

THE UNMANLY FEAR: EXTORTION BEFORE THE TWENTIETH CENTURY

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Abstract

This essay concerns the history of extortion in American law and culture, highlighting the shift from extortion as a paradigmatically male enterprise to one inseparably associated with women. Before the nineteenth-century, extortion was figured as an assault on a victim's consent. Since men monopolized consent, extortion unfolded as a contest between legal subjects over political manhood. After the mid-nineteenth-century, a new class of 'respectable' victims, openly terrified by women's threats, made unprecedented claims for legal protection. In response, well-placed courts wrote consent out of the equation, broadening the scope of extortionous threats to unleash the familiar fin-de-siècle tide of sex scandal.

Keywords: extortion and law relating to, blackmail, sexual blackmail, gendered power, consent and coercion

Introduction

Before the middle of the nineteenth century, women were completely absent from American legal stories of extortion.² This does not mean that no woman threatened to accuse a man of some crime unless compensated, or that no man tried to gain advantage by threatening to expose some woman's secrets. There surely were. But in law and culture, extortion had been a legal relationship intimately, even constitutively, about men. In the decade after the end of the American Civil War, however, men in some of the most self-consciously 'respectable' circles began to hear warnings that 'the blackmailer, though sometimes a man, is usually a woman.'³ Historians have noted the development, seeing in this moment the crystallization of what Lawrence Friedman calls the '(pure) blackmail' of sexual scandal.⁴ Yet, as paradigmatic as the sexualized extortion scene might seem to observers today, the exact nature of the extortionous exchange was not nearly so clear to contemporaries. Since the seventeenth-century, in fact, jurists and commentators wrestled with the non-violent threat so heinous as to compel a victim to pay money for protection - an exchange not self-

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² As Angus McLaren shows us, there is some tradition of blackmailing aristocratic women in Europe; perhaps the lack of such examples in America is a strong reflection of a fraternal republic built on sex more than aristocratic class. See Angus McLaren, *Sexual Blackmail: A Modern History* (Cambridge: Harvard University Press, 2002).

³ James D. McCabe, *Lights and Shadows of New York Life: The Sights and Sensation of the Great City* (Philadelphia: National Publishing Company, 1872), pp.525-526.

⁴ Lawrence M. Friedman, *Guarding Life's Dark Secret Legal and Social Controls over Reputation, Propriety, and Privacy* (Palo Alto: Stanford University Press, 2007), pp. 87-89.

evidently criminal, yet one that victims insisted felt just like an actual act of violence. Thus the historical and legal problem of extortion: identifying that threat that 'constitute[s] the equivalence of actual violence,' overwhelming the free consent of the victim and forcing the seemingly willing exchange of cash for security that made a mockery of men's monopoly on the legal power of full consent.⁵ And in this light, the sudden appearance of women in nineteenth century stories of extortion reveals something more than the birth of the 'pure' essence of a crime that had existed for centuries. It reveals a challenge to the gendered grammar of consent, coercion, and manhood that animated extortion as such a persistent and powerful feature of the Anglo-American legal tradition. This article will trace some of these contesting claims for legal recognition, not only to take a wider look at the history of a fascinating crime, but to illuminate the underlying cultural and legal struggles over the uses of consent and the nature of coercion that both sustained and transformed the meanings of extortion in the American legal imagination.

The subject of extortion has received a lot of scholarly attention in the past few years. Lawrence Friedman and Angus McLaren, most importantly, have carefully examined the appearance of the sex scandal as a matter of legal concern in late nineteenth century America, and both have arrived at a basic, fairly indisputable calculus: 'as middle-class notions of sexual respectability emerged,' McLaren tells us, 'so in tandem did sexual blackmail.'⁶ The logic of his claim is strong. This well-researched yet still hard-to-define 'middle class' has long been associated with their self-consciously 'respectable' celebration of a sentimentally-domesticated familial intimacy, an aggressive counterpoint to a larger American political landscape strung-out in tension between the wealth of property rights and the numbers of democracy.⁷ So it would not surprise if an ambitious class might seek to criminalize those accusations of sexual impropriety that would undermine their justification for political relevance. True enough, both Friedman and McLaren apply the term 'blackmail' to a whole range of examples where contemporaries never mentioned the word, they frame a distinction between the presumably sexual category of *blackmail* and more mundane *extortion* that did not exist in law or ordinary usage, they do not emphasize the fact that the

⁵This is overly simplified. Coverture - where 'the very being or legal existence of the woman is suspended during the marriage' - was a central pillar of men's power and women's voicelessness in republican society. Yet unmarried adult women were, as *feme sole* (as opposed to *feme covert*), able to sign contracts in their own name. But even for women who were *feme sole* - that is, not under coverture - the percentage who enjoyed official political power between 1807 and the last part of the century was exactly zero. See Sir William Blackstone, *Commentaries on the Laws of England* Book 1 (1765; New York: Callahan, 1899) pp.82-83.

⁶McLaren, *Sexual Blackmail*, p.5.

⁷Though 'middle class' is a favourite term of analysis, it is also very imprecise, as it is doubtful that all members of this class thought the same way, or that all people who thought this way were members of this class. This essay will use the term 'respectable,' as it emphasizes cultural self-consciousness, as opposed to class structure.

term 'blackmail' was not really a legal term, and they fail to mention that well into the twentieth century 'blackmail' most commonly denoted police corruption and not some essential connection to sexuality.⁸ But this is all beside the point. Their work is about unearthing the origins of categories that we know perfectly well in our own modern, intimacy-obsessed culture. This essay, on the other hand, is rooted in the past, situating the late nineteenth century contests over the meanings of extortion within their own overlapping cultural, legal, and institutional contexts, first by taking seriously earlier regimes of extortion as 'purely' terrifying in the hearts of contemporaries themselves, and then by examining in more detail the disruptive efforts of a rising class of men whose fears of women helped to reshape the institutional organization of unmanly terror in their own cultural image. Ultimately, however, this discussion hopes to do more than contextualize. It will illuminate the ways that cultural struggle destabilized the republican epistemology of extortion, and in the process, framed a new regime of extortionous intimacy that seems to many so natural and uncontested in the first place.

1 Extortion and Extortionists

The reason why it has been difficult for recent scholars to capture the meaning of extortion beyond its 'modern sense' is that extortion was not essentially about sex, or really about any specific kind of threat. Extortion was, rather, a crime of fear rooted in the production of a 'terror of the mind' so profound as to act as the 'equivalence of actual violence' and compel the payment of money in exchange for emotional relief. In this light, extortion signalled more than a taking of mere possessions. It was an attack on self-possession, and in an emerging constitutional landscape where only men possessed the legal privileges of self-possession, the loss of consent undermined all the revolutionary possibilities of 'independent manhood' itself. Through 'fear, that abject and unmanly passion,' extortion worked a strange sort of alchemy, transfiguring the practical measure of legal independence - the free contractual agreement - into its very obverse, what one American termed 'internal oppression.'⁹ Certainly

⁸ It is exceedingly common, if not ubiquitous, for scholars to suggest that blackmail and extortion are different. There was in the twentieth century a movement to create a legal difference, but for examples before the end of the nineteenth century this alleged difference was imported from modern culture. 'From *Judicial and Statutory Definitions of Words and Phrases* (St Paul, Minn.: West Publishing, 1904), Vol.3, p.2624: 'In common parlance and in general acceptance, "extortion" is equivalent to and synonymous with 'blackmail.' Also see Samuel Maxwell, 'Blackmail,' *Central Law Review* 43 (July 1896), pp.5-9.

⁹ Hugo Grotius, the seventeenth century Dutch philosopher and theologian, was a pioneer of thinking about 'equality, which is an essential requisite in all contracts.' See Hugo Grotius, *On The Law of War and Peace*, translated by Stephen A. Neff (1625; reprint New York: Cambridge University Press, 2012), Book 2, ch.12, pp.202-214; J.R. Pole, *Contract and Consent: Representation and the Jury in Anglo-American Legal History* (Charlottesville: University of Virginia Press, 2010), pp34-629; Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (University of Chicago

one eighteenth century extortionist revealed his awareness of this perverse transmutation of consent into willing subjection when he confided to his victim (whom he threatened to accuse of murder): 'It is my aim,' wrote a man named Felton, 'to make it your inclination to serve me.'¹⁰ True enough, courts and constituencies could hardly agree upon the precise nature of a fear powerful enough to 'overcome the senses of a firm and prudent man' and make subjection the victim's inclination; in fact, that persistent contestedness is one of the themes of the present essay.¹¹ Yet extortion's gendered calculus of fear and consent resonated powerfully in an age of men's republican liberation. For if consent defined the possibilities of a liberated manhood, then 'Fear,' read an early examination of republican government, 'is *the* principle of despotism.'¹²

The term 'extortion' appears in statutes as early as the late fourteenth century, though the acts considered extortionous were criminalized a century earlier. Its primordial purpose was to prevent local officials from using their position to extract excess fees 'under color of office' ('sub colore officii').¹³ The early development of the law was a matter of intense practical concern; before 1275 Edward I authorized a series of special inquests to expose widespread corruption by aggressive sheriffs and other local officers. The First Statute of Westminster tackled these problems by specifically prohibiting the receipt of any excessive fees, a move that strengthened the administrative power of the sovereign as it provided very real protections for the ordinary people who so often found themselves at the mercy of local authorities.¹⁴ To be sure, as the modern scholar James Lindgren tells us, not all cases of what would be called 'extortion' were forceful.¹⁵ The law grew out of a prohibition on excess fees, and there were a number of early cases of bribery or fraud mixed-in with the more familiar docket of false imprisonments or threatened accusations. Similarly, later statutes also included frauds perpetrated 'by the subtle and untrue demeanour of sheriffs

Press, 1990); 'internal oppression' quote is from Jonathan French, *A Practical Discourse Against Extortion* (Boston, New-England: Printed by T. and J. Fleet, 1777).

¹⁰ Felton quote is from *American Magazine & Monthly Chronicle For The British Colonies*, Sep 1758, p.594.

¹¹ 'Firm and prudent man' is from Nathan Dane, *Digest of American Law*, Vol.VII (Boston: Cummings, Hillyard, & Co, 1824), p.256.

¹² Quote from the 1812 Report of the Common School Commissioners of the State of New York, in Samuel S. Randall, *The Common School System of the State of New York* (Troy, NY: Johnson and Davis, 1851), 10. Emphasis added.

¹³ Henry IV, ch.11; Later statutes criminalized threats 'to kill or destroy' even 'though no money or venison, or any valuable thing, shall be demanded,' but extortion as the coerced exchange 'sufficient to overcome a firm and prudent man,' nevertheless remained embedded in the intimidating presence of public officers: 16 Geo II, ch.5.

¹⁴ Statute of Westminster. 3 Edw.1, 1275 chs.26,30.

¹⁵ James Lindgren, 'The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbes Act,' *UCLA Law Review* 35, pp.815-904.

undersherifs shire clerks,' declaring their acts of trickery a 'greate extortion.'¹⁶ Nevertheless, before the eighteenth century, it was the predatory and engrossing sheriff - or the ferryman, or the tavern-keeper, or potentially any holder of a license or monopoly - who dominated legal proceedings.¹⁷ At the most immediate level, then, early extortion did double-duty for a consolidating central state: it contained the corruption of local authorities while, at the same, it deployed state power to protect the king's subjects from an irresistible abuse.¹⁸

From the perspective of the administrative state, extortion appears as a threat to the system, a simple prohibition on excessive fees to prevent local officers selling public justice for their own private gain. Victims, however, probably knew official extortion in considerably more personal, considerably more emotional, terms. Certainly this was the case for many American men of the eighteenth century. Drawing from an Anglo-American political vocabulary that had begun coalescing in the seventeenth century (historians call this a 'Commonwealth tradition'), many free American men expressed an acute sensitivity to men's political rights and of their equal treatment before the law.¹⁹ Almost reflexively defensive, the call 'to either manfully oppose the injuries We endure...or submissively submit to the degrading terms those haughty Despots choose to impose,' animated an intensely personal resistance all through the American revolutionary epoch.²⁰ The fear of humiliating submission to local officials was palpable, the 'dreadful fear of the extortion of excessive fees' hanging like a pall over the head of helpless men, eliciting not anger or hurt or even loss, but the 'dread' that dictionaries of the day identified with the perfect subjection of 'awe,

¹⁶ Acts of II Henry VII, ch.15. (1487) See also S.B. Chrimes, *Henry VII* (Berkeley: University of California Press, 1972), p.187.

¹⁷ William Oldnal Russell and Charles Spengel Greaves, *A Treatise on Crimes and Misdemeanors*, Volume 1 (London: Saunders and Benning, 1843), p.143; Humphrey Woolwrych, *A Treatise on the Law of Ways* (London: Saunders and Benning, 1829), pp.282-284; *Trotter v Harris* (1827), in *Reports of Cases Argued and Determined in the Courts of Exchequer*, Vol.II (London: 1829), pp.285-289; Joseph Shaw, *The Practical Justice of the Peace, and Parish and Ward-Officer*, Vol.1 (London: Henry Lintot, 1756), pp.363-364; Sharon Salinger, *Taverns and Drinking in Early America* (Baltimore: Johns Hopkins University Press, 2004), p.154, n.9; Delaware Laws of 1808 CXL Section 9, in *Laws of the State of Delaware Vol.3* (Wilmington: Bradford and Porter, 1816), p.314.

¹⁸ The tension between Parliament, Crown, and Officers is an important theme in G. Barnett Smith, *History of the English Parliament* (London: Warwick House, 1894).

¹⁹ Classic texts on the Commonwealth tradition and its American effects include Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967); Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development, and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (Cambridge: Harvard University Press, 1959).

Furthermore, the connection between men's equality rooted in their common status as the masters of women lies at the heart of the important work of Carol Pateman, *The Sexual Contract* (Palo Alto: Stanford University Press, 1988); on the language of political fraternity, see Mark E. Kann, *A Republic of Men: The American Founders, Gendered Language, and Patriarchal Politics* (New York: NYU Press, 1998).

²⁰ Quote is from Benjamin Goodhue, reported in E. Anthony Rotundo, *American Manhood: Transformations of Masculinity from the Revolution to the Modern Era* (New York: Basic Books, 1994), p.16.

fear, terror.²¹ Later writers agreed. The 'extortion of sheriffs,' another possible victim exclaimed, always overcame any wilful resistance, 'oppressing [victims] to conform' to the seemingly irresistible demands of local 'public servants.'²² This inner debasement undermined all pretension of reasoned consent, the independent will of free men laid low in 'the humiliating state of submitting to the extortion of official fees without any remedy.'²³ The power of this humiliating subjection, though not spelled out in statute, seemed clear to contemporary English jurists too, who reasoned that the mainspring of the injury was in the 'vehement terror of mind' by which 'the free agency of the party is destroyed.'²⁴ Indeed, so basic was this political calculus of fear and consent that American provincial legislatures expressed a considerable preoccupation with the crime, not only ubiquitously enacting extortion statutes early in the eighteenth century, but immediately reiterating them after 1776, as the newly independent states constructed republican constitutions out of 'the consent of the governed.'²⁵ Extortion was a pressing concern because it destroyed the manly use of independent consent that defined the highest possibilities of the revolutionary republic.

It should not surprise that courts and legislatures understood extortion in terms of the relationship between men and government. This, in a way, is their very native language. Yet other communities, with other concerns, freely employed the cultural resonance of extortion to describe their own particular anxieties of fear and loss. The social anxieties of American Protestant separatists bear out the creative possibilities embedded in the terrifying violation of extortion.²⁶ In this community, however, the terror was not incited by the 'tyranny of excessive fees,' though fees were closely regulated. It was the horror of high prices that cut to the heart of the covenanted community. Following the Old Testament admonitions of the prophet Ezekiel, who warned the proud denizens of Jerusalem that 'Thou has greedily gained of thy neighbours by extortion, and hast forgotten [God],' Puritans in Massachusetts

²¹ Letter from 'H.Y.', New York *Evening Post* 29 March 1736, p.33; William Perry, *The Royal Standard English Dictionary* (London: J. Murray, 1788), p.211.

²² *Rhode Island Gazette*, 4 March 1744, p.8.

²³ Honestus [Benjamin Austin], *Observations on the Pernicious Practice of the Law* (Boston: Adams and Nourse, 1786), p.4.

²⁴ *Newland's Case* was heard before the Court of King's Bench in 1798. Thomas Leach, (ed.), *Cases in Crown Law* (London, 1813), 727-730.

²⁵ Virginia, 1777; Pennsylvania 1778; South Carolina 1781; North Carolina, 1783; Georgia, 1784; Connecticut, 1784; New Jersey, 1784; New York, 1787; Delaware, 1787; Rhode Island 1789. The phrase 'Consent of the governed' is from the Second Continental Congress' 'Declaration of Independence, 1776.

²⁶ The preoccupation with declension was a mainstay of an earlier generation of historiography; most important here is Perry Miller, 'Errand Into the Wilderness,' *William and Mary Quarterly* 10 (January 1953). More recent scholarship tends to downplay the declension narrative, emphasizing the collective mind of an anxious Puritan leadership. David D Hall, *A Reforming People: Puritanism and the Transformation of Public Life in New England* (New York: Knopf, 2011).

Bay constructed a comprehensive system of economic regulations to maintain the cultural cohesion of a utopian regime where 'love and affection are reciprocal in a most equal and sweet kind of commerce.'²⁷ The earliest Provincial law codes made clear that the act of selling too high constituted the very legal definitions of 'oppression' and 'extortion.'²⁸ The reason for this care, insisted the famous Puritan Cotton Mather, was that high prices constituted an unparalleled assault on the most basic commitments of Christian neighbours and theocratic rule, both self and society collapsing as erstwhile neighbours 'screw[ed] upon one another' (and it would be good to remember here that the screw was a favourite instrument of torture) in the chaos of 'Oppression and Extortion.'²⁹ This social and spiritual anxiety only metastasized in the crisis of revolutionary war. One minister, Jonathan French from Massachusetts, practically writhed in anguish at the thought of sellers taking advantage of the weakness of neighbours; seeing the distress of his community weighed heavy with the burdens of the Revolutionary War, it seemed clear, in his *Practical Discourse Against Extortion*, that the cruelty of extortion lay in the bargain struck under duress, inciting a palpable pain in the covenanted body politic, 'knawing out the bowels under the mask of a friend.'³⁰ Even the harsh oppression of arms appeared preferable to the extortionous bargains of supposed friends; 'Who is worse,' asks one anonymous pamphleteer during the upheaval of Revolution, 'Extortioners or Tories?' - one attacks openly while his own countrymen 'act...in secret, and kill...ten to one.'³¹ The pain was excruciating within the community of saints. True enough, by the later eighteenth century all this talk about price extortion might have seemed something of an anachronism as price regulation gave way to the responsiveness of contract. And with culture of loving commerce waning, the crime of 'oppression' did not make it into the nineteenth century.

²⁷ Ezekiel 22: 12, Geneva Bible; second quote is from Winthrop's sermon 'The Modell of Christian Charity,' in Edmund Morgan, (ed.), *The Founding of Massachusetts: Historians and Sources* (Indianapolis, 1964).

²⁸ *The Colonial Laws of Massachusetts: Reprinted from the 1672 Edition* (Boston, 1887), pp.120, 286; William E. Nelson, *The Common Law of Colonial America: Volume 1* (New York: Oxford University Press, 2008), pp.49-80; Furthermore, though not specific to the Puritan utopian communities, courts routinely invalidated private contract that were deemed inequitable. See Morton J. Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977), pp.161-173.

²⁹ Cotton Mather, *The Circumstances of Boston Considered* (Boston: T Fleet, 1715), p.19; the association with torture was built into the word 'extortion.' The word 'extortion,' like 'torture,' 'tort' and 'torque,' all derive from 'the Latin *extorqueo*: to twist out. Sometimes this focus on extortion as a regulatory mechanism to define the covenanted community produced unexpected outcomes; Boston carpenter Edward Palmer, for one, charged excessive fees for the construction of the town's first stocks. He was sentenced to be the first prisoner to use this new piece of equipment. See Elihu Palmer, *The Prospect for the Year 1804* (New York, Chatham Street, 1804), p.270.

³⁰ Jonathan French, *A Practical Discourse Against Extortion*. (Boston, New-England: 1777). Prices did increase in times of war. Even British occupation administration asserted the 'wisdom and policy of the well-regulated state...to guard against the extortion of individuals, who raise the necessities of life, without which other parts of the community cannot subsist.' See Proclamation of Sir Henry Clinton, 20 December 1777.

³¹ Anonymous, *Oppression: A Poem* (Boston: Ezekiel Russell, 1777).

2 Constructive Violence: Sexual Blackmail

As both a cultural and legal institution, extortion was a powerfully flexible institution. Whether in the society of the saints, founded in collective submission to the will of God and undermined by the selfish aggrandizing of personal wealth, or in the body of citizens, tied together by law as free and equal men and dissolved by the tyranny of official oppression, we see the peculiar shape of irrepressible fear written in the cultural self-consciousness of highly organized political communities. Scholars, however, have largely ignored these historical possibilities in their archaeologies of the crime. Instead, historians have tended to focus on a small number of late eighteenth century cases, concerning accusations of men's 'sodomitical' actions, as the primordial seed from which '(pure) blackmail' emerged.³² And, indeed, as 1784's *Hickman's Case* found, the special terror of a 'threat to accuse of the greatest of all crimes' - and this was the telling colloquialism contemporaries used to signify sex between men - constituted 'the equivalent of actual violence,' an accusation provoking a fear 'equally, if not more terrific than the dread of personal injury.'³³ Here appears a state of affairs recognizably modern, grounded in sexuality as the essence of human experience and of individual identity. No wonder the moment has received attention. For this is where historian Lawrence Friedman insists, 'Sexual blackmail [emerges] as the historic heart of the crime.'³⁴

Modern commentators have regularly insisted that it was the humiliating nature of the sexual accusation itself that robbed the victim of the capacity to resist. Yet it was not simply the social disapprobation of sexual exposure that was so fearful here. What made such accusations terrifying, judges made clear, was that accusations of sodomitical practice could be, quite literally, a matter of life and death. In a social and legal order where sex created legal relations of domination and subordination, sex between formally equal men was such a profound threat to the stability of the institutional order that it not only constituted a capital offence (all crimes designated felonies were once punishable by death), but 'the greatest of all crimes,' a profound assault on society as a whole. In this light, an accusation of sodomy was not simply a private matter, or even a social one. Sodomy was a crime against the people, and its prohibition contained all the potentiality of official violence. In *Donnelly's Case* of 1779, for example, the terror of accusation did not lie solely in the accusation itself -

³²Friedman, pp.85-87; McLaren, p.15; Mike Hepworth, *Blackmail: Publicity and Secrecy in Everyday Life* (London: Routledge and Keegan Paul, 1975), pp.13-14.

³³*Rex v Hickman* (1784) 1 Leach 278; this was adjudicated in light of the earlier *Donnelly's Case* (1779) 1 Leach 193.

³⁴Friedman does recognize this analysis is fully presentist and not necessarily one recognizable by contemporaries. See Friedman, p.86.

again, there were very familiar legal tools available to recover for an injury to reputation.³⁵ Rather, the status of sodomy as a 'crime of infamous punishment' made the accusation 'a threat of personal violence, for the [victim] had everything to fear from being dragged through the streets as a culprit charged with an unnatural crime.'³⁶ Without the fear of the state's power to legally deprive persons of their life, liberty, and property, the accusation appeared in a completely different light to English courts. Take the forgotten 1770s example of a man of 'unblemished reputation' threatened by one James Reane with a public accusation of 'taking indecent liberties at [a London] park.' The victim, in response, colluded with the local constabulary to capture Reane.³⁷ Though no one doubted the fact of the threat, the panel of judges nevertheless established that there was no legitimate fear of punishment or real loss, despite the embarrassing rumours that surely would follow accusation. Thus it followed that 'in this case there was no violence,' opined the judges, 'either real or constructive.' The crime, then, was in the fear. But it was not fear of sexual defamation. It was fear of official violence, in English courts, that constituted extortion's peculiar 'constructive violence.'

These sodomy cases thus constituted, legal writers would insist in the nineteenth century, and as no historian has since revealed, a species of oppression under colour of office.³⁸ To American courts and legislatures, increasingly, all men could participate in extortion, or at least as long as their relationship was inflected with the possibility of official violence. As early as New Jersey's 1796 Act criminalizing 'threat[s] to accuse any person of a crime of an indictable nature by the laws of this State, with intent to extort him or her of any money, wares, merchandise, goods or chattels,' some state legislatures were open to reorienting extortion as a crime ordinary people could commit, yet never abandoning the government as the prime mover in the dance of terror and consent.³⁹ Other antebellum states followed this lead, though none included the nomenclature of 'him or her' to describe potential victims - New York in 1818, Rhode Island in 1822, then Massachusetts, Ohio, Indiana, Michigan, and

³⁵ Presumably this only included men of esteem, as contemporary libel law was quite clear that damage to reputation was recoverable only for men of the reputable class. See Norman L. Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill: University of North Carolina Press, 1986).

³⁶ *Reane's Case* 2 Leach Cr. L. (4th ed.) 616.

³⁷ *Reane's Case*, 616-622.

³⁸ John H Colby, *A Practical Treatise Upon the Criminal Law and Practice of the State of New York* (Albany: Little Booksellers, 1868), p.18.

³⁹ The quote is from the New Jersey law of 1797 that criminalized any threat to accuse of a crime as extortionous. See: *The Public Laws of Rhode Island Passed in the Year 1822*, 'An act to reform Penal Laws,' sec.32, p.346; *Ohio Acts of 1823*: sec.21; *Session Laws of the Commonwealth of Massachusetts Passed by the General Court in the Year 1836*, sec.125, subsection125; *Commonwealth of Virginia*, *Acts 1847-48*, sec.18, p.96; In England, Parliament's Larceny Act 1827 embodied the principles of accusation in statute form. Henry Roscoe, *The Law of Evidence in Criminal Cases* (Philadelphia: T & JW Johnson, 1840), pp.867-869.

Virginia through the 1820s. In England, as a counterpoint, it was not until the Larceny Act 1827 criminalized robbery as any 'threat to accuse any person of any crime punishable by law with death, transportation, or pillory,' a rule not as expansive as Americans would have it, but certainly more brutal, as the penalty was death.⁴⁰ By opening up the ambit of extortionous threats, American legislatures infused the space between all citizens with the possibilities of debilitating terror. Such was the uses of extortion in a regime where citizens were responsible for ruling themselves

The process of state legislatures clarifying and reorganizing the ambit of extortion might be seen as a democratizing movement - any person, under these laws, could summon the irresistible power of official terror to coerce victims without resorting to actual violence. Nevertheless, American legal conflicts over extortion included only men through the first half of the nineteenth century. There was no explicit provision in either statute or court decision concerning the gender of extortion. But, in a contest over consent, men's privileged status did not have to be explicitly articulated. After all, almost all women found themselves circumscribed by the legal regime of *coverture* that 'covered' a woman under the existence of her husband; thus defined by law, a married woman had no legal status of her own, no property of her own, no legal voice of her own, a creature, one lawyer of the period insisted, of 'no political relation to the state any more than an alien.'⁴¹ The situation might have been marginally more open for unmarried adult women who, as *feme sole*, could own property and make personal economic decisions, but nevertheless even they were explicitly excluded from the practices of political consent and were completely absent from policy-making circles.⁴² In a regime where being a man defined the very possibilities of liberation, men did not cry-out in terror from a woman's secret threats. This is not to deny that, in real life, a woman could extract payments for keeping certain secrets. But no American man of the eighteenth century demanded state protection from an extortionous woman.

⁴⁰ Roscoe, *The Law of Evidence in Criminal Cases*, pp.867-869.

⁴¹ Quoted in Linda K. Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (New York: Hill and Wang, 1998), p.27; Not all women lived under coverture, but huge majorities of them would at some time in their lives. The 1890 census returns - the first to track marital status - indicated that nearly 70% of all adult women were either married, widowed, or divorced, and the numbers for women in their 30s and 40s were much higher, while women over 65 had a 94.5% chance of having been married sometime during their lives. For women in the 46-to-54 age group, over 90% were married, widowed, or divorced. For 35-to-44s, the number was almost 89.5%. For 30-to-34 year old women, the likelihood of experiencing marriage was 84.36%. But even for women who were *feme sole* - that is, not under coverture - the percentage who enjoyed official political power between 1807 and the last part of the century was exactly zero percent. See *Historical Statistics of the United States, 1789-1945, Volume 1* (Washington DC, GPO, 1975), 'Marital Status by Age and Sex,' p.20.

⁴² From 1790 to 1807, some especially propertied widows had the power to vote in some New Jersey elections. Politicking for the several dozen votes per county was not insubstantial. Irwin Gertzog, 'Female Suffrage in New Jersey, 1790-1807,' *Women & Politics* 10, (1990), pp.47-58. Also, see Philadelphia *Aurora*, 20 October 1797 for a Jeffersonian report of these 'Amazonian exertions.'

Perhaps the story of Maria Reynolds' attempted extortion of Alexander Hamilton might shed some light on this gendered dynamic of terror and consent in the late eighteenth century. The story is rather involved, but it began in 1795 when James Callender accused the first Secretary of the Treasury of a 'connection with one James Reynolds for purposes of improper pecuniary speculation' designed to defraud the holders of Revolutionary War debts.⁴³ It would be hard to conjure a more devastating allegation for the architect of the early American financial order, promising not just personal humiliation, but perpetual obloquy in the American patriotic catechism. Hamilton's response: 'My real crime,' he volunteered against the advice of his friends, 'is an amorous connection with [Reynolds'] wife for a considerable time with his privity and connivance, if not originally brought on by a combination between the husband and his wife with a design to extort money from me.'⁴⁴ To counter the serious accusation of violating his fraternal trust, Hamilton offered the extortionous woman, a virtual alien to the circle of creditable and consenting men. And on this point he made it perfectly clear - 'the dread of the disclosure of an amorous connection,' he wrote in 1797, making plain that she could not terrify him into submission, 'was not a sufficient cause for my humility.' Hamilton's friends desperately tried to get him to reconsider his confession, and his enemies used it to harass Hamilton for the rest of his duel-shortened life. Yet, Hamilton calculated, the promise of absolution that would come from feminizing his wrongdoing was worth the risk of an embarrassing disclosure. Improper speculation meant not only the end of a career - it meant certain ignominy in the American patriotic catechism. Extortion at the hands of a woman, however, promised political redemption.

In all of these examples of extortion, some celebrated, some forgotten, it was men who monopolized the extortionous use of fear. This is not just because of the lack of threatening women. Rather, the emphasis on consent and contract embedded the crime in definitively masculine terms, and even if some women were allowed to sign their own contracts, free exchange (and its negation through coercion) nevertheless unfolded in law and culture as a normatively male experience. There simply was no need for statutory or juridical exclusion of women from the extortionous exchange. To be sure, the possibility of an unmarried adult

⁴³ Jacob Katz Cogan, 'The Reynolds Affair and the Politics of Character,' *Journal of the Early Republic* 16 (1996), 389-417.

⁴⁴ Alexander Hamilton, 'Observations on Certain Documents Contained in No.V & VI of The History of the United States for the Year 1796, Which the Charge of Speculation Against Alexander Hamilton, Late Secretary of Treasury, is Fully Refuted,' in *The Papers of Alexander Hamilton*, Harold C. Syrett, ed. (New York: Columbia University Press), Vol.X: 243. The details of this sordid affair are commonly known and described in any of many biographies of Hamilton. I consulted Broadus Mitchell, *Alexander Hamilton: The National Adventure, 1788-1804* (New York: The Macmillan Company, 1962, 399-420, and Robert A. Hendrickson, *The Rise and Fall of Alexander Hamilton* (New York: Dodd, Mead and Company, 1985), 360-373. Mitchell describes the 'Reynolds case' as an unfortunate 'aberration in [Hamilton's] private life,' p.399.

woman, who as *feme sole* could sign contracts in her own name, remained open. This we shall take up a bit later. Nevertheless, the historical record remains perfectly consistent. No American law court, no theoretical treatise, no public appeal included women in the extortionous relationship. This is something that Hamilton surely knew. Otherwise his strange defence would have made no sense at all.

3 The Emergence of the 'Terrifying Woman'

Perhaps it was the absence of women from the American legal culture of extortion that influenced the New York longshoreman John Zahn to allegedly send a number of letters threatening to accuse Caroline Reiser, if she did not pay \$1000, of running a disorderly house. Because, even though he admitted sending the letters to his former sweetheart throughout the summer and fall of 1866, he did not seem to think that these threats to a woman were particularly extortionous. This was all a 'private business relationship,' he insisted, a facet of his long dealings with the Reiser family, and especially with her brother, Michael. Caroline Reiser was not at all the focus of the whole affair, it seemed, but rather was caught up in the whirlwind of a commercial exchange between legally competent men.⁴⁵ But she was the one injured, her attorney insisted, as Reiser experienced an emotional injury on her 'nervous system' that felt like a physical attack, 'causing her constant excitement and sickness.'⁴⁶ A trial ensued at the level of police court (the most local of the multi-layered system of precinct, city, and state courts that enforced law in New York City), and though it was not reported, newspaper accounts show that Zahn was jailed for a time.⁴⁷ Thus Caroline Reiser appears as the first women in an American extortion trial.

If John Zahn hoped to use Caroline Reiser as a lens through which to sharpen focus on his financial relationship with Michael Reiser, as Alexander Hamilton saw in Maria Reynolds, he miscalculated. The legal and cultural landscape of class and gender in nineteenth century America, after all, had changed greatly in the six decades since Hamilton's time. Much of this change, as historians have well-researched, was driven by the rising prominence of an ambitious and educated white-collar class in the modernizing nineteenth century. Struggling for relevance in a political landscape dominated by wealth and numbers, advocates of urbane respectability 'advis[ed] retreat into a private and individualized world,' celebrating 'a cultural preference for domestic retirement and conjugal family intimacy' that constituted a powerful claim for political relevance in the 'heartless world' of political machines and

⁴⁵New York Herald 10 February 1867, p.24; John L. Tillinghast and Thos. G. Sherman, *Practice, Pleadings, and Forms in Civil Actions in Courts in the State of New York*, Vol. 1 (New York: Lewis Brothers, 1865), pp.71-75 on Civil Arrest.

⁴⁶New York Herald, 8 February 1867.

⁴⁷New York Herald, 11 February 1867.

predatory markets.⁴⁸ Though some more recent critics have assailed these cultural ambitions as ‘a perpetual mothers’ day,’ this should not diminish the importance of domesticated women as both a machine of transformative intimacy and a badge of class membership.⁴⁹ Women defined the possibilities of respectable manhood. For ‘with her,’ one early writer described women’s central place in this cultural universe, ‘man not only feels safe, but is actually renovated.’⁵⁰ To the adherents of this more domesticated sort of manliness, women constituted the very measure of a self-consciously and aggressively respectable manhood. Women’s voices, to some men at least, could not be ignored.

This celebration of the cultural power of certain women energized powerful and persistent movements to reshape the gendered order of republican institutional life. At perhaps the most basic level, the increasingly resonant voices of women echoed unprecedentedly within state legislatures, both as an image of class ethics, and as an echo of organized women’s political labours. In the framing of the famous ‘Maine Law’ of 1851 that prohibited the production and sale of liquor, and in the creation of Married Women’s Property Acts (the first of which was 1839), for example, women successfully lobbied legislatures with stories of alcohol and financially irresponsible husbands as offences against domesticated intimacy and against women’s place as the cornerstone of family life.⁵¹ Movements to grant married women the competence to sign contracts in their own name also gained momentum in legislatures.⁵² All of this signalled a profound shift in the legal structure of gendered power, organizing the foundation of married women’s legal existence as a consenting citizen and undermining the deep systems of coverture that sustained centuries of men’s near-monopoly on legal personhood.⁵³ There was certainly more than a little paternalism on the part of male legislators and jurists when it came to protecting the honour of some women. Through the first half of the nineteenth century, for example, judges and state legislatures creatively

⁴⁸ Quote from Mary Ryan, *Cradle of the Middle Class: The Family in Oneida County, New York, 1790-1865* (New York: Cambridge University Press, 1981), p.150; Nancy F. Cott, *The Bonds of Womanhood: ‘Woman’s Sphere’ in New England, 1780-1835* (New Haven: Yale University Press, 1977), p.92 makes the same point. Structurally, see Stuart Blumin, *The Emergence of the Middle Class: Social Experience in the American City, 1760-1900* (New York: Cambridge University Press, 1989); Also relevant is Karen Halttunen, *Confidence Men and Painted Women: A Study of Middle-class Culture in America, 1830-1870* (New Haven: Yale University Press, 1986).

⁴⁹ Ann Douglas, *The Feminization of American Culture* (New York: Knopf, 1977), p.6.

⁵⁰ From *Ladies’ Magazine*, March 1830, pp. 83-84.

⁵¹ Alice Taylor, ‘From Petitions to Partyism: Antislavery and the Domestication of Maine Politics in the 1840s and 1850s,’ *New England Quarterly* 77 (2004), pp.70-88

⁵² Carol Shammas, ‘Re-Assessing the Married Women’s Property Acts,’ *Journal of Women’s History* 6 (1994), pp.9-30

⁵³ Historiographically, see Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge University Press, 1998); Also, see Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* (Ithaca: Cornell University Press, 1999).

reformed the common law of slander, traditionally used to defend the reputations of reputable men, to protect appropriately 'deserving' women from untoward accusations of sexual 'incontinence.'⁵⁴ Nevertheless, the early institutionalization of women's political voices signalled an important shift in the gendered structures of legal subjectivity in the American institutional order. Women, in their own names, were increasingly objects of law and subjects of consent.⁵⁵

So perhaps it should not surprise that, as domesticated women's voices were finding institutional legitimacy, some men began to betray a deep anxiety about how this might affect their own ambitions of respectability. Historians have well documented the creation of men's movements, like all-male 'brotherhoods' or the cult of Theodore Roosevelt's 'strenuous life,' that asserted an aggressive maleness for a class increasingly associated with domestication and domesticated women.⁵⁶ But men could not completely exclude women from their lives -indeed, respectability just would not have it. One helpful Freemason, for example, was careful to instruct women of their enormous responsibility in this new world. 'A women should remember when she admits another to her friendship, how much she places in her power,' he wrote in 1845. For the 'mischief to society, and the individual misery occasioned by the viscous practice of retailing the faults of others, is incalculable in extent.'⁵⁷ The enormous power of women's domestic knowledge was indispensable to the demonstration of class 'respectability,' yet the danger to men, if this power erupted unbound, was immense. No wonder others thought that it was men who should be warned of the

⁵⁴Andrew J King, 'Constructing Gender: Sexual Slander in Nineteenth-Century America,' *Law and History Review* 13 (Spring 1995), pp.63-110.

⁵⁵There is of course a deeper political history of women in the republic, one where women appeared as a fundamental component of the larger society that government existed to represent. Two important personas in this line of reasoning were the 'republican mother' and 'the republican wife,' flourished in the early republic to describe the dynamic by which republican women contributed to the general good. Befitting this status, free American women were perhaps unprecedentedly likely to be schooled, and were never excluded from early systems of public education. See Linda Kerber, 'The Republican Mother: Women and the Enlightenment-An American Perspective,' *American Quarterly* 28 (1976), pp.187-205; Jan Lewis, 'The Republican Wife: Virtue and Seduction in the Early Republic,' *William and Mary Quarterly* 44 (1987), pp.689-721; Jan Lewis, 'Of Every Age, Sex, and Condition: The Representation of Women in the Constitution,' *Journal of the Early Republic* 15 (1995) pp.359-387; Mary Kelley, *Learning to Stand and Speak: Women, Education, and Public Life in America's Republic* (Chapel Hill: University of North Carolina Press, 2008.) Nevertheless, women were exceedingly absent from more conventional political contexts, with the short-lived exception of propertied *feme sole* (women not under coverture, usually widows who had inherited estates) in New Jersey, who could vote in local elections before 1807. Partisan attacks associating women's voting with elite Federalist politics led to the abolition of this early gender-neutral regime of representation. Rosemarie Zagarri, *Revolutionary Backlash, Women and Politics in the Early America Republic*. (Philadelphia: University of Pennsylvania Press: 2008)

⁵⁶ A few examples: Mark C. Carnes, *Secret Ritual and Manhood in Victorian America* (New Haven: Yale University Press, 1991); Clifford Putney, *Muscular Christianity: Manhood and Sports in Protestant America, 1880-1920* (Cambridge: Harvard University Press, 2003); Kim Townsend, *Manhood at Harvard: William James and Others* (New York: W.W. Norton, 1996).

⁵⁷*American Masonic Review*, May 1845.

dangers of domesticated regeneration, of those 'women who enter private places, see all, know all, and give details celebrated and dangerous, precious and uncontainable expose with grave faces, to grave-looking men, as if they knew precisely what they were stating.'⁵⁸ In this way women were both intimate and alien to the ambitions of the self-consciously respectable, energizing with their transformative presence yet potentially destabilizing by placing in women's hands the precious knowledge of men's intimacies - a knowledge that could be wielded like a knife, as the eager young clerk Richard Robinson felt in the years before the Civil War: 'Will you expose me to the world,' he reportedly wrote to Helen Jewett right before he killed her, '*will you cut my throat?*'⁵⁹ By the middle of the nineteenth century, it was becoming increasingly common to hear men telling the world just how terrified they were of women's power.

Perhaps, in this light, Emma Couch was not the first woman to actually try to extort a man, which allegedly she did in later 1871 with a threat to accuse the eminently respectable Abraham Beech Carter, rector of Manhattan's Episcopal Holy Name Church, of criminal adultery. There is no telling how often women successfully, if secretly, blackmailed men before this drama. But it seems certain that no American man, even one completely innocent of any wrongdoing, used law to defend himself in such a situation. This Carter did when he indignantly publicized his victimization in a letter to the paradigmatically respectable *New York Times*.⁶⁰ Though scholars have suggested that the explosion of 'sexual blackmail' served to 'police the boundaries of respectability' and keep people within their prescribed social roles, commentators did not respond with indignation against Carter, or even with insults to Emma Couch.⁶¹ They responded, in a way that no men of earlier generations had done, with the fear and terror of a woman young, poor, and by all accounts, friendless. One theme that emerged in the uproar over Couch was that her extortion was indistinguishable from real violence, his mind subject to 'excruciating pain,' his soul and money alike 'being bled' to exhaustion.⁶² And, probably unknowingly reiterating much of the legal epistemology of extortion, more than one made the connection between a woman's emotional terror and Carter's own 'self-possession and judgment.'⁶³ To protect what more than one commentator referred to as Carter's 'manly self-possession,' his advocates pleaded with Carter to press criminal charges against Couch, her terror, one state official insisted, 'of the gravest concern

⁵⁸ *The National Era*, 27 October 1853. Article reprinted from the Cleveland *True Democrat*.

⁵⁹ Quoted in Patricia Cline Cohen, *The Murder of Helen Jewett: The Life and Death of a Prostitute in Nineteenth-Century New York* (New York: Alfred A. Knopf, 1998), p.324

⁶⁰ Letter printed in *New York Times*, 8 March 1872.

⁶¹ McLaren, *Sexual Blackmail*, pp.60-61.

⁶² *New York Times*, 15 March 1872.

⁶³ *New York Times*, 14 March 1872.

to the entire community.⁶⁴ In early April the Grand Jury read the indictment, at 170 pages the longest on record up to that time, and passed a true bill.⁶⁵ She pled guilty. By early spring she disappeared from the pages of the city's newspapers and into the women's house of detention. Her imprisonment was surely the first example of an American woman imprisoned for extortion in any American state.

Emma Couch's conviction was not the result of new law. It had been more than a half-century since New York criminalized extortion by accusation of a crime. What had shifted was the cultural understanding of the extortionous injury. The supporters of Abraham Beech Carter, probably quite unconsciously, reiterated the lexicon of 'constructive violence' in a wholly unique context; it was a poor woman who inflicted pain, who bled a victim, who robbed a man's 'manly self-possession.' Perhaps the story of Couch and Carter was not of paradigm-defining importance. But it was an opening shot to an unprecedented invasion of extortion stories that would spread through the 1870s and after. Looking back to 1872, the editors of the *New York Times Index* had to introduce a new heading of 'Blackmail' just to contain them all.⁶⁶

The widespread terror incited by Emma Couch may have been heightened by Carter's sterling reputation. But it was not simply attacks on presumably good men that incited moral panic. Take, for example, the story of James Fisk, Jr., Erie Railroad magnate, architect of the famous ploy to corner the national gold market that culminated in the 'Black Friday' collapse of 1869, and generally considered a loud, brash, ostentatious, womanizing, tactless parvenu.⁶⁷ Yet even with all this against Fisk, his former lover's threats to expose their illicit (and Fisk's adulterous) relationship nevertheless sent waves of fear throughout the community of respectable men. Unleashed in a series of 'extraordinary letters' published in the *New York Herald* ('the most invading and sensationalist of the leading New York papers' and a great enemy of the Republican *Times*) Fisk recoiled at the exposure of 'some of the purest thoughts that ever stirred me.' much more than the brash demands for \$200,000 to

⁶⁴*New York Herald*, 10 March 1872; *New York Times*, 15 March 1872; *New York Times*, 20 April, 1872.

⁶⁵*People v. Couch* indictment papers, 21 February 1871. New York City Indictment Papers, New York Municipal Archives

⁶⁶*New York Times Index*, Vol 2, 1863-1874 (New York: The New York Times Company, 1875), p.231

⁶⁷Mrs. John King Van Rensselaer and Frederic Van Der Water, *The Social Ladder* (New York: H. Holt and Co., 1924), p.124. George Ellington writes in 1869 of Fisk's society status: 'How James Fisk, Jr. got in, nobody knows; and it is doubtful if he ever has reached the highest round of the ladder.' It is doubtful, in the final three years of Fisk's life, that he completed the ascent. See Ellington, *Women of New York*, p.24.

stop the leaks⁶⁸ He protested loudly, telling anyone who would listen of Mansfield's bad character; Mansfield filed a libel complaint in return, accusing him of publishing her letters in his defence (even though she, too, had numerous letters published, but none incriminating her of any wrongdoing.)⁶⁹ Though he could have counter-sued Mansfield for Civil Libel, Fisk pressed criminal charges of extortion, perhaps suggesting a sophisticated understanding of the emerging landscape of sex and terror in the Gilded Age.⁷⁰ Before the early January 1872 sitting of the Grand Jury, however, Fisk was assassinated by Ned Stokes - a man simultaneously Fisk's business partner, the namesake of his favourite pet parrot, and Mansfield's intimate.⁷¹ What might have been a memorable extortion scheme, one would think, died with Fisk on the floor the Grand Central Hotel.

The strange thing is, although no one fingered Josie Mansfield as an accomplice in Fisk's murder, many contemporaries made their own folk-legal judgment on the guilt of a person whose very nature caused 'civilization itself' to tremble.⁷² By no means did all of this bile emit from the mouths of men; even correspondents in famous sex radical Victoria Woodhull's eponymous journal recoiled from the destructive possibilities of Mansfield: 'By her duplicity, treachery, and falsehood to her woman-nature, she has consigned one man to death and sent another on a direct way to the same fate.'⁷³ But men could be especially forceful in proclaiming their judgment, as when a riot of Lowell, Massachusetts men 'hooted and hustled' Mansfield while she stood on the train platform, subjecting her to a public humiliation usually reserved for more 'masculine' threats to male political authority.⁷⁴ Women depicted as violent and duplicitous extorters were sometimes, in the immediate aftermath this drama, called 'Mansfields.'⁷⁵ Even a half-century of time did nothing to wipe the imaginary blood off her 'small white hands,' a commentator in the 1920s making the folk-legal decision that

⁶⁸ *New York Herald*, 14 January, 1872; Robert H. Fuller, *Jubilee Jim: The Remarkable Life of Colonel James Fisk, Jr* (New York: The MacMillan Company, 1928, pp. 252-253; James L. Crouthamel, *Bennett's New York Herald and the Rise of the Popular Press* (Syracuse: Syracuse University Press, 1989), p.43

⁶⁹ *The Murder of James Fisk, Jr, with the trial of Edward S. Stokes* (New York: Thos. O. Kane, n.d. [1872?]), p.7

⁷⁰ . Men like the Californian Nathaniel Austine and the Idahoan James Baker, among many others, would successfully accuse women of blackmailing them as a way to defend against other charges. *Nathaniel Austine v. Illinois* 110 Illinois 48 (1884); *State v. Baker*, 6 Idaho 496 (1899); see also, in this regard, McLaren, *Sexual Blackmail* p. 60-61; *Mathews v. State*, 19 Neb. 330, 27 N.W. 234; *Sowers v. Territory*, 6 Okla. 436, 50 P. 257; *People v. Lambert*, 120 Cal. 170, 52 P. 307.

⁷¹ Barbara Goldsmith, *Other Powers: The Age of Suffrage, Spiritualism, and the Scandalous Victoria Woodhull* (New York: Harper Collins, 1999), p.162

⁷² Actually, Fisk's murder put an end to the Grand Jury's indictment of Mansfield and Stokes for Conspiracy to Extort. *People v Edward Stokes and Josephine Mansfield*, 8 January 1872. New York City Indictment Papers, New York Municipal Archives.

⁷³ *Woodhull and Claflin's Weekly*, 10 February 1872.

⁷⁴ *Boston Transcript*, 27 January 1872.

⁷⁵ 'Another Mansfield,' [San Francisco] *Daily Evening Bulletin*, 11 January 1872.

Mansfield was 'the woman who was to cause Fisk's death.'⁷⁶ Her emotional terror was not merely metaphorical violence. It was, in the minds of her enemies, bloody, physically painful, and real. From this perspective, a woman's threat to expose precious secrets of a secretive class was more than the symbolic 'equivalent of actual violence.' It constituted, in the cultural ambitions of the respectable, violence itself.

Perhaps it is saying too much to suggest that the travails of Carter and Fisk, of Couch and Mansfield, sparked the unprecedented early-1870s explosion of what Angus McLaren calls 'heterosexual blackmail' stories. They were, however, at the leading edge of a powerful cultural and legal movement, introducing the basic theoretical approaches and legal practices that would flower in the emerging age of sex scandal. True enough, it was not uncommon for respectable writers before 1870 to include women extorters as professional criminals in the class of 'streetwalkers, stragglers on the pavement, loungers about hotels, keepers of dance-halls, panel thieves [who hide behind secret panels to steal from unsuspecting passers-by], and criminals of all grades.' Yet increasingly commentators focused on what appeared as women's naturally extortionous disposition.⁷⁷ For some writers, the new realization of extortion's fundamental femininity snuck up almost imperceptibly. The expositor James Dabney McCabe, famous for his accounts of the class contrasts of urban life, constantly shifted his view on the place of blackmailing women in each of his subsequent publications, going from the insistence in 1868 that blackmailing women were 'sustained by a rough, or professional thief, or pickpocket' to, by 1882, dropping men completely from the description of the blackmailer.⁷⁸ Other writers were more explicit; 'The female sex,' wrote one journalist in the year of Couch and Mansfield, 'particularly excels at blackmail.'⁷⁹ And though some were incredulous that this emerging fear was women's doing, since 'no woman is able to devise the legal frauds which are necessary to carry out a plan of black-mailing,' it was far more usual for critics to describe

⁷⁶ Dennis Tilden Lynch, *'Boss' Tweed: The Story of a Generation* (New York: Blue Ribbon Books, 1927), p.299.

⁷⁷ Matthew Hale Smith, *Sunshine and Shadow in New York* (Hartford: JR Burr, 1868) pp.128-139; Edward Crapsey, *The Nether Side of New York: Or, the Vice, Crime, and Poverty of the Great Metropolis* (1872; Reprint: Montclair, N.J.: Paterson Smith, 1969), pp.32-33; Edward Winslow Martin, *Secrets of the Great City: A Word Descriptive of the virtues and the Vices, the Mysteries, Miseries, and Crimes of the Great City of New York* (Philadelphia, Jones Brothers, 1868) p.347.

⁷⁸ James Dabney McCabe, *The Secrets of the Great City* (Philadelphia: Jones Brothers, 1868) pp.347-353; James Dabney McCabe, *Lights and Shadows of New York Life* (Philadelphia: National Publishing Company, 1882), pp. 658-662.

⁷⁹ Frederick Gerhard, *The Dark Side of New York Life and its Criminal Classes* (New York: Frederick Gerhard, 1873), p.642; In reality, women were very infrequently jailed, or even arrested. In 1894, the first year New York published comprehensive crime statistics, there were only three women apprehended, for extortion, as opposed to 65 men, 4.5 percent of the total. See Board of Police Justices, *Annual Report of the Board of Police Justices of the City of New York for the Year 1894* (New York: Board of Police Justices, 1894), pp.50, 80, 102, 128, 151.

extortionous women as the very physical embodiment of the crime, 'heartless and depraved,' 'soulless,' blood-stealing 'vampires and pests of civilization.'⁸⁰ Such creatures only had one purpose: for 'Men are their victims,' James McCabe warned, 'and they rely upon their fears for success.'⁸¹

As the terrifying woman emerged in the extortion stories of the 1870s, it is worth noting, a faint counter-discourse of extortion flashed into existence to challenge the cultural ethics of respectable men's victimhood. Working-class journals, preeminent among them the *National Police Gazette*, reported in the 1870s a spate of stories concerning the extortionous exploitation of working women by men of higher class status, where voracious capitalists, devious divines, and perverted physicians wielded their power to extract even more surplus value from the purses and the psyches of a vulnerable female proletariat.⁸² Here women stood as place-holders in overlapping dramas of sex and class exploitation, their double weakness as women and as workers reinforcing their structural subordination at the hands of an insidious professional class. Such stories had no traction in the respectable press, however, and by the 1880s the *Police Gazette* focused almost exclusively on threats such as 'beautiful blackmailer[s]' and 'Pretty Mary Morton.'⁸³ Even here, outside of the fearful mainstream, the terrifying women prevailed.

4 Legal Developments and Reform

Though the extensive media coverage of Emma Couch and Josie Mansfield suggests that ordinary readers were trying to make sense of women who seemed so unprecedentedly fearful, the underlying structures of law remained familiar. Both women were charged with extortion by threat of criminal accusation, and while earlier generations of male victims must not have thought such threats were so terrifying as to ask courts for protection, victims and their advocates found existing legal categories sufficient to the particular situations at hand. Still, existing law in different states had its limits when it came to protecting victims from the full array of coerced exchanges. In both Pennsylvania and Ohio, for example, juries had acquitted accused blackmailers because the content of their particular threats, though personally fearful, were nevertheless 'not covered by law.'⁸⁴ Yet increasingly after the

⁸⁰ *New York Times*, 14 March 1872; this editorial was entitled 'The Woman Blackmailers.'

⁸¹ James D. McCabe, *Lights and Shadows of New York Life*, p.526.

⁸² *National Police Gazette*, 6 March 1876, p3, 'Reverend Blackmails;' 'Love and Blackmail,' about extortionous clothing factory owner oppressing a female worker, May 11 1878, pp.32-33; 'Villainy or Blackmail,' about blackmailing physician and his female patients, 11 January 1879, p.33; 'Vice's Varieties,' about Missouri dry-goods merchant blackmailing wife of a poor farmer, 8 February 1879, p.33.

⁸³ *National Police Gazette*, 23 October 1886, p.49; *National Police Gazette*, 18 November 1882, p.41

⁸⁴ *Brabham v State*, 18 Ohio 485 (1869); *Philadelphia Inquirer*, 14 February 1874.

scandals of 1872, legal scholars and legislatures reassessed and reorganized the structures of the crime to more perfectly contain the fears of those who prized their domesticated secrecies. By the early 1880s states had not only vastly expanded the menu of threats considered legitimately extortionous, but had begun a process of undermining the common law calculus of fear and consent that made extortion such a haunting spectre in the republican imagination.

Even before the terrific explosion of extortion-related anxieties in the 1870s, legal codifier David Dudley Field sensed that the available law just did not get to the point - not only in the particular law of extortion, which he did indeed consider, but in the principles of American law itself. Though largely forgotten today, Field served as the preeminent character in the nineteenth century American legal codification movement, a concerted effort to transform the 'chaos of centuries of laws, customs, judgments, and statutes' that constituted the Common Law tradition, into 'an intelligent, clear, and concise arrangement, a classification - a Code'⁸⁵ The code movement was more than a matter of tidying up. Inspired by a French Civil Law tradition that emerged from the revolutionary-era ardour for making the world anew, Field sought to sweep away the common law web of interacting and conflicting networks of rights and obligations to achieve what Jeremy Bentham insisted was the 'the principal object of the [Civil] Laws: the care of security.'⁸⁶ And, indeed, modern-day scholars have seen this emphasis on security as definitive of code traditions going back to the time of Justinian, showing a logic of rights without any hint of the privileged domain of participation that energized more 'republican' systems of political relations.⁸⁷ Opponents to codification could hardly tolerate the wholesale dissolution of the 'social standard of justice' that underscored the common law preoccupation with regulating practical relations between legal subjects, as opposed to Civil Law's focus on individuals as objects of regulatory power.⁸⁸ But to codifiers, intent on identifying 'objective and external standards' that historian G. Edward White sees as a 'morality directed at acts, not persons,' this was the precisely the point.⁸⁹ For the objective of modernizers was to reduce an infinite array of possible injuries to a set of universal principles organized for the efficient application of justice.

⁸⁵ William Morton Grinnell, *A Comparative Glance at the French Civil Code and the Proposed New York Civil Code* (New York: Willis McDonnell, 1883), pp.1-2.

⁸⁶ Jeremy Bentham, *Principles of the Civil Code* part 1 ch.7.

⁸⁷ J.G.A. Pocock, 'The Ideal of Citizenship Since Classical Times,' *Queen's Quarterly* 99 (1992), pp.48-70. For a response, see Susan Moller Okin, 'Women, Equality, and Citizenship,' *Queen's Quarterly* 99 (1992), pp.57-71.

⁸⁸ James C Cater, 'The Ideal and the Actual in the Law,' *Transactions of the Thirteenth Annual Meeting of the American Bar Association* 1890, pp.217-245.

⁸⁹ G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993), 159; Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown and Company, 1891), p.64.

The New York Committee on the Code, created in 1848, presented the proposed Code of Penal Law in 1864. It was, again, not a restatement or a compilation or a revision. It was, instead, a law of the future, total, systematic, able to account for ‘the progress of society [that] creates new temptations and new opportunities to crime.’⁹⁰ The problem of extortion was one of the categories where this ‘progress’ erupted, and it received considerable attention. Where common law described extortion as a kind of relationship between subjects embedded in complex matrices of competing rights and obligations, the Code saw the crime in especially singular terms.⁹¹ ‘Fear,’ the Code begins a three-page delineation of the crime, ‘constitute[s] extortion.’⁹² Of course many things could terrify - threats of violence, the codifiers listed, and threats to accuse of a crime. These dimensions of terror remained foundational. But the codifiers revealed the anxieties of the age; the provision’s fourth subsection installed a novel threat as sufficient to cause recognizable terror, a criminal act to even threaten ‘to expose any secret whatsoever’ in lieu of monetary payment. There was no paradigmatic secret whose exposure degraded men in the eyes of their fellows, nor was there a need to even feel oppressed. Secrecy itself, and not the things held secret, defined the principles of an ‘internal oppression.’ Fear was not a subjective state of mind, in this light, but an administrative protocol, its weight not in the effect on the victim’s capacity to act, but in the act of telling a victim’s secrets. The inclusion of telling another’s secrets in the menu of legally-recognized species of extortion was thus something more than an expansion of official protection to recognize the basic values of a reticent, self-consciously ‘respectable’ manhood. It rewrote, in a way, the structures of republican manhood embedded in the calculations of fear and consent that animated the history of extortion.

Undoubtedly the codifiers could have gone further. The contemporary state of the Civil Law in France forbid not only the publication of a person’s image without his or her consent, but prohibited the publication of any person’s name in matters other than of deep national interest.⁹³ (In the U.S., conversely, courts would declare that the use of an actual child’s image for commercial purposes, without that person’s consent, was absolutely

⁹⁰ Commissioners of the Code, *Draft of a Penal Code for the State of New York* (Albany: Weed, Parsons & Co., 1864), p.vii.

⁹¹ 1810 French penal code translated in Gerhard Mueller, ed., *The French Penal Code* (South Hackensack, NJ: F.B. Rothman, 1960).

⁹² Chapter VI, § 614: The Commissioners of the Code, *Draft of a Penal Code for the State of New York* (New York: Weed, Parsons & Co, 1864), pp.220-221.

⁹³ Indeed, because unauthorized publication was in itself a criminal act, the category of extortion as an illegitimate bargain not to publicize was unknown in nineteenth century Continental Codes. The tendency is rooted deep in the Civil Code tradition. See R.H. Helmholz, ‘The Roman Law of Blackmail,’ *The University of Chicago Journal of Legal Studies* 30 (2001), where the author writes (contra the title or even the intended objective of the essay,) that ‘the Romans had no special legal category for blackmail.’

permissible.)⁹⁴ But for many others, things had already gone much too far. To writers like David Prentiss Bishop, the injuriousness of a mere 'threat [that] is no more a physical force than is a lecture from a moralist' appeared to lower the bar precipitously when it came to measuring the legal value of threats.⁹⁵ Others, similarly, decried the reorientation of law around 'merely sentimental injury.'⁹⁶ And Thomas Cooley, among the most famous legal commentators of the time, pointed to the central irony of protecting secrecies, writing that 'it is better oftentimes that crime should go unpunished than the citizen should be liable to have his premises...exposed to...prying curiosity.'⁹⁷ The very idea of making 'any secret whatsoever' a basic object of government regulation seemed nothing if not ludicrous, not only a profound shift away from a common law preoccupation with measurable losses, but fundamentally contradictory in the effort to organize the absence of knowledge as a primary object of state regulation.

Though the Penal Code would make a powerful impact on the American legal order in the late nineteenth century, it was not the only effort to reorganize extortion to meet the peculiar anxieties of respectable men. In some states, legislatures approached the novel problem of protecting men's secrecies in a familiar language, using existing legal forms to describe in well-established ways the controversial substance of men's secrecy. As early as 1849, the Virginia legislature imported principles of libel law to organize threatened 'injury to the character' of a man as an actionable threat.⁹⁸ This example, however, probably had more to do with ongoing political discussions about duelling and the very hot topic of men's reputations that unfolded generally in the US South and particularly in antebellum Virginia.⁹⁹ After the Civil War, however, other states would follow similar lines. Indiana, in 1873, expanded the menu of extortionous threats to include attempts 'to accuse ... of any immoral conduct, which, if true, would tend to degrade and disgrace such person, with intent to extort.'¹⁰⁰ New York followed in 1878 and Ohio in 1881.¹⁰¹ Victims certainly welcomed the

⁹⁴ *Roberson v Rochester Folding Box Co.* 171 N.Y. 538 (1902). The next year, the New York Legislature passed 'An act to prevent the unauthorized use of the name or picture of any person for the purposes of trade.'

⁹⁵ Joel Prentiss Bishop, *New Commentaries on the Criminal Law* (Chicago: T.H. Flood, 1892), p.344.

⁹⁶ Contemporary jurists like Harry Bishoff rejected the legal import of emotional value: 'the law does not take cognizance of and will not afford compensation for sentimental injury.' See *Murray v The Gast Lithographic and Engraving Co.*, 8 Misc 36 (NY City Superior Court, Special Term, 1894.)

⁹⁷ Thomas M Cooley, *A Treatise on Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 4th Edition (Boston: Little, Brown, 1878), p. 374; Joel Prentiss Bishop, *Treatise on Criminal Law*.

⁹⁸ Virginia Acts of 1847-1848, §18, p.96.

⁹⁹ Harwell Wells, 'The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America.' *Vanderbilt Law Review* 54 (May 2001), pp.1805-1847; Barbara J. Griffen, 'Thomas Ritchie and the *Code Duello*,' *Virginia Biography of History and Biography* 92 (1984), pp.71-95.

¹⁰⁰ Indiana Acts of 1873, p.138.

¹⁰¹ Ohio Criminal Code of 1881, Section 6838, pp.46-47.

expansion of extortion injuries to include the simply disgraceful; courts summarily dismissed cases where plaintiffs were accused of humiliating, though not criminal, threats.¹⁰² Not too different from contemporary libel law, these efforts to criminalize threats to humiliate operated as sort of a pre-emptive strike for victims. Thus, drawing from the uncontroversial injury of libel, these statutes could account for the unique losses of an anxious and upstart class, and do so in a language already understood by all state courts. These statutory efforts of the 1870s served as a middle ground, of sorts, a strategy for recognizing what appeared to be a newfound problem without discarding the existing systems of legal understanding.

These state efforts illuminate the overlapping local responses to the political problem of lost domestic secrets. But it was, ultimately, the Field Code that realigned the legal landscape. New York finally adopted a modified Penal Code in 1881, and in the process superseded existing common law - not only on the subject of extortion, but on the entire body of criminal law. New York was not the first state to adopt the Code; California (whose Chief Judge Stephen J. Field, who would author the famous 1873 *Slaughterhouse* dissent as Supreme Court justice, was David Dudley's brother) had in fact been the first to adopt, in 1872, inciting a western rush to adopt the ready-made codes in Dakota and Montana Territories. By the early 1890s, even more states had adopted at least some parts of the Field Committee's penal code: Ohio, Iowa, Texas, Wyoming, Nevada, and Utah,¹⁰³ (Georgia and Louisiana had their own Civil Code traditions, but did not partake of the Field variety.) The Field Code's definitions of extortion, furthermore, even insinuated themselves in pages of some of the more popular treatises on the criminal law that appeared in the last decades of the nineteenth century, though there was among more established theorists a considerable prejudice against the legal innovations of the new age.¹⁰⁴ By the end of the century, the Field Code, and the codified law of extortion, had spread to states throughout the United States.¹⁰⁵

5 Fear, Coercion and Consent

The code provisions must have brought comfort to those New York men peculiarly fearful of losing control over their precious domestic secrets. After all, the reorganization of extortion around the cultural capital of men's secrets did more than contain the potential of subversive

¹⁰² Take the case of Belle English, indicted for threatening to expose the alleged fact that she was adopted. See *Ohio v English*, 9 Ohio Dec. Reprint 167 (1887).

¹⁰³ Andrew P. Morriss, 'Codification and Right Answers,' *Chicago-Kent Law Review*, 74, pp.360-369.

¹⁰⁴ For example, Stuart Rapalje, *A Treatise on the Law of Larceny and Kindred Offenses* (Chicago: Wait Publishing, 1992), pp. 693-694; Emlin McLain, *A Treatise on the Criminal Law as Now Administered in the United States* (Chicago: Callaghan & Co, 1897), Vol 1. §728-743. Otherwise, influential treatise writers like Joel Prentiss Bishop and Frederick Wharton (and his *post mortem* editors) fairly well stuck to republican orthodoxy when it came to conceptualizing extortion.

¹⁰⁵ Morton J. Horowitz, *The Transformation of American Law, 1870-1960*, (New York: Oxford University Press, 1994), pp.117-121.

women to usurp the secrecies so central in reformist men's self-consciousness as respectable, urbane, men. It freed fear from the common law's complex calculations of consent and oppression that sustained a republican masculinity of political presence, and stabilized the experience of lost secrets (alone among extortionous assaults) as an injury in itself, independent of any degradation to person or property. Some blackmailers, however, saw new opportunities in this reconstructed legal landscape. For if fear was more than ever rooted in the theoretical foundation of the law, then threats that do not produce actual fear could still conceivably come short of the level of extortion. The thinking was rooted in the history of extortion, debating the conditions that produced irresistible fear. Several failed blackmailers of the time found promise in this clever argument. One of these creative criminals was a New York private investigator named Charles Gardner. His case would be familiar to readers of law reports over the coming century.

Gardner was a one-time private investigator intimately familiar with the city's legendary underworld of sex and vice. For 20 years before the 1890s, Gardner had been in the sometime employ of the ambitious reformer Charles Parkhurst, the 'fearless missionary to the haunts of vice' who was famous as the unusually articulate and learned pastor of the fading Madison Avenue Presbyterian Church.¹⁰⁶ Along with their trusty sidekick Erving, Gardner and Parkhurst moved through the most notorious corners of the notorious city, exploring the vibrant 'vernacular sexual culture' of street-corner and saloon that both repelled and fascinated, sitting at bars to proselytize among the wayward just as they associated with blackmailers like May Duigan to ferret-out crooked cops.¹⁰⁷ Yet, in the spring of 1892, Gardner went alone. He was not on a mission of purification. The investigator was there to use his knowledge of the city's sexual topography to extort sex-workers, demanding from his chosen victims the payment of cash to prevent his accusation of criminal conduct. The moralizer had become, in an instant, the marauder.

One of Gardner's targets was a newcomer to the city, Katie Amos, the 'keeper of a disorderly house' who had recently moved into Manhattan's once-fashionable 'Tenderloin

¹⁰⁶ Quoted in Charles W. Gardner, *The Doctor and the Devil, Or: the Midnight Adventures of Doctor Parkhurst* (New York: Gardner & Co, 1894), 30; Timothy J. Gilfoyle, *City of Eros: New York City, Prostitutions, and the Commercialization of Sex, 1790-1920* (New York: W.W. Norton, 1994), pp.289-299, considers Parkhurst and Gardner, but not Garner's later extortionous career.

¹⁰⁷ The notion of 'vernacular sexual culture' is from Helen Lefkowitz Horowitz, *Rereading Sex: Sexual Knowledge and Suppression in Nineteenth-Century America* (New York: Knopf, 2002). To Horowitz, the 'vernacular' was one of four sexual discourses (or 'frameworks') that circulated in the nineteenth-century United States, the other three being those moralizers like Parkhurst, 'reform physiologists' medicalizing sex, and sexual 'free thinkers.' Frank Columb, *Chicago May: The Queen of the Blackmailers* (Cambridge: Evod Academic Publishers, 1999), pp.66-67; Britton H. Tabor, *Skepticism Assailed; or, the Stronghold of Infidelity Overturned* (Chicago: H.J. Simon & Smith, 1895), pp.ix-xii; Gardner, *The Doctor and the Devil*, pp.64-80.

District'. His standard fee for silence was \$50 a month. She accepted and, for a while, paid the erstwhile investigator. Then Gardner came down harder, tripling his monthly demands. Terrified and backed into a corner, Katie Amos went to the police where she met an old acquaintance, 22nd Precinct Captain William Devery. They plotted to trick Gardner. The plan was to pay the protection money with \$150 in recorded bills to mark Gardner as the recipient of extorted money. Just to enhance the effect, Devery planned to hide in the closet and spring out just at the moment Amos handed over the cash. The scheme went off perfectly. Taken to the Precinct-house, Gardner was booked on the charge of extortion. Though the defence argued that there was no fear and thus no extortion, the city court sentenced Gardner to two years in prison for the attempted extortion of Katie Amos.¹⁰⁸ 'Gardner was then taken to the prisoner's pen, where he found his wife just recovering from a swoon,' the papers reported, unconsciously poetic. 'He made a weak effort to comfort her and was then taken back to the Tombs.'¹⁰⁹

Gardner's counsellor appealed on two grounds. The first one, procedural, focused on the propriety of ordering the defendant to rise to identify himself, which lawyers argued was a violation of the Fifth Amendment protection against self-incrimination. But it was the substantive problem of the law that received the greatest attention; 'His threats did not inspire fear inducing any action on the part of Mrs. Amos,' the argument went, which 'renders it impossible to sustain a...conviction for the crime of an attempt at extortion.' The argument was not spurious; the Code read, after all, that 'fear...constitute[s] extortion.' And if Amos was not put in fear, then there was no oppression, and if there was no oppression then there was no extortion. Gardner's detractors sometimes recognized this legal point only to dismiss; 'although there might have been a legal barrier against his conviction on the specific charge for which he was indicted,' wrote one commentator, 'yet his general character, as shown by the evidence, was such as to warrant the jurors in brushing aside this legal barrier and convicting him on his demerits.'¹¹⁰ The court, however, disagreed on this seeming technicality: 'The crime of extortion is not committed unless the person parting with his money is induced to do so by wrongful use of force or fear.'¹¹¹ There was no fear. Thus the crime was logically impossible to commit, no matter Gardner's intent. Convinced by this 'impossibility defence,' the Appeal court vacated the original conviction and ordered Gardner released. Both history and law demanded that extortion was about real, substantive fear.

¹⁰⁸ *People v. Gardner*, 25 N.Y. Suppl 1072 (1893); *New York Times*, 21 November 1892; *Pittsburgh Gazette and Commercial Advertiser* 14 February 1883.

¹⁰⁹ *New York Times*, 9 February 1893, p.1.

¹¹⁰ *New York Times*, 10 February 1893, p.8.

¹¹¹ *New York Times*, 5 January 1894, p.1.

At this point, however, the state Supreme Court intervened and invalidated the decision of the first Appeals court. Given the abruptness of intervention, one might suppose the panel of judges saw the liberation of Gardner as an injustice of a high order. Overturning an Appeals court's ruling that found sufficient differences between the alleged act and the categories of the code to clear Gardner of wrongdoing, the Supreme Court unanimously agreed that Gardner had in fact committed a crime. In order to demonstrate this conclusion, the opinion unfolded a complex web of similitudes in classic Common Law fashion, triangulating Gardner within a cosmology of earlier state decisions concerning frauds whose victims knew the truth, counterfeiters who exchanged fake bills with knowing merchants, and pickpockets who put their fingers into empty purses to deduce that it was not the effect on 'the victim's state of mind' that defined the crime, but the intent - the 'guilty mind,' or '*mens rea*' - of the criminal that mattered. With such reasoning it became clear that 'The threat of the defendant was plainly an act done with intent to commit the crime of extortion, and it tended, but failed, to effect its commission, and, therefore, the act was plainly within the statute an attempt to commit the crime.'¹¹² Gardner was again remanded to the care of the city's jailers. The prisoner hung his hopes on the connection between the cultural emergence of women's consent and the emerging regime of sexualized extortion. But he miscalculated.

The case of Charles Gardner was not the only contemporary example of an alleged blackmailer claiming that the crime was impossible because the victim was not, for some reason or another, 'put in fear.' In California, in Nevada, and again in New York, defendants tried to convince juries and judges to pity them as the pawns of unscrupulous victims, led on and set up to commit a crime that had no chance of success.¹¹³ American state courts were never sympathetic, however. Gardner ran through the texts of these decisions and then some, unfolding as a ubiquitous presence not only in the cases of extortion, but in the so-called 'impossibility defence in general.'¹¹⁴ Widely cited well into the later twentieth century, no court has deviated from Gardner's conclusions.¹¹⁵ If the law of extortion was in constant

¹¹² *People v. Gardner*, 144 NY 98 (1893). Curiously, there was one precedent for both Gardner's argument as well as the for the final court decision. In 1844, the Maine Supreme court rejected an appeal of one man's conviction for extortionously threatening to accuse his victim of larceny, even though said victim Lyon was clearly not guilty of any crime and, thus, not terrified. See *Maine v. Bruce*, 24 Maine 71 (1844) 'The offense does not consist of the effect,' the majority opinion presciently stated. Nevertheless, this case was never cited in any of the extortion cases of Gardner's day. Nor did it cite any precedents.

¹¹³ *State v. Williams* 127 Cal. 212 (1899); *State of Nevada v. M.J. Smith* 33 Nev. 438 (1910); *People v. Spolasco* 68 N.Y.S. 924 (1900).

¹¹⁴ *People v. Mills* 178 N.Y. 274 (1904); *State v. Taylor* 47 Ore. 455 (1906).

¹¹⁵ For example: *New Jersey v. John J Meisch* 86 N.J. Super. 279 (1965) and *New York v. William Bracey and Tyrell Foster-Bey* 1 N.Y.2d 296 (1977) are two of the later twentieth century 'impossibility defence' cases whose decisions were grounded in Gardner.

stress and flux for the better part of a century, Gardner's efforts to terrify a woman out of her consent settled it. With a woman as plaintiff, courts realized that consent and fear no longer defined the crime.

Conclusion

Though extortion emerged as an almost paradigmatic crime for the emerging culture of spectacular intimacy, this legal and cultural consensus has its critics. The matter at issue, in large measure, is contract. To the important theorist Murray Rothbard, the criminalizing of extortionous contracts constituted a limit on contractor's liberty. Rothbard writes: 'Blackmail would not be illegal in the free society. For blackmail is the exchange of money in exchange for the service of not publicizing certain information about the other person. No violence or threat of violence...is involved.'¹¹⁶ Looking at the extortionous exchange through the lens of what one might call 'contractual formalism,' the mere existence of an agreement defined the practical reality of consent - a line of reasoning, not coincidentally, at the heart of the early-twentieth century American legal tradition of 'freedom of contract,' which courts used to invalidate some state protection of male workers as a violation of the free agreement between employer and employee,¹¹⁷ (the Court allowed regulation of women workers, however, given women's seeming inability to be fully autonomous moral agents.)¹¹⁸ For Rothbard, thusly, the extortionous contract is no different from the employment contract, and for more than half a century, this line of analysis continues to influence critics of extortion

¹¹⁶ See Murray N. Rothbard, *Man, Economy, and State* (Princeton: Van Nostrand, 1962), Vol.1, p.443. Also, Robert Nozick, *Anarchy, State, and Utopia* (New York, Basic Books, 1975). Additionally, Walter Block, 'The Case for Decriminalizing Blackmail,' *Western State University Law Review* 24 (Spring 1997), pp. 225–246; James Lindgren, 'Unraveling the Paradox of Blackmail,' *Columbia Law Review* 84 (1984), pp.670–717.

¹¹⁷ The paradigmatic expression of 'freedom of contract' is the 1905 Supreme Court case *Lochner v. New York*, 198 U.S. 45. Here, the Court invalidated a maximum hours law for bakers as a violation of the rights of contractors. Critics have suggested the decision undermined worker health and safety, and often suggest a strong bias in favour of employers influenced the narrow court majority. A comprehensive overview of debates over *Lochner* and 'freedom of contract' is David E. Bernstein, 'Lochner v New York: A Centennial Retrospective,' *Washington University Law Review* 83 (2005), pp.1469-1516; David Gillman, *The Constitution Besieged: The Rise and Demise of Lochner-Era Police Powers Jurisprudence*, (Durham: Duke University Press, 1992); Laurence Tribe, David E Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (Chicago: University of Chicago Press, 2012) supports the decision and the Court's thinking on contractual agreements. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998) argues that weaknesses in *Lochner* presaged later transformations in constitutional interpretation.

¹¹⁸ The significant case here is *Mueller v. Oregon*, 208 U.S. 412 (1908), which allowed states to regulate the working hours of female laundry workers. Other similar cases followed. See Joan G. Zimmerman, 'The Jurisprudence of Equality: The Women's Minimum Wage, The First Equal Rights Amendment, and *Adkins v. Children's Hospital*, 1905-1923,' *Journal of American History* 78 (1991), 118-225.

law.¹¹⁹ And here Rothbard's analysis hits an historical impasse: the history of terror was so deeply embedded in the extortionous relationship that the very existence of extortion as a crime made the exchange of money for emotional security a fundamentally different species of agreement than the employment relation. Just as the formalism of the age structured the employment contract as the act of free will celebrated by libertarians like Rothbard, so it reflexively framed the extortionous contract as the opposite of consensual. The mere appearance of the form of an extortionous agreement constituted, on the face of it and apart from any larger context, an act of coercion. Ultimately, the libertarian critique of extortion law must be a critique of coercion and consent. But perhaps this is unavoidable. After all, the history of extortion is the history of probing the limits of free will - not the abstract free will of the formal contract, but free consent as experienced in its most intimate, most visceral reality.

As much as the transformation of extortion law worked to accommodate the shifting cultural fears of self-consciously respectable men, those domestic fears were not quite quelled by the increasing power of states to guarantee the security of 'any secret whatsoever.' If anything, they flourished. Towards the end of the century, concern for control over domestic secrets circulated among social critics, legists, artists and even scientists, all concerned about the profound moral implications of autonomy in an increasingly interdependent and technologically advanced age.¹²⁰ But perhaps the most famous, most concise, and most insightful contribution to this creative anxiety was Louis Brandeis' famous 1890 article 'The Right to Privacy.' Written with his law partner Charles Warren, 'The Right to Privacy' reiterated many of the keywords of the extortion debates in order to critique the nature of legal protection itself, as it argued that the focus of law should not be the security of property or domicile or even bodily integrity. Rather, this landmark article insisted, law must ground itself in the subjective intimacy so prized by that respectable class, in the seemingly universal experience of those particular 'thoughts, emotions, and sensations' that flowered in 'the sacred precincts of private and domestic life.'¹²¹ As with extortion, it was terror that animated this project, the dread of a 'mental pain and distress far greater than could be

¹¹⁹ Glanville Williams, 'Blackmail,' *The Criminal Law Review* (1954); James Lindgren, 'Unraveling the Paradox of Blackmail,' *Columbia Law Review* 64 (1984), 670-713; Michael Gorr, 'Liberalism and the Paradox of Blackmail,' in *Philosophy and Public Affairs* 21(1992), pp.43-66; Walter Block, N. Stephan Kinsella and Hans-Hermann Hoppe, 'The Second Paradox of Blackmail,' *Business Ethics Quarterly* 10, pp.593-622.

¹²⁰ Robert Mensell, 'Koderkers Lying in Wait: Amateur Photography and the Right to Privacy in New York, 1885-1915,' *American Quarterly* 43 (1991), 24-45; Thomas Halper, 'Privacy and Autonomy: from Warren and Brandeis to Roe and Cruzan,' *Journal of Medical Philosophy* 21 (1996), 121-135; Glenn Wallach, 'A Depraved Taste for Publicity: The Press and Private Life in the Gilded Age,' *American Studies* 39 (1998), 31-57. On privacy threats from roentgen rays (that is, X-Rays) see *North American Review* 163 (July 1896), 65-66.

¹²¹ Louis D. Brandeis and Charles D. Warren, 'The Right to Privacy,' *Harvard Law Review* 4/5 (1890)

inflicted by mere bodily injury.’ Yet Brandeis was interested in more than simply mitigating the terrors of domesticated men. He presented a manifesto for a modern republic where ‘the right to life has become the right to enjoy life,’ animating a century’s-worth of legal rethinking about the nature of citizenship and the substance of rights, and embedding itself in a post-World War II jurisprudence where ‘the right to privacy’ (and not just a residual right of privacy) stands fully recognized in American law, if not in politics.¹²² In a way, then, extortion has served a double-function in American law and culture. It sums up the contests over the gendered nature of consent and coercion that constituted the epistemological subtext of the crime. But extortion also adumbrates, foreshadowing the anxieties, the terms of debate, and the theoretical reasoning of much privacy talk in the later-twentieth-century United States.¹²³ This movement to increase state enforcement of emotional security was inevitable, Brandeis insisted, embedded in the very nature of modern citizenship.

¹²²*Lawrence v. Texas*, 539 U.S. 558 (2003), otherwise known as the ‘Texas Sodomy Case,’ is perhaps the most broad invocation of ‘the right to privacy,’ as it declared that any legal regulation of sexuality was a violation of the right to privacy. Also, in a larger perspective (although written before *Lawrence v. Texas*), is David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Berkeley: University of California Press, 1998).

¹²³ Garrow, *Liberty and Sexuality*.