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# BLACKMAIL, EXTORTION, AND EXCHANGE

WALTER BLOCK & GARY M. ANDERSON\*

## I. INTRODUCTION

*Blackmail* sounds menacing and nefarious, an activity at its heart a criminal enterprise. Indeed, in most modern countries and jurisdictions *blackmail* is in fact a crime, alongside murder, theft, and rape. However, this grouping of the (admittedly) illegal act of *blackmail* with crimes like murder is misleading on one score: blackmail is, *per se*, a voluntary act between consenting adults.

A leading authority in the law and economics literature on the problem of blackmail is Richard Posner.<sup>1</sup> He argues that the prohibition of this practice can be justified on grounds of economic efficiency. Thus, he regards blackmail as an exception to the rule that free market exchange maximizes wealth.

Posner defines blackmail as "the attempt to trade silence for money."<sup>2</sup> But a more accurate definition would be *willingness to trade*

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1. Richard Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817 (1993).

2. *Id.* Posner maintains that the following articles constitute "the best introduction to the scholarly literature": James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV., 670 (1984); James Lindgren, *More Blackmail Ink: a Critique of 'Blackmail, Inc.,' Epstein's Theory of Blackmail*, 16 CONN. L. REV. 909 (1984); James Lindgren, *In Defense of Keeping Blackmail A Crime: Responding to Block and Gordon*, 20 LOY. L. REV. 35 (1986); James Lindgren, *Blackmail: On Waste, Morals and Ronald Coase*, 36 UCLA L. REV. 597 (1989); James Lindgren, *Kept in the Dark: Owen's view of Blackmail* 21 CONN. L. REV. 749 (1989); James Lindgren, *Secret Rights: A Comment on Campbell's Theory of Blackmail*, 21 CONN. L. REV. 407 (1989). *Id.*

In addition to Posner's citations, we would include, on his own side of the debate which defends the present illegality of blackmail, the following: Peter Alldridge, "Attempted Murder of the Soul": *Blackmail, Privacy and Secrets*, 13 OXFORD J. LEGAL STUD. 368 (1993); Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639 (1993); Gary Becker & Mitchell N. Berman, *The Case Against Blackmail* (Jan. 1985) (unpublished manuscript on file with the authors); Mitchell N. Berman, *The Evidentiary Theory of Black-*

*money for silence.* What is the difference between the two versions? In Posner's formulation, the blackmailer must initiate the deal. Accord-

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*mail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998); James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 CAL. L. REV. 1413 (1992); Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935 (1993); Debra J. Campbell, *Why Blackmail Should be Criminalized: A Reply to Walter Block and David Gordon*, 21 LOY. L.A. L. REV. 883 (1988); A.H. Campbell, *The Anomalies of Blackmail*, 55 LEGAL QUARTERLY REV. 382 (1939); Coase, Ronald, *The 1987 McCorkle Lecture: Blackmail* 74 VA. L. REV. 655 (1988); George Daly & J. Fred Giertz, *Externalities, Extortion, and Efficiency: Reply*, 68 AM. ECONOMIC REV. 736 (1978); Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993); Daniel Ellsberg, *The Theory and Practice of Blackmail*, in BARGAINING: FORMAL THEORIES OF NEGOTIATION 343 (Oran R. Young ed., 1975); Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); Hugh Evans, *Why Blackmail Should be Banned*, PHILOSOPHY (1990); Joel Feinberg, *The Paradox of Blackmail*, 1 RATIO JURIS 83 (1988); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988); JOEL FEINBERG, HARMLESS WRONGDOING (New York: Oxford University Press, 1990); George P. Fletcher, *Blackmail: The Paradigmatic Case*, 141 U. PA. L. REV. 1617 (1993); CHARLES FRIED, CONTRACT AS PROMISE 102 (1981); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849 (1993); Arthur L. Goodhard, *Blackmail and Consideration in Contracts*, 44 LEGAL QUARTERLY REV. 436 (1928), reprinted in, ARTHUR L. GOODHARD, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 175 (1931); Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741 (1993); Michael GORT, *Nozick's Argument Against Blackmail*, 58 PERSONALIST 187, (1977); Michael Gort, *Liberalism and the Paradox of Blackmail*, 21 PHIL. AND PUB. AFF. 43 (1992); Vinit Haksar, *Coercive Proposals*, in POLITICAL THEORY 65 (1976); Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COL. L. REV. 603 (1943); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787 (1993); MICHAEL HEPWORTH, BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE, LONDON: ROUTLEDGE AND KEGAN PAUL 29 (1975); Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905 (1993); R.S. Jandoo & W. Arthur Harland, *Legally Aided Blackmail*, 134 NEW L.J. 402 (1984); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567 (1993); Leo Katz & James Lindgren, *Instead of a Preface*, 141 U. PA. L. REV. 1565 (1993); William Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. OF LEGAL STUD. 43 (1975); James Lindgren, *The Theory, History and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993); James Lindgren, *Blackmail: An Afterward*, 141 U. PA. L. REV. 1975; Daniel Lyons, *Welcome Threats and Coercive Offers*, 50 PHILOSOPHY 425; G. Murphy Jeffrie, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156 (1980); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (Basic Books, 1974); David Owens, *Should Blackmail be Banned?*, 63 PHILOSOPHY 501 (1979); RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW (4th ed. 1992); Richard Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817 (1993); Steven Shavell, *An Economic Analysis of Threats and Their Legality: Blackmail, Extortion and Robbery*, 141 U. PA. L. REV. 1877 (1993); L.G. Tooher, *Developments in the Law of Blackmail in England and Australia*, 27 INT'L & COMP. L. Q. 337 (1978); Jeremy Waldron, *Blackmail as Complicity* (Nov. 1992) (unpublished manuscript on file with the authors); Glanville Williams, *Blackmail*, in THE CRIMINAL LAW REVIEW 79 (1954); W.H.D. Winder, *The Development of Blackmail*, 5 MOD. L. REV. 21 (1941).

ing to the alternative definition, the first offer can come from either of the two parties to the bargain. This difference is subtle but nonetheless highly significant. For example, suppose that A, an adulterer, approaches B, a party who knows of the adultery, and offers him money if he, B, will not tell anyone about this secret. Posner, strictly speaking, could not call this blackmail. Based on the proffered definition, however, we would have no problem labeling A's conduct as blackmail;<sup>3</sup> it is precisely the same trade of money for silence, no matter who initiates it.

Another critical definitional issue concerns the distinction between *extortion* and *blackmail*. Blackmail can only be an offer, not a threat; extortion can be only the latter. Further, extortion is the threat to do something which *should* be illegal (murder, rape, pillage), while in blackmail the offer is to commit the paradigm *lawful* act (i.e., engage in free speech or gossip about secrets which embarrass or humiliate other people). For example, since it would be legal to reveal a secret about adultery, it should also be lawful to offer to do just that, or to accept money, when offered, in exchange for not making such a revelation.<sup>4</sup> In contrast, since it is illegal to murder or rape, it should also be a criminal act to threaten such acts.

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3. See Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1572 (1993).

4. For the alternative point of view which favors blackmail legalization, see: Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 274 (1982); MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (New York University Press 1998); MURRAY N. ROTHBARD, *MAN, ECONOMY AND STATE* 443, n.49 (Mises Institute 1993); Walter Block, *The Blackmailer as Hero*, 4 LIBERTARIAN FORUM 3 (1972); WALTER BLOCK, *DEFENDING THE UNDEFENDABLE* 44-49 (Fleet Press Corp. 1991); Walter Block & David Gordon, *Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren*, 19 LOY. L. A. L. REV. 37 (1985); Walter Block, *Trading Money for Silence*, 8 U. HAW. L. REV. 57 (1986); Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997); Walter Block, *A Libertarian Theory of Blackmail*, 33 IRISH JURIST 280 (1998); Walter Block & Robert W. McGee, *Blackmail from A to Z*, 50 MERCER L. R. 569 (1999); Walter Block, *Toward a Libertarian Theory of Blackmail*, 15 J. OF LIBERTARIAN STUD. (forthcoming 2001); Walter Block, Stephan Kinsella & Hans-Hermann Hoppe, *The Second Paradox of Blackmail*, 10 Q. J. OF BUS. ETHICS 593 (2000); Walter Block, *Let's Legalize Blackmail*, 30 SETON HALL L. REV. 1182 (2000); Walter Block, *Blackmailing for Mutual Good*, 24 VT. L. R. 121 (1999); Walter Block, *Blackmail and "Economic" Analysis*, 21 T. JEFFERSON L. REV. 165 (1999); Walter Block, *Threats, Blackmail, Extortion, Robbery and Other Bad Things*, TULSA L. REV. (forthcoming); Walter Block, *Blackmail is Private Justice*, 33 U. BRIT. COLUM. L. REV. (forthcoming 2000); Walter Block, *The Crime of Blackmail: A Libertarian Critique*, 18 CRIM. JUST. ETHICS 3 (1999); Walter Block, *Replies to Levin and Kipnis on Blackmail*, 18 CRIM. JUST. ETHICS 23 (1999).

Posner argues that "blackmail is, and should be, forbidden" because "it is likely to be, on average, wealth reducing rather than wealth maximizing."<sup>5</sup> But if blackmail is voluntary, as Posner admits,<sup>6</sup> then it *must, ex ante*, be wealth enhancing, since each party would only agree to the contract if he receives something more valuable to him than what he gives up. That is to say, the blackmailer values the money he receives for his silence more than the disutility he receives from not being able to broadcast the secret; the blackmailee values the preservation of his secret more than what it costs him. How, possibly, could wealth *not* increase from such a contract, as it does from *all* voluntary agreements? Our purpose here is to carefully critique Posner's model of blackmail from this perspective.

This article is divided into five sections. Section II closely examines the differences between blackmail and extortion, and argues that the former does, under all circumstances, represent an entirely voluntary transaction. Section III subjects Posner's elaborate taxonomy of different types of blackmail to close scrutiny and shows that after adventitious coercive elements are clearly distinguished, what remains is an ordinary market trade of a service for money. Section IV examines various difficult cases in which non-coercive blackmail may become intermingled with, and subsequently confused with, theft and fraud. Finally, Section V summarizes and concludes the argument.

## II. BLACKMAIL AND EXTORTION COMPARED AND CONTRASTED

Blackmail is often treated as a kind of intermediate case, partly voluntary but partly coercive. Posner shares this view. Consider the following statement by Posner:

. . . contracts made under duress, a class of contracts with which blackmail is often grouped. 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 quali-

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5. Posner, *supra* note 1, at 1817.

6. *Id.* at 1818.

fication is discussed later). In this case a restriction on freedom of contract protects a contracting party *ex ante*.<sup>7</sup>

But this particular threat would represent an instance of extortion, not blackmail. Such an “offer” would not constitute a voluntary contract. The phrase “or your life” clearly implies the robber’s intent to kill you, should you not submit to his threats. But from whence does his right to perpetrate such a foul deed spring? Such a right does not exist, since we have no right to murder other people. Contrast this with a different offer: “Your money or I go public with your secret adultery.” If this offer is accepted, the result is a *contract*, not an instance of robbery or extortion. The U.S. Constitution guarantees free speech rights. If there is a right to speak, it logically follows that there is a right to *discuss speaking* (e.g., to talk about the forthcoming speech, warn of it, reveal one’s willingness to refrain from so doing, perhaps even for a fee).

This, however, is not the perspective adopted by Posner. Instead, he states, “people desperately eager to pay blackmail would prefer not to be blackmailed and would therefore prefer a regime in which blackmail is forbidden.”<sup>8</sup> In his view, blackmail is akin to extortion. But just because some people do not prefer a thing, does not mean that the thing is criminal. People prefer not to get fat, lose customers, lose a mate to a competitor, get beaten in sports, experience unrequited love. This does not mean that an appropriate public policy would outlaw all of these things.

Posner clearly finds blackmail confusing. Indeed, he repeatedly contradicts his earlier assertion that the practice is not voluntary. Although at one point he proclaims “. . . it is a voluntary transaction between consenting adults,” only one paragraph later he returns to his original theme: “[a]nother way of bringing out the commonality between duress and blackmail is to note that both involve threats.”<sup>9</sup> But this observation is highly misleading. *Every* voluntary interaction can be couched in the form of a threat. “If you don’t give me that newspaper,” says the buyer, “I won’t give you this fifty cents.” The vendor replies: “Oh, yeah? If you don’t give me that fifty cents, I will not give you this newspaper.” What is this but a rather convoluted way of saying, “Hey, let’s trade the paper for the four bits.” When the vendor threatens to withhold the newspaper unless the buyer hands him the fifty cents, what else is he doing but attempting to transfer wealth from the buyer to himself? To be sure, the vendor will give the buyer some-

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7. Posner, *supra* note 1, at 1819.

8. Posner, *supra* note 1, at 1819.

9. *Id.*

thing in return for his money. However, at least from his own point of view, the vendor will have registered a wealth improvement, since he prefers the money to the daily paper.

All we have said about the newspaper sale "threat" also applies to blackmail (as distinct from extortion). This is because what is threatened in both scenarios is *per se* legal. In contrast, one may not properly run off with your TV (nor, therefore, threaten to do so) since it is your property. Such an extortionate action would, therefore, be criminal.

Posner dismisses this distinction between coercive and non-coercive threats on the ground that all threats constitute a sterile redistribution activity, like simple theft.<sup>10</sup> Even conceding, for the sake of argument, that the blackmail threat "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,"<sup>11</sup> should that render it fit for legal prohibition? There are lots of idle, time wasting, "sterile" activities which, presumably, no one would wish to make into a criminal offense: watching soap operas, reading poetry, listening to non-baroque music, gardening and camping.

Or consider voluntary charity, birthday gifts, and other forms of altruism. Here, too, resources are used by the donor (e.g., to set up criteria for gifts and to find the recipient) as well as the recipient (e.g., to adopt the behavior set for him in the criteria and to make an application). Surely, if threats are a drain on society, then charity also diminishes social wealth. But neither allegation is true. On the contrary, both the donor and the recipient assume these costs voluntarily. Consequently, then, this behavior is *not* a drain on society, since neither would do so if he did not expect to be more than compensated for his initial investment. That is, the philanthropist expects more pleasure from his donation than the attendant costs, and the recipient expects a greater transfer of money than the costs of obtaining it, complying with the applicable conditions, et cetera.

The same argument applies in blackmail cases, but *not* with extortion. In the latter, there is no voluntary exchange. The extortionist might well gain, but the victim's rights are violated, in that he must give up something to which he was legally entitled. When someone extorts money from you with the statement "your money or your life!" and you give up the former, you are wronged since you own both. In sharp contrast, when someone threatens "Give me money or I reveal your secret," you are not wronged since you do not have title to both,

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10. See Posner, *supra* note 1, at 1818.

11. *Id.* at 1820.

any more than you may fairly claim title to both the money and the newspaper in the previous example.

### III. POSNER'S TAXONOMY OF BLACKMAIL DISSECTED

Posner carefully delineates seven different circumstantial categories across which the term blackmail applies. He proceeds to argue that legal prohibition is efficient across these various categories. We now turn to a detailed examination of this taxonomy.

#### A. *Criminal acts for which the blackmailer's victim has been duly punished*<sup>12</sup>

Which agency is more likely to maximize wealth or optimally allocate resources to the punishment of criminals—the market or the political system? If in your opinion it is the latter, then you will favor disallowing the blackmail of, for example, ex-convicts as a form of private punishment. You will be content to substitute the wisdom of politicians in “a legislature mulling over the question whether to forbid blackmail”<sup>13</sup> as to whether or not this should be allowed to occur.

Consider how Posner handles the case of the employer who refuses to hire a person with a criminal record, vis-à-vis the blackmailer. He states:

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 over deterrence. It merely transfers wealth to the blackmailer.<sup>14</sup>

But blackmail does not “merely” transfer wealth to the blackmailer; it *also* provides a service for the blackmailee, namely silence. Thus the two cases are on a par, as holds true for all commercial activity; it benefits *all* traders. Posner attempts to deny this on the ground that just because information garnered by blackmailers increases, it will not necessarily be more widely disseminated: “the information gathered by the blackmailer may be suppressed.”<sup>15</sup> Yes, it will likely be

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12. See *Posner, supra* note 1, at 1821.

13. *Id.* at 1822.

14. *Id.*

15. *Id.*



disseminated if the blackmail contract is not consummated, and suppressed if it is. But wealth will increase *either way*.

In the former case, Posner concedes as much.<sup>16</sup> In the latter, he complains, the stock of *suppressed* information will increase. But what is wrong with attaining knowledge for its own sake, without spreading it around? Every scholar who does research but does not publish is guilty of that which Posner charges the blackmailer. Are we to jail all of those who learn simply for their own pleasure without sharing it with others? Nor can we even claim that quiet study and deliberation, without "dissemination," is contrary to wealth creation. From the fact that a man chooses to spend his time in this way, whether in the library, the laboratory, or as a blackmailer, we are entitled to deduce that this was a productive use of his time, of greater value to him than his opportunity costs, at least *ex ante*.

Posner claims it will be "rare"<sup>17</sup> that information unearthed by the blackmailer will be publicized: "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."<sup>18</sup> He gives as an example blackmailing a person with AIDS who deceives his sex partners about his condition. But there are all sorts of ways to internalize such externalities. One could publish this information in a free society; potential customers include all those contemplating sexual relations with *anyone*.

*B. Criminal acts that were not detected, hence not punished*

The gist of Posner's critique is that government protection will tend to "optimize law enforcement,"<sup>19</sup> and that the activities of private police, such as blackmailers, will move us away from this optimal point and hence reduce wealth.

Posner relies on a model of crime and punishment which itself is flawed. Here, "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."<sup>20</sup> But why should this essentially unjust, lawless approach be accepted as the basis for optimization? It is unjust because, in principle, it allows for *any* punishment for *any* crime, and judges the results

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16. See Posner, *supra* note 1, at 1822.

17. Posner, *supra* note 1, at 1820.

18. *Id.* at 1822-23.

19. *Id.* at 1823.

20. *Id.* at 1823-24.

solely on the basis of “cost minimization.” If the death penalty would stop petty theft most efficiently, then, suggests this view, it should be imposed; unasked is the question of whether someone who steals bubble gum *deserves* to be executed.

Another flaw is that this is essentially a central planning model of law enforcement. The police are assumed to be governmental. When Posner states “[p]rivate 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,”<sup>21</sup> he sees the “private enforcers” (i.e., the blackmailers) as interlopers, interfering with the privileged actions of the monopoly state police. Contrary to Posner, if a private policeman, who must withstand the market test of profit and loss avoided by his public sector counterpart,<sup>22</sup> decides to invest more resources in enforcement, then this is *prima facie* proof that such expenditures are *efficient*, rather than inefficient.

Posner’s critique of private enterprise police continues: “[p]rivate 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.”<sup>23</sup>

On this ground, *all* private enterprise should be forbidden, if it is in any way in competition with the state. If the government owns a steel mill, for instance, and private producers bid up the price of factors, such as labor, coal, and iron, against it, the government—horrors!—would have to pay more! Happily, Posner pulls back from this precipice with the concession that “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.”<sup>24</sup>

Unfortunately, he does not place the burden of proof on the public sphere; for Posner, it is the *private* sector, which must prove its usefulness.<sup>25</sup> He states this in the context of his mirror image problem: “we wanted to reduce rather than increase the severity of criminal punishments and, correspondingly, increase rather than reduce the invest-

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21. Posner, *supra* note 1, at 1824.

22. See Patrick Tinsley, *Private Police: A Note*, 14 J. OF LIBERTARIAN STUD. 95 (1998-99); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* ch. 11 (Macmillan 1973).

23. Posner, *supra* note 1, at 1824.

24. *Id.* at 1825.

25. Strange, in a supposed friend of free enterprise.

ment of resources in catching criminals.”<sup>26</sup> The “we” here clearly refers to government. “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.”<sup>27</sup> If Posner placed the burden the other way around (i.e., correctly), he would have instead said that “this is another reason not to rely on [government justice], viewed as [public] law enforcers, as part of our (private) law enforcement system.”

C. *Acts that are wrongful but not criminal, such as acts that the common law classifies as torts*

Posner objects to blackmail in this case on the ground that “the law has given the exclusive right of enforcement to the victim (which) 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.”<sup>28</sup> One problem with this answer is that it is an instance of legal positivism. The law says X, therefore X is correct. Go tell that to the victims of Nazism or Communism, many of whom were unjustly but *legally* punished. The law may have given the exclusive right to obtain money from the tortfeasor to the victim, but that arrangement may not be *just*.<sup>29</sup> If no one has a right to obtain money from a tort violator then anyone who sells him anything (e.g., a meal) can be found guilty of a crime, and, presumably, punished to the same extent as the blackmailer. This is because what the blackmailer is guilty of in this instance, according to Posner, is not blackmail itself, but rather “depleting the wrong doer’s resources.” The same result occurs when the restaurant sells a meal to the criminal and charges him a price.

It is true that the criminal has less money after the blackmailer or restaurateur is through with him. But this simple observation is misleading. *Both* of these things – being blackmailed and buying food—

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26. Posner, *supra* note 1, at 1824.

27. *Id.* at 1825.

28. Posner, *supra* note 1, at 1827.

29. On collapsing crimes into torts, see MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (1998); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (1973); Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 *ETHICS* 279 (1977); Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 *Bos. U. L. Rev.*, 157-68 (1996).

are consensual acts. As such, they *increase* wealth. This is obvious in the case of the meal: if the criminal didn't purchase it, he would be worse off. Perhaps he would even die. Then, surely, this purchase would not "deplete the wrong doer's (total, real) resources." Presumably "the victim of the wrong" could obtain more compensation from a live criminal than a dead one. However, the identical analysis applies to blackmail. This act, too, increases the criminal's total resources, even though his stock of money declines.

*D. Acts, whether civilly or criminally wrongful, of which the blackmailer (or his principal) was the victim*

Posner claims "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."<sup>30</sup>

Posner's inconsistency here is particularly glaring, since there is no difference in principle between this and any other instance of blackmail. In all such cases, this one specifically included, there is a "threat" to do something completely licit, unless one is paid to refrain. Why does the spouse who "threatens to disclose that information in a divorce proceeding or other forum, in order to extract maximum compensation" not fit that bill? Blackmail is blackmail is blackmail. Why should "a threat *merely* to litigate a civil suit" (emphasis added), or "confidentiality clauses" which are paid for, not be considered blackmail?

*E. Disreputable, immoral, or otherwise censurable acts that do not, however, violate any law, or at least any commonly enforced law*

Consider this statement from Landes and Posner: "[t]he social decision not to regulate a particular activity is a judgement that the expenditure of resources on trying to discover and punish it would be socially wasted. That judgement is undermined if blackmailers are encouraged to expend substantial resources on attempting to apprehend and punish people engaged in the activity."<sup>31</sup> This suggests a remarka-

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30. Posner, *supra* note 1, at 1828.

31. *Id.* at 1829.

ble confidence in our political institutions, one seemingly not shaken even by the entire edifice of the Public Choice school.<sup>32</sup>

Second, just because something is legal does not mean it is "encouraged." Eating lima beans is, at least so far, a protected activity. But the state does not thereby *encourage* this practice, it only *allows* it. We reject the notion that which is not prohibited is somehow *subsidized*.

Posner explains his reasoning in the course of discussing the hypothetical example of a secret, non-practicing homosexual. He writes:

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32. See, e.g., Gary M. Anderson, *Welfare Programs in the Rent Seeking Society*, 54 S. ECON. J. 377 (1987); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); James M. Buchanan, *What Should Economists Do?*, 30 S. ECON. J. 213 (1964); James M. Buchanan, *Good Economics - Bad Law*, 60 VA. L. REV. 483 (1974); JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975); James M. Buchanan, *The Samaritan's Dilemma*, in *ALTRUISM, MORALITY AND ECONOMIC THEORY* 71-83 (Edmond Phelps ed., 1975); JAMES M. BUCHANAN, *FREEDOM IN CONSTITUTIONAL CONTRACT* (1977); James M. Buchanan, *Public Choice and Public Finance*, in *WHAT SHOULD ECONOMISTS DO?* (Indianapolis: Liberty Press, 1979); *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* (James M. Buchanan, et al. eds., 1980); JAMES M. BUCHANAN & GEOFFREY BRENNAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* (1980); L.S.E. *ESSAYS ON COST* (J.M. Buchanan & G. F. Thirby eds., 1981); James M. Buchanan, *The Domain of Subjective Economics: Between Predictive Science and Moral Philosophy*, in *METHOD, PROCESS AND AUSTRIAN ECONOMICS* (Israel M. Kirzner ed., 1982); James M. Buchanan, *The Ethical Limits of Taxation*, 86 SCAND. J. ECON. 102 (1984); James M. Buchanan, *The Limits of Taxation*, in *TAXATION: AN INTERNATIONAL PERSPECTIVE* (Walter Block & Michael Walker eds., 1984); James M. Buchanan, *The Contractarian Logic of Classical Liberalism*, in *LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT* (Ellen Frankel Paul & Howard Dickman eds., 1990); JAMES M. BUCHANAN, *LIBERTY, MARKET AND STATE* (1986); ROBERT B. EKELUND, JR. & ROBERT D. TOLLISON, *MERCANTILISM AS A RENT SEEKING SOCIETY* (1981); Kevin B. Grier & Joseph P. McGarrity, *The Effect of Macroeconomic Fluctuations on the Electoral Fortunes of House Incumbents*, 40 J. L. & ECON. 143 (1998); *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS* (James D. Gwartney & Richard E. Wagner eds., 1988); Randall, G. Holcombe, *Non-Optimal Unanimous Agreement*, 48 PUB. CHOICE 229 (1986); Randal G. Holcombe, *Constitutions As Constraints: A Case Study of Three American Constitutions*, 2 CONST. POL. ECON. 303 (1991); RANDALL, G. HOLCOMBE, *AN ECONOMIC ANALYSIS OF DEMOCRACY* (1985); Randall, G. Holcombe, *The Distributive Model of Government: Evidence from the Confederate Constitution*, 59 S. ECON. J. 762 (1992); Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); Robert E. Lloyd & Joseph P. McGarrity, *A Probit Analysis of the Senate Vote on Gramm-Rudman*, 85 PUB. CHOICE 81 (1995); Gordon Tullock, *Rent-Seeking as a Negative Sum Game*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* (James M. Buchanan, et al. eds., 1980); Gordon Tullock, *Adam Smith and the Prisoner's Dilemma*, 100 Q. J. ECON. 1073 (1985); Gordon Tullock, *The Welfare Cost of Tariffs, Monopolies and Theft*, 5 W. ECON. J. 224 (1967); Gordon Tullock, *Efficient Rent Seeking*, in *TOWARDS A THEORY OF THE RENT SEEKING SOCIETY* 51 (James M. Buchanan, et al. eds., 1980); *EXPLORATIONS IN THE THEORY OF ANARCHY* (Gordon Tullock ed., 1972).

“. . . assume that the blackmailer’s victim is a homosexual and confided 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.”<sup>33</sup>

First, the notion that unless “benefits” can be shown, an act should be prohibited, is a dubious proposition. Secondly, the act of blackmail will encourage the blackmailee to pick his “friends” more carefully. Third, there is the usual “benefit” in the case of blackmail: the homosexual values the silence of his “friend” more than the money he must part with. The difference between these two is a *net gain*; it must be positive, or he would not have agreed to pay.

Posner replies by listing three costs. “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.”<sup>34</sup>

But why is it unjust to raise the costs of being gay — higher, that is, than they would have been had injustice been perpetrated on blackmailers? The point is, the only way to lower costs for homosexuals in this way is to raise them for blackmailers. Why is the former group more deserving than the latter?

In any case, gays are hardly the only non-typical group, which pays extra costs. Adults above 6’5” and below 4’11” are forced to pay extra costs for clothing; the same goes for those too fat or thin to wear off-the-rack products. The sick pay extra for medicine, as do those born without limbs or kidneys. More is paid for food by those who have a penchant for caviar instead of burgers. Diamonds cost more than costume jewelry. Is that fair? Would not wealth increase if these things were cheaper? Should the government subsidize all of these things to this end, the implication of Posner’s analysis, in order to maximize wealth?

Admittedly, legalizing blackmail might increase resources devoted to defining sexual preference, but if all such investments are made vol-

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33. Posner, *supra* note 1, at 1830.

34. Posner, *supra* note 1, at 1830-31.

untarily, the presumption must be that the benefits will outweigh these costs and that profit will be earned, at least *ex ante*.

Posner claims that "homosexuality is an involuntary and unalterable condition."<sup>35</sup> On this basis, he argues that legalizing blackmail would bring "about a pure redistribution of wealth from the homosexual to the blackmailer."<sup>36</sup> But why should this occurrence, if true, be rejected? Why should we believe that the allocation of wealth between the blackmail and homosexual communities is ideal under prohibition of the former? Why not of the latter? Since *neither* per se commits an invasion of person or property, *both* should be allowed by law—and let wealth distribution between them fall where it may.

And why is "entrapping"<sup>37</sup> people so wrong that it should be prohibited by law? For the libertarian, the test is, "does an act per se involve the use of initiatory violence." Although pimping, prostitution, alcohol, gambling, pornography,<sup>38</sup> and entrapment sometimes do just that, they need not do so, and therefore, should be legal. Posner, however, cites *State v. Harrington*, "[w]here 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."<sup>39</sup> No coercion was practiced by either party in this example. However, "entrapment" of a sort occurs in everyday commercial and social life, though morally, but not economically, distinguishable from this scenario. What are lipstick, perfume and stockings but an attempt to "entrap" a man, perhaps eventually into marriage? What are bargains, cut rate prices, specials and other such arrows in the quiver of a retailer but attempts to "entrap" purchasers into buying things they otherwise might have gone without? All advertising, whether or not of the beautiful-blond-sitting-on-the-hood-of-a-car variety, is an attempt to "entrap" people into opening their wallets.<sup>40</sup>

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35. *Id.* at 1831.

36. *Id.*

37. Posner, *supra* note 1, at 1832.

38. See WALTER BLOCK, *DEFENDING THE UNDEFENDABLE* (1976).

39. Posner, *supra* note 1, at 1832 n.33.

40. For a critique of advertising which is consistent with Posner's views on entrapment, see JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (1958). For a definitive rejoinder, see Friedrich A. Hayek, *The Non Sequitur of the "Dependence Effect,"* in *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* (New York, Simon and Schuster 1967); ISRAEL M. KIRZNER, *COMPETITION AND ENTREPRENEURSHIP* (1973).

Posner declares that “blackmail really is the economic equivalent of theft,” and observes that “the blackmailer is unlikely to pay tax on his blackmail income.”<sup>41</sup> Certainly, when blackmail is illegal, the blackmailer is no more likely to pay taxes than distillers were when whisky was illegal. But now that booze is legal, firms in this industry pay taxes. Why should it be any different for the blackmailer? But, for the sake of argument, suppose it is. Assume, for example, that the blackmailer, under legalization, still refuses to pay taxes. In other words, he keeps his own money, protecting it from the predation of the state, which attempts to steal it from him. The only way this could amount to theft is if refusing to turn over a portion of your own hard-earned money to the government<sup>42</sup> is considered stealing.

Consider Posner’s treatment of gossip, which he describes as “an informal and very cheap system of deterring the lesser forms of wrongdoing.”<sup>43</sup> He goes so far as to complain that gossip’s “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.”<sup>44</sup> This is particularly difficult to understand, in view of the fact that Posner continually takes the side of the person who is blackmailed. From this perspective, the target of blackmail would vastly prefer to have his secret controlled by the *blackmailer* rather than the gossip. In the latter case, the jig is up, and the information is revealed, no matter how great a value is placed upon it by the blackmailee. In contrast, at least the blackmailer allows the blackmailed to buy his way out of such a predicament, should he value privacy more than its cost.

Ultimately, we must consider the starting point of the analysis. Posner, whether purposefully or inadvertently, adopts that of the status quo. The burden of proof, for him, rests on those who would change the law from prohibition to legalization. In contrast, the initial pre-

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41. Posner, *supra* note 1, at 1834.

42. This is a dubious claim since there is no contract or agreement between the state and the individual indicating that the latter has agreed to pay anything to the former. For the argument that taxation *itself*, and not refusal to pay tax, is theft, see MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (1998); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (1973); HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993); HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS AND ETHICS* (1989); LYSANDER SPOONER, *NO TREASON* (1867).

43. Posner, *supra* note 1, at 1835.

44. *Id.*



mise for the libertarian implies that blackmail is simply the "threat" to engage in gossip. In a free enterprise, private property regime, to do so does not constitute an invasion. Posner, curiously, defends gossip; contradictorily, he finds the starting point of his analysis in a status quo, which criminalizes "threats" or warnings of impending gossip.

Posner sees blackmail as a "form of extortion." Nothing could be further from the truth. In the former case, the threat consists of doing no more than one unarguably has a right to do: exercise his vocal chords in an act of free speech. In the latter, and in sharp contrast, one can threaten to "beat up"<sup>45</sup> one's victim. Is the distinction between violating and not violating person and property a distinction not worth making? This seems to be the implication of the Posnerian world view.

*F. 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<sup>46</sup>*

According to Posner, "[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 judgement. Criminalizing this form of blackmail can thus be viewed as backing up the law against defamation."<sup>47</sup>

The clear implication is that the law prohibiting defamation is itself a legitimate one. Let us test this contention by asking if defamation is a per se violation of person or property rights. At first glance it would appear to be an unequivocal interference with others, in that it ruins their reputations. Upon further reflection, however, reputations, even though they are self-referential, paradoxically consist of the possessions of others.<sup>48</sup> That is, A's reputation consists of, and nothing but, the thoughts of other people (e.g., B, C, D). What A does, tends to determine his reputation, and he can capitalize on it by selling the good will derived thereby. However, since A cannot own the thoughts of B, C, and D, and his reputation consists of their thoughts and *only*

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45. Posner, *supra* note 1, at 1835.

46. *See id.* at 1836.

47. *Id.*

48. *See* BLOCK, *supra* note 38, at 59.

their thoughts,<sup>49</sup> he *cannot*, paradoxically (i.e., logically), own his reputation. Therefore, when we defame A, we are not doing anything akin to stealing something from him. This being the case, it would be improper to criminalize our behavior. Thus, the case for prohibiting blackmail on the ground that it “backs up the law against defamation”<sup>50</sup> is not a very convincing one.

Suppose, somehow, that reputations are indeed legitimately owned by the people to whom they refer. Then, defamation, as per Posner, should indeed be a criminal act. But this position is open to various *reductios*. Critical book, movie, and play reviews all, if successful, tend to denigrate the reputations of writers, producers, directors, actors and playwrights. That is, all such critiques have negative effects similar to defamation. If it is appropriate to legally proscribe defamation on this ground, this must apply to negative reviews of all other kinds as well.

Let us grant that defamation is lying, while negative critiques express differences of opinion. To be sure, there are important differences between these two concepts. But in any given real world situation, the two shade uncomfortably into one another. Is it a false accusation, or a mere matter of opinion, for example, to say that Jay Leno is a lousy comedian, or Robin Williams a poor actor? If lying is the telling of an untruth, then anyone who asserts that  $2+2=5$ , or that the world is flat, should be clapped into prison. But what about “a chicken in every pot?” Should lying politicians be imprisoned? How about the claim that God exists? Is this a lie? Should all religious people be jailed? Do we really want to entrust such decisions to the tender mercies of the state apparatus? The weather forecaster, surely, lies roughly half the time. So do husbands who invariably tell their wives their dress is attractive. Home owners often lie to criminals requesting the whereabouts of their valuables. Under Posner, prison crowding would dramatically and unwarrantedly escalate.

#### IV. BLACKMAIL, GOSSIP, SILENCE, AND THEFT

Consider Posner’s explanation of “. . . 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.

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49. What A thinks of *himself* has much to do with his self-esteem, but nothing at all with his reputation. For a critique of this concept, see MICHAEL R. EDELSTEIN & DAVID RAMSEY STEELE, *THREE MINUTE THERAPY* (1997).

50. Posner, *supra* note 1, at 1836.

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."<sup>51</sup>

Of course, the mere approach to the blackmailer by the blackmailee would not be considered criminal blackmail. The crime of blackmail applies to the blackmailer, not the blackmailee who is widely seen as the "victim" of the piece. The real question, then, is whether the blackmailed person is guilty of a crime when he *accepts* the blackmailer's offer of money for silence. Posner would answer in the negative, due to the unlikeliness of squandered resources. A contrary opinion is offered by Katz, who states that this is one of "a line of cases that has regularly plagued German criminal courts."<sup>52</sup> That is to say, at least in the minds of German judges, it is by no means as clear as Posner seems to think.

But suppose, if only for argument's sake, that Posner is correct in his view that this is not blackmail. Could his unlikeliness of squandered resources be the correct explanation? There are reasons to reject this hypothesis. What is to prevent a wealth "wasting" Blackmail Inc.<sup>53</sup> from trolling in an attempt to encourage potential blackmaileds to approach him? An example: Blackmail, Inc. knows that A has been unfaithful to his wife. Blackmail, Inc. cannot, of course, approach A directly, and offer to maintain silence, in return for money. That would be illegal for Posner. However, the Blackmail corporation *can* approach A, or write him a letter, informing him of an intention to "tell all" to Mrs. A. Then, he can sit back and wait for A to approach him, the blackmailer. Strangely, Posner himself mentions this scenario<sup>54</sup> without realizing how it undercuts his own case. It may not constitute blackmail in Posner's view, but it has all the earmarks of blackmail. As well, it is as "resource-wasting" as the ordinary, traditional, more direct blackmail.

Posner asks why blackmail is "regarded with great distaste and punished severely in comparison with other nonviolent thefts?"<sup>55</sup> However, as we have argued above, blackmail is *not* theft. In theft,

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51. Posner, *supra* note 1, at 1836.

52. Katz, *supra* note 3, at 1571.

53. See Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983).

54. See Posner, *supra* note 1, at 1838.

55. *Id.* at 1836.

someone steals your money under the threat of inflicting violence on you or yours. Clearly, he has no right to initiate such violence. In blackmail, someone threatens to *gossip* about you unless paid off.

Posner offers several explanations for the relative severity of legal sanctions in the case of blackmail. First, he argues that blackmail involves advance planning as opposed to being impulsive.<sup>56</sup> This argument provides only weak support of blackmail prohibitionism since the fact that something is premeditated—canned speeches, marriage proposals—does not necessarily render it fit for criminalization.<sup>57</sup>

Another argument offered by Posner is that it would be difficult to capture blackmailers; after all, the blackmailee will scarcely complain, fearing the loss of his secret. According to Posner, “[b]ecause 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.”<sup>58</sup>

There is yet another eminently reasonable explanation offered by Posner. “Rational blackmailers will not approach people who are likely either to defy 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.”<sup>59</sup> Who are the “vulnerable?” Surely, among other things, they have the lowest productivity. That is, there is a positive correlation between “vulnerability” in this sense and “squandering” resources. So, if we want to increase the per capita gross domestic product, and no advocate of the “economic approach”<sup>60</sup> worthy of his econometric equations could reject that, any phenomenon which particularly disconcerts, brings down, and in the extreme, drives to suicide those with low earnings capacity, is only to be *applauded*. Blackmail, according to Posner, fits that bill to a “T,” preying on those who are “psychologically or otherwise vulnerable.”<sup>61</sup> Therefore, blackmail will maximize wealth by eliminating, or at least reducing the control over resources, of those with less ability in this regard. Per capita GDP will tend to *rise*.

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56. See Posner, *supra* note 1, at 1836-37.

57. A synonym for “premeditated” is “purposeful.”

58. Posner, *supra* note 1, at 1837.

59. *Id.* at 1839.

60. To call this the “economic” approach is to imply, falsely, that all economists must adhere to it. Nothing could be further from the truth. Less tendentious nomenclature might be “the Chicago School” approach.

61. Posner, *supra* note 1, at 1839.

Posner claims as an "effect of the criminalization of blackmail, that of eliminating property rights in the blackmailer's information."<sup>62</sup> But this is not so. When blackmail is criminalized, the blackmailer still owns the information. The real effect is that of placing a price ceiling of zero on it. He still owns it and can still dispose of it, but only for free, that is, as a *gossip*. Criminalization merely means that he cannot *sell* it. This must be something of an anomaly for a member of the Chicago school in good standing, who can usually be counted upon to *oppose* price controls. Every empirical generalization, it would appear, can have exceptions.

## V. CONCLUSION

*Blackmail* has sinister connotations in everyday discourse, suggesting shady dealing and ill-gotten gain. But *blackmail* per se, the exchange of silence for cash, is an uncomplicated voluntary act between consenting adults. It would seem to constitute a simple example of mutually beneficial exchange.

Richard Posner is on record as holding to an ethic of wealth maximization, which justifies institutions based on consent. Logically, then, Posner should favor the legalization of blackmail insofar as it is a voluntary trade of money for silence, and consequently net-wealth enhancing. But he does not; instead, he supports the legal status quo of prohibition.

We have argued that voluntary blackmail becomes easily confused with coercive extortion, and that this fact accounts for some of Posner's objection to legalization. But legal positivism also plays a role; to Posner, laws against blackmail are assumed to be efficient, and hence justified, because they *exist*. Thus the anomaly of a leading Chicago school economist favoring the continued prohibition of this particular "capitalist act between consenting adults"<sup>63</sup> becomes understandable, if not justifiable.

When blackmail is criminalized, the real effect is that of placing a price ceiling of zero on it; the prospective blackmailer still owns the damaging information and can still dispose of it, but only for *free*, that is, in the form of *gossip*. Criminalization, in other words, merely means that he cannot *sell* it.

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62. Posner, *supra* note 1, at 1840.

63. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 163 (1974).

Consider some other examples of activities subject to social opprobrium which also happen to be currently illegal: buying and selling heroin; prostitution; baby selling; pornography; and commerce in used body parts (e.g., kidneys).<sup>64</sup> All of these things have one thing in common with blackmail: not a one of them violates the libertarian axiom of non-aggression against non-aggressors. Blackmail is blamed for the same reasons as all these others; there is an insufficient appreciation for the virtue and value of laissez faire capitalism and individual sovereignty. Blackmail prohibition is merely one more instance of the violation of these principles.

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64. Curiously, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed., Aspen Publishers 1998), favors free markets in all of these goods and services.

