts of the world. This crime has probably always existed, and may well, unfortunately continue. We have never had full alienability. But this is really irrelevant to the more important deontological issue of whether or not alienability is justified, apart from its utilitarian aspects, such as, possibly, this one.

3. It is impossible to alienate the will

The will, schmill. Voluntary slavery is orthogonal to the will, or lack of same. It is solely a matter of whether or not what would otherwise be considered assault and battery, rape, or murder would still be viewed in this way in the face of an agreed upon contract that legitimizes such (otherwise) execrable behavior.

4. Illegal Acts

Suppose the slave master orders the (voluntary) slave to do something illegal, such as rob, rape, or murder an innocent person. Is the slave obligated to do such heinous things? No, of course not. The owner may not properly compel the slave to do anything on this order that he himself would be precluded from doing by law. If it is illegal for the slave owner, say, to bite someone, it would be illicit also for him to order his slave, or his dog, to do so.

F. Conclusion

We have made what would appear to be on the surface merely a utilitarian case for alienability. With inalienability, things would go worse for the

alcoholic, for the tightrope walker, and for the father. If alienability is legal, then these three can have what they desire most: freedom from alcoholism, safety in tightrope walking, and the life of his son preserved. But, actually, the argument goes far deeper than that. Not only is alienability to be preferred on utilitarian grounds, the deontological case for it, too, is very powerful.³² The point is, if you cannot sell something or give it away, then there is a strong sense in which you do not own it in the first place.³³

Does this mean that all contracts, voluntarily entered into, should be upheld by law? No, at least not on libertarian grounds. A contract between X and Y to murder innocent person Z would be invalid, since it violates a libertarian basic premise, the Non-Aggression Principle.³⁴ Some contracts are invalid on their face since they contravene the laws of logic. For example, no one may sell anyone else a square circle. This is a contradiction in terms. Nor may pink elephants, nor yet unicorns, be subjects of commercial interaction, since as a matter of fact such creatures do not exist.³⁵

32. See Walter Block, *Alienability, Inalienability, Paternalism and the Law: Reply to Kronman*, 28 AM. J. CRIM. L. 351 (2001); Walter Block, *Alienability: Rejoinder to Kuflik*, 23 HUMANOMICS 117 (2007); Walter Block, *Epstein on Alienation: A Rejoinder*, 33 INT'L J. SOC. ECON. 241 (2006); Walter Block, *Market Inalienability Once Again: Reply to Radin*, 22 T. JEFFERSON L. REV. 37 (1999); Walter Block, *Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Smith, Kinsella, Gordon, and Epstein*, 17 J. LIBERTARIAN STUD. 39 (2003); Walter Block, *On "Baby Selling"*, LIBERTARIAN REV., Jan. 1979, at 41 (reviewing NANCY C. BAKER, *BABY SELLING: THE SCANDAL OF BLACK MARKET ADOPTIONS* (1978)); Walter Block, *Are Alienability and the Apriori of Argument Logically Incompatible?*, DIALOGUE (Apr. 2004), <http://www.unisvishtov.bg/dialog/2004/256gord6.pdf>.

33. States Malcolm: "On one walk he 'gave' to me each tree that we passed, with the reservation that I was not to cut it down or do anything to it, or prevent the previous owners from doing anything to it: with those reservations it was henceforth *mine*." NORMAN MALCOLM, *LUDWIG WITTGENSTEIN: A MEMOIR* 31–32 (1958).

34. Walter E. Block, *The Non-Aggression Axiom of Libertarianism*, LEW ROCKWELL (Feb. 17, 2003), <http://www.lewrockwell.com/2003/02/walter-block/turning-their-coats-for-the-state/>.

35. For libertarian critiques of fractional reserve banking contracts, mentioning the specifics of which would take us too far afield, see JÓRG GUIDO HÜLSMANN, *THE ETHICS OF MONEY PRODUCTION* (2008); MURRAY N. ROTHBARD, *THE CASE FOR A 100 PERCENT GOLD DOLLAR* (Mises Inst. 1991); MURRAY N. ROTHBARD, *THE LOGIC OF ACTION I: METHOD, MONEY, AND THE AUSTRIAN SCHOOL* 364–84 (1997); Philipp Bagus, David Howden & Walter Block, *Deposits, Loans and Banking: Clarifying the Debate*, 72 AM. J. ECON. & SOC. 627 (2013); William Barnett, II & Walter E. Block, *Crash and Carry: Financial Intermediaries, the Intertemporal-Carry Trade, and Austrian Business Cycles*, 11 ETHICS & POL. 455 (2009); William Barnett, II & Walter Block, *In Defense of Fiduciary Media—A Comment; or, What's Wrong with "Clown" or Play Money?*, 8 Q. J. AUSTRIAN ECON. 55 (2005); William Barnett, II & Walter E. Block, *Time Deposits, Dimensions, and Fraud*, 88 J. BUS. ETHICS 711 (2009); Walter Block & Kenneth M. Garschina, *Hayek, Business Cycles and Fractional Reserve Banking: Continuing the De-Homogenization Process*, 9 REV. AUSTRIAN ECON. 77 (1996); Walter Block & Laura Davidson, *The Case Against Fiduciary Media: Ethics Is The Key*, 98 J. BUS. ETHICS 505 (2011); Hans-Hermann Hoppe, Jörg Guido Hülsmann & Walter Block, *Against Fiduciary Media*,

III. PROFESSOR LEVY ON THE *REAL* BLACKMAIL PARADOX: A RESPONSE³⁶

Those of us among whom Ken Levy calls the “significant minority of scholars” who think that blackmail ought to be legal have reason to be grateful to him for his important and provocative recent article on the real paradox of blackmail.³⁷ He acknowledges that “there are some very good arguments . . . that lead to . . . the conclusion that blackmail threats should be perfectly legal,”³⁸ and he carefully sets forward no less than six of these.

He has not in this acknowledgment joined the “significant minority”—far from it. Quite the contrary, the “very good arguments” in his view fall victim to even better refutations. Levy discusses these arguments in the context of what he calls the “*real* Blackmail Paradox.”³⁹ As he sees matters, a paradox in philosophy normally opposes intuition and argument.⁴⁰ We strongly believe, for example, that motion exists, but well-known arguments that stem from Zeno seem to show that motion is impossible. Precisely this opposition is found in blackmail: “On the one hand, we tend to think that blackmail threats are rightly criminalized”,⁴¹ but on the other hand, the six “very good arguments” threaten to undermine the intuition that supports criminalization.

1 Q. J. AUSTRIAN ECON. 19 (1998); Hans-Hermann Hoppe, *How is Fiat Money Possible?—Or, The Devolution of Money and Credit*, 7 REV. AUSTRIAN ECON. 49 (1994); Jesús Huerta de Soto, *A Critical Analysis of Central Banks and Fractional-Reserve Free Banking from the Austrian School Perspective*, 8 REV. AUSTRIAN ECON. 25 (1995); Jesús Huerta de Soto, *A Critical Note on Fractional Reserve Free Banking*, 1 Q. J. AUSTRIAN ECON. 25 (1998); Jörg Guido Hülsmann, *Free Banking and Fractional Reserves: Reply to Pascal Salin*, 1 Q. J. AUSTRIAN ECON. 67 (1998); Jörg Guido Hülsmann, *Free Banking and the Free Bankers*, 9 REV. AUSTRIAN ECON. 3 (1996); Jörg Guido Hülsmann, *Has Fractional-Reserve Banking Really Passed the Market Test?*, 7 INDEP. REV. 399 (2003); Murray N. Rothbard, *The Myth of Free Banking in Scotland*, 2 REV. AUSTRIAN ECON. 229 (1988); Philipp Bagus, *The Commons and the Tragedy of Banking*, MISES DAILY (Nov. 12, 2003), <http://mises.org/story/1373>; Tony Baxendale, *Free Banking, the Balance Sheet and Contract Law Approach*, THE COBDEN CENTRE (Mar. 15, 2010), <http://www.cobdencentre.org/2010/03/free-banking-the-balance-sheet-and-contract-law-approach/>; Laura Davidson, *Fractional Reserve Banking Is Indeed Fraudulent*, LEWROCKWELL.COM (Nov. 17, 2008), <http://www.lewrockwell.com/2008/11/laura-davidson/fractional-reserve-banking-is-indeedfraudent/>; Robert P. Murphy, *The Fractional-Reserve Banking Question*, MISES DAILY (June 14, 2010), <http://mises.org/daily/4499>; Gary North, *What Is Money? Part 5: Fractional Reserve Banking*, LEWROCKWELL.COM (Oct. 10, 2009), <http://www.lewrockwell.com/2009/10/gary-north/fractional-reserves/>.

36. This section is co-authored with David Gordon, Ph.D., senior fellow at the Ludwig von Mises Institute.

37. Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1058 (2007).

38. *Id.*

39. *Id.*

40. *Id.* at 1057.

41. *Id.* at 1058.

Levy's resolution to his paradox is straightforward. As we have already suggested, he maintains that the arguments in favor of legalization fail. He thus leaves us with nothing to oppose the intuition that blackmail threats should be illegal, and the paradox thus dissolves. We shall endeavor to show that Levy has not succeeded in refuting the arguments for legalization that he discusses. If we are right, then the situation for him will be one of a paradox regained: he still will face the problem of reconciling intuition and argument. We confront no such daunting task, though, because we reject the intuition in favor of criminalization. We can happily accept the "very good arguments" as they stand.⁴²

Levy confines his analysis of blackmail threats to one type of case, and we shall follow him in this limitation. He is concerned only with threats to disclose embarrassing information that is non-criminal.⁴³ Levy thinks that the case for criminalizing blackmail threats to disclose criminal behavior presents no difficulty: "[T]he remainder of this [Levy's] Article will . . . focus entirely on what is the much *harder* problem—the question why blackmail threats to disclose *embarrassing* information should also be criminalized."⁴⁴ The disclosure that is threatened is not itself illegal: it is not a crime to publish embarrassing information. Blackmail threats must be distinguished from extortionate threats, which involve either illegal actions or the use of illegal means to perform a legal act.⁴⁵

42. Levy's use of the term "paradox" differs in one way from its usual use in the philosophical literature. Genuine paradoxes present arguments that are very difficult to defeat: the examples that Levy mentions, Zeno's paradoxes of motion and the Surprise Exam paradox, are cases in point. Levy, *supra* note 37, at 1057 n.10. Even if one thinks that there is a resolution of these paradoxes, this is achieved only with great difficulty and something of the initial puzzlement remains. But, by his own lights, he dispatches the pro-blackmail arguments with little fuss. If he is correct in his refutations, not much is left of the initial paradox. His argument then would be better taken as showing that the "real paradox of blackmail" is *not* a real paradox. If we are correct that his refutations fail, we have given him back his paradox.

43. A sees B rob a store. A blackmails B about that. That is an example of blackmail based on a criminal act. C observes D cheating on his wife. C blackmails D on that basis. That is an example of blackmail based on a non-criminal act.

44. Levy, *supra* note 37, at 1069. We do not agree with Levy that blackmail threats to disclose illegal behavior should be illegal, much less that the case for this view is easy to make, but we will not pursue the matter here.

45. *Id.* at 1070. We here paraphrase Levy. The definition of "coerce" that he offers in his account of extortion appears mistaken. He says, "[b]y *coerce*, I [Levy] mean presenting a target with the option of either performing a certain action or facing a highly probable risk of being subjected to what the coercer correctly believes the target will perceive as a harm." *Id.* at 1071 n.42. Suppose that someone is afloat on a small plank of wood in the ocean. A rescuer in a helicopter lowers a life preserver to him. If he does not put on the life preserver, he will drown; but it would be wrong to say that he has been coerced to don the life preserver. If it is objected that the harm must worsen the situation from what it would have been absent the action of the intervener, we can readily modify the example. Suppose lowering the life preserver knocks away

After he clarifies the blackmail situation with which he is concerned, Levy proceeds to state six arguments that support legalizing blackmail.⁴⁶ He follows this with his response to each argument.⁴⁷ Rather than follow his procedure step-by-step, we shall advance at once to what he takes to be his “[c]entral argument.”⁴⁸ The supporter of legalization claims that when the blackmailer tells his victim that he will disclose embarrassing information unless the victim makes it worth his while not to do so, he does not violate the victim’s rights.⁴⁹ People do not have a right to have embarrassing information suppressed. If the blackmailer had published his material instead of offering to conceal it for pay, the embarrassed subject of the publicity would be without legal recourse. Why then should the blackmailer face a legal ban on his activities?

Levy replies that our reputation is among our supreme interests.

The criminal law is largely concerned with protecting people against deliberately inflicted harm to our *supremely valued* interests, to the interests that they generally most highly value—namely life, physical well-being, emotional well-being, family, liberty, and property. . . .

The fact that emotional well-being is among the supremely valued interests explains why we have criminal laws against menacing, harassment, and stalking These laws are all designed to protect people, in one way or another, from undue *fear* and *anxiety*. As it turns out, for the same reason, there should be laws against threats to reputation. For, like emotional well-being, reputation is also a supremely valued interest. Its owners tend to value it just as much as, if not more than, any of the other supremely valued interests (life, physical well-being, etc.) So threats to it are just as likely to inflict the same level of fear and anxiety as extortionate threats, menacing, harassment, and stalking. And, if this likely consequence is sufficient to criminalize these latter kinds of threats, then it is also sufficient to criminalize the former kind of threats—i.e., blackmail threats.⁵⁰

the plank of wood, so that the person on it must don the preserver or immediately drown. It still seems odd to claim that he has been coerced.

46. The six are as follows: (1) Legal threatened action entails legal threat; (2) Blackmail threats are not attempted theft; (3) Blackmail threats belong to the family of legally permissible threats; (4) Blackmail constitutes an ordinary economic transaction; (5) Legalization would help to make blackmail targets better off; (6) If target-initiated blackmail is legal, then blackmailer-initiated blackmail should also be legal. *Id.* at 1064–65.

47. *Id.* at 1079–95.

48. *Id.* at 1080.

49. Levy does not note that you can blackmail someone by threatening to disclose embarrassing information about someone else. Suppose, for example, that you threaten to disclose that my wife listens to Lawrence Welk. I do not want her lack of musical taste to become known, so I pay you to keep this to yourself. This counts as blackmail of me, not my wife.

50. Levy, *supra* note 37, at 1065.

Levy's argument, in sum, is that the threat to our supremely valued interest of reputation posed by blackmail generates a high level of fear and anxiety, to which the law may appropriately respond by banning blackmail threats; but the connection between the blackmail threat and fear and anxiety is less direct than Levy surmises. Suppose that I value highly my reputation for religious orthodoxy, and someone threatens to expose my failure on a particular occasion to observe my religion's strict standards. When the blackmailer informs me of his demands, will I feel fearful and anxious? It is not clear why I would. No doubt I should prefer that my misstep had remained undiscovered, and, failing that, that my interlocutor had tactfully kept his damning knowledge to himself. But why would I be fearful or anxious? I would probably be angry that I had been put into the position of having to buy silence; but so long as I thought he would keep his bargain, what have I to fear? By hypothesis, I value my reputation and might be fearful of efforts to damage it; but what I have secured by paying his price is precisely his silence. My reputation remains intact to everyone except him.

Further, the extent to which a threat to reveal embarrassing information induces fear and anxiety often is subject to the control of the threat's recipient. If someone tries to blackmail you, you do not *have* to suffer embarrassment at the prospect of exposure; you may be able to meet the situation with indifference. Perhaps you think that your reputation will survive the knowledge of your sins. When someone threatened to expose the Duke of Wellington's relationship with the courtesan Harriette Wilson, the Duke answered, "Publish and be damned!"⁵¹ President Clinton did not appear much disconcerted by the publicity surrounding his romantic adventures. If one is free to disarm a blackmailer's threat by not reacting as he hopes, why should one receive legal protection as well?⁵² Suppose someone contends that advertisements for luxury goods should be banned because they induce unhappiness in those unable to afford these products. Is not the appropriate response that the person upset by these advertisements should try to modify his feelings? Admittedly, both here and in the blackmail cases, one's responses are not always under one's control, but to the extent they are, the case for legal action is weakened.

We also readily admit that other aspects of the situation could induce fear and anxiety. I might think that the blackmailer will not be satisfied with his initial demand and worry that he may continually come back for more money. Even if he does not ask for additional payments, can I be sure that he will maintain his silence? What if he takes my money and discloses my misstep

51. Brian Cathcart, *Rear Window: When Wellington Said Publish and Be Damned: The Field Marshal and the Scarlet Woman*, THE INDEPENDENT (Mar. 20, 1994), <http://www.independent.co.uk/voices/rear-window-when-wellington-said-publish-and-be-damned-the-field-marshal-and-the-scarlet-woman-1430412.html>.

52. We owe this point to Terrance Tomkow.

anyway? Further, I might be anxious because the blackmailer's demand is so great that I doubt my ability to meet it. None of these circumstances, though, is essential to the blackmail demand, and the illegality of blackmail may serve to exacerbate rather than alleviate these sources of fear and anxiety. If, under a regime of legal blackmail, someone disclosed information after accepting payment for his silence, he could be sued. Not so under the present system, since one cannot sue for breach of an illegal contract.

More importantly, if people are as fearful and anxious over their reputations as Levy thinks, then it is the disclosure of damaging information, rather than its concealment, that is likely to upset them. But the illegality of blackmail makes it more likely that those who discover damaging information will disclose it: they risk criminal sanction if they attempt to exchange their silence for money. Will not this situation increase fear and anxiety? Levy responds to the argument that making blackmail illegal increases the chances of disclosure by saying that "it is speculative and therefore counter-balanced by equally speculative considerations."⁵³ But even if one finds persuasive the considerations he advances, the effects of legalizing blackmail on the level of fear and anxiety are at best uncertain. Levy has not given us reason to think that, on balance, legalizing blackmail would raise fear and anxiety.

The crucial issue, as we see it, is this. Levy maintains that people are owed protection against harm to their supremely valued interests and that reputation counts among these interests. But, given the scope of the right to one's reputation as he conceives it, he is unable to show that the threat of blackmail counts as a harm. To state one's intention to disclose embarrassing information may very well induce fear and anxiety and so cause harm (though if we are right, it need not); but to do so is not illegal. Neither is it illegal to disclose embarrassing information. What then is the extra harm that stating an intention to disclose embarrassing information, conditional on not paying blackmail, adds? Levy maintains that the fact that it is legal to disclose embarrassing information leaves intact his claim that reputation ranks among our supreme interests: the fact that free speech overrides reputation does not demonstrate that reputation falls outside our supreme interests. We need not challenge him here. The point is that, given that free speech trumps reputation in the way Levy indicates, he cannot show any distinctive harm to reputation generated by blackmail beyond legally-permitted acts.

To reiterate, our challenge to Levy is not to his claim that people should have a legally-protected interest in their reputation. In our libertarian view, people do not have reputation rights: your reputation is what other people think of you, a matter over which you have no jurisdiction. Levy is right that people are interested in their reputations, but not every interest, or even every

53. Levy, *supra* note 37, at 1094.

supremely important interest, generates a right.⁵⁴ People generally have very strong interests in having a large bank account, maintaining good health, and enjoying satisfying relationships with their families and friends, but it does not follow that they have rights to any of these things. But even if one accepts Levy's account of a right to reputation, he has failed to justify prohibiting blackmail.

Again, our challenge to Levy does not depend on rejecting a general right to be protected against undue fear and anxiety. Once more, even if one accepts his views about protection from fear and anxiety, this does not offer sufficient reason to prohibit blackmail. Nevertheless, the topic is important, and we do in fact dissent from his position.

Why should one think that there is a general right to be protected against serious fear and anxiety?⁵⁵ Is it not the case that "[a]lmost any change is potentially anxiety-producing, and a policy of anxiety reduction would be a prescription for maintaining the status quo"?⁵⁶ If so, why should the fact, if it is one, that blackmail causes fear offer a ground to prohibit it? In defense of his view that it does offer such a ground, Levy launches a counterattack: If Block's argument worked, "then extortionate threats, menacing, harassment, and stalking should not be criminalized. For, again, the main reason why these kinds of acts are criminalized is because they tend to cause especially high levels of fear and anxiety. Yet they clearly *should* be criminalized."⁵⁷

This counterattack fails. These acts that Levy mentions often involve threats to violate rights. If, for example, someone approaches you, takes out a gun, and points to it while he glares at you, you have good reason to think he may shoot you. We would without difficulty acknowledge that such behavior ought to be illegal. It is only when there exists no threat to violate rights that we would throw into question the legality of prohibition. To reject a general right to protection against fear and anxiety is not at all to allow unlimited menacing, harassment, and stalking, contrary to Levy's claim about Block's argument.

54. An influential theory of rights defines "rights" in terms of "interests." See, e.g., Matthew H. Kramer, *Introduction* to MATTHEW H. KRAMER, N.E. SIMMONDS & HILLEL STEINER, *A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES* 1, 1-2 (1998). But it does not follow from this account that every important interest creates a right.

55. Levy thinks that "[t]he mere fact that a particular (kind of) action causes serious fear and anxiety does not by itself warrant the conclusion that it should be criminalized . . . the action must also not have a sufficiently counter-balancing moral or institutional justification." Levy, *supra* note 37, at 1095 n.119. But it is evident that he would extend protection against fear and anxiety to many more cases than we would.

56. *Id.* at 1086 (quoting Walter Block, *Replies to Levin and Kipnis*, 18 CRIM. JUST. ETHICS 23, 23 (1986)).

57. Levy, *supra* note 37, at 1086.

If we are correct, Levy's central argument fails, but several other claims that he makes also seem open to challenge. We have already commented on Levy's claim that it is "speculative" that legalizing blackmail would make people better off by giving targets of blackmail a chance to avoid exposure if they were willing to pay the price. Levy adduces against this speculative considerations aimed to show that legalization would increase the number of people threatened with blackmail. Even if he is right, it is still the case that his favored policy imposes a burden on those denied a chance to purchase silence. They must, at least in some cases, put up with exposure in order to help secure, on admittedly speculative grounds, fewer blackmail threats overall.⁵⁸ The circumstance is analogous to a law that would impose criminal penalties for payment of ransom demands. Such laws might well reduce the number of kidnappings for profit, but they would impose a severe cost on the families of those who had been kidnapped. They would face a much higher risk of the death of the victim than would be the case were paying ransom legal.

Levy, in response to the argument that blackmail is an ordinary economic transaction, lists a large number of distinctions between blackmail and other economic transactions, but a number of his items are questionable. He says, for example, that in a legitimate business transaction, the seller is offering to abstain "from some profit or advantage which he might legitimately enjoy,"⁵⁹ but the common blackmailer abstains from no such advantage. This is not so; a blackmailer may be surrendering the profit he would have earned from selling his information. It is not the case that blackmailers always threaten to exercise "immoral liberties," that is, legal actions that are morally wrong.⁶⁰ Publicizing damaging material about someone is in many circumstances not morally wrong. Further, many ordinary economic transactions involve, at least arguably, immoral liberties—for example, selling pornography, writing for-profit political propaganda that one deems grossly mistaken, etc. Further, many ordinary transactions, not just blackmail, are intended to harm the target.⁶¹ Suppose, for example, that you install a garish statue on your front lawn in the hope that your aesthetically sensitive neighbor will pay you to remove it. It is not clear how the blackmail proposal requires the victim "to choose between two of her rights."⁶² You do not have a right to be free from exposure: that precisely is why blackmail is not extortion.

58. And this is putting aside the possibility that the lowered cost of blackmail to the blackmailer, if it were legal, would reduce the number of occasions of blackmail. Levy acknowledges that his "speculative considerations" are counterbalances for the effect just mentioned. *Id.* at 1094.

59. *Id.* at 1090.

60. *Id.* at 1093.

61. *Id.*

62. Levy, *supra* note 37, at 1093.

We take particular interest in Levy's criticism of the argument that legal threatened action entails legal threat because he concentrates his fire against an earlier paper of our own. The sentence in our paper to which he refers is this: "If a person has the right to *do X*, he necessarily has the right to give warning of the fact that he will do or may do *X*—that is, to threaten to do *X*."⁶³ On further consideration, we think that this is slightly too strong. It is not that an illegal threat with no corresponding illegal action is a logical or metaphysical impossibility; rather, the illegality of an action is a criterion, in Wittgenstein's sense, for the illegality of the threat to perform the action.⁶⁴ Exceptions are not ruled out *a priori*, but they are conceptually odd.

Levy offers two criticisms. First, it is not clear why we hold the principle just quoted "and not the converse—namely, that the legal status of the threat entails the legal status of the threatened action, in which case the illegality of blackmail threats rather than the legality of disclosure would be the starting point."⁶⁵ Two points in response: First, we do not hold the converse principle because this principle is false. It is, or may be, illegal to threaten to overthrow the government, but it is not illegal to overthrow it. If you succeed in doing that, the previous legal system lapses. More centrally, the conceptual dependence is that of threat on action, not the other way around.

But this brings us to Levy's second criticism. Is not our claim "less an argument than a stipulation"?⁶⁶ Why not say, instead, that there is "simply a virtually, but not fully, exceptionless correlation between the legal statuses of threats and their threatened actions"?⁶⁷ Here, we readily acknowledge that we have no other argument besides asking the reader to think about threats and see whether he agrees with us that a conceptual dependence is present rather than the mere correlation Levy mentions. If it is the latter, the correlation is quite a coincidence.

In response to the objection that "if blackmailer-initiated blackmail is illegal, then target-initiated blackmail should be illegal as [w]ell,"⁶⁸ Levy accepts the point. Target-initiated blackmail *should* be illegal. Here we applaud him for his willingness to accept the consequences of his position. We think that he ought to extend what he says further and recognize that making

63. Walter Block & David Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37, 38 (1985).

64. See STANLEY CAVELL, *THE CLAIM OF REASON* 65–85 (1979); Rogers Albritton, *On Wittgenstein's Use of the Term "Criterion,"* 56 J. PHIL. 845 (1959).

65. Levy, *supra* note 37, at 1080.

66. *Id.*

67. *Id.*

68. *Id.* at 1095.

blackmail illegal should have more consequences for the legal system.⁶⁹ Specifically, if blackmail is illegal, then disclosing embarrassing information should also be illegal. We of course do not favor this change, but at least it is a coherent position. What we claim is not coherent is to hold that blackmail should be illegal because it is a harm to people's interest in their reputations, accompanied by the view that free speech trumps the interest to reputation in a way that that renders the harm of the blackmail threat unintelligible.

69. There are signs in Levy's article that he might view such further consequences with favor. He says, "it does not strain reason to think that society might very well have adopted the reverse judgment and made truthful but reputation-damaging disclosures illegal." *Id.* at 1083.

