The Legalization of Blackmail and the Provision of Testimony

By

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Walter Block’s remarkably prolific writings on the subject of blackmail center around two paradoxes: 1) It is legal to threaten to tell a secret and it is legal to ask for money, yet when these two licit actions are combined, the law as it stands condemns it. 2) It is legal to pay someone to keep a secret if you initiate the exchange, but it is illegal if he or she initiates the exchange. Block argues that these paradoxes disappear when blackmail is legalized and shows that various attempts to reconcile the prohibition of blackmail with these paradoxes ultimately fail even on their own terms. Furthermore, he argues that such a ban is completely inconsistent with libertarian principles. Blackmail should therefore be legalized.

However, there remains a serious worry that the legalization of blackmail would have a negative influence on the provision of testimony in the criminal justice system. Suppose that A knows about a crime committed by B. Is it not true that A will be less likely to testify against B if he can get money from B in exchange for his silence? As fewer people come forward with crucial testimony, this produces the undesirable result of more crimes going unpunished.

When asked about this argument, Block responded, “This is a good utilitarian criticism of my theory…but it’s only a utilitarian argument.” That is to say, even if the argument succeeds on utilitarian grounds, it is still not a sufficient justification for a law against blackmail. Regardless of whatever undesirable consequences may result from its legalization, blackmail still does not violate the core libertarian principles of non-aggression and property rights and should therefore be treated as permissible by the law.

Block’s response may be true, but it is unlikely to convince the utilitarians who would raise such an objection in the first place. A better response, and the purpose of the present paper, is to show that this argument against the legalization of blackmail fails even on consequentialist grounds.

First of all, it is worthwhile to note that even if we take a purely consequentialist view of the law and accept the objector’s claim that there would be less testimony, then this objection would not be an argument against all blackmail contracts, just contracts where someone wishes to prevent someone else from testifying. This would have no effect on the many blackmail cases in which criminal behavior is not an issue.

4 It should be noted that this argument is pertinent not only to blackmail, but to the general case of contracts in which secrecy is exchanged for money.
More to the point, however, there is no reason to grant the objector’s assertion that there would be less testimony in a society where contracts intended to restrict testimony are legal. In fact, there is good reason to think that in a libertarian society it is extremely unlikely that a blackmail contract would prevent anyone from coming forward with information about a crime.

At first blush, the case that there is a financial incentive to withhold information about crimes in a society without blackmail laws is quite compelling. Consider the following blackmail contract: “B hereby agrees to pay A $1000. In exchange, A agrees not to tell anyone about B’s crime. If A breaks this contract, A hereby agrees to pay B a fine of $2000.” In order for this contract to be formed, both parties must expect to benefit. B therefore must value A’s silence more than he values $1000. Before signing the contract, A could have told anybody about B’s crime without losing money. Therefore the existence of the contract proves that at the time of the agreement, A values $1000 more than he values telling anybody about B’s crime. It follows from this that so long as A’s valuation of telling people about B’s crime remains constant, A will never tell anybody about B’s crime.

It should be fairly clear that the claim that A will not come forward with information about B’s crime depends entirely on whether or not A will continue to value $2000 more than he values telling somebody about B’s crime. There are many ways in which A’s valuations could change. It’s not unimaginable, for instance, that A will have ever-increasing guilt about his decision to withhold information until $2000 becomes a reasonable price to pay for alleviating himself of this guilt. While a situation such as this is perhaps plausible, we certainly would not expect every such blackmailer to be overcome by guilt in this way.

However, in a society governed by libertarian principles, there would likely exist a much stronger incentive for A to break such a contract. Suppose that A hears about an organization (perhaps provided by victims, police services, insurance companies or other interested parties) that offers to pay the fine for breaking a blackmail contract for any blackmailer who comes forward with the information about a crime (for the purposes of this paper I shall refer to any such fine-paying organization as an ‘FPO’). Clearly this would erase A’s incentive to stay silent. He will now keep the $1000 he got from B, happily come forward with the information, and the organization will pay the $2000 fine to B. The existence of FPOs would not only remove any incentive to stay silent, but it would have effects on the incentives involved in the formation of such contracts in the future. B will no longer form such contracts with the intention of buying A’s silence, because there will no longer be any way to guarantee A will not testify against B. Therefore if FPOs exist, there is no reason to think that the legalization of blackmail would have any adverse effect on the provision of testimony.

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6 Clarification of terminology: An FPO does not have to be an organization specifically dedicated to the function of paying blackmail fines. It could be any organization or individual that performs this function.
But could FPOs exist on the free market? An objector might offer the following reason to believe they could not: Even if the existence of FPOs stopped B from forming blackmail contracts with A with the purpose of buying A’s silence, B might continue to form similar contracts, only now with the intention of gaining money at the expense of the FPO. Suppose that Adam knows that Bill stole $500 from Steve. Bill expects a penalty of $1000 if Steve ever finds out it was he who stole the money, so he enters into a blackmail agreement with Adam. The agreement states that Bill will pay Adam $900 in exchange for Adam’s silence, and if Adam breaks his end of the agreement he agrees to pay a fine of $4000. When signing this agreement, they both know that an organization exists that offers to pay Adam’s fine when he testifies against Bill. So Adam testifies, the organization pays Bill $4000, and Bill pays Steve $1000. Even after subtracting Adam’s blackmail fee of $900 and Steve’s $1000, Bill is still $2100 richer than he was before, and the organization is $4000 poorer. And so the argument is that there is no way that an organization that functions like this could possibly survive financially. More and more blackmail contracts will be formed with the express purpose of extracting money from the organization until it becomes bankrupt. Furthermore, there appears to be nothing preventing B from raising the fine for breaking the contract to some ludicrously high sum, like $100,000,000,000,000. Once again it appears that the organization will almost instantly become bankrupt.

However, whether or not the organization will become bankrupt depends on how it is funded. While the funding may initially come from the victim of B’s crime (or his police agency or insurance company), the victim has the right to reclaim any such costs from B. In the words of Walter Block, “In encapsulated form, [libertarian punishment theory] calls for two teeth for a tooth, plus costs of capture and a premium for scaring.” The costs of capture are of particular interest here. It is easy to see why these costs should be included in a punishment. Imagine a case where a thief steals $500 and then hires somebody to guard his door. He tells the guard not to let anybody in unless they pay $20,000. When the victim comes to collect his $500 debt from the thief, he must pay the guard the $20,000 in order to enter. But he can later reclaim that $20,000 from the thief because the victim rightfully owned $500 that was in the house. By hiring the guard, the thief was forestalling the victim’s rightful collection of his property. When B enters into a blackmail contract with A, he is forestalling justice in a very similar way. The result is that if the victim discovers that he must pay A $2000 in order to collect his debt from B, then B’s debt increases to include the extra $2000.

With libertarian punishment theory in mind, it is obvious that an organization that pays breach-of-contract fines for blackmailers on behalf of victims could not possibly become bankrupt in the way suggested earlier. For whatever money it loses to B in fines, it can reclaim from B as costs of capture.


8 The debt could actually be up to $1000 according to Block’s principle of ‘two teeth for a tooth.’
Even more significantly, it should now be clear that in a society that subscribes to such principles of punishment no rational criminal would ever enter into the type of blackmail contract we have discussed in this paper. In order for the contract to come into existence both parties must expect to benefit. B therefore must value $2000 more than he values A’s silence. In other words, $2000 must be greater than what B expects to lose should A testify against him. But in a libertarian society A’s testimony would cause B to lose $2000 at the very least, and most likely much more, since the $2000 is included in the punishment as the costs of capture. B could therefore not possibly expect to benefit, and the contract would consequently never come into existence.

The original worry about the provision of testimony in societies where blackmail is legalized no longer seems to have much bearing on libertarian societies. Let us review:

P1) If FPOs exist, there is no reason to think that the legalization of blackmail would have any adverse effect on the provision of testimony.
P2) FPOs would exist on the free market, so long as criminals are forced to pay the costs of capture.
P3) In a libertarian society, criminals are forced to pay the costs of capture.
C) Therefore in a libertarian society, there is no reason to think that the legalization of blackmail would have any adverse effect on the provision of testimony.

We can now see that the legalization of blackmail in a libertarian society would not result in fewer people coming forward with information about crimes. The case for the legalization of blackmail is solid not only on the footing of libertarian principles, as Block has so thoroughly demonstrated; it is also solid on utilitarian grounds.