BLACKMAIL, PRIVACY, AND FREEDOM OF CONTRACT

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INTRODUCTION

Blackmail is an exotic crime, and quite possibly, as we shall see, a rare one. But it exerts considerable fascination at both the popular and the theoretical level, and it has evoked a substantial literature[1] to which this Article seeks to contribute by emphasizing economic and strategic considerations, positive and empirical analysis, the relation between blackmail and private law enforce-

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[1] See the following articles by James Lindgren for the best introduction to the scholarly literature as it stood before this Symposium: *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597 (1989) [hereinafter Lindgren, *On Waste*]; *Kept in the Dark: Owens's View of Blackmail*, 21 CONN. L. REV. 749 (1989); *Secret Rights: A Comment on Campbell's Theory of Blackmail*, 21 CONN. L. REV. 407 (1989); *In Defense of Keeping Blackmail a Crime: Responding to Block and Gordon*, 20 LOY. L.A. L. REV. 35 (1986); *More Blackmail Ink: A Critique of* Blackmail, Inc., *Epstein's Theory of Blackmail*, 16 CONN. L. REV. 909 (1984); *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984) [hereinafter Lindgren, *Unraveling the Paradox*].

By "blackmail," I mean the attempt to trade silence for money. The term is sometimes used in law as the equivalent of extortion, which is the extraction of money by threats generally, of which threats to reveal incriminating or embarrassing information are a subset. Shavell's article in this Symposium analyzes threats in general as well as blackmail; I discuss other threats too, but only in passing. The descriptive literature on blackmail is sparse. The best work is probably MIKE HEPWORTH, BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE (1975), but it is limited to British law. For philosophical discussions of blackmail that are partially parallel to the economic analysis of this Article, see JOEL FEINBERG, HARMLESS WRONGDOING 238-76 (1988) and ALAN WERTHEIMER, COERCION 90-103 (1987).

An interesting form of blackmail that I do not discuss occurs when a criminal defendant threatens to disclose state secrets if the state prosecutes him.

ment[2] and between blackmail and the right of privacy, and the neglected but theoretically illuminating case of blackmailing a person about an involuntary condition such as sexual preference. I argue that blackmail is, and should be, forbidden because, although ostensibly a voluntary transaction between consenting adults, it is likely to be, on average, wealth-reducing rather than wealth-maximizing.

The economic cast of my analysis is no accident. Economists[3] and economically minded lawyers have found the prohibition of blackmail more problematic than have other students of the legal system. Economists tend to be great believers in voluntary transactions. Blackmail is, in the usual case, a voluntary transaction between competent adults. The blackmailer possesses information about his prospective victim that the latter would prefer not be made public. The victim values the blackmailer's silence more than the blackmailer values the right to publicize the information. Accordingly, the blackmailer sells the victim the right to the information. Since blackmail is a crime, the actual transactions do not much resemble those of ordinary commercial intercourse, but that is an artifact of their illegality. If blackmail were legal, blackmailers and their customers (today called "victims") would enter into legally enforceable contracts whereby the blackmailer would agree for a price never to disclose the information in question; the information would become the legally protected trade secret of the customer.

Economists are troubled by prohibitions against voluntary transactions unless the transactions impose involuntary costs on third parties. Who might the third parties be in the case of blackmail? We can, at least for the moment, elide that question by taking a slightly different approach to freedom of contract, one that asks whether prohibiting a particular class of contracts would raise or lower the net social product.[4] This is the easiest approach to

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[2] On this point, see also William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 42-43 (1975).

[3] Besides those works discussed by Lindgren, see WALTER BLOCK, DEFENDING THE UNDEFENDABLE 53-58 (1976) [hereinafter BLOCK, DEFENDING THE UNDEFENDABLE]; Walter Block, *Trading Money for Silence, in* ECONOMIC IMPERIALISM: THE ECONOMIC METHOD APPLIED OUTSIDE THE FIELD OF ECONOMICS 157 (Gerald Radnitzky & Peter Bernholz eds., 1987) [hereinafter Block, *Trading Money*].

[4] Ronald Coase, in the paper criticized by Lindgren, *see* Lindgren, *On Waste*, *supra* note 1, at 602, also asks the question this way, but, as Lindgren points out, he does not analyze it satisfactorily because he does not consider the possible social value of blackmailing as a method of law enforcement. *See* Ronald H.

contracts made under duress, a class of contracts with which blackmail is often grouped.[5] If an assailant points a gun at you, saying, "Your money or your life," you will doubtless be very eager to accept the first branch of this offer by tendering your money. There are third-party effects, but the essential objection to the transaction is that the victim would prefer a regime in which such transactions were outlawed, because it would reduce the probability of his receiving such unwanted offers (a qualification is discussed later). In this case a restriction on freedom of contract protects a contracting party ex ante.

Similarly, people desperately eager to pay blackmail would prefer not to be blackmailed and would therefore prefer a regime in which blackmail is forbidden. That cannot be decisive against legalizing blackmail, because others might benefit. But it shows that blackmail cannot be approved on economic grounds just because it is a voluntary transaction between consenting adults; not all such transactions are wealth-maximizing. One alternative to economic analysis in both the duress and the blackmail cases is to play with the meaning of "voluntary," for example by confining "voluntary" acts to those in which severe constraints are absent; but this just adds a layer of uncertainty.

Another way of bringing out the commonality between duress and blackmail is to note that both involve threats. Threats have the interesting property that both parties involved—the threatener and the person threatened—are made worse off if the threat is actually carried out. This fact does not by itself condemn a threat as inefficient, since the deterrence theory of punishment is constructed on the premise that threatening is a good way of getting people to behave. But extortionate threats, whether to beat or kill or lie—or tell the truth—that is, threats designed to induce the person threatened to pay the threatener, are not intended to regulate behavior. They are intended to transfer wealth from the person threatened to the threatener. Such a transfer does not, on its face,

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Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 670-76 (1988).

[5] Indeed the line between threatening to do something (such as instigating a legal proceeding) and threatening to tell something (such as that the person threatened has committed a legal wrong) is often faint. *See, e.g.*, Commonwealth v. Tucker, 142 A.2d 786 (Pa. Super. Ct. 1958) (upholding a conviction for intimidating a debtor by simulating delivery of court process). For a comparison of the two types of threat, see Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 555-57 (1983) (distinguishing a threat of physical violence from a threat to take one's business elsewhere).

increase social wealth; indirectly, it diminishes social wealth by the sum of the resources employed by the threatener to make his threat credible and of the victim to resist the threat. So, prima facie at least, it is a sterile redistributive activity, like (simple) theft.[6]

Of course, this seemingly sterile redistributive activity might confer a social benefit; that is the argument for blackmail. But if there is no good reason to suppose it does, then, on purely economic grounds, blackmail should be forbidden.

I. A TAXONOMY AND A NEW ECONOMIC THEORY OF BLACKMAIL

The best way to anatomize blackmail is to distinguish among the seven categories of acts or conditions that a blackmailer might threaten to reveal:[7]

1. Criminal acts for which the blackmailer's victim has been duly punished.
2. Criminal acts that were not detected, hence not punished.
3. Acts that are wrongful but not criminal, such as acts that the common law classifies as torts.
4. Acts, whether civilly or criminally wrongful, of which the blackmailer (or his principal) was the victim.
5. Disreputable, immoral, or otherwise censurable acts that do not, however, violate any law, or at least any commonly enforced law.
6. Involuntary acts or conditions that are a source of potential shame, ridicule, or humiliation.
7. Any of the above, except that the blackmailer's victim did not in fact commit the act for which he is being blackmailed.

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[6] The idea of common law crimes, and their counterpart, intentional torts, as pure coercive wealth transfers can be traced to Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-27 (1972), and, with specific reference to extortion, to George Daly & J. Fred Giertz, *Externalities, Extortion, and Efficiency*, 65 AM. ECON. REV. 997, 999 (1975); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 217-68 (4th ed. 1992) (discussing the economic nature and function of the criminal law). Ginsburg's paper for this Symposium, which was written in 1979 and widely circulated although not published, first applied the idea to blackmail. *See* Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849 (1993).

[7] Feinberg, *see supra* note 1, at 240-58, presents a somewhat similar taxonomy.

A. *Category 1: Criminal Acts for Which the Blackmailer's Victim Has Been Duly Punished*

Here, allowing blackmail would interfere with the penalties prescribed by law, and by doing so might reduce the social product. Or it might not. But we know that blackmail is a costly redistributive activity, and if we have no reason to suppose that it would confer significant third-party benefits, then the fact that we cannot be *certain* that it would not confer any such benefits is not a good reason to carve it out of the general prohibition of extortionate threats.

Suppose the blackmailer's victim is a person who had been convicted of a crime, served his time, incurred all collateral penalties such as loss of civil rights, and eventually been pardoned. Years later the blackmailer appears on the scene and threatens to expose the victim's criminal past. If the blackmailer is allowed to collect money from the victim in exchange for silence, then to the victim's prescribed penalties will be added the amount of the blackmail, an amount equal to the lower of (1) the cost to the victim of the stigma of being exposed as an ex-convict and (2) his financial resources. Of course, the blackmailer may be legally entitled to divulge the information, depending on how broadly the tort of invasion of privacy is defined. But if deterred from engaging in blackmail, he will lack—though not completely, as we shall see—an incentive to expend the resources necessary to obtain the information in the first place.[8] So in all likelihood the information about the victim's past will not be divulged. This may seem a shame, since the information might have some, even considerable, value to people who transact with the victim. But that is irrelevant. If blackmail were permitted, the information would not be divulged either. Blackmail is payment for secrecy. The only effect of blackmail would be to increase the victim's punishment by the amount of the blackmail paid. If the original punishment was optimal, that punishment plus the blackmail would be excessive and the transaction costs of the blackmail would be an additional social waste.

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[8] The expenditure will not always be great; the blackmailer may come by the information casually, at little or no cost. But if blackmail were legal, there would be incentives to engage in blackmail on a commercial scale. For further discussion on this point, see *infra* notes 14-17 and accompanying text.

That "if" is a big one, because punishment is rarely optimal in any strong sense. But we must consider the situation as it would appear to a legislature mulling over the question whether to forbid blackmail. If dissatisfied with the combination of probability and severity of punishment for crimes, the legislature could alter the combination directly. If satisfied, it will want to forbid the blackmail in Category One of my taxonomy. Granted, this assumes that the legislature has decided to use a system of public punishments. An alternative would be a system of private punishments, of which blackmail would be (as we shall see) a natural component. But legislative preference for public punishments is a fact, and may be (again, as we shall see) efficient.

Granted, too, blackmail is not the only private conduct that adds to public punishments. An employer who refuses to hire a person with a criminal record adds a market sanction to the person's official punishment. The difference is that the employer benefits from imposing this additional sanction; presumably it is a cost-minimizing policy. A blackmail transaction does not confer an equivalent social benefit, once its deterrent effect is discounted because of concern with overdeterrence. It merely transfers wealth to the blackmailer. The reason is that blackmail does not actually increase the stock of information in a socially useful sense. This is a paradox. Legalizing blackmail would increase the resources devoted to acquiring information about people's criminal acts and other behavior or dispositions to which opprobrium attaches, and how could an increase in the resources devoted to gathering information *not* increase the amount of information? The amount gathered has to increase, all right, but the amount disseminated need not; for the information gathered by the blackmailer may be suppressed.

He will suppress it, it is true, only if suppression is worth more to the blackmail victim (and hence to the blackmailer) than it is to third parties. Otherwise he will disseminate it to them, and if he does, his activity will have brought about a net increase in the usable stock of information after all. The blackmailer is not interested in secrecy per se, but in money. If someone will pay more for the dirt he has gathered than the blackmail victim will pay, the blackmailer will sell to that third party rather than rebury the information he has unearthed. But these cases will be rare even if the information is socially valuable. Often the benefits of the information will be highly diffuse, being spread across a variety of actual and potential transactors with the blackmail victim, some of whom may not even

be identifiable. Blackmailing a person who is trying to conceal from his future sexual partners that he is a carrier of the AIDS virus would be an example. It may be difficult to transform these diffuse benefits into a commensurate gain appropriable by the blackmailer. Also, it is difficult to sell a secret without revealing it before the sale. If the blackmailer tells the victim's wife that he has some information about the victim that she would value highly, how does she know how much to pay? If he reveals the information to her before she signs a contract, she will not pay anything unless she wants proof, say, for use in a divorce action. Solutions to analogous problems in the area of legitimate intellectual property such as inventions and entertainment exist, but they are not simple. The more costly a transaction, the less likely it is to be made. For both reasons it seems a fair guess that allowing blackmail would not increase the usable stock of information significantly. Indeed, we shall soon consider the possibility that it might actually reduce that stock.

This conclusion is important. If blackmail is unlikely to increase the stock of usable information, one possible third-party benefit from allowing the practice is eliminated from consideration. Another possible benefit is to make criminal punishments more severe, but this may well be an additional cost rather than a benefit. Therefore, the case for carving an exception to the crime of extortion for blackmail in our first category has not been made.

B. *Category 2: Criminal Acts that Were Not Detected, Hence Not Punished*

Here the blackmailer is in effect a supplementary law enforcer. His efforts increase the probability that offenders will be caught but by doing so interfere with a criminal justice system that combines relatively low probabilities of apprehension and conviction with relatively severe punishments—a combination that, under certain assumptions, will optimize law enforcement.[9] Expected punishment cost, which determines deterrence, is the product of the severity and the probability of punishment. Within some range, increasing the fine for an illegal activity by another dollar is essentially costless and enables a reduction in the resources devoted to catching and prosecuting offenders (and hence the costs incurred

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[9] *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 180-85 (1968).

in these activities) without any impairment of deterrence. Private enforcers, however, may treat an increase in the fine as an inducement to invest more resources in enforcement rather than, as intended, as a signal to invest fewer resources.[10] I say "may" rather than "will" because the higher fine, by deterring more offenders, may raise the costs of the private enforcement industry.[11]

Private enforcement can be disruptive in another way as well. Suppose police obtain valuable information by paying informers. The price they pay will be lower if blackmail is forbidden, since competition between police and blackmailers for information concerning guilt would drive up the price of the information.[12] So blackmail might actually reduce the usable stock of information. We cannot be certain. Blackmail increases the incentive to gather information, so more is gathered, and some of it is disseminated rather than reburied, either because the blackmailer and his victim fail to come to terms or because someone offers the blackmailer a higher price than the victim is willing and able to pay. But blackmail also enables some information to be concealed that would otherwise be divulged.

Now suppose that we wanted to reduce rather than increase the severity of criminal punishments and, correspondingly, increase rather than reduce the investment of resources in catching criminals. Under a system of private law enforcement, we would

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[10] The analysis is more complicated, but the results are basically the same, if punishment takes the form of imprisonment rather than a fine. *See* Landes & Posner, *supra* note 2, at 25.

[11] I am indebted for this point to Steven Shavell. *See also* A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

[12] *See* Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1200-01 (1985). Shavell makes the same point in a different form in his article for this Symposium when he argues that effective punishment might be greatly reduced if law enforcement officers or crime victims were free to blackmail criminals. Both these groups have good information about criminals, and the punishment they would impose would consist of monetary exactions necessarily limited by the financial resources of the criminals. *See* Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877, 1901 (1993). But this is just to say that if blackmail were lawful, the price that the government would have to pay such an informant for his information would often exceed the criminal's total wealth. In other cases the informant's reward would be less than the criminal's resources, and blackmail would then provide adequate punishment.

Presumably, bribe-taking by law enforcement officers would be forbidden even if blackmail were allowed generally, but that does not affect Shavell's analytical point.

encounter the mirror-image problem of too little rather than too much enforcement. Private enforcers would treat the reduction in penalties as a signal to reduce rather than increase their investment in enforcement, because the returns would be lower.[13] But this is another reason not to rely on blackmailers, viewed as private law enforcers (which in a functional sense they are), as part of our criminal law enforcement system.

The basic argument in this section is thus a simple one: blackmail is a form of private law enforcement, so in areas where private law enforcement is banned (and we have seen that there are economic reasons why one might want to ban it in some areas), blackmail should be banned. The implication is that in areas where private law enforcement is permitted, blackmail-like activities, though not called by that pejorative name, will be permitted; and we shall see shortly that they are.

The argument is not conclusive, however, for banning blackmail. To begin with, private enforcers might have so much lower costs of operation than public enforcers as to make private enforcement more efficient on balance than public enforcement. Private enterprises generally have lower costs than public ones for the same quality and quantity of output. A blackmailer, moreover, will frequently come upon incriminating information by accident. His blackmail victim might be his spouse, coworker, employer, companion in crime, client or patient, student or teacher, or social acquaintance. Of course if blackmail were legal there would be an incentive to expend more resources on obtaining incriminating information about people; there would be a blackmail industry, though maybe not a very large one, at least if we confine our attention to the blackmailing of people who have committed crimes. One reason for distinctive criminal penalties, such as imprisonment, is that criminals rarely have financial resources commensurate with the injury they do.[14] Such people will not be able to pay huge blackmail either, and this will limit the scale of the industry. But by how much? Far more people commit crimes than are caught and

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[13] I am indebted to David Friedman for this point. It assumes of course that when punishment takes the form of imprisonment rather than fines there are bounties for enforcers; otherwise, they would have no incentive to enforce the law.

[14] This is the rationale for criminal law stressed in the economic literature. *See* Posner, *supra* note 12, at 1204-05; *see also* Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1238 (1985).

prosecuted, so the aggregate gains from lawful blackmail might be huge.

One might try to defend the blackmailing of criminals (whether or not they have been caught and formally punished) differently, as a way of generating a more discriminating scale of punishments.[15] The people most susceptible to blackmail on account of their past crimes are, first, those with the largest incomes and, second, those who occupy jobs or other situations in which the expected cost of a repetition of their crime would be highest. Examples are the convicted embezzler who is once again working in a bank and the wife-slayer who has remarried. Allowing blackmail would enable a greater use of monetary sanctions because a fine, payable out of current assets, plus blackmail payable out of future income would together constitute a heavier such sanction than a fine by itself would. Thus, blackmail might actually promote Becker's program of optimal sanctions,[16] and it would optimize the preventive effect of criminal punishment by steering criminals away from the activities in which the expected costs of their recidivism would be highest. But employers may, as we have seen, be able to protect themselves. And sentencing courts have the power to impose conditions on a criminal's subsequent activities, such as that he keep out of a particular profession (this is a common sanction in securities cases); this may be a simpler solution than blackmail.

But there is more to be said on behalf of blackmail as an ancillary method of law enforcement. The threat of blackmail would not only deter criminal activity directly; it would raise the costs of that activity by inducing criminals to take steps to reduce the likelihood of being blackmailed by each other.[17] Also, some people (especially criminals) may be more willing to engage in blackmail than to report incriminating information to the police, even if there is a reward; for the information may have been obtained illegally, or in circumstances that reveal the informer's own illegalities. So here is a class of cases where allowing blackmail would yield socially productive information even though the information was not disseminated to the authorities: it would be socially productive because it would make the criminal pay for his crime.

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[15] I am indebted to William Landes for this suggestion.

[16] *See* Becker, *supra* note 9.

[17] *See infra* text accompanying note 42.

The discussion in this section may seem inconclusive. Certainly no confident conclusion that allowing the blackmailing of undetected criminals would undermine the enforcement of the criminal laws is possible. But that is not necessary in order to justify the *continued* prohibition of blackmail. As a costly and apparently sterile redistributive activity, blackmail fits the economic definition of a common law crime.[18] The speculative argument that blackmail might serve a socially productive role as an auxiliary form of law enforcement does not justify removing it from the prohibited category, when the opposite argument, that legalizing blackmail would actually undermine optimal law enforcement, is equally plausible.

This conclusion can be criticized as giving undue weight to the status quo, but in evaluating that criticism one should distinguish between an analytical evaluation and a policy recommendation. So far as the first is concerned, all that can be said is that we do not know whether blackmail of undetected criminals is, on balance, an efficient practice. We can translate that conclusion into a recommendation either to retain or abolish the prohibition of blackmail only by bringing in other considerations. One might be a presumption against government intervention in private affairs that is not demonstrably efficient; another, a presumption against the expenditure of scarce political capital on an effort to change laws that are not demonstrably inefficient. Although I cannot prove that blackmail is on balance inefficient, I believe that it is and therefore the second presumption weighs more heavily with me.

C. *Category 3: Acts that Are Wrongful but Not Criminal, such as Acts that the Common Law Classifies as Torts*

With respect to this category of acts, the law has given the exclusive right of enforcement to the victim, and although overenforcement is not a problem (because for most private wrongs the probability of detection is close to one, and therefore the optimal sanction approximates the social cost of the wrong), the law's decision to give the victim a property right in rectifying the wrong would be undermined by allowing a third party to blackmail the injurer-defendant. Blackmail would deplete the wrongdoer's resources and thus make it more difficult for the victim of the wrong to enforce his right to damages.[19]

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[18] *See supra* note 6.

[19] This point assumes that the blackmailer would ordinarily approach his victim

D. *Category 4: Acts, Whether Civilly or Criminally Wrongful, of Which the Blackmailer (or his Principal) Was the Victim*

The difference between Categories Two and Three is that when the victim of wrongdoing, rather than the state, is the authorized enforcer, practices superficially indistinguishable from blackmail often (though not always, hence the need for the fourth category) are permitted. It is broadly true that "[n]o one seems to object to a person's collecting information about his or her spouse's adulterous activities, and threatening to disclose that information in a divorce proceeding or other forum, in order to extract maximum compensation for the offending spouse's breach of the marital obligations."[20] Professor Lindgren reminds us that we are walking on a tightrope here, because there is a division of legal opinion on "whether it is or should be illegal to threaten to disclose damaging information to the press in order to settle a contract or tort claim."[21] A threat merely to litigate a civil suit, however, and not to trumpet the defendant's conduct to the press or other media, is much less likely to be classified as blackmail than a threat to lodge a criminal complaint.[22] This is so even though many civil suits are in fact settled because the defendant does not want the details of his misconduct to become known, as they would be if the case went to trial: trials are public. Settlement agreements often contain confidentiality clauses, and these agreements are not classified as blackmail.

This analysis implies that if private enforcement were permitted generally—if the criminal laws, for example, were privately enforced—then blackmailers would merely be private enforcers who had compromised their enforcement proceedings, much as public law enforcers compromise their enforcement proceedings through plea bargaining. If this were the case, it would be hard to object to blackmail.

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before the latter was made to pay damages.

[20] Landes & Posner, *supra* note 2, at 42-43.

[21] Lindgren, *Unraveling the Paradox*, *supra* note 1, at 697-98.

[22] *See* Block, *Trading Money*, *supra* note 3, at 184.

E. *Category 5: Disreputable, Immoral, or Otherwise Censurable Acts that Do Not, However, Violate Any Law, or at Least Any Commonly Enforced Law, and Category 6: Involuntary Acts or Conditions that Are a Source of Potential Shame, Ridicule, or Humiliation*

Professor Landes and I once remarked that

> [t]he social decision not to regulate a particular activity is a judgment that the expenditure of resources on trying to discover and punish it would be socially wasted. That judgment is undermined if blackmailers are encouraged to expend substantial resources on attempting to apprehend and punish people engaged in the activity.[23]

Lindgren points out, however, that society does "allow substantial resources to be spent on private enforcement of such moral rules and norms without criminalizing such enforcement."[24] His most colorful example is that "President McKinley once denied someone an ambassadorship because years before McKinley had seen the man act selfishly on a streetcar—he had failed to give his seat to an old washwoman carrying a heavy basket."[25] Lindgren's criticism has merit, but a full evaluation must wait upon the consideration of some other issues.

To begin with, the qualification in the definition of Category Five ("or at least any commonly enforced law") is important. Some "immoral" conduct, such as fornication, adultery, and homosexual intercourse, is nominally criminal in many states but so rarely punished as to call into question the existence of any social commitment to extirpate the conduct. When a blackmailer threatens to reveal the victim's immoral conduct, this rarely will be interpreted as a threat of criminal prosecution, though sometimes as a threat to stir up a divorce proceeding. Still, the very overinclusiveness of the criminal law is a possible reason against legalizing the blackmail in Category Two (criminal acts committed but not punished). Allowing such blackmail would bring into existence an industry devoted to enforcing criminal laws that remain on the

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[23] Landes & Posner, *supra* note 2, at 43.

[24] Lindgren, *Unraveling the Paradox*, *supra* note 1, at 698.

[25] *Id.* at 699. The cost of enforcement in this example is subtle: it is the loss of the benefit that the man would have conferred on society as an ambassador. This characterization assumes that McKinley declined to appoint the man in order to punish him for his selfishness, rather than because his selfishness made him less fit for the post than McKinley would have believed had he not witnessed the incident with the washerwoman.

books because of legislative inertia[26] or because of their symbolic importance to influential interest groups but that society as a whole has decided not to enforce. That decision might be undermined by allowing blackmail. One can only say "might" and not "would" because the decision may have been based on considerations peculiar to criminal law and not engaged by informal methods of "law enforcement," including blackmail. This criticism parallels Lindgren's.[27]

It will help in getting a handle on these questions to approach Category Five through Category Six (involuntary acts or conditions that are a source of potential shame, ridicule, or humiliation). Indeed, the original motivation for this paper came from my research into the law and economics of sex,[28] a field rich in cases in this category. Suppose a man is a homosexual in the sense of having a strong, and basically lifelong, preference for sex with other males. This condition is almost certainly involuntary.[29] Of course, having a homosexual preference and acting on it are different things; the preference may be involuntary but the homosexual acts themselves are not. So, to begin, let me assume that the blackmailer's victim is a homosexual and confides this to a friend but refrains from homosexual acts, and in fact is married. The "friend" threatens to tell the victim's wife about his homosexuality unless the victim will pay him to keep silent. This is a classic blackmail threat, yet it is difficult to see what the benefits would be of allowing it to be made.[30] In fact the net social product would probably be diminished if this class of contracts were permitted.

To see this, consider the effects of such permission. One would be to raise the cost of having a homosexual preference—of being a homosexual. Another would be to increase the resources expended on discovering homosexual preference and on negotiating contracts to prevent the discovery from being revealed. A third would be to

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[26] The separation of powers in state as well as federal governments makes it more difficult to repeal laws than in a unitary system of government, such as the parliamentary system.

[27] *See* Lindgren, *Unraveling the Paradox*, *supra* note 1, at 698-99.

[28] *See* RICHARD A. POSNER, SEX AND REASON (1992).

[29] *See id.* at 101-05; *see also* RICHARD GREEN, SEXUAL SCIENCE AND THE LAW 63-84 (1992).

[30] The focus here is not upon the benefits from disclosing the information—information which may be significant (for example to the blackmail victim's wife). The information will not be disclosed if the blackmail transaction is successful, and it would be more likely to be successful if blackmail were legal.

increase the resources devoted to concealing homosexuality and to other defensive measures against the threat of blackmail.

The second effect cannot be dismissed with the argument that the resources that would be devoted to blackmailing, if it were a lawful activity, would be slight because most blackmailers concerned with intimate acts probably obtain their information as a byproduct of their transactions with the victim (the spurned lover, etc.) rather than through elaborate investigation; even so, a fair amount of sexual blackmail involves entrapment of the victim.[31] To repeat an earlier point, the illegality of blackmail reduces the amount expended on investigation and entrapment, making that amount a poor predictor of what the costs of blackmail would be if blackmail were legal. Moreover, in a legal market, it is doubtful that the casual blackmailer would deal directly with the victim, because the latter would want a reliable guarantee that the blackmailer would not renege on his promise of silence. Blackmail would tend to be dominated by "reputable" blackmail enterprises, whose costs would not be trivial.

If raising the cost of being a homosexual has no allocative effect because homosexuality is an involuntary and unalterable condition, then legalizing blackmail would channel real—and, I have just argued, considerable—resources into bringing about a pure redistribution of wealth from the homosexual to the blackmailer. There would be no net social gain but instead a net social loss equal (at a minimum, as we shall see) to the resources expended in the blackmailing. Here is where the involuntary character of being a homosexual is important, which is what caused me to specify a separate Category Six for cases of involuntary, unalterable conditions. If a condition cannot be changed by incentives, taxing it is unlikely to have any allocative effect. No gain, much cost.

I am oversimplifying. There would be some allocative effects. Some homosexuals would be less likely to marry, to enter traditionally heterosexual or homophobic occupations (notice the parallel to the occupational effects of allowing blackmail with respect to past criminal convictions), or in short to try to "pass" as heterosexual, since a known homosexual cannot be blackmailed. Others, however, would try all the harder to pass, in an effort to reduce the risk of blackmail by raising potential blackmailers' costs of information. Both classes of response would be defensive measures akin to the

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[31] *See infra* note 33.

purchase of a security system by a householder fearful of burglary. If we anticipated a social gain from homosexuals' making either greater or fewer efforts to pass as heterosexuals, and if we knew which effect would be more likely on balance if blackmail were permitted, then we could evaluate a suggestion that allowing homosexuals to be blackmailed would generate social benefits. But there is no basis in existing knowledge for either judgment. For example, while it could be argued that a male homosexual who marries a woman to whom he does not disclose his sexual preference commits a fraud upon her and therefore that such marriages should be discouraged, we do not know whether allowing blackmail would reduce the number of such marriages by increasing the cost of the marriage to the homosexual or would increase the number of such marriages by increasing the benefits of marriage to homosexuals through its camouflage effect (married men are presumed heterosexual). In the face of this uncertainty, the safest guess is that allowing the blackmailing of homosexuals would yield a net social loss equal to the resources expended in blackmailing and in defending against blackmailing.[32] Additional resources would be squandered on efforts to entrap people in compromising situations.[33]

The analysis is more complicated if the focus is switched from the *condition* of being homosexual (in the sense of having a homosexual orientation) to homosexual *acts*. One way a homosexual can reduce the probability of detection is by reducing the number of homosexual acts he engages in, and in particular the number of different homosexual partners he has. Indeed, if he simply screens his partners more carefully, this will raise his sexual search costs and so indirectly reduce the number of his sexual partners. If, perhaps

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[32] Block, insisting that there would be a real social gain in allowing blackmail, makes the remarkable argument that blackmail benefits homosexuals "by making the public more aware and accustomed to homosexuality" and by "engender[ing] an awareness on the part of members of a group [i.e., homosexuals] of one another's existence." BLOCK, DEFENDING THE UNDEFENDABLE, *supra* note 3, at 57-58.

[33] Hepworth gives examples of these types of expenditures, which he calls "entrepreneurial blackmail." HEPWORTH, *supra* note 1, at 74-75. For an American illustration, see State v. Harrington, 260 A.2d 692, 694 (Vt. 1969), where the defendant, a lawyer, procured a woman to entice his client's husband to commit adultery with her, and then threatened to expose the husband's adultery in order to obtain better divorce terms for the wife. A recent case of this sort is United States v. Lallemand, No. 92-2178, 1993 U.S. App. LEXIS 6423 (7th Cir. Mar. 29, 1993).

because of the AIDS epidemic, we thought it a good idea to create incentives for homosexuals to reduce the number of their homosexual acts or homosexual sex partners, allowing blackmail might generate a net social benefit. This seems unlikely, though. The expected cost of AIDS to homosexuals who do not practice safe sex is very high and must swamp the expected cost of blackmail (more precisely, the higher expected cost of blackmail if blackmail were legal). Put differently, a person willing to risk AIDS is probably willing to risk being blackmailed. This conclusion requires qualification, however, because the blackmail risk would soar if blackmail were decriminalized. Nevertheless, the blackmail "tax" would probably remain a minor factor in most homosexuals' decision calculus. What is more, the danger of infection with AIDS is greatly reduced by the use of condoms, and blackmail would do nothing to induce such use.

Here is an even clearer example of a case in Category Six: A man is impotent, and is obtaining treatment from a sexual therapist. Suspecting Victim's condition,[34] a blackmailer follows him to the therapist's office, discovers (without breaking any law) what the problem is, and blackmails him. What would be the consequences if such blackmail were permitted? Not less impotence, surely, but more. An impotent man would hesitate to seek professional assistance for fear of increasing the probability that blackmailers would discover his problem. The increase in impotence would generate (after subtracting the reduction in the use of therapists' services) a net social cost, to be added to the cost of the resources

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[34] Jerky, agitated gestures in conversation or public speaking were once thought an infallible symptom of impotence. Medical literature of the late nineteenth and early twentieth century taught that impotence had a rich and observable symptomatology:

> [C]ertain subjective symptoms were present. . . . Prominent among these signs are pain in the back . . . so that the subjects are tired out by comparatively slight exertions and walking. [T]here is dull, heavy pain in the back of the head, the neck, the shoulders, which now and then become flushed. . . . In other instances, the symptoms are . . . impairment of memory, mental debility, depression, anxiety, or irritability. . . . In other cases . . . troubled and unrefreshing sleep, . . . coldness of the hands and feet, poor appetite, coated tongue . . . vertigo, and constipation are very common.

SAMUEL W. GROSS, A PRACTICAL TREATISE ON IMPOTENCE, STERILITY, AND ALLIED DISORDERS OF THE MALE SEXUAL ORGANS 37-38 (1881); *see also* John S. Haller, Jr., *Spermatic Economy: A 19th Century View of Male Impotence*, 82 S. MED. J. 1010, 1011 (1989) ("[T]he symptoms . . . included . . . inability to focus one's attention on any subject, [and] stammering and quavering of the voice . . . .").

expended by the blackmailer. This is another example of defensive and offensive expenditures on wealth redistribution that yield no social gain.

Thus far I have been assuming that the victim's secret is worth more to his potential transacting partners than it is to himself. As such, the objection to blackmail is that, when successful, it bottles up socially valuable information. In many cases, however, the secret may be worth more to the victim than unmasking it would be worth to others.[35] Impotence is a good example. The condition will be known to the man's sexual partners; and of what interest would it be, except as a source of mild titillation, to anyone else? The embarrassment to the victim if his condition becomes known to the public may greatly outweigh the benefits of the information to the public.

To summarize, Category Six involves the levying of a private tax on an activity that either is unlikely to be discouraged by the tax or that society has no interest in discouraging. Of course, from the standpoint of public finance, a tax that has minimal allocative effects is an ideal revenue raiser. But there is no social interest in allowing one member of society to impose and collect a tax on another member for his own use, especially when the blackmailer is unlikely to pay tax on his blackmail income (if he were likely to pay tax on that income, he could be regarded as a sort of tax collector). In cases of this sort, blackmail really is the economic equivalent of theft.

Category Five, consisting of disreputable but not unlawful acts, is difficult to analyze because there is no enforcement scheme to be disrupted and there are potential allocative gains from taxing disreputable conduct (as with a pollution tax). The selfish man who aroused President McKinley's ire might have behaved differently toward the washerwoman if he had known that anyone on the streetcar could have gone up to him and said, "Give me five dollars or I will proclaim to the world that you are a selfish man." The threat of blackmail would act as a tax on selfishness and thus make us less selfish.

That would be one effect but another would be the manufacture of phony reputations.[36] Suppose McKinley had not seen the

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[35] *See* Gary S. Becker, The Case Against Blackmail 1 (Jan. 1985) (unpublished manuscript).

[36] The notion that people use the concealment of discreditable information about themselves to enhance their success in the market for personal relations is

selfish act on the streetcar but had been told about it by one of the passengers (who, let us say, merely to simplify analysis, was the only one who had seen it). In a regime of lawful blackmail, that passenger might have gone to a blackmailer and sold exclusive rights to the information to him, and he in turn would have sold it to the selfish man, who would, of course, have buried it. The informant is silenced by blackmail.

Society has an informal and very cheap system of deterring the lesser forms of wrongdoing: gossip. Its efficacy would be undermined by blackmail because the gossip would sell his information to the blackmailer and thence to the wrongdoer and thereafter his lips would be sealed. This scenario both underscores the analogy between trade secrecy and lawful blackmail and illustrates how blackmail can reduce rather than increase the usable stock of information. It is true that, at the same time the efficacy of this informal system of regulation was reduced by allowing blackmail, so would be the need for it, because the tax effect of blackmail would reduce the incidence of wrongdoing. But it cannot be assumed that, overall, the amount of wrongdoing would be less. If it were not less, then the costs of blackmail would be a deadweight loss.

This argument against Category Five blackmail is hardly conclusive. The possibility that blackmail would be an efficient intermediate method of discouraging relatively minor forms of wrongdoing between the criminal law (effective but too costly) and gossip (cheap but perhaps not very effective) cannot be excluded. But, once again, the argument for allowing blackmail is too speculative to make a strong case for decriminalizing this particular form of extortion.

Consider, by way of analogy, the following argument: we should allow extortion whenever it is founded upon the wrongdoing of the victim. *X* obtains proof that *Y* is an adulterer, goes to *Y*, and threatens to beat him up unless *Y* will pay him $25. The possibility that allowing such threats would reduce breaches of the marital obligation at a cost commensurate with this benefit cannot be excluded a priori, but seems altogether too conjectural to justify making an exception to the laws against extortion. It is the same with blackmail.

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basic to the economic analysis of privacy. *See* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 232 (1981) ("[S]ocial, like business, dealings present opportunities for exploitation through misrepresentation.").

F. *Category 7: Any of the Acts in the Previous Categories, but the Blackmailer's Victim Did Not in Fact Commit the Act for Which He Is Being Blackmailed*

A blackmailer could attempt to blackmail someone with a threat to accuse him falsely, but we should expect such cases to be rare because the victim has a good remedy: sue the blackmailer for defamation. The remedy is not perfect, however, because the blackmailer may not have the resources to pay a legal judgment. Criminalizing this form of blackmail can thus be viewed as backing up the law against defamation.

II. FURTHER IMPLICATIONS OF THE ECONOMIC APPROACH

The analysis to this point has shown that there is an economic case for the prohibition of blackmail; but this conclusion does not exhaust the potential contribution of economics to the understanding of the prohibition. Apart from earlier points, economic analysis may explain why it is not blackmail for a person who gets wind that another is about to disclose damaging information about him to approach that person and pay him to keep mum.[37] Allowing such transactions is unlikely to give rise to an industry of dirt-seekers, with all the squandered resources thereby implied, since the dirt-seekers could not advertise for or otherwise seek out customers (which would be blackmail) but would have to wait for the latter to come upon them by chance.

Economic analysis can also cast light on why the crime of blackmail is relatively recent[38] and why it is regarded with great distaste and punished severely in comparison with other nonviolent thefts. A possible answer to the first question is that blackmail is less likely to be common, and therefore less likely to be deemed a social problem requiring a public remedy, in a society in which people have very little privacy and, therefore, few secrets. In addition, blackmail imposes fewer social costs in a system dominated by private rather than public enforcement, and the latter is a relatively modern innovation.

One answer to the second question is that blackmail partakes of the opprobrium visited on crimes that involve advance planning, as

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[37] If the information concerns an undetected crime, however, the payee might be deemed an accomplice after the fact in the commission of the crime.

[38] There appear to have been few prosecutions for blackmail before the nineteenth century.

distinct from impulsive crimes. Moreover, it is extremely easy for a legislator, judge, or other public official to visualize himself or herself as a blackmail victim: any public official is a prime target for blackmail, and public officials are influential in the formation of law. Furthermore, the probability of punishing a blackmailer may be low. There appear to be, as we shall see, few prosecutions.[39] The blackmail victim does not want to reveal his secret to the police; and in a public trial of the blackmailer,[40] the secret may leak out even if the blackmailer is intimidated by the prosecution into keeping mum.

The blackmail victim may have two better choices than to go to the police. One is to pay blackmail, for the rational blackmailer will try to set a price that does not drive the victim to the police. Another is to call the blackmailer's bluff, since if in retaliation the blackmailer reveals the damaging information, there will no longer be any incentive for the victim not to complain to the police; he has nothing more to lose. The blackmailer whose victim defies him faces a tradeoff between loss of reputation among his potential victims if he does not carry out his threat and a greatly enhanced probability of punishment if he does; and the former consideration would weigh heavily only if blackmail were lawful, so that a blackmailer could advertise his qualities to potential victims. Knowing all this, many blackmail victims can be expected to thumb their noses at the blackmailer and many other victims can be expected to pay, leaving only a handful to complain. Because the probability of punishment is very low, the punishment must be set high to deter, and so blackmail will have the appearance of being a serious crime.

There is another reason to expect (illegal) blackmailing often to fail: a blackmailer cannot easily conceal his identity from the blackmail victim. Unlike most crimes, blackmail requires explicit, and often protracted, negotiations between the criminal and his victim, and in the course of these negotiations the victim is likely to learn the criminal's identity—especially since there are likely to be only one or a few persons who could have obtained the information

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[39] *See infra* part III. We shall also see that this point is not decisive, hence the hedged "may be."

[40] Criminal defendants in this country have a constitutional right to a public trial, although measures are sometimes taken to conceal secret information, including trade secrets. I have noted the analogy between blackmail and the theft of a trade secret.

used to blackmail the victim. Once the victim knows who the blackmailer is, he has as potent a secret as the blackmailer: if the blackmailer knows that the victim is a criminal, the victim knows that the blackmailer is a criminal. The situation becomes implicitly one of mutual blackmail, and the blackmailer cannot be confident of coming out ahead.

The sophisticated blackmailer tries to avoid incriminating himself by such ploys as informing the victim that he (the blackmailer) has incriminating information and asking the victim what he should do with it. If the victim offers to buy it, without solicitation on the part of the blackmailer, and the blackmailer accepts the offer and sells, there is, in the contemplation of the law, no blackmail. But this is a complicated minuet, in which one false step will turn the transaction into blackmail. Moreover, if the victim makes no offer, and the blackmailer responds by divulging the information, the blackmailer has to worry that the victim may incite a prosecution against him out of anger, even if conviction is unlikely.

There is another side to this coin, however. By giving his victim irrefragable proof of blackmail, the blackmailer reduces the probability that he (the blackmailer) will renege on the blackmail "contract" by going back to his victim with an additional demand for money. He has armed his victim to resist him—indeed to blackmail him![41] But in partial offset to this ingenious point,[42] it should be noted that in many cases the victim's fear is not of disclosure to the police, who may be uninterested in his shameful secret, but to a spouse or other family member, or to an employer. In such a case, the victim may have a strong incentive to complain to the police—unless, realizing this, the blackmailer, once again, scales down his price appropriately. It might seem that the victim would be afraid of the blackmailer's disclosing the information to the spouse, employer, or whomever, out of spite at being reported. But as I have emphasized, a rational blackmailer, once caught, usually

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[41] This is similar to hostage-giving, another extralegal method of making a credible commitment.

[42] For which I am indebted to Steven Shavell, who has also directed my attention to a mystery novel in which the blackmailer furnishes his victim incriminating information about himself (apart from the blackmail) explicitly to reassure her that he is unlikely to renege on their deal by making a further demand upon her. *See* LAWRENCE BLOCK, TIME TO MURDER AND CREATE 44-47 (Jove Books 1983) (1977). The novel describes another blackmail transaction, in which there is a specified periodic payment so that the victim knows he's buying silence only for a period and the blackmail price can be adjusted accordingly. *Id.* at 32-33.

will keep mum in an effort to obtain leniency. Given the difficulty of establishing reputation in an illegal market with few repeat customers, considerations of reputation are unlikely to offset the benefits of a lighter punishment.

Reference to "spite" suggests another qualification. A blackmailer who has a spiteful motive to reveal the victim's secret if the victim does not pay up is a more credible blackmailer: his spite is a form of precommitment. The blackmailer may thus be more credible, but is he more effective? Maybe not. The victim may fear that the spiteful blackmailer will reveal the secret whether or not he pays up; if so, he has nothing to gain from paying. There is another reason, unrelated to spite, for not paying anything to a blackmailer. Paying anything may confirm the blackmailer's belief in the accuracy of the discrediting information that he has about the victim, and so raise his price, thereby making a further demand inevitable. Indeed, every time the victim pays, he gives the blackmailer more information concerning the value of the blackmailer's information about him. This is an especially important consideration in regard to blackmailing with a false accusation. By paying blackmail, the victim gives the accusation credibility, thus increasing the optimal blackmail price. The broader point is that such payment, however modest, makes it more difficult for the victim to deny the truth of the blackmailer's information should it ever be divulged.

All things considered, it must often, perhaps usually, be rational for a blackmail victim either to thumb his nose at the blackmailer or to pay a trivial amount in hush money (its triviality reflecting the potency of the first alternative). If this is right, however, then actual cases of blackmail will tend to be ones in which victims are naive. Rational blackmailers will not approach people who are likely either to defy them[43] or to bargain them down, but will concentrate on the psychologically or otherwise vulnerable. This selection bias will make the blackmailer seem especially vicious and predatory, and will thus create pressure for severe punishment.

Is severe punishment warranted from a deterrent standpoint? This is a difficult question. Certainly some punishment is warranted, even though blackmail may be rare; if blackmail is rare, it may

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[43] "Publish and be damned" was the Duke of Wellington's response to a blackmailer. Wellington wrote these words on a blackmailing letter he received from the publisher of the memoirs of Wellington's mistress, Harriette Wilson, then posted it back to him. *See* 1 ELIZABETH LONGFORD, WELLINGTON: THE YEARS OF THE SWORD 166-67 (1969).

be so in part because it is punished. By making blackmail a crime, the law does three things: (1) gives the blackmailer an incentive not to reveal the victim's secret after the victim has complained to the police, which makes such complaints more likely and therefore blackmail less likely; (2) makes it impossible to conduct blackmail in the open; (3) prevents the blackmailer from offering his victim a legally enforceable promise of secrecy. The first effect is enhanced by severe punishment, but the second and third are independent of it—and the second alone may, by retarding the emergence of professional blackmailers, largely confine blackmailing to intimates of the victim. Intimates can extract concessions that cannot readily be proved to be blackmail, and when proof is difficult, heavy punishment may actually reduce deterrence, because juries are more reluctant to convict in doubtful cases the heavier the punishment is. If the blackmailer knows the victim's guilty secret, the victim is more likely to treat the blackmailer well, but the latter could not be proved guilty of blackmail beyond a reasonable doubt unless he made a demand of some kind. This is related to the earlier point that passive blackmail, as it were, is not a crime.

An intimate is likely to come across incriminating information by accident, that is, without an expenditure of resources. So the basic economic objection to blackmail—that it is, on balance anyway, a sterile expenditure of resources—is weakened.[44] But it would be wrong to conclude that blackmail by intimates is a socially costless activity. It raises the cost of intimacy, much as would a rule requiring a person to testify to admissions made by his or her spouse. Of course, intimacy can be used for bad as well as for good purposes, so Walter Block is right to point out that legalizing blackmail would increase the costs of conspiracy.[45]

The third effect of the criminalization of blackmail, that of eliminating property rights in the blackmailer's information, reduces the amount of blackmail that the victim will pay, because he has no protection against being blackmailed in the future. The amount may fall all the way to zero, that is, the victim may pay nothing, knowing that he is not buying anything: the blackmailer may return the next day with a new demand. Again, this effect of criminaliza-

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[44] *Cf.* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9-32 (1978) (arguing that property rights should not be recognized in information acquired casually, but should be recognized in information acquired as a result of a deliberate search).

[45] *See* Block, *Trading Money*, *supra* note 3, at 186.

tion does not depend on the severity of the punishment; indeed, the effect could be achieved without criminal law simply by making blackmail contracts unenforceable as a matter of contract law.

Note that if prohibition keeps blackmail prices low, potential blackmail victims may prefer some blackmail to none, because there will be cases where a blackmailer, who would otherwise report a crime or other misconduct, can be bought off at low cost. This added wrinkle suggests that a rigorous economic analysis of blackmail would be complex and also that the existing situation, in which blackmail is a crime but enforcement efforts are slight, may be the best we can do. The paradox proposed is that an underenforced law may confer a greater net social benefit than a vigorously enforced one even if the conduct that the law prohibits has no social value. This is another reason why private enforcement of law, which would tend to eliminate underenforcement, is not always socially desirable.

III. THE CASES

It would be nice to be able to test the predictions implicit in my analysis against a body of data concerning blackmail, but there are no good data on this furtive underworld activity. The next best thing—and it is by no means good—is published judicial opinions in blackmail cases. Only a small fraction of legal proceedings result in a published opinion, but it is still remarkable how few such opinions there are in blackmail cases. A computer search of the approximately three million opinions published by West Publishing Company in the last century disclosed only 124 blackmail cases. No doubt my search missed many blackmail cases, because the word often does not appear either in the statute under which a blackmailer is punished or in the opinions applying the statute; often blackmail is lumped in with other forms of extortion. Nevertheless, the remarkably small number of blackmail cases retrieved by my search suggests, though does not establish, that blackmail is indeed rarely prosecuted. The reason may be that it is rarely committed. No one knows how rare or common blackmail is, but I have suggested that it probably is rare because when blackmail is a crime a rational blackmail victim will refuse to pay blackmail. Any offer to pay will lead the blackmailer to increase his demand and, more important, the victim knows that if he complains to the police, the rational blackmailer, in order to minimize his punishment, will refrain from divulging the blackmail secret.

The following table classifies, so far as is possible to do, the 125 cases in the categories of Part II.[46]

TABLE I
CLASSIFICATION OF REPORTED BLACKMAIL CASES

Category	*Number of Cases*	%
1	1	1
2	54	47
3	8	7
4	4	4
5	23	20
6	10	9
7	14	12
Unclassifiable	11	—
Total	125	100†

† Percentage of classifiable cases.

There is only one case in Category One—criminal acts for which the blackmail victim has been punished. One reason may be that ex-convicts cannot conceal their criminal record anyway and so cannot be blackmailed about it. By far the dominant category (47% of the classifiable cases) is Two—criminal acts for which the blackmail victim has not been punished. This is not surprising. It is the only category in which the victim has reason to fear that if he reports the blackmail to the police he too will be prosecuted: hence the only category in which blackmail is unlikely to be self-deterring. The

[46] The numbers in the table sum to 125 because one case fell into two categories and was therefore counted twice. A list of the cases is attached as an appendix to this Article. Recall that the categories are: 1. Criminal acts for which the blackmailer's victim has been duly punished; 2. Criminal acts that were not detected, hence not punished; 3. Acts that are wrongful but not criminal, such as acts that the common law classifies as torts; 4. Acts, whether civilly or criminally wrongful, of which the blackmailer (or his principal) was the victim; 5. Disreputable, immoral, or otherwise censurable acts that do not, however, violate any law, or at least any commonly enforced law; 6. Involuntary acts or conditions that are a source of potential shame, ridicule, or humiliation; and 7. Any of the above, except that the blackmailer's victim did not in fact commit the act for which he is being blackmailed.

"involuntary" category is dominated by homosexual cases (five out of the ten). A relatively small number of cases in the sample involved a false accusation (12%); this is as predicted. In only 4% of the cases was the blackmailer or his principal the victim of the blackmail victim's blackmailable conduct; again, this is as expected. Category Five (immoral acts) is dominated by fornication and adultery cases. And only one case in the entire sample appears to involve spite.

The cases are consistent with the economic analysis, but that is not saying much: it would be reckless to generalize from so small and possibly unrepresentative a sample to the "dark" figure of the total number of blackmail incidents whether or not they lead to prosecution, conviction, and a reported opinion.[47] May further research someday enlarge the sample! In the meantime, I am content to argue that economic analysis is indispensable in guiding investigation and analysis of a fascinating class of criminal behavior.

[47] In this connection, I point out that almost 10% of a large sample (more than 1400) of male homosexuals reported having been blackmailed at least once by a sexual partner. *See* PAUL H. GEBHARD & ALAN B. JOHNSON, THE KINSEY DATA: MARGINAL TABULATIONS OF THE 1938-1963 INTERVIEWS CONDUCTED BY THE INSTITUTE FOR SEX RESEARCH tbl. 545 (1979).

APPENDIX

Category	*Case*
3	United States v. Fero, 18 F. 901 (E.D. Wis. 1883)
5	People v. Wightman, 11 N.E. 135 (N.Y. 1887)
2	Schoener v. Lessauer, 13 N.E. 741 (N.Y. 1887)
5	People v. Tonielli, 22 P. 678 (Cal. 1889)
8	People v. Choynski, 30 P. 791 (Cal. 1892)
2	People v. Hoffman, 58 P. 856 (Cal. 1899)
5	People v. Williams 59 P. 581 (Cal. 1899)
2	People v. Sexton, 64 P. 107 (Cal. 1901)
7	People *ex rel.* Colo. Bar Ass'n v. Varnum, 64 P. 202 (Colo. 1901)
5	State v. Coleman, 110 N.W. 5 (Minn. 1906)
2	State v. Nethercutt, 92 P. 938 (Wash. 1907)
2	People *ex rel.* Perry v. Gillette, 93 N.E. 953 (N.Y. 1911)
5	State v. Conradi, 60 So. 16 (La. 1912)
2	State v. Barr, 120 P. 509 (Wash. 1912)
7	Lee v. State, 145 P. 244 (Ariz. 1914)
2	State v. Richards, 167 P. 47 (Wash. 1917)
2	People v. Beggs, 172 P. 152 (Cal. 1918)
2	People v. Sanders, 207 P. 380 (Cal. 1922)
2	State v. Barger, 145 N.E. 857 (Ohio 1924)
2	Farkas v. United States, 2 F.2d 644 (6th Cir. 1924)
3	Simpson v. Coastwise Lumber & Supply Co., 147 N.E. 77 (N.Y. 1925)
2	People *ex rel.* Rock Island County Bar Ass'n v. McCaskrin, 156 N.E. 328 (Ill. 1927)
7	Wilcox v. State, 6 Ohio L. Abs. 571 (Ct. App. 1928)
2	Williams v. State, 167 N.E. 609 (Ohio Ct. App. 1929)
2	State v. Duffy, 229 N.W. 558 (Minn. 1930)
5	State v. McKenzie. 235 N.W. 274 (Minn. 1931)
2	State v. Burns, 297 P. 212 (Wash.), *aff'd*, 1 P.2d 229 (Wash. 1931)
7	Commonwealth v. Bernstine, 162 A. 297 (Pa. 1932)
5	Webster v. State, 190 N.E. 52 (Ind. 1934)
2	State v. Williams, 71 S.W.2d 732 (Mo. 1934)
8	*In re* Goodman, 36 N.E.2d 259 (Ill. 1941)
5	State v. Linhardt, 3 So. 2d 552 (La. 1941)
2	People v. Parker, 11 N.W.2d 924 (Mich. 1943)
2	People v. Watson, 11 N.W.2d 926 (Mich. 1943)
2	Commonwealth v. Downer, 49 A.2d 516 (Pa. Super. Ct. 1946)
7	People v. Goldstein, 191 P.2d 102 (Cal. Ct. App. 1948)

Category	*Case*
5	Commonwealth v. Halleron, 63 A.2d 140 (Pa. Super. Ct. 1949)
8	State v. Reinoehl, 218 P.2d 865 (Idaho 1949)
2	People v. Clarke, 95 N.E.2d 425 (Ill. 1950)
2	Lano v. State, 77 A.2d 125 (Md. 1950)
2	People v. King, 229 P.2d 20 (Cal. Ct. App. 1951)
2	People v. Percin, 47 N.W.2d 29 (Mich. 1951)
7	People v. Hallinan, 108 N.Y.S.2d 285 (N.Y.C. Magis. Ct. 1951)
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