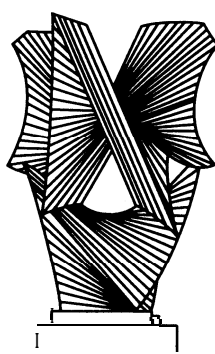


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BLACKMAIL, PRIVACY, AND FREEDOM OF CONTRACT

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I. 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 literature¹ to which this article seeks to contribute by emphasizing

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. I thank Gary Becker, Richard Epstein, David Friedman, William Landes, James Lindgren, Stephen Schulhofer, Andrew Shapiro, Steven Shavell, and participants in a faculty seminar at DePaul University Law School for exceedingly generous and helpful comments on a previous draft of this paper, and Mary Jane DeWeese and Brian Weimer for valuable research assistance. An unpublished note by Gary Becker, "The Case against Blackmail" (January 1985), makes several arguments parallel to mine; I was not aware of his note when I wrote my paper.

¹ See the following articles by James Lindgren for the best introduction to the scholarly literature: "Blackmail: On Waste, Morals, and Ronald Coase," 36 *UCLA Law Review* 597 (1989); "Secret Rights: A Comment on Campbell's Theory of Blackmail," 21 *Connecticut Law Review* 407 (1989); "Kept in the Dark: Owens's View of Blackmail," 21 *Connecticut Law Review* 749 (1989); "In Defense of Keeping Blackmail a Crime: Responding to Block and Gordon," 20 *Loyola of Los Angeles Law Review* 35 (1986); "More Blackmail Ink: A Critique of *Blackmail, Inc.*, Epstein's Theory of Blackmail," 16 *Connecticut Law Review* 909 (1984); "Unraveling the Paradox of Blackmail," 84 *Columbia Law Review* 670 (1984).

I mean by "blackmail" 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. The descriptive literature on blackmail is sparse. The best work I have found is Mike Hepworth, *Blackmail: Publicity and Secrecy in Everyday Life* (1975), but it is limited to England. For philosophical discussions of blackmail that are partially parallel to my economic analysis, see Joel Feinberg, *Harmless Wrongdoing* (vol. 4 of his treatise *The Limits of the Criminal Law*) 238-275 (1990), and Alan Wertheimer, *Coercion*, ch. 5 (1987).

An interesting form of blackmail that I do not discuss is when a criminal defendant threatens to spill state secrets if he's prosecuted.

economic and strategic considerations, positive and empirical analysis, the relation between blackmail and private law enforcement,² and the neglected but theoretically illuminating case of blackmailing a person about an involuntary condition such as homosexual 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, for, quite apart from my own proclivities, **economists**³ and economically minded lawyers have found the prohibition of blackmail more problematic than other students of the legal system have. Economists tend to be great believers in voluntary transactions. Blackmail is in the usual case a voluntary transaction between competent adults. Blackmailer possesses information about Victim that Victim would prefer not be made public, Victim values Blackmailer's silence more than Blackmailer values the right to publicize the information, so Blackmailer sells Victim the right to the information. Because 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 issues, one that asks whether prohibiting the particular class of contracts in issue

² Here drawing on the analysis of blackmail in my article with William M. Landes, *The Private Enforcement of Law*, 4 *Journal of Legal Studies* 1, 42-43 (1975).

³ Besides those discussed by Lindgren, see Walter Block, *Defending the Undefendable* 53-58 (1976); Block, "Trading Money for Silence," in *Economic Imperialism: The Economic Approach Applied outside the Field of Economics* 157 (Gerald Radnitzky and Peter Bernholz eds. 1987).

would raise or lower the net social product.⁴ This is the easiest approach to contracts made under duress, a class of contracts to which blackmail is often assimilated.⁵ Assailant points a gun at Victim, saying, ‘Your money or your life.’ Victim is very eager to accept the first branch of this offer by tendering his money. There are third-party effects, but the essential objection to the transaction is that 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. The alternative to economic analysis in both the duress and the blackmail case of playing with the meaning of “voluntary” just adds a layer of confusion.

Another way of bringing out the commonality between duress and blackmail is to note that both involve threats, which have the interesting property that both parties to a threat—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: 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

⁴ Coase, in the paper criticized by Lindgren in his *UCLA Law Review* article, note 1 above, 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. Ronald H. Coase, “Blackmail,” 74 *Virginia Law Review* 655 (1984).

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. For an example, see *Commonwealth v. Tucker*, 187 Pa. Super. 61, 142 A.2d 786 (1958). And for comparison of the two types of threat, see Richard A. Epstein, “Blackmail, Inc.,” 50 *University of Chicago Law Review* 553, 555-557 (1983).

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 anyway, increase the social wealth; and indirectly it diminishes it 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 (no one makes a similar argument for the other forms of extortion). But if there is no good reason to suppose it does, then—on purely economic grounds—blackmail should be forbidden.

II. A TAXONOMY, AND A NEW ECONOMIC THEORY, OF BLACKMAIL

The best way to anatomize blackmail is to distinguish among the seven kinds of act or condition that a blackmailer might threaten to reveal?

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—at least any commonly enforced law.
6. Involuntary, and not unlawful, acts or conditions that are, nevertheless, a source of potential shame, ridicule, or humiliation.

⁶ The idea of common law crimes, and the 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 *Harvard Law Review* 1089 (1972). See also Richard A. Posner, *Economic Analysis of Law*, ch. 7 (3d ed. 1986).

⁷ Feinberg, note 1 above, at 240-258, presents a somewhat similar taxonomy.

7. Any of the above-but the blackmailer's victim did not in fact commit the act for which he is being blackmailed.

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. It also 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 had been pardoned. Years later Blackmailer appears on the scene and threatens to expose Victim's criminal past. If Blackmailer is allowed to collect money from Victim in exchange for silence, then to Victim's prescribed penalties will be added the amount of the blackmail-an amount anywhere up to the monetary cost of the stigma of being exposed as an ex-convict. Of course Blackmailer may be legally entitled to divulge the information, depending on how broadly the tort right of privacy is defined. But if he is 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 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 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 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.

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, and this could be costly. More on this point later.

That “if” is a big one. 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 the legislature were dissatisfied with the combination of probability and severity of punishment for crimes, it could alter the combination directly. If it is satisfied, it will want to forbid the blackmail in cell 1 of my taxonomy. Granted, this assumes that the legislature has decided to use a system of *public* punishments. An alternative would be private punishments, and then blackmail would be (as we shall see) a natural component of the punishment system. But legislative preference for public punishments is a fact, and maybe (again, as we shall see) an efficient fact.

Granted, 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. Lawful 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? Well, 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 do so, 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-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 an AIDS carrier 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 Blackmailer tells Victim's wife that he has some information about 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 won't 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 take place. For both reasons it seems a fair guess that allowing blackmail would not increase the usable stock of information significantly. (In a moment we shall 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. The case for carving an exception to the crime of extortion for blackmail in our first category has not been made.

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. This combination will, under certain assumptions, optimize law enforcement.⁹ 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 in these activities) without any impairment of deterrence, since expected punishment

⁹ Gary S. Becker, "Crime and Punishment: An Economic Approach," 76 *Journal of Political Economy* 169 (1968).

cost, which determines deterrence, is the product of the **severity** and the probability of punishment. This optimal pattern of **enforcement** and sanctions is disrupted by private enforcers, who will 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

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**.¹¹ So blackmail might actually reduce the usable stock of information. But of this one cannot be sure. 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.

We might want 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 encounter the mirror-image problem of too little rather than too much enforcement. Private enforcers would treat the reduced penalties as a signal to reduce rather than increase their investment in enforcement, because the returns would be **lower**.¹² 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

¹⁰ The analysis is more complicated, but the results basically the same, if punishment takes the form of imprisonment rather than fines. Landes and Posner, note 2 above, at 25.

¹¹ See my article "An Economic Theory of Criminal Law," 85 *Columbia Law Review* 1193, 1200-1201 (1985).

¹² 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.

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 in favor of 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 despite the points made above. Private enforcers—perhaps particularly blackmailers—might have lower costs not only because private enterprises generally have lower costs than public ones, but also because a blackmailer 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—but perhaps not a 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.¹³ Such people won't be able to pay huge blackmail either, and this will limit the scale of the industry. But how much? Far more people commit crimes than are caught and 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**.¹⁴ 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

¹³ This is the rationale for criminal law that is stressed in the economic literature. See Posner, note 11 above; Steven Shavell, "Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent," 85 *Columbia Law Review* 1232 (1985).

¹⁴ I am indebted to William Landes for this suggestion.

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. 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. However, employers may, as we have seen, be able to protect themselves. Sentencing courts, moreover, 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), and 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, but also raise the costs of criminal activity, by inducing criminals to take steps to reduce the likelihood of being blackmailed by each **other**.¹⁵ Still another point is that 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 productive information even though it was not disseminated to the authorities: it would be productive in making the criminal pay for his crime.

The discussion in this section may seem inconclusive. Certainly no **confident** conclusion that allowing blackmailing 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 *prima facie* the economic definition of a common law crime (note 6). The speculative argument that blackmail might serve a socially productive role as an ancillary form of law enforcement does not justify removing it from the prohibited category-especially

¹⁵ See, further, text at note 33 below.

since the opposite argument, that legalizing blackmail would actually undermine optimal law enforcement, is equally plausible.

3. *Acts that are wrongful but not criminal, such as acts that the common law classifies as torts.* Here 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 1 and therefore the optimal sanction approximates the social cost of the wrong, the law's decision to give the victim a property right in the rectification of 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. (This point assumes that the blackmailer would ordinarily approach his victim before the latter was made to pay damages.)

4. *Acts, whether civilly or criminally wrongful, of which the blackmailer (or his principal) was the victim.* The difference between categories 2 and 3 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 "no 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."¹⁶ But 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**."¹⁷ However, a threat *merely* to litigate a civil suit, 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**,¹⁸ even though many civil suits are in fact settled because the defendant does not want the details of

¹⁶ Landes and Posner, note 2 above, at 43.

¹⁷ Lindgren, "Unraveling the Paradox of Blackmail," note 1 above, at 697-698 (emphasis added).

¹⁸ Block, "Trading Money for Silence," note 3 above, at 184.

his misconduct to become known, as they would be if the case went to trial because trials are public. Settlement agreements often contain confidentiality clauses, and these 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. And then it would be hard to object to blackmail.

5. *Disreputable, immoral, or otherwise censurable acts that do not, however, violate any law, or at least any commonly enforced law.* Professor Landes and I once remarked that “the 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.”¹⁹ 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**.”²⁰ 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.”²¹ 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 5 (*or at least any commonly enforced law*) is important. Some “immoral” conduct, such as fornication, adultery, and homosexual sex acts, 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

¹⁹ Landes and Posner, note 2 above, at 43.

²⁰ Lindgren, “Unraveling the Paradox of Blackmail,” note 1 above, at 698.

²¹ Id. at 699 (footnote omitted). 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 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.

immoral conduct, this will rarely 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 2 (criminal acts committed but not punished). Allowing such blackmail would generate an industry devoted to enforcing criminal laws that remain on the books because of legislative inertia 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. “Might” 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 is a parallel criticism to Lindgren’s.

It will help in getting a handle on these questions to approach category 5 through category 6—*involuntary, and not unlawful, acts or conditions that are, nevertheless, 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,²² 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 is almost certainly an involuntary condition.²³ 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 let me assume to begin with that Victim is a homosexual by preference and confides this to his friend Blackmailer but refrains from homosexual acts, and in fact is married. Blackmailer threatens to tell Victim’s wife about Victim’s homosexuality unless 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.²⁴ In fact the net social product would probably be diminished if this class of contracts were permitted.

²² See my book *Sex and Reason*, chs. 4, 11 (1992).

²³ See references in *id.*, esp. ch. 4.

²⁴ *Not* the benefits from disclosing the information, which might be significant (for example to 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.

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 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**.²⁵ 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 6, for cases of involuntary, unalterable conduct. If conduct can’t 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

²⁵ See further, note 27 below.

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 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 likelier 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**.²⁶ An additional wasteful use of resources would be on entrapping people in compromising **situations**.²⁷

²⁶ Block, *Defending the Undefendable*, note 3 above, at 57-58, 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.” To similar effect see his “Trading Money for Silence,” also note 3 above, at 187.

²⁷ Hepworth, note 1 above, at 74-75, gives examples of this practice, which he calls “entrepreneurial blackmail.” *State v. Harrington*, 128 Vt. 242, 260 A.2d 692 (1969), provides an American illustration: 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.

The analysis is more complicated if the focus is switched from homosexual preference 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. (If he simply screens them more carefully, this will raise his sexual search costs and so indirectly reduce the number of his sexual partners.) If, perhaps 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, 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). A blackmail “tax” would be 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 **6**: Victim is impotent, and is obtaining treatment from a sexual therapist. Blackmailer, suspecting Victim’s **condition**,²⁸ follows him to the therapist’s office, discovers (without breaking any law) what Victim’s problem is, and blackmails him. What would be the consequences if such blackmail were permitted? Not less impotence, surely—more, because an impotent man would hesitate to seek professional assistance lest by doing so he increase 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 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, so

²⁸ I read somewhere—I wish I could remember where, but I cannot—that jerky, agitated gestures in conversation or public speaking were once thought an infallible symptom of impotence, and that on this basis Lenin was pronounced impotent by someone who saw a film of one of his speeches.

that 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**.²⁹ 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 6 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 for his own use on another member, 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 5, 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 (it is like 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 \$5 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**.³⁰ Suppose McKinley hadn't seen the 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

²⁹ As stressed in Becker, note * above.

³⁰ The notion that people use the concealment of discreditable information about themselves to enhance their success in the market in personal relations is basic to the economic analysis of privacy, on which see my book *The Economics of Justice*, pt. 3 (1981).

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 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, on net, the amount of wrongdoing would be less. If it was not less, then the costs of blackmail would be a deadweight loss.

This argument against category 5 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 on 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.

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. Good but not perfect, 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.

III. 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. 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 (that 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 (there appear to have been few prosecutions before the nineteenth century) and why it is regarded with great distaste and punished severely in comparison with other non-violent 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 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 (we shall also see that this point is not decisive---hence the hedged "may be"). For

the blackmail victim does not want to reveal his secret to the police; and in a public trial of the blackmailer (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-and I have noted the analogy between blackmail and the theft of a trade secret), 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-and the rational blackmailer will '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 spills the beans, there will no longer be any incentive for the blackmail 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 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 black-

mailer) has incriminating information and asking the victim what shall he 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 out of anger incite a prosecution against him, even if conviction is unlikely.

There is another side to this coin, however. By giving Victim irrefragable proof of blackmail, Blackmailer reduces the probability that he (Blackmailer) will renege on the blackmail “contract” by going back to Victim with an additional demand for money. He has armed the Victim to resist him—indeed to blackmail him! But in partial offset to this ingenious point³¹ 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 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 doesn’t pay up is a more credible blackmailer: his spite is a form of precommitment. More credible—but more effective? Maybe not.

³¹ 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. Lawrence Sanders, *Time to Murder and Create*, ch. 5 (1976). 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.

The victim may fear that the spiteful blackmailer will spill the beans 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 won't approach people likely either to thumb their noses at them 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.

But is severe punishment warranted from a deterrent standpoint? This is a difficult question. Certainly *some* punishment is warranted, even though blackmail may be rare, for if it's rare it's rare in part *because* it is punished. By making blackmail a crime, the law does three things: 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; makes it impossible to conduct blackmail in the open; and 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 Blackmailer knows Victim's guilty secrets, Victim is more likely to treat Blackmailer well, but Blackmailer 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**.³² But it would be wrong to conclude that blackmail by intimates is a socially costless activity, for 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**.³³

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 dunned in the future. The amount may fall all the way to zero—the victim may pay nothing, knowing that he isn't buying anything: the blackmailer may return the next day with a new demand. Again, this effect of criminalization 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 can be bought off at low cost who otherwise would report a crime or other misconduct. This added wrinkle suggests that a rigorous economic analysis of blackmail would be quite complex, but also that the existing situation, in which blackmail is a crime but enforcement efforts are slight, may

³² Cf. Anthony T. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts," 7 *Journal of Legal Studies* 1 (1978).

³³ "Trading Money for Silence," note 3 above, at 186.

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.

IV. 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 isn't 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 72 blackmail cases. Of course most prosecutions do not generate appeals and not all appeals are reported; nevertheless this very small number suggests that blackmail is 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 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 the 72 cases in the categories of Part II.³⁴

³⁴ The numbers sum to 82 because some cases fall into two categories and are therefore counted twice. A list of the cases is available from the author on request.

Table 1
Classification of Reported Blackmail Cases

<i>Category</i>	<i>Number</i>
1	0
2	30
3	7
4	8
5	18
6	10
7	6
Unclassifiable	3
<i>Total</i>	82

There are no cases in category 1--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 (nearly 40 percent) is 2-- 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 will be prosecuted too: hence the only category in which blackmail is unlikely to be self-detering. The "involuntary" category is the fourth largest, and is dominated by homosexual cases (6 out of the 10). Only 6 cases in the sample involved a false accusation; this is as predicted. Of the 8 cases in which Blackmailer or his principal was the victim of Victim's blackmailable conduct, Blackmailer was convicted in 6 of the 7 cases in which he threatened criminal proceedings. In one, because Blackmailer demanded the exact amount due him from the Victim, the court held that the threat was proper (distinctly a minority view). In the eighth case, in which Blackmailer threatened merely a civil proceeding, the court held that he was acting within his rights: the "blackmail" threat in that case was merely an offer of settlement.

Category 5 (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 isn't saying much: it would be reckless to generalize from so small and quite 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. May further research someday enlarge the sample! In the meantime, economic analysis is helpful in guiding inquiry into and the analysis of a fascinating class of criminal behavior.

This Working Paper is a preliminary version of a forthcoming article. Readers with comments should address them to:

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