

Rejoinder to Wysocki and Dominiak on Blackmail Law and Austrian Economic Welfare Theory

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Wysocki and Dominiak (2023) defend the thesis that blackmail is only beneficial, relatively, since the target of this offer values his secrecy more than the money he must pay. However, he loses absolutely, since the blackmailee would have been even better off if the blackmailer had disappeared from the scene, and/or never made his demand in the first place. In their view, the blackmailer is thus akin to the highwayman who offers you the choice of your money or your life. You value the latter more highly, so you “gain” by complying, but only in this relative sense. However you lose absolutely, since you would have been even better off had there been no highwayman threatening you, in the first place. This is in sharp contrast to the person who sells you a car. There, you gain in both cases: you value the auto more highly than its price, otherwise you would not make the purchase, and, you would not be better off if he disappeared. The present paper is critical of this thesis.

Keywords: Justice; Austrian economics; economic welfare; libertarianism.

Wysocki and Dominiak (2023, hereafter WD) make an important contribution not only to libertarian theory, but, also, to Austrian as well as mainstream economics. They bring new intellectual energy to the study of, and the interactions between, the freedom philosophy and the praxeological school of thought, as it pertains to welfare economics.

WD start off on the right, well, correct, foot. They state:

This paper argues—contra some Austro-libertarians—that whether a given exchange is welfare-enhancing or welfare-diminishing does not depend on whether that exchange is just or unjust, respectively. Rather, we suggest that in light of our two thought experiments, Austro-libertarianism has at

least a pro tanto reason to conceive of justice and welfare as two logically distinct ideals.

We don't need any new thought experiments to establish this, however welcome, and clever, are the ones supplied by WD.¹ The fact value distinction, that between positive and normative economics, is already well established within the economics literature. There is all the world of difference between "A causes B" and "A is justified, B is not." However, all too often this distinction is honored more in the breach than in any other way, so, hats off to these authors for reminding us of this important understanding.²

However, from this foundation of political economy, WD "... predict the possibility of (a) just but welfare-diminishing exchanges and (b) unjust but welfare-enhancing ones." Here, I fear, they go astray.

In this regard they mention the following quote from Rothbard:

It so happens that the free-market economy, and the specialization and division of labor it implies, is by far the most productive form of economy known to man, and has been responsible for industrialization and for the modern economy on which civilization has been built. This is a fortunate utilitarian result of the free market, but it is not, to the libertarian, the prime reason for his support of this system. That prime reason is moral and is rooted in the natural-rights defense of private property we have developed above. Even if a society of despotism and systematic invasion of rights could be shown to be more productive than what Adam Smith called 'the system of natural liberty,' the libertarian would support this system. Fortunately, as in so many other areas, the utilitarian and the moral, natural rights and general prosperity, go hand in hand. (Rothbard 2006: 48–49)

Here, I must depart from Rothbard. In my view, it would be logically impossible for "a society of despotism and systematic invasion of rights ... to be more productive than" laissez faire capitalism. For under the latter regime, each and every commercial interaction necessarily enhances economic welfare at least in the ex ante sense.³ This includes buying, selling, trading, bartering, investing, gift giving, etc. In each case, all parties to the transaction expect to be made better off by engaging in it, otherwise they would scarcely agree to do so. Nor is there any other system that can truthfully make this claim. Certainly, when rights are violated, at least one person, the victim, necessarily loses by the interaction.

¹ See on this below.

² Our authors use the phrase "Austro-libertarians." Strictly speaking, this is a violation of the normative positive distinction, as the former deals with facts, cause and effect, etc., while the latter focuses on rights. However, this phrase is so well-entrenched in the literature, I use it myself, that I can hardly blame them for so doing. My interpretation of this phrase is that it is simply a short hand version of characterizing those who support both Austrian economics and libertarianism. Just because facts are philosophically different from values does not mean we cannot have views on both.

³ And very often ex post as well, although this is not a necessary condition of the system.

It is puzzling that Rothbard takes this position since his own Unanimity Rule has it that “[w]e can only say that ‘social welfare’ (or better, ‘social utility’) has increased due to a change, if no individual is worse off because of the change (and at least one is better off)” (Rothbard 2011: 23).

One possible counterexample is the harm of automation. The computer comes along, and pretty much bankrupts all producers and sellers of typewriters.⁴ The response is that these people are no longer part of the market. They are not able, any more, to make an offer other people find attractive. I now offer you, gentle reader, this here pencil for the designed to sell price of one million dollars. What? No takers? Does this mean I am a market participant who is worse off? No. I am not a market participant at all, defined as someone who can find someone else to interact with, commercially.

Another possible counterexample is pollution. A produces steel and sells it to B. But C is harmed by the pollutants A places into the air, and into his lungs. The best refutation of this claim against the market is Rothbard (Rothbard 1982a: 152), who demonstrates that this is a trespass of private property rights, and not an aspect of the free enterprise system at all.

It is clear that WD are onto something important when they write that “(1) the free market always increases social utility and that (2) no governmental intervention can ever increase it. In other words, the above two statements have it that just exchanges are always mutually beneficial and that unjust exchanges can never be welfare enhancing.”

Unhappily, their paper, instead, “... makes a positive argument for market inefficiencies and mutually beneficial injustices, and hence for the position that justice and welfare should constitute two independent ideals within the Austro-libertarian framework. This in turn predicts that there can indeed be (a) just but welfare-diminishing exchanges and (b) unjust but welfare-enhancing ones.”

We wait with baited breath for these authors to show that “Just exchanges are not necessarily welfare-increasing.” They make this attempt starting with the highwayman example, who demands your money at the point of a gun and threatens to kill you if you resist. You pay, since you value your life more than the money.⁵ Our authors say of this situation: “... the recipient seems to be rendered worse off when compared to the situation in which the gunman would have nothing to do with the recipient at all.”

Nothing to do with? But there are lots of other cases, where justice prevails, and yet there is indeed a loss in utility of this sort. Competition for example. A and B compete for the custom of C. A wins. B loses out.

⁴ Other examples immediately come to mind regarding the computer, the horse and buggy industry, cameras, etc.

⁵ Comedian Jack Benny whose schtick was that he was a miser, when confronted with this choice would whine in response: “I’m thinking, *I’m thinking*.”

Yes, in Nozick's (Nozick 1974: 84) drop dead theory, blackmail is "non-productive." The blackmailee would be better off if the blackmailer didn't exist, or didn't know his secret. B would be better off if A didn't exist. But it is productive when the blackmailee pays for silence.⁶

You would be better off if your neighbor and the big tree on his property that keeps growing and now blocks your view didn't exist. But he, and it, does. So, is it productive when you pay him to shorten the height of his tree so you can have a better view? Sure it is. Yet, according to WD, while this is a just contract, it is not welfare enhancing. I find it difficult to understand why it is not productive, not mutually beneficial. Certainly it is justified for the neighbor to have a big tree, or even a spite fence, on his property.

Take another case. You are dating a girl. She has a younger brother. You would just as soon as he would disappear over the hill, so that you can have more quality time with your lady friend. So you spring for a movie, dinner, popcorn, whatever it takes, for the young lad. This is certainly a productive exchange on your part. You regard his absence as of far more value to you than the cost of the film and some food. Yet, he has done nothing wrong just by being at home while you wish he were away. In the view of WD, again, this is a non-productive exchange, only beneficial in the relative but not the absolute sense, since you would have been even better off were he not present at his home in the first place; then, you would not have to bribe him to disappear for a few hours.

Let us try one more example. You purchase some shoes for \$50. You would be much better off if the store owner gave them to you for free, out of the goodness of his heart. In this case, also, as in the previous one, there is nothing untoward going on; all that takes place is legal. But if we follow the logic being put forth by WD, you didn't really absolutely benefit from the sale of the shoes, even though, obviously, you valued them at \$60, and thus made a \$10 relative profit on the deal. Why not? That is because you would have gained even more welfare had you received the shoes as a free gift.

The parallels with blackmail are obvious. Yes, the blackmailee would have been better off had the blackmailer not unearthed his secret. In actual point of fact, the former pays the latter a given sum because he values the silence of the blackmailer to a greater extent than the cost of purchasing his quiet. Revealing a secret is not a crime. It is part and parcel of free speech. It is to engage in mere gossip.

WD then offer the case of the Car Dealer where both buyer and seller gain from their transaction.⁷ These authors characterize this as

⁶ For a defense, not of blackmail per se, but of legalizing it, see Block (1972, 1976: 53–58, 1986, 1997, 1998, 1999a, 1999b, 1999c, 1999d, 2000a, 2000b, 2000c, 2000d, 2001a, 2001b, 2002–2003, 2009, 2013), Block and Anderson (2001), Block and Gordon (1985), Block, Kinsella and Hoppe (2000), Block and McGee (1999a, 1999b), Mack (1982), Murphy (2019), Rothbard (1982b: 124–126).

⁷ Necessarily in the *ex ante* sense, but only presumably, also, *ex post*.

both an absolute gain (since the buyer would not be better off if the seller disappeared) and also a relative one (since voluntary trade is always mutually beneficial).

Next they wheel in their big guns and apply their insights to blackmail. They state:

Suppose that a blackmailer makes the following proposal to the blackmailee:

(1) If you pay me \$1,000,000 (demand), I will let your reputation remain untarnished (relative benefit).

(2) If you don't pay me (refusal), I will gossip about your secrets (threat).

First of all, since the threat element promises an action that would not violate the criminal's rights, the blackmailee paying the blackmailer \$1,000,000 would result in a just distribution. To see that, consider the following assessment of justice of blackmail proposals by Block (Block 1999: 124), who has it that in blackmail scenarios "a valuable consideration is demanded, under the threat of doing something entirely licit, something that everyone would agree is legitimate if it occurred in any other context." Moreover, our author also notes that under blackmail "money is usually the valuable consideration demanded" and that "the threat is to engage in entirely legal gossip."

Second, since the blackmailee paying the blackmailer is an action, the blackmailee must have benefited relatively by transferring money. Otherwise, he would not have paid. However, contrary to Car Dealer, the blackmailee did not benefit in absolute terms because he would have been better off when compared to the situation in which the blackmailer had had nothing to do with him at all (since then he would preserve his reputation for free).

"Thus, in this respect, the blackmailee is in the same position as the highwayman's victim in Highwayman. That is, he benefits only relatively but not absolutely."

Into which philosophical category does the blackmailer fit? WD's car salesman or their highwayman? These authors plump for the latter. But, in my view, the former is correct. The highwayman threatens violence; he is a rights violator. Does the car salesman threaten violence? Of course not. What about the blackmailer? Again, we must answer in the negative. If he does any such thing as to threaten violence, he is an extortionist, not a blackmailer. The only thing the blackmailer threatens is to engage in gossip. But gossip is an aspect of free speech, it is not at all a rights violation.⁸ This position strengthens when we realize that sometimes it is the blackmailee who approaches the blackmailer, and not the other way around. The supposed victim initially offers money to the blackmailer, in order to shut him up. So it is not, merely, the case that the blackmailer more resembles the car salesman than he does the

⁸ By the way, the car salesman also makes a "threat." He threatens that if you do not pay him for the purchase of the automobile, he will not give it to you. You, also, "threaten" him: if he does not give you the vehicle, no money will be forthcoming from you.

highwayman. Rather, it is a fact that the blackmailer and the car salesman are indistinguishable in this regard; neither threatens a rights violation. In very sharp contrast indeed, the highwayman occupies a completely separate category, a threatener of unjustified violence.⁹

As for being better off if someone disappears, WD are in danger of conflating the highwayman with the young brother of the lady the suitor wishes would disappear. They aver as follows:

The only relevant difference between the two cases is justice of the threat element and, therefore, of the subsequent distribution. Hence, blackmail exchanges would be just, although welfare-diminishing in the relevant sense.

But precisely the same analysis applies to the younger brother and also to the tree case. Are WD prepared to carry through with these examples, also, and maintain that welfare decreases there, too? Sometimes, the world is not exactly as we would like it. We might wish all sorts of people to disappear: younger brothers, tree owners, competitors of all sorts in business, in sports, in romance. There would seem to be no limit in this regard. But this hardly demonstrates that there is something untoward going on in any of these cases, nor in the blackmail instance either, the views of my two philosophical colleagues to the contrary notwithstanding.

Saith WD:

Thus, we have a case that seems to run counter to Rothbard's first welfare theorem that just exchanges always increase social utility. To illuminate further why we contend that blackmail exchanges do not increase blackmailees' welfare, we should come back to our distinction between benefitting relatively and benefitting absolutely. We might also call benefitting (sic) relatively benefitting in a weak sense, whereas benefitting absolutely benefitting in a strong sense. Now let us define benefitting in a weak sense as maximizing one's welfare under a newly imposed budget constraint. In fact, little wonder this sense of benefitting is weak. For we should bear in mind that every instance of human action benefits its doer at least in the weak sense.

These authors are to be congratulated upon creating a new distinction, benefitting in the weak and in the strong sense, relatively versus absolutely. The former in each pair is compatible with wishing the trading partner to have vanished, the latter, not. I commend them upon their creativity. This is indeed an important philosophical breakthrough. And, I concede to them that in the case of blackmail, the target¹⁰ does indeed wish that his partner in this commercial interaction did not exist, along with the younger brother, the tree owner and all the rest. But the lesson usually drawn is invalid: that it ought to be prohibited by law. The proof is a *reductio ad absurdum*: if you ban blackmail, you must also do so with regard to all these other cases I have been adumbrating. It is highly problematic to ban younger brothers, owners of growing trees, etc.

⁹ Categorization is important in philosophy. See on this Barnett and Block (2008).

¹⁰ I will not say victim, since he gains at least in the weak or relative sense

Our learned authors further aver:

Whatever economic agents do, they maximize their expected welfare under the occurrent circumstances, whether welcome or not. However, were Austro-libertarians to adopt the weak sense of benefitting in their defence of the presumed social-welfare-enhancing character of blackmail exchanges, they would at the same time prove too much. For then, it would transpire that the gunman's proposal "Money or your life" is welfare-enhancing too. After all, whatever the gunman's victim happens to choose under the thus imposed constraint will automatically increase his expected welfare.

As a libertarian, I cannot of course countenance highwaymanship. However, fair is fair. Some of these robbers just out and out murder their victims, not offering them any choice at all. The criminal resorted to by WD, in contrast, is a relatively decent chap. He offers his prey a choice. I would much prefer to be in the hands of this relatively benevolent felon than under the gun of his nasty brother in arms who offers no option at all, just pulls the trigger. But this observation on the part of my friends and colleagues WD does not undermine my examples of the younger brother, tree owner, attempt at a *reductio ad absurdum* against their position. I congratulate them on their relative absolute distinction, but fail to see how it undermines the case for legalizing blackmail.¹¹

Next in the batter's box is this statement from WD:

it is a matter of course that no Austro-libertarians would be ready to bite the bullet and thus concede that the victim's exchange with the gunman constitutes a Pareto-superior move. Besides being extremely counterintuitive, this move would violate the second welfare theorem, which has it that no unjust exchanges ever increase social utility.

It all depends upon the starting point. Handing money over to the extortionist most certainly is Pareto-superior compared to being shot to death. Both parties "gain" from this "exchange" when compared to that other option. The criminal saves the cost of a bullet, reduces the risk of being punished as a murderer, the victim keeps his life. Another difficulty with the position laid out by these scholars is that they keep insisting that blackmail is an "unjust exchange." The blackmailer is not at all an extortionist. His threat is to do something entirely legal: gossip. Yes, the blackmailee would be better off if the blackmailer did not exist, or did not know his secret, or had no desire to engage his vocal cords in any such manner. But none of that renders his offer to be paid for silence "unjust."

But WD are not having any of this. Rather, they maintain:

... to establish whether the blackmailee actually benefits from the blackmailer's proposal we should compare this situation to a merely possible situation in which the actual blackmailee does not have to deal with the actual blackmailer at all, everything else equal. It seems quite clear that the ac-

¹¹ Our authors do not call for a legal prohibition of blackmail. However, to call something "unjust" is to at least hint at this conclusion.

tual blackmailee would be better off if no blackmailer were around, for in this situation the former would not even have to pay to preserve his reputation. By contrast, once the blackmailer appears on the stage and makes his blackmail proposal, there is no chance for the blackmailee to preserve his good reputation and keep the money. Therefore, it stands to reason that the blackmailee does not benefit absolutely when given a blackmail proposal. And, rather unsurprisingly, the same remark applies to Highwayman. The highwayman's actual victim would have been better off had he had nothing to do with the highwayman at all in the first place. Once confronted by the highwayman, the victim can no longer preserve his money and his life.

True, true, and well said to boot.¹² However, this analysis continues to be vulnerable to the cases of the tree owner, the younger brother etc. There, too, there can be no absolute benefit. But that failure should not be the criterion of economic welfare. We should be more modest and content ourselves with relative benefit. Absolute benefit is a will-o-the-wisp; not always to be attained; often, not. There must be thousands of examples where someone would be better off if someone else simply did not exist, or engage in action that is entirely legal. For example, in the last National Basketball League Championships, the Denver team beat the one from Florida in the final contest. Surely, the latter would have been better off if the former did not play as well as they in fact did play.¹³

In the next section of their paper, WD switch gears and attempt to demonstrate that "Unjust exchanges are not necessarily welfare-diminishing." I fear I cannot say they have succeeded. They argue as follows:

Suppose A has an old broken fridge in his backyard, which is an economic bad for him. He would like to get rid of it, but it takes disposing of it in a faraway junkyard. Selling it would also be burdensome for him due to high transaction costs. So, the fridge just sits there in the backyard spoiling its owner's view. One day he sees, to his delight, a thief absconding with the fridge. Having realized his fridge is thus being removed for free, he decides not to interfere. First of all, this exchange of an old fridge for the satisfaction of having it removed is unjust. Clearly, our thought experiment stipulates that person A holds a property right in the fridge. Additionally, the above scenario assumes that A has never waived his ownership rights.

This is all well and good. It must be acknowledged that it is also far more than passing clever. The example exhibits great creativity, for which these authors are to be highly congratulated. However, to what extent is this even an "exchange." An exchange, contrary to WD, implies the human action of at least two parties. Here, there is only one person who is doing anything: the thief. This is an example of robbery. True, from a common-sense point of view, A has indeed benefitted. How

¹² Given the illicit basic premise on which it is predicated

¹³ Of course this applies to any opponent in a competitive game; if they did not exist, there would have not been able to be any contest. No one can be deemed a champion if they cannot outplay their rival.

do we know that? Why, WD have told us that. However from an Austrian perspective, we are entitled to reach no such conclusion. All we know as praxeologists is that the thief absconded with property owned by someone else. We are not at all entitled to assume that the owner regarded this as a garbage good, and was happy to be rid of it.¹⁴

Here is the second error committed by my learned friends in this fridge scenario. They state:

However, there is a worry that the putative theft cannot count as rightviolating (sic) simply because A welcomes it, which might translate into a tacit waiver. But this charge is unavailable for Austro-libertarians, who repudiate the juridical significance of tacit or implicit consent.

Yes, as Hoppe (Hoppe 2006: 389–390), Evers (Evers 1977: 193), Nozick (Nozick 1974: 287) Rothbard (Rothbard [1982b] 2002: 164–166) and Barnett (Barnett 1986: 317) correctly maintain, most representative political theorists, from John Locke to James Buchanan and John Rawls, have tried and failed to justify the existence of government on the basis of implicit contracts. But we can hardly deduce from this undoubted fact that there can be no such thing from a libertarian, if not an Austrian point of view.

Our authors opine: “the above thought experiment assumes that the exchange in question involves an action on the part of A. After all, A omitted to interfere with the process of stealing and as Mises (Mises 1998: 13) famously contented, all omissions are actions.”

Methinks WD stretch this undoubted insight of Mises’s beyond reasonableness. Suppose that the thief stole the fridge while the owners were away from home. No longer could it be even hinted that they acquiesced in the theft. Yet, nothing substantive has changed from altering the thought experiment offered therein. The thief is still equally a thief.

Consider the following: Jones goes to a restaurant, orders a cup of coffee and drinks it. Whereupon he is presented with a bill for \$1 million dollars. Must he pay this amount of money? Of course not. There is a tacit agreement in effect that if the eatery wants to charge that amount, indeed, anything out of the ordinary, they must notify the customer and obtain his explicit agreement. It does not logically follow from the undoubted fact that some tacit agreements are invalid, the ones proving that government is a voluntary organization, that all implicit contracts are without legal foundation.

Strangely enough, our authors themselves admit as much. To wit, they allow that when you take a taxi, or order a drink, you are implicitly agreeing to pay for this good or service; that when friends shake hands, they tacitly agree to do so but when a bully grabs a woman’s hand from behind, no such accord is in operation.

¹⁴ Often, owners in A’s position would place a sign on the fridge, something along the lines of “free” or “take this.” Then, we could go along with WD’s assessment. But, then, taking this refrigerator would hardly be considered theft.

In the next section of their paper our authors continue their attempt to undermine the case for the legalization of blackmail. They do so on the basis of the "Involuntariness charge." They state:

However, as we remember, Austro-libertarians adhere to the Nozickian (Nozick 1974: 262) rights-based contrast, in the blackmail scenario, the agreement on the part of the blackmailee secured by the blackmailer's proposal is voluntary since there is no right violation looming in the case of the blackmailer spreading the unwelcome gossip. In other words, in the blackmail scenario, the blackmailer's threat is legitimate and it is for this reason that when the blackmailee agrees to pay, he does so voluntarily. Now because he agrees voluntarily, Austro-libertarians could try to argue that the exchange is welfare-enhancing, regardless of the fact that he loses in absolute terms.

But the blackmail target does not at all "lose" from the actual exchange of money for silence. Rather, he is disadvantaged from the fact that someone knows his secret and is about to blab about it. The exchange itself is mutually beneficial and hence promotes welfare. WD are not sufficiently distinguishing between the exchange itself, which is necessarily mutually beneficial, and the fact that the blackmailer threatens to gossip, which is not an exchange at all. It is the same, to return to the view-blocking tree example. The buyer benefits from the tree owner pruning his tree. That is the exchange, that is the only exchange. There is no other exchange. None. The fact that the tree grows and blocks his view is not at all an exchange. Again, WD are failing to distinguish these two very, very different phenomenon. It is not at all the case that there are two exchanges, an absolute one and a relative one, and that the former is beneficial, the latter not. I repeat, there is only one exchange: the purchase of silence in blackmail, the purchase of tree pruning in order to improve the view. The fact that trees grow, and that people sometimes learn secrets about us that we do not want revealed, are not exchanges. They are just facts of life.

I must now conclude. This is a brilliant paper. It is radical, in that it gets to the very root of the libertarian political economic philosophy. Its distinction between relative and absolute economic welfare is singularly important. It uses the legalization of blackmail as a vehicle to overturn the Rothbardian claim that this exchange is both justified and welfare enhancing. It allows this on the basis of relative, but not absolute exchange. The fridge example is a masterful one in attempting to tease apart justice (is it a clear crime), from welfare enhancement (WD claim it does have this effect).

I have given reasons to reject much of the claims of these scholars: tree growing, younger brother, general competition. But I acknowledge that reading their essay and writing about it has been an exhilarating experience. I have been in the presence of first class minds, and I hope and trust that together, the three of us, have advanced our knowledge of libertarian that proverbial once millionth of an inch closer to the Truth with a capital "T."

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