

The Legalization of Blackmail: A Reply to Professor Gordon

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Blackmail is the offer to refrain from engaging in an act that one has the right to perform.¹ Typically, the licit act from which the blackmailer is offering to refrain is the exercise of his rights of free speech. Alternatively, the blackmailee can initiate this agreement; he may approach the blackmailer with the offer of money or other valuable consideration as the price for the blackmailer's silence. In a 1993 article, Wendy J. Gordon hypothesized that blackmail's "central case" occurs when the blackmailer is in possession of information embarrassing or harmful to the blackmailee, and for a fee refrains from publicizing that information.² The present Article responds to Gordon's assertion that, for various reasons, blackmail should be legally prohibited.

A blackmail³ contract would be legal in a libertarian society.⁴ Libertarianism is a political philosophy. The central core of

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¹ Walter Block & Christopher E. Kent, *Blackmail*, in MAGILL'S LEGAL GUIDE, 109 (1999). Alternatively, blackmail is the threat to engage in a licit act, unless paid off not to do so.

² See Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741, 1746 (1993).

³ It is difficult to overestimate the importance that blackmail plays in the political economy of our society. It pervades every nook and cranny. For example, *Newsweek* states, "[Bill] Gates cogently answered questions . . . , while in Washington, Attorney General Janet Reno and the head of her antitrust division, Joel Klein, were charging Microsoft with playing a game of anticompetitive blackmail to force computer manufacturers to favor its Internet browsing program." Steven Levy, *Breaking Windows*, NEWSWEEK, Nov. 3, 1997, at 46. There is no reason to couch antitrust issues in blackmail terminology; intellectually, one topic is quite a stretch from the other. That this is done in a popular magazine, however, is evidence of how deeply embedded the concept of blackmail is in our everyday thinking.

⁴ See generally WALTER BLOCK, DEFENDING THE UNDEFENDABLE 44-49 (1976) [hereinafter BLOCK, UNDEFENDABLE]; MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY

Libertarianism is that an individual may do anything he wishes with his person and his justly acquired property, provided that he does not interfere with the identical rights of any other person.⁵ Free speech (as long as it occurs on one's own property) is a protected activity, and a man can expose another's secrets without invading the other's person or his property. In a libertarian society, someone could also refrain, for consideration, from revealing information about another. In such situations, the individuals would enter into a mutually agreed upon contract. The blackmailer would benefit because he values the money he receives more than the costs to him of the silence he must maintain. The blackmailee also would gain because he ranks the confidentiality he attains higher than the money he pays for it. Were both parties not to experience this mutual gain, the agreement would not take place.

I. THE NONEXISTENT PARADOX

In contrast to this position, and despite the mutual gains and consent on both sides, Gordon maintains that blackmail should be legally prohibited.⁶ In taking this stance, Gordon begins her argument by stating that "criminalizing blackmail involves neither a paradox nor a contradiction, notwithstanding the fact that blackmail law prohibits offers to sell discreditable information that the law would permit the seller to disclose without penalty."⁷ This statement, however, is a paradox because it acknowledges that people are

124-26, 245-49 (1982) [hereinafter ROTHBARD, ETHICS]; MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE 443 n.49 (1993) [hereinafter ROTHBARD, ECONOMY AND STATE]; Walter Block, *Trading Money for Silence*, 8 U. HAW. L. REV. 57 (1986); Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997) [hereinafter Block, *De-Criminalizing*]; Walter Block & David Gordon, *Blackmail, Extortion and Free Speech Rights: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37 (1985) [hereinafter Block & Gordon, *Blackmail, Extortion*]; Eric Mack, *In Defense of Blackmail*, 41 PHILOSOPHICAL STUD. 273, 273-4 (1982).

⁵ See generally BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* (1990); DAVID BOAZ, *LIBERTARIANISM: A PRIMER* (1997); HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993) [hereinafter HOPPE, *PRIVATE PROPERTY*]; TIBOR MACHAN, *INDIVIDUALS AND THEIR RIGHTS* (1989); CHARLES MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN* (1997); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (1973) [hereinafter ROTHBARD, *NEW LIBERTY*]; ROTHBARD, ETHICS, *supra* note 4; Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, 9 J. LIBERTARIAN STUD. 1 (1989); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); Tibor Machan, *Law, Justice and Natural Rights*, 14 W. ONTARIO L. REV. 119 (1975).

⁶ See Gordon, *supra* note 2, at 1784-85.

⁷ *Id.* at 1741.

incarcerated merely for doing what they have a right to do. Gordon demurs on this point by stating that "[i]f people do not invariably have a right to threaten to do or not do the things they are at liberty to do or not do, then blackmail's illegality is perfectly consistent with the larger pattern. Hence, the statement does not produce a paradox."⁸ In this Gordon is mistaken; people most certainly have the right to threaten (or to offer) to do that which they have a right to do. Were this not the case, an individual would have the right to engage in an act, but would not be able to tell anyone about it, to publicize it, to offer or to threaten to do it, or to in any way indulge his free speech rights about it.

To buttress her point, Gordon cites the doctrine of "unconstitutional conditions," which "holds that even though the government may withhold a benefit entirely, it can nevertheless be prohibited from offering the benefit on the condition that the recipient forgo a constitutional right."⁹ Why, though, should what the government may or may not do serve as the basis for law? From the libertarian perspective, the United States government itself is a lawless institution in violation of the libertarian legal code because it necessarily initiates violence against nonaggressors (for example, those who are forced to pay taxes against their will and those who are prevented from patronizing alternative defense agencies).¹⁰

Gordon's contention, however, is problematic even apart from this consideration. Even supposing that the government is a

⁸ *Id.* at 1743.

⁹ *Id.* at 1743 n.19 (citing Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989)).

¹⁰ See generally ROTHBARD, *ETHICS*, *supra* note 4, at 159-88 (articulating the libertarian philosophy as applied to government); ROTHBARD, *NEW LIBERTY*, *supra* note 5, at 45-69 (exploring the private provision of all government services); MURRAY N. ROTHBARD, *POWER AND MARKET: GOVERNMENT AND THE ECONOMY* 10-23, 203-55 (1970) (positing that taxes are an illegitimate government action) [hereinafter ROTHBARD, *POWER*]; LYSANDER SPOONER, *NO TREASON: THE CONSTITUTION OF NO AUTHORITY* (1870) (arguing that the United States Constitution is not a binding contract upon its citizens); MORRIS TANNENHILL & LINDA TANNENHILL, *THE MARKET FOR LIBERTY* (1984) (explaining how the market can supplant the government in providing for public goods); WILLIAM C. WOOLRIDGE, *UNCLE SAM, THE MONOPOLY MAN* (1970) (explaining how the market can supplant the government in providing for public goods); Randy E. Barnett, *Whither Anarchy? Has Robert Nozick Justified the State?*, 1 J. LIBERTARIAN STUD. 15 (1977) (articulating Robert Nozick's failure to show the deficiencies of libertarian anarchism); Roy A. Childs, Jr., *The Invisible Hand Strikes Back*, 1 J. LIBERTARIAN STUD. 23 (1977); Williamson M. Evers, *Toward a Reformulation of the Law of Contracts*, 1 J. LIBERTARIAN STUD. 3 (1977); Murray N. Rothbard, *Robert Nozick and the Immaculate Conception of the State*, 1 J. LIBERTARIAN STUD. 45 (1977); John T. Sanders, *The Free Market Model versus Government: A Reply to Nozick*, 1 J. LIBERTARIAN STUD. 35 (1977).

legitimate institution, basing blackmail law on the fact that the government can "be prohibited from offering [a] benefit on the condition that the recipient forgo a constitutional right"¹¹ amounts to legal positivism. The government, conceivably, could have taken the opposite tack by allowing itself to offer a "benefit on the condition that the recipient forgo a constitutional right."¹² If that had been the case, Gordon would not have been forced to concede the case for blackmail legalization because, in fact, *no* implications for blackmail logically flow from the doctrine of unconstitutional conditions.

Gordon relies on several other considerations in coming to the conclusion that the right to act does not imply a right to notify. For example, Gordon states:

Threatening to disclose induces action in a way that disclosure does not, so that doing and threatening can have quite different effects. This occurs in part because the two acts affect different parties: any threat the blackmailer makes will be directed to the person with the embarrassing secret, but any disclosure will be to third parties.¹³

It is irrelevant, however, that the threat of action may focus on one set of people, while the actual action may focus on another. The real issue is whether any of these acts or threats to act constitute an uninvited border-crossing contrary to the libertarian code. Because none of them do, all should be decriminalized, notwithstanding the undoubted distinction between acts and threats to act.

Gordon also supports her position that blackmail should be illegal by stating:

[T]he blackmailer does more than merely threaten: He threatens to disclose unless money is paid. Regardless of whether we have liberty to threaten, the law often forbids us to commodify our liberties by selling them. Our liberties to make sexual use of our bodies cannot be bartered for cash in most states; our right to vote can neither be transferred gratuitously nor sold. The growing literature on inalienability makes clear that doing and selling are quite different issues.¹⁴

The first of these allegations is no more than another instance of legal positivism. Propriety in the law consists of precisely what the legislature mandates, no more and no less. Gordon's argument implies that the law forbids individuals from selling or

¹¹ Gordon, *supra* note 2, at 1743 n.19 (citing Sullivan, *supra* note 9, at 1415).

¹² *Id.*

¹³ *Id.* at 1744.

¹⁴ *Id.*

commodifying¹⁵ their liberties, and that is the end of the matter. This is an untenable argument because the law can often be mistaken, and what the law says at any particular time or place often gives little indication of what the law should be. Moreover, Gordon's argument is particularly troubling for reasons beyond its legal positivism approach. Gordon implicitly concedes that in *some* states individuals *are* at liberty to trade sexual services for cash; she states that the law "often" (but not *always*) "forbids us to commodify" and that prostitution is forbidden only in "most" (but *not* all) states. (If so, this example certainly cannot be used to prove her point regarding the illegality of blackmail.) According to Gordon's logic, blackmail should be legalized in some states but not in others.

Gordon also erroneously relies on the prohibition of the transfer of one's right to vote. Vote buying is prohibited not because there is anything intrinsically wrong with such a state of affairs, but rather because, by stipulation,¹⁶ individuals have *agreed* to live under such institutional rules. If consent is the basis for this prohibition, however, society could just as easily have consented to do the very opposite.

Gordon further argues, citing an article by James Lindgren for support, that "if an unfaithful husband pays hush money to conceal his infidelity, the blackmailer is receiving compensation while the affected wife receives neither information nor compensation."¹⁷ This

¹⁵ For a libertarian analysis of commodification, see ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 331 n.48 (1974); Walter Block, *Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Epstein and Kinsella*, J. LIBERTARIAN STUD. (forthcoming); Walter Block, *Market Inalienability Once Again: Reply to Radin*, 22 T. JEFFERSON L.J. 37-88 (1999).

¹⁶ That this stipulation is a heroic one can be seen in the following statement: [T]he state has been living on a revenue which was being produced in the private sphere for private purposes and had to be deflected from these purposes by political force. The theory which construes taxes on the analogy of club dues or of the purchase of the services of, say, a doctor only proves how far removed this part of the social sciences is from scientific habits of mind.

JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 198 & n.11 (1942).

¹⁷ Gordon, *supra* note 2, at 1744-45 n.24 (citing James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984) [hereinafter Lindgren, *Paradox*]). For Lindgren's contribution to the debate, see generally James Lindgren, *Blackmail: An Afterward*, 141 U. PA. L. REV. 1975 (1993); James Lindgren, *Blackmail: On Waste, Morals and Ronald Coase*, 36 UCLA L. REV. 597 (1989); James Lindgren, *In Defense of Keeping Blackmail a Crime: Responding to Block and Gordon*, 20 LOY. L.A. L. REV. 35 (1986); James Lindgren, *Kept in the Dark: Owen's View of Blackmail*, 21 CONN. L. REV. 749 (1989); James Lindgren, *More Blackmail Ink: A Critique of Blackmail, Inc., Epstein's Theory of Blackmail*, 16 CONN. L. REV. 909 (1984); James Lindgren, *Secret Rights: A Comment on Campbell's Theory of Blackmail*, 21 CONN. L. REV. 407 (1989); James

statement, however, begs the question: How can this "information . . . properly belong . . . to third parties?"¹⁸ Before any commercial interaction takes place, only two people own the information: the blackmailer and the unfaithful husband, the possible future blackmailee. The husband may well owe his wife full disclosure, due to his marriage vows,¹⁹ but the blackmailer, a total stranger, certainly does not owe anything to this unfortunate woman. While Gordon characterizes the spurned wife as the "primary party,"²⁰ she has no claim against the blackmailer no matter how unfairly her spouse has treated her. To support her argument, Gordon relies on Edward J. Bloustein, who in a 1964 article stated that "[i]n a community at all sensitive to the commercialization of human values, it is degrading to thus make a man part of commerce against his will."²¹ This, however, is a misreading because no one is being forced to do anything against his will. Consider the possibility that the husband, learning that someone is about to reveal his secret, *initiates* the blackmail offer by approaching the *blackmailer* and offering him money in exchange for silence. This may amount to "commodification," but it is not coercive to the husband. On the contrary, the husband *initiated* the transaction.

Gordon also cites articles by George Daly and J. Fred Giertz,²² Ronald H. Coase,²³ Douglas H. Ginsburg and Paul Shechtman,²⁴ and Richard A. Epstein²⁵ to support her argument that performing an act

Lindgren, *The Theory, History and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984). For criticism of Lindgren, see generally Block & Gordon, *Blackmail, Extortion*, *supra* note 4; Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849 (1993); Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905 (1993).

¹⁸ Lindgren, *Paradox*, *supra* note 17, at 702.

¹⁹ If the state were to separate itself from this essentially private institution, and people signed voluntary marriage contracts providing for faithfulness, then and only then would this be true. At present, whether any such conclusion may be drawn is unclear at best.

²⁰ See Gordon, *supra* note 2, at 1745.

²¹ *Id.* at 1745 (quoting Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 988 (1964)).

²² See *id.* at 1745 n.25 (citing George Daly & J. Fred Giertz, *Externalities, Extortion, and Efficiency: Reply*, 65 AM. ECON. REV. 736, 997, 999-1001 (1975)).

²³ See *id.* at 1745 n.26 (citing Ronald Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 671-74 (1988) [hereinafter Coase, *McCorkle*]).

²⁴ See *id.* at 1745 n.27 (citing Ginsburg & Shechtman, *supra* note 17, at 1865 (1993)).

²⁵ See Gordon, *supra* note 2, at 1745 n.28 (citing Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 561-65 (1983)). For a critique of the Epstein article, see

and threatening to perform an act can have quite different economic impacts. Despite this support, Gordon's point is far from proven because the argument is irrelevant to the legality of blackmail. Threats or offers are legitimate to the extent that the underlying action is (or should be) legal. An individual may properly threaten to gossip about another person's secret unless paid because the underlying free speech is legitimately protected by law. That same individual, however, may *not* threaten to murder or to kidnap unless compensated because those acts are rightfully proscribed.

II. THE CENTRAL CASE OF BLACKMAIL

Gordon introduces the model of "central case blackmail" to show that both the economic wealth maximization and the deontological moral theoretical schools of thought²⁶ argue that blackmail should be prohibited by law.²⁷ Gordon explains that the "central case" occurs

where the blackmailer acquires information for the sole purpose of obtaining money or other advantage from the victim, and where he has no intent or desire to publish the information, except as an instrument toward this purpose. The blackmailer's sole claim to this advantage rests on his possession of the information as leverage.²⁸

In Gordon's view, this model, in one form or another, underlies the opposition to blackmail legalization espoused in the writings of Robert Nozick,²⁹ Kent Greenawalt,³⁰ Epstein,³¹ Coase,³² and Ginsburg

generally Walter Block, *Blackmail from A to Z: A Reply to Joseph Isenbergh's "Blackmail from A to C,"* 50 MERCER L. REV. 569 (1999).

²⁶ The economic wealth maximization school of thought defines proper law as that which will lead to the greatest amount of wealth possible. A chief proponent of this viewpoint is Richard A. Posner. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986) [hereinafter POSNER, ANALYSIS]. Deontological schools of thought define proper law in terms of an underlying philosophical background. For example, a religious deontological school might define it in terms of adhering to biblical requirements. A libertarian one would define proper law as that which promotes, or is in keeping with, private rights and the nonaggression axiom. See generally ROTHBARD, *ETHICS*, *supra* note 4; HOPPE, *PRIVATE PROPERTY*, *supra* note 5.

²⁷ See Gordon, *supra* note 2, at 1746.

²⁸ See *id.* at 1746.

²⁹ See *id.* at 1746-47 & n.37 (citing ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 84-86 (1974) [hereinafter NOZICK, *ANARCHY*]).

³⁰ See *id.* at 1747 & n.42 (citing Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1099 (1983)).

³¹ See *id.* (citing Epstein, *supra* note 25, at 561-66).

³² See *id.* at 1747-48 (citing Coase, *McCorkle*, *supra* note 23, at 674).

and Shechtman.³³ This may well be true, at least in part. All of these authors mistakenly favor prohibitionism and may have been guided, at least to some degree, by the considerations Gordon brings to the fore. This concern with mere motives, however, is problematic. The purposes and intentions of the blackmailer should not play any role in the determination of the legal status of blackmail, let alone the central one that Gordon assigns to them. It is said that if bad intentions were enough to violate the criminal law, we would all be in jail. A similar point needs to be made on behalf of the blackmailer.

Moreover, even if Gordon somehow proves her point with regard to "central case" blackmail, this cannot be used to legally proscribe such acts. For all the blackmailer need maintain in his defense is that he is not a "central case blackmailer." Rather, he derives a psychic benefit from releasing the information, whether out of a sense of justice (for example, punishing the philandering husband) or out of a desire to establish himself as a professional blackmailer with a reputation for divulging information when not paid off. In neither of these cases can the unique Gordon contribution to this debate be used against such a defendant.

III. A CONSEQUENTIALIST PERSPECTIVE

A. *The Economic Argument*

Gordon quite correctly distinguishes between "harmful acts [people] are free to perform,"³⁴ and those which, presumably, they are not legally free to conduct. To illustrate this, the author states:

For example, a person who decides not to build a sun-blocking fence out of consideration for his sun-loving neighbor cannot sue to obtain a reward for his forbearance. He can choose, however, to negotiate over the fence's height, and demand consideration from his neighbor in exchange for keeping the fence low.³⁵

How does blackmail fit into all of this? This act is in one sense "harmful" to the blackmailee, who would prefer that the blackmailer had never learned of his secret. On the other hand, given that his past has been uncovered, the blackmailee would vastly prefer that a blackmailer, not the inveterate gossip, discover the information. By definition, the gossip will broadcast all the information at his

³³ See Gordon, *supra* note 2, at 1747-48 (citing Ginsburg & Shechtman, *supra* note 17, at 1859).

³⁴ *Id.* at 1748.

³⁵ *Id.* at 1748-49 n. 50.

disposal. The blackmailer, in contrast, provides at least the chance of a mutually agreeable deal. If the blackmailer places a low enough value on his service of silence, and the blackmailee a high enough value on his secret, then a deal can be struck that benefits both parties, at least in the *ex ante* sense.³⁶

Regardless of whether blackmail is harmful, revealing another's secret is an act that an individual is free to perform. No one suggests that the gossip should be incarcerated. But if one may legitimately speak, then one may also keep silent. If one has the right to keep silent, then one may be paid for keeping silent. Because blackmail consists of no more than being paid for remaining silent, Gordon logically should be compelled to favor its legalization.

Gordon evades this conclusion by referring to the notion that "[t]he blackmailer does not wish to disclose, only to extract a transfer payment."³⁷ Gordon rejects legalization because she defines "central case blackmail" so as to preclude from consideration those who are motivated by profits, not free speech.³⁸ Motive, however, seems to be a weak reed upon which to hang an entire theory of criminal behavior. For in Gordon's view, two people can act in an identical manner, yet one will be guilty of a crime and the other will be totally innocent of it. The first, call him the "speech blackmailer," wishes, initially, to disclose the blackmailee's secret, but is only dissuaded from making a revelation by payment for his silence. The second, call him the "profit-seeking blackmailer," has no real independent interest in exposing the history of the blackmailee; he is solely interested in receiving money. The profit-seeking blackmailer, however, asks for or accepts a payment to keep silent just as the speech blackmailer does, perhaps even an identical amount. Yet, merely because of these different intentions, Gordon condemns the one as a criminal, yet not the other. Motive is often used to determine *degree* of guilt; here, remarkably, motive is being used to discern presence or absence of guilt. This is too great a weight to place on so frail a foundation.³⁹

³⁶ BLOCK, UNDEFENDABLE, *supra* note 4, at 44-49.

³⁷ Gordon, *supra* note 2, at 1749.

³⁸ *See id.*

³⁹ Even Gordon herself states that "[m]otive is a notoriously difficult basis on which to build fundamental legal distinctions." *Id.* at 1771.

B. The Irrelevance of Lawful or Beneficial Nature of the Threatened Action

For many scholars, the prohibition of blackmail is paradoxical: Two distinct acts are legal when taken separately, but are illegal when taken together.⁴⁰ Those individuals admit that the first act—making a threat, or an offer, or giving a warning that you will speak—as well as the second act—asking for or accepting money—are both licit. They assert, however, that when combined into one single act, the two together should be prohibited by law.

⁴⁰ Peter Alldridge, *Attempted Murder of the Soul: Blackmail, Privacy and Secrets*, 13 OXFORD J. L. STUD. 368-87; Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639-61 (1993); Gary Becker, *The Case Against Blackmail*, January, 1985 (unpublished); James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 CAL. L. REV. 1413-1540 (1992); Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935-73 (1993); Debra J. Campbell, *Why Blackmail Should Be Criminalized: A Reply to Walter Block and David Gordon*, 21 LOY. L.A. L. REV. 883-92 (1988); A. H. Campbell, *The Anomalies of Blackmail*, 55 L. Q. REV. 382 (1939); Daly & Giertz, *supra* note 21; Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663-93 (1993); Daniel Ellsberg, *The Theory and Practice of Blackmail*, in BARGAINING: FORMAL THEORIES OF NEGOTIATION 343 (Oran R. Young, ed., 1975); Epstein, *supra* note 25; Hugh Evans, *Why Blackmail Should Be Banned*, 65 PHILOSOPHY 89-94 (1990); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1990); Joel Feinberg, *The Paradox of Blackmail*, 1 RATIO JURIS 83 (1988); George P. Fletcher, *Blackmail: The Paradigmatic Case*, 141 U. PA. L. REV. 1617-38 (1993); CHARLES FRIED, *CONTRACT AS PROMISE* (1981); Ginsburg & Shechtman, *supra* note 17; Arthur L. Goodhart, *Blackmail and Consideration in Contracts*, 44 LEGAL Q. REV. 436 (1928), reprinted in ARTHUR L. GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 175 (1931); Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFFAIRS 43-66 (1992); Michael Gorr, *Nozick's Arguments Against Blackmail*, 58 PERSONALIST 187, 190 (1977); Vinit Haksar, *Coercive Proposals*, POL. THEORY 65-79 (1976); Robert L. Hale, *Bargaining, Duress and Economic Liability*, 43 COLUM. L. REV. 603-28 (1943); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Russell Hardin, *Blackmailing for Mutual Goods*, 141 U. PA. L. REV. 1787-1815 (1993); MICHAEL HEPWORTH, *BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE* 29-40 (1975); Isenbergh, *supra* note 17; R. S. Jandoo & W. Arthur Harland, *Legally Aided Blackmail*, 27 NEW L.J. 402-04 (1984); Leo Katz, *Blackmail and Other Forms of Arm Twisting*, 141 U. PA. L. REV. 1567-1615 (1993); William Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 43 (1975); Lindgren, *supra* note 17; Daniel Lyons, *Welcome Threats and Coercive Offers*, PHILOSOPHY 425-36 (1975); Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156 (1980); Nozick, *supra* note 29; David Owens, *Should Blackmail Be Banned?*, 63 PHILOSOPHY 501-14 (1979); Richard Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817-47 (1993); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, (3d ed. 1986); Steven Shavell, *An Economic Analysis of Threats and Their Legality: Blackmail, Extortion and Robbery*, 141 U. PA. L. REV. 1877-1903 (1993); L. G. Tooher, *Developments in the Law of Blackmail in England and Australia*, 27 INT'L & COMP. L. Q. 337 (1978); Jeremy Waldron, *Blackmail as Complicity* (Nov. 1992) (unpublished); W. H. D. Winder, *The Development of Blackmail*, 5 MODERN L. REV. 21, 36-41 (1941).

Gordon, in contrast to both of these views, takes a third, distinct position. Gordon describes her view as follows:

The initial "paradox" involved the fact that the blackmailer threatened to do an act that was itself lawful and, by implication, beneficial. The foregoing discussion should make clear that the beneficial or harmful nature of the action threatened is irrelevant to the core economic argument against central case blackmail. In central case blackmail, the threatened action has no independent positive value for either party. What motivates the bargain instead is that the action will have a negative value to the person threatened that is greater than the null or negative value it has for the threatener. In such a context, it is in no one's interest for the threat of disclosure to be carried out.⁴¹

Gordon's first error is that she equates "lawful" with "beneficial." Although the first term simply does not imply the second, Gordon slides smoothly from the one to the other, failing to recognize that the two are neither identical nor deducible from one another. There are many lawful acts that should not be considered beneficial, such as pornography, gambling, prostitution, and consuming unhealthy foods. An act need not be beneficial for it to be legal.⁴²

Gordon, however, does have a response to this criticism:

Note that the distinction here addresses the beneficial nature of the threatened action and does not separately consider its lawfulness. That is because I am assuming that in assessing the "blackmail paradox," the lawfulness of disclosure would have meaning for the economist merely as an indirect indicator that disclosure yielded more benefits than costs.

The analysis would be more complex if we were to take into account the possibility that *any* criminalization of a threat to do a lawful act would itself have negative consequences. For example, such criminalization may cause confusion or erode respect for the law. I give no attention to these possibilities since I think the criminalizing central case blackmail has no such consequences, largely because the person on the street perceives blackmail to be a wrong; therefore, criminalization of the activity evokes no sense of inconsistency.⁴³

Gordon is undoubtedly correct about "the person on the street." Moreover, it is not just this presumably ignorant man who sees no

⁴¹ Gordon, *supra* note 2, at 1750-51.

⁴² Of course, acts such as pornography and fatty food consumption are beneficial in at least *some* sense; in both instances, the products were purchased by willing buyers. The purchasers of these items must have perceived *some* value in them.

⁴³ See *id.* at 1750 n.55.

logical inconsistency in "any criminalization of a threat to do a lawful act." Judging from the writers who favor the status quo prohibition of blackmail,⁴⁴ one might well conclude that the mainstream professor in the law school or in the economics department also fails to see the paradox of blackmail prohibition. This paradox most certainly does "erode respect for the law" on the part of those, such as this Author and a small band of commentators,⁴⁵ who have long been protesting this perversion of the law. Indeed, one of the primary motivating forces in writing this reply is to protest that this injustice is *based* on a sense of inconsistency. That this should be dismissed on the grounds that the masses of people on the street or in the professorate seem to have missed the point sets a new and very remarkable standard for analysis in social science. After all, had you asked most people, even most scientists at one time, they would have replied that yes, the Earth is flat and the Sun revolves around it. Happily, these sentiments were not taken as bedrock upon which further analysis rested.

In any case, the fact that the "man on the street" has the views he does with regard to criminalizing threats to engage in *legal* activities is due in no small part to the efforts of Gordon and her colleagues, who have striven mightily to convince him of this very erroneous point. It comes, then, with particular ill grace, and with more than a whiff of circularity, for Gordon to now turn around and rely on the unprofessional opinions of the common man to support her own views. She and her colleagues played a great role in causing them in the first place.

Error number two is that Gordon's screed against legalization depends utterly on her assumption that the blackmailer derives not one iota of pleasure out of releasing the secret, in those cases in which the blackmailee refused to pay. Who among us, were he to enter into this ancient profession in the first place, would act in so cold-blooded a manner? Surely, it is part and parcel of the human condition to lash out at those who balk us. So, as a matter of realism, it may fairly be charged that Gordon's central case blackmailer is a null set.⁴⁶ Gordon is correct in stating that the leverage value obtained by the blackmailer who carries through on his threat when

⁴⁴ See *supra* note 17 and accompanying text (listing several articles advocating the prohibition of blackmail).

⁴⁵ See *supra* note 4.

⁴⁶ On the other hand, this extreme case, it cannot be denied, performs a useful heuristic function, much akin to that of the perfect gas, the frictionless system in physics, and equilibrium in economics.

not paid, so as to make further threats more credible, "is thus not an independent positive value to the single-instance, central-case blackmailer."⁴⁷ But she seems oblivious to the possibility that there has never been and is now no such person.

Gordon, in support of her argument, cites Daly and Giertz, who state that "the key feature of extortion is the use of a threat to elicit a payment, not whether the threatened action is legal or illegal."⁴⁸ Gordon's argument is not strengthened by equating blackmail and extortion. Such an equation is problematic because the legality or illegality of the threatened act is crucially important in determining whether extortion has occurred. For example, suppose a boss threatens an employee with dismissal unless he comes in to work on time,⁴⁹ or a girl threatens a boy that she will not date him unless he takes her to a movie, or a buyer threatens a seller that he'll take his business elsewhere unless the price is lowered. Surely all these threatened acts are themselves legal, and, so, perforce, is the act of making these threats. In very sharp contrast indeed are demands for money or other valuable considerations coupled with threats to murder, maim, or rape.

C. *Caveat*

In making her argument, Gordon quite reasonably supports the view of William Landes and Richard A. Posner that blackmail may make a positive social contribution because the "fear of having to make blackmail payments may induce potential nonconformists to conform their behavior to majority standards."⁵⁰ However, Gordon then attempts to escape from the implications of this insight with the contention that blackmail

will impose transaction costs that could well outweigh any beneficial disclosure resulting from blackmail attempts that misfire. Further, the possible allocative effect resulting from occasional disclosure or deterrence is not guaranteed to be beneficial. Disclosure may have a social value that is positive (for

⁴⁷ Gordon, *supra* note 2, at 1751 n.56.

⁴⁸ See *id.* at 1751 n.60 (citing Daly & Giertz, *supra* note 22, at 757 n.2. Gordon asserts that, despite the fact that Daly and Giertz, in their article, address extortion by threat of violence, their model "describes the supply and demand structure of central case blackmail." *Id.*

⁴⁹ See Fletcher, *supra* note 40, at 1619 (outlining a series of examples in which one individual can legally threaten to do an act unless another individual performs or refrains from performing an action).

⁵⁰ Gordon, *supra* note 2, at 1752 (citing Landes & Posner, *supra* note 40, at 42-43).

example, disclosing to the electorate that a mayor has embezzled funds) or negative (for example, making public a secret of no public import that causes deep distress in the family concerned, such as the fact that when the mayor was a child he was sexually abused by a relative). It is similarly possible that blackmail-induced conformity might involve a net cost to society.⁵¹

According to what she characterizes as the deontological perspective, Gordon maintains that blackmail is "unjustifiably hurting others," and thus should be declared illegal.⁵² The blackmailer, however, does not hurt the blackmailee. On the contrary, the blackmailer is the *benefactor* of the blackmailee, in that he has the power to release embarrassing information, but forebears from doing so. Although the blackmailer does charge a fee for his services, in the view of the blackmailee, this price is lower than the possible harm of disclosure, a fact evidenced by the blackmailee's willingness to pay.

If there is any doubt of this, compare the case of the blackmailer with that of the gossip. If a gossip uncovers an individual's secret, the information will necessarily become public because, regardless of the value the person places on his privacy, the gossip's silence cannot be bought. When a blackmailer discovers an individual's secret, on the other hand, there is at least some chance that a bargain can be struck to ensure the blackmailer's silence. Because no one advocates jailing gossips, it is difficult to see why Gordon and her colleagues advocate this fate for blackmailers.

A second flaw in Gordon's argument that blackmail's unjustified harm to others requires its illegality is that the argument assumes that a person who unjustifiably hurts another always should be incarcerated. This, however, is not necessarily so, at least according to the libertarian philosophy, which reserves penal sentences for violations of the person or of property rights. For example, consider a situation in which a wife divorces her husband, not for any fault of his, but merely because she finds a more attractive younger man. The wife's action is gratuitous and, therefore, will presumably cause some degree of unjustified harm to the husband. If Gordon's dicta were taken literally, the wife would have to be incarcerated because her action reasonably could be expected to hurt the husband.

Gordon's assertion that the benefits of blackmail are outweighed by its transaction costs⁵³ is weakened by the fact that virtually any act

⁵¹ *Id.* at 1752-53.

⁵² *Id.* at 1752 n.62.

⁵³ *See id.* at 1752.

"will impose transactions costs."⁵⁴ The real issue is not whether transaction costs exist, or whether they are imposed upon other people (they often are, as in the cases of the divorce), but instead whether the blackmailer has a *right* to engage in the blackmailing activities. There are two utilitarian approaches to answering this question.⁵⁵ The first, called the "macro" viewpoint, has been adopted by Gordon and her peers who believe "market failure"⁵⁶ to be overwhelmingly prevalent. The proponents of this approach ask themselves, from their own subjective perspective, which is stronger: the harm caused by the blackmail or the benefits caused by the blackmail. And, since they cordially hate blackmail, they deem it of lesser value (on the rare occasions they consider it valuable at all) than attendant costs.

The second approach, call it the "micro" viewpoint, accepts the *ex ante* evaluations of the economic actors as definitive. For example, if a person buys a coat for \$100, there are considerable transactions costs associated. The proponent of the "micro" viewpoint, however, will conclude that the benefits of this transaction outweigh its total costs, at least in the *ex ante* sense, because otherwise the deal would not have been consummated. In the context of blackmail, the "micro" viewpoint reasons that the blackmailee would not have paid the blackmailer had he not regarded the latter's silence as greater in value than the price—including its attendant transaction costs—of that silence. On the strength of this consideration alone, the "micro" evaluator, such as

⁵⁴ Gordon's assertion also begs the question: Why single out *transactions* costs? Most acts are costly in terms of land, labor, time, capital, and interest, to say nothing of opportunity costs. In light of these varied expenses, Gordon's focus on transaction costs in this context seems arbitrary.

⁵⁵ The reasons one would want to adopt utilitarianism is another matter altogether. For a critique, see generally HANS-HERMANN HOPPE, *PRAXEOLOGY AND ECONOMIC SCIENCE* (1988); ROTHBARD, *POWER*, *supra* note 10.

⁵⁶ There is a mischievous and misbegotten thesis popular among mainstream socialist economists to the effect that the market is subject to all sorts of "market failures." This thesis is essentially those authors' contention that, compared to some arbitrary standard, real-world functioning markets come off second best. For example, the market is not perfectly competitive, and, therefore, it suffers the market failure of monopoly. Also, some people benefit from the actions of others without being charged for those benefits; that is the "market failure" of external economies. See generally HOPPE, *PRIVATE PROPERTY*, *supra* note 5; THE THEORY OF MARKET FAILURE: A CRITICAL EXAMINATION (Tyler Cowen ed. 1988); Donald J. Boudreaux & Thomas J. DiLorenzo, *The Protectionist Roots of Antitrust*, 6 REV. AUSTRIAN ECON. 81 (1992); Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 REV. AUSTRIAN ECON. 43 (1997); Randall G. Holcombe, *A Theory of the Theory of Public Goods*, 10 REV. AUSTRIAN ECON. 1 (1997).

the economist, determines that blackmail, as with all other "capitalist acts between consenting adults,"⁵⁷ promotes social welfare.⁵⁸

Gordon also becomes enmeshed in a defense of "harmless behavior that happens to be nonconforming," such as same-gender sexual relations.⁵⁹ The author does not employ this discussion to support a simple straightforward libertarian defense; since this is consensual adult behavior, a victimless crime as it were, with no initiation of violence against nonaggressors, it is a very paradigm case of legally permitted activity. This realization strikes far too close to home for Gordon because, had she relied upon this perspective, it would be a short step indeed to the conclusion that the blackmailer-blackmailee relationship, too, is a willing one on both sides.

Instead, Gordon resorts to a utilitarian analysis⁶⁰—doomed at the start due to the illegitimacy of interpersonal comparisons of utility⁶¹—in an attempt to show that legalized blackmail would have an unjustified adverse effect upon homosexuality.⁶² The author could have utilized the "micro" approach: gay relationships promote utility in the *ex ante* sense, evidenced by the fact that, otherwise, at least one of the partners would terminate, or refuse to even enter into, the

⁵⁷ NOZICK, *ANARCHY*, *supra* note 29, at 163.

⁵⁸ If people voluntarily agree to *any* deal, the presumption is that they both gain from it, at least in the *ex ante* sense of anticipations. For example, if one individual agrees to trade his pen to a second individual for that individual's tie, it must be because the first individual values the tie more. Likewise, for the transaction to take place, the second individual must make the opposite evaluation. For an elaboration of this point, see generally MURRAY N. ROTHBARD, *TOWARD A RECONSTRUCTION OF UTILITY AND WELFARE ECONOMICS* 21 (Center for Libertarian Studies, Occasional Paper Series No. 3, 1977) [hereinafter ROTHBARD, *UTILITY AND ECONOMICS*].

⁵⁹ Gordon, *supra* note 2, at 1753 n.64.

⁶⁰ Utilitarianism is the philosophy most closely associated with Jeremy Bentham and John Stuart Mill. It is the view that the good, or the ethical, choice consists of the one that provides the greatest good for the greatest number of people, thus maximizing total utility. One obstacle that this view founders on is that it is impossible to meaningfully measure, and thus compare, the utility of different people. Unless utility is measurable, however, and additive, maximization is impossible. Another great difficulty is that the approach is contrary to justice. Suppose, for example, it could be shown that the Nazis gained more utility from the torture and murder of Jews than the latter lost from this process. This would hardly be just, even though it would maximize utility, and thus, seemingly, be advocated by utilitarians. See generally JOHN STUART MILL, *UTILITARIANISM: WITH CRITICAL ESSAYS*, (Samuel Gorowitz, ed., 1971).

⁶¹ See ROTHBARD, *UTILITY AND ECONOMICS*, *supra* note 58, at 21. Rothbard argues that, while there are valid measurements for such things as weight, height, speed, acceleration, and temperature, there is no such thing as a unit of happiness. Therefore, while it is reasonable to say that *x* is twice the weight of *y*, it is an act of economic illiteracy to claim that *x* is twice as happy as *y*.

⁶² See Gordon, *supra* note 2, at 1753 n.64.

relationship. The objections of the more conservative⁶³ have no standing under this analysis⁶⁴ because they have no means of "demonstrating their preferences"⁶⁵ against such relationships. Gordon, however, could not tread down this path, for in order to do so, she would have had to jettison the concept of "negative externalities."⁶⁶ Much beloved of the "market failure set," Gordon calls same-gender sexual relationships "harmless." But what about AIDS, which initially was most prevalent among homosexuals, continues heavily in those circles, and has devastated, as well, members of the larger community? Based on this consideration alone, a utilitarian case could be made that our society does not make such nonconforming behavior "too expensive,"⁶⁷ but rather too cheap.

Then there is an intractable problem: Given that much of the general public disapproves of the gay lifestyle, and many homosexuals reciprocate, which of them should cease and desist? Gordon proposes to answer this by determining "who is the least cost avoider" or, perhaps, the least changer of taste, ascribing this way of attempting to solve the problem to the typical "economist."⁶⁸

To be sure, this is precisely the approach of the Coasean economist.⁶⁹ But in the absence of scientifically reliable interpersonal

⁶³ Conservatives, particularly religious conservatives, object to homosexuality on the ground that it is forbidden in the bible.

⁶⁴ See ROTHBARD, *UTILITY AND ECONOMICS*, *supra* note 58, at 2.

⁶⁵ *Id.*

⁶⁶ Negative externalities occur whenever one person harms another and the law does not allow the victim to be compensated for this harm or to be granted an injunction to prevent it. Such harms range from railroads creating sparks that set ablaze a farmer's haystacks, to smoke pollution, to jamming radio signals. These externalities also include competition; if one individual opens a grocery store across the street from that of another individual and wins half the original's customers, this, too, can be perceived as a negative externality for which the law will not compensate. For libertarians, the key distinction is not harm to second or third parties. Rather, the distinction revolves around whether any uninvited border crossing has occurred. If a person dumps garbage on another's lawn, a trespass has occurred that the law should stop. However, engaging in competition does not involve any violation of personal or private property rights. For more on this, see generally Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, in *ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION* (Walter Block, ed., 1990).

⁶⁷ See Gordon, *supra* note 2, at 1753 n. 64.

⁶⁸ See *id.*

⁶⁹ For critiques of Coaseanism, see Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12 *HAMLINE L. REV.* 229-44 (1989); ROY E. CORDATO, *WELFARE ECONOMICS AND EXTERNALITIES IN AN OPEN-ENDED UNIVERSE: A MODERN AUSTRIAN PERSPECTIVE* (1992); Roy E. Cordato, *Knowledge Problems and the Problem of Social Cost*, 14 *HIST. OF ECON. THOUGHT* (1992); Elisabeth Krecke, *Law and the Market Order: An Austrian Critique of the Economic Analysis of Law*, in *COMMENTARIES*

comparisons of utility, there is simply no nonarbitrary way to resolve this debate. In their absence, moreover, it is not even a meaningful question. If the right to engage in homosexual activity depends upon so insecure a foundation, there is little hope for its defense.

Fortunately, there is a justification for gays to engage in consensual, private, adult sex. It is the "live and let live" philosophy that emerges in libertarianism. Since neither homosexuality nor heterosexuality involves per se invasions of other people or their property, both are licit in the free society. Neither can be justly prohibited. But this means that we have to count as invalid all notions of "externalities" and "least cost avoiders." And, if it is permissible to use in the case of sex, this applies as well to blackmail.

D. Imperfect Knowledge

Gordon suggests that markets are efficient and can be relied upon to sort out the aforementioned problems, stating that "it might be argued that allowing blackmail data to be bought and sold is the best way to finesse the economic unknowns."⁷⁰ Gordon relies on two experts, Friedrich A. Hayek⁷¹ and Coase,⁷² to support this possibility. Her reliance on the former is unobjectionable; Hayek played a major role in demonstrating that markets process information with efficiency beyond the scope of government.⁷³ Gordon's reliance on

ON LAW AND ECONOMICS 86 (Robert W. McGee ed., 1997); GARY NORTH, TOOLS OF DOMINION: THE CASE LAWS OF EXODUS (1990); GARY NORTH, THE COASE THEOREM, TYLER, TEXAS (1992); Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, in ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION 233 (Walter Block ed., 1990).

⁷⁰ Gordon, *supra* note 2, at 1754.

⁷¹ See *id.* at 1754 n.66 (citing Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524-25 (1945) (asserting that "decentralized decisionmaking can often utilize knowledge better than centralized planning").

⁷² See *id.* at 1754 n.67 (citing Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) [hereinafter Coase, *Social Cost*]).

⁷³ Some commentators, however, believe that Hayek merely scratched the surface of the case against governmental central planning. Hayek stopped at the knowledge problem—it would be too difficult for the central planners to find out in a timely way the information needed to rationally plan. A more radical criticism of socialism is that, even if there were no such information difficulty, the planners still could not engage in rational action without private property rights, individual choices, and free market prices based on the appraisal of values on the part of market participants. A second problem with Hayek is that he made many compromises with democratic socialists and other critics of the market. See, e.g., Jeffrey M. Herbener, *Calculation and the Question of Arithmetic*, 9 REV. AUSTRIAN ECON. 151 (1995); Hans-Hermann Hoppe, *Socialism: A Property or Knowledge Problem?*, 9 REV. AUSTRIAN ECON. 143 (1995); Joseph T. Salerno, *A Final Word: Calculation, Knowledge and Appraisal*, 9 REV. AUSTRIAN ECON. 141 (1995); Joseph T. Salerno, *Ludwig von Mises as Social Rationalist*, 4 REV. AUSTRIAN ECON. 26 (1990); Joseph T. Salerno, *Mises and Hayek*, 6

Coase, however, presents grave difficulties. First, the author states that "the Coase theorem teaches that in a properly functioning market, absent transactions costs, people will trade a resource until it reaches its highest value use regardless of where the government initially assigns its ownership."⁷⁴ For this assertion to be true, however, the loser in the lawsuit would have to possess the financial ability to bribe the winner to allow resources to flow to what Coase considers to be their optimal use.⁷⁵

Gordon latches on to this Coasian "straw man" in an effort to undermine the implications that Hayek's analysis would have for the legalization of blackmail.⁷⁶ The author asserts:

[I]n blackmail the transaction costs can be so high as to preclude all the affected parties from making their preferences known through the market, thus preventing transactions from reliably directing resources to their highest valued uses. For example, there may be a multitude of voters who would be willing to pay something to learn that their mayor has embezzled public funds. Yet a person who has this information cannot practicably contact this mass of possible buyers; even if he could, free rider strategic behavior could well forestall agreement, particularly when coupled with the well-recognized difficulties that accompany any attempt to sell a secret to people ignorant of its content.⁷⁷

REV. AUSTRIAN ECON. 113-46 (1992).

⁷⁴ Gordon, *supra* note 2, at 1754.

⁷⁵ See Walter Block, *Coase and Demsetz on Private Property Rights*, 1 J. LIBERTARIAN STUD. 111, 111, 112 (1977) [hereinafter Block, *Coase and Demsetz*].

⁷⁶ See Gordon, *supra* note 2, at 1754.

⁷⁷ *Id.* Gordon's strategy here reminds the reader of the argument that antitrust advocates utilized to support their position. First, the technique defines a misbegotten criterion for efficiency, such as "perfect competition" in the antitrust context and Coasian theory in the present case. In the antitrust context, the hypothetical state against which the real world is to be measured is a state where there are millions of firms, each selling a small percentage of the total product, which is homogeneous. In addition, information is costless, there is a constant state of equilibrium, and no profits are ever made. The Coasian equivalent of this is a world with zero transaction costs.

Second, the technique criticizes the real world for not living up to these artificial standards set by the criterion. The difficulty with this procedure is easy to see. It would be similar to defining a life-sized version of the Barbie Doll as the criteria for successful adult women and then fining all those human females who do not measure up to the criterion. Several authors, however, have prescribed an antidote to this stratagem in the case of antitrust and monopoly. See, e.g., DOMINICK T. ARMENTANO, *ANTITRUST POLICY: THE CASE FOR REPEAL* (1986); DONALD ARMSTRONG, *COMPETITION VERSUS MONOPOLY: COMBINED POLICY IN PERSPECTIVE* (Walter Block ed., 1982); Boudreaux & DiLorenzo, *supra* note 56; DiLorenzo, *supra* note 56; Fred McChesney, *Antitrust and Regulation: Chicago's Contradictory Views*, 10 CATO J. 775 (1991); William F. Shugart, Jr., *Don't Revise the Clayton Act, Scrap It!*, 6 CATO J. 925

This reliance upon the theories of Coase, however, is not sufficient to support Gordon's antilegalization goals.⁷⁸ In drawing this conclusion, Gordon ignores the phenomenon of externality internalization.⁷⁹ A blackmailer would not need to deal directly with thousands of potentially free-riding citizens and convince them to be curious of something about which they are ignorant. On the contrary, newspapers and magazines—not even those limited to muckraking—would be more than happy to publicize a mayor's embezzlement. The publications could profit on this information through increased subscriptions and greater advertising revenues. The blackmailer, therefore, would not need to deal directly with a mass audience. The threat of exposure in such venues tends to keep a damper on activities of this sort on the part of our elected officials.

Gordon, however, does not accept this reasoning or the "micro" perspective of utilitarianism, according to which the only actors are the blackmailer and the blackmailee.⁸⁰ In contrast, the author is concerned with the macro "societal economic welfare," which requires that the entire citizenry be made aware of the mayor's peccadilloes.⁸¹ Absent interpersonal comparisons of utility,⁸² though,

(1987); Fred L. Smith, Jr., *Why Not Abolish Antitrust?*, REGULATION, Jan.-Feb. 1983, at 23.

⁷⁸ See Gordon, *supra* note 2, at 1754-55 (citing Coase, *Social Cost*, *supra* note 71, 1-44 (1960)).

⁷⁹ Externality internalization is the process through which the market deals with the issue of externalities. Consider, for example, the difficulty of creating a private park in what is now a slum area. The owner of the park will only be able to recoup his investment through admission charges. However, if successful, the park also presumably would increase real estate values in the surrounding neighborhood. The problem—the "market failure" of externalities—is that the potential park owner does not own these properties and thus is not in a position to take advantage of these benefits "external" to his park. The solution—the internalization of this externality—is for him to purchase these lands *before* word gets out about his forthcoming urban park. He can do this because he is the only one who knows where he will locate this park.

⁸⁰ This perspective is, essentially, Austrian economics. See generally ROTHBARD, MAN, ECONOMY AND STATE, Los Angeles, Nash, 1962; LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS (1966). The Austrian School of economics is well known for its emphasis on methodological individualism. In this view, economic acts essentially occur on an individual level; groups are only amalgamations of individuals. There are no such things as groups apart from the individuals who comprise them. In the present context, from an Austrian point of view, there are only two actors in the contract: the blackmailer and the blackmailee. No one else has any standing.

⁸¹ See Gordon, *supra* note 2, at 1755. Gordon asserts that, because of well-known difficulties affecting markets in information, "most of the societal benefits that could flow from disclosure are likely to be kept *external* to the blackmailer's decision." *Id.* at 1754-55. As a result, the author concludes, "the outcome of dealings among blackmailer, victim, and other possible buyers [of information] will prove unreliable

it cannot be demonstrated that the value to the masses of the disclosure of this information will be greater than the value to the mayor of his privacy. Demanding this information dispersal in the name of justice, moreover, presumes the legitimacy of a positive obligation: that the ignorant citizenry has a right, not only against the thieving mayor, which it certainly does, but also against the innocent blackmailer, that he disclose the knowledge that he alone (apart from the mayor, of course) possesses.

In light of these considerations, it is difficult to conclude that a blackmailer should be forced to share knowledge with the masses, if the mayor is willing to compensate him for his silence. Gordon argues, based on the Coase theorem, that the public allocation of "fundamental resources," such as reputation, can enhance wealth.⁸³ The author claims that the free market system cannot create values sufficiently well to determine whether it would be more beneficial for a blackmailer to retain confidential information or to reveal it to the public.⁸⁴ Under a free enterprise system, if the blackmailee values the secret more than the price demanded by the blackmailer, he will pay and retain his privacy. If not, he risks exposure.

Gordon arrives at the opposite conclusion because she conflates the Coasian system with free enterprise or capitalism.⁸⁵ Capitalism is noncontroversially defined as the totality of all voluntary trades; that is, when one person trades his rightfully owned property for that of another. Coase, in sharp contrast, specifically addresses himself to the situation in which a trade *cannot* take place because there is a

as a guide to societal economic welfare." *Id.* at 1755.

⁸² As an example of an interpersonal comparison of utility, consider the following: *A* values his pen at 10 utils, and *B* values his hat at 40 utils. Thus, both *A* and *B* regard *B*'s hat as worth exactly four of *A*'s pens. Needless to say, since there are no such things as utils, nor indeed, any other measure of happiness, this comparison fails on two grounds. First neither *A* nor *B* can rate items on such a scale. Second, there can be no interpersonal comparison of the items. The relevance of this explanation to the textual discussion is that Gordon is maintaining that the interests of the entire citizenry in the mayor's difficulties are greater than the mayor's interest in his own privacy. Therefore, social welfare will be enhanced if the mayor's interests are disregarded for those of the citizenry. Even apart from such specific valuations, however, there is no way to demonstrate that the mayor's privacy is more valuable to him than is the citizenry's interest in obtaining the information.

⁸³ See Gordon, *supra* note 2, at 1755.

⁸⁴ *Id.* at 1754-57.

⁸⁵ *Id.* at 1756-57. Although Gordon reasonably enough equates "allowing . . . data to be bought and sold" with "markets," she identifies "markets" with "the Coase Theorem." However, the Coase theorem and the Coasianism based upon that theorem are really an *attack* on markets, particularly free markets, in that private property rights undergird free enterprise, and the Coase theorem is singularly antipathetic to such rights.

dispute as to who possesses the rights to the property in question.⁸⁶ But in our system, only the courts, not the market, can make such determinations.⁸⁷

In the dispute over blackmail, no real debate exists regarding who is the legitimate owner of the relevant property rights. Assuming that the blackmailer learned the embarrassing secret without violating any person or his property rights, the blackmailer may dispose of this information precisely as he wishes. On the other hand, of course, if knowledge of the secret came to him improperly (for example, through theft, torture, or kidnapping) then the blackmailer must be punished—not for blackmail, but for these other activities. Because the fruit of the poisoned tree is itself poisoned, blackmail under these conditions also would be properly illegal, but not because of anything intrinsic to that practice. Rather, blackmail should be considered illicit because of these improper antecedents.⁸⁸ For Coase, these matters would be examined very differently because, as an unsophisticated utilitarian at heart, he *has* no real theory of property rights.⁸⁹

Gordon does not seem to realize that Coase can be interpreted in a manner consistent with her position regarding the legalization of blackmail.⁹⁰ All the Coasian judge need do is declare that the secret

⁸⁶ See Coase, *Social Cost*, *supra* note 71, at 8-15. This Article is mainly concerned not with markets, within which trade occurs, but rather with lawsuits regarding nuisance or pollution, wherein no trade occurs, no matter what else is transpiring.

⁸⁷ Assuming that this is true, no free market actually exists that permits multiple public and private defense agencies to compete for services. For an explication of that system, see *supra* note 5. The philosophy adumbrated therein is one of libertarian anarchism, or anarcho-capitalism. Under such a philosophy, *all* government functions, including armies, courts and police, are provided through the voluntary market place, such as through competing defense-insurance-mediation agencies.

⁸⁸ This reasoning would apply to any act that is normally legal. For example, driving a taxicab is a completely legal practice. If the driver stole the vehicle or was drunk, then operating the cab would become an illegal activity because of the underlying illicit action, which precedes the seemingly legal act.

⁸⁹ In Coase's view, when a dispute arises concerning property ownership, the disputed property should vest in the person who, in a world of zero transactions costs, would have ended up owning the property in question. See Coase, *Social Cost*, *supra* note 71, at 38. That is, had he not been awarded it, he would have bribed the winner of a judicial decision into giving him the property under dispute. For example, Coase maintains that property under dispute should be awarded to the person who values it most highly, not to the rightful owner. In other words, for Coase, the rightful owner, to the extent that there can be any such thing, is the person who values the property most strongly, not necessarily the one who purchased it or built it.

⁹⁰ See generally Coase, *Social Cost*, *supra* note 71. That Coase's writing can be read as supporting Gordon's argument against blackmail should occasion little surprise

in the hands of the multitude of voters would be more valuable than if controlled solely by the mayor and the blackmailer, in order to reconcile Coase's principles⁹¹ with Gordon's assertions.

Gordon is mistaken in thinking that the Coase theory cannot be utilized to reach her favored conclusion. In fact, contrary to what the author has seemingly concluded, Coase actually agrees with her views on blackmail.⁹² Therefore, Gordon's attempt to use Coase as a foil against which to contrast her own position fails because he argues on the same side of the blackmail debate as does she.⁹³

given that Coase has previously drawn the same conclusions as Gordon regarding blackmail. See generally Coase, *McCorkle*, *supra* note 23.

⁹¹ See generally Coase, *Social Cost*, *supra* note 71. The principle of Coase in law and economics is to maximize wealth. For example, in a 1987 article he stated:

In a blackmailing scheme, the person who will pay the most for the right to stop the action threatened is normally the person being blackmailed. If the right to stop this action is denied to others, that is, blackmail is made illegal, transaction costs are reduced, factors of production are released for other purposes and the value of production is increased. This is an approach which comes quite naturally to an economist and was certainly the way in which I first analyzed the problem of blackmail.

Id. The problem with all such approaches, of course, is that they founder on the lack of interpersonal comparisons of utility or wealth.

⁹² See Coase, *McCorkle*, *supra* note 23, at 673. Coase states:

Business negotiations (which may also cause anxiety) either lead to a breakdown of the negotiations or they lead to a contract. There is, at any rate, an end. But in the ordinary blackmail case there is no end. The victim, once he succumbs to the blackmailer, remains in his grip for an indefinite period. It is moral murder.

Id. It is hard to see what more Coase can possibly do to subscribe to the antiblackmail legalization sentiments of Gordon than to characterize this practice as "moral murder."

⁹³ Gordon also criticizes Coase on grounds very similar to those employed by this Author. Compare Gordon, *supra* note 2, at 1757, with Walter Block, *Free Market Transportation: Denationalizing the Roads*, 3 J. LIBERTARIAN STUD. 209 (1979). Gordon states:

[T]he celebrity is limited in his ability to protect his reputation by the amount of money he possesses or can borrow. If the celebrity does not have enough money to outbid the network, then the highest valued use of the information would now seem to be publication, even if all that has changed is the initial assignment of rights.

Gordon, *supra* note 2, at 1757. This makes it doubly difficult to understand her analysis of Coase. Gordon and this Author agree—contrary to the positions of Coase, Demsetz, and their followers—that the initial assignment of property rights can determine who will be able to outbid whom in the zero transaction costs world. Gordon focuses on the point that "[i]f the celebrity does not have enough money to outbid the network, then the highest valued use of the information would not seem to be publication, even if all that has changed is the initial assignment of rights." *Id.* This is precisely the point this Author has made against Coase and Demsetz in other articles, utilizing a "flower pot" example. See Block, *Coase and Demsetz*, *supra* note 75, at 111-15.

Gordon next argues that there are "certain fundamental resources . . . whose possession can affect our ability to enjoy all other goods . . . examples include life, sight, and one's standing in a community of peers."⁹⁴ Gordon believes that "[r]eputation may well be one of those fundamental resources," and reputation is precisely what blackmail threatens to harm.⁹⁵ Gordon makes the same mistake as Adam Smith⁹⁶ did when he failed to solve the diamonds-water paradox. That paradox asks how diamonds, which are useless in preserving human life, at least when compared to water, nevertheless are more highly valued on the market than that life-preserving liquid. Economists did not address this enigma until the marginalist revolution⁹⁷ of the 1870s. That revolution argued that it was illegitimate to compare the value of water against that of diamonds because no human being has ever been called upon to choose between them in their totality. Instead, objects should be considered from the point of view of an actual market participant, who chooses only between small (or marginal) amounts of goods and services. In other words, the value of objects should be considered as a matter of more or less, not all or none; hence, there is no such thing as a "fundamental" good.

IV. A NONCONSEQUENTIALIST MORAL VIEW

A. Background

Moving from her economic grounds for the prohibition of blackmail, Gordon next advances several deontological⁹⁸ arguments.⁹⁹

⁹⁴ Gordon, *supra* note 2, at 1755.

⁹⁵ *Id.*

⁹⁶ See ADAM SMITH, *THE WEALTH OF NATIONS* 132 (Prometheus Books 1965) (1776).

⁹⁷ The marginalist revolution in economics directed attention not to the total amounts of anything, such as diamonds or water, but rather to the marginal amounts between which humans choose, such as a cup of water or a swimming pool of water. From this perspective, it is easy to see why diamonds are so valuable and water is not; there is very little of the former, relative to demand, while there is a great deal of the latter. See, e.g., CARL Menger, *PRINCIPLES OF ECONOMICS* (James Dingwall & Bert F. Hoselitz, Institute for Humane Studies, 1976); W. STANLEY JEVONS, *THE THEORY OF POLITICAL ECONOMY* (3d ed. 1888); LEON WALRAS, *PRINCIPLES OF POLITICAL ECONOMY* (1874).

⁹⁸ "Deontological" means theoretical and morality based, as opposed to utilitarian or pragmatic. See Gordon, *supra* note 2, at 1759.

⁹⁹ See Gordon, *supra* note 2, at 1758-74. In beginning her deontological analysis, Gordon quite rightly rejects Robert Nozick's critique that blackmail constitutes a "nonproductive" exchange by pondering whether the happening of such occurrences is "wrong in itself." See *id.* at 1758 (citing NOZICK, *ANARCHY*, *supra* note

The author claims that when blackmail occurs, "[o]ne person deliberately seeks to harm another to serve her own ends—to exact money or other advantage—and does so in a context where she has no conceivable justification for her act."¹⁰⁰ If this is an accurate characterization,¹⁰¹ one may agree that such activity is indeed despicable, immoral, and vicious; the law, however, still should not ban it. Gordon's argument is susceptible to a *reductio ad absurdum*.¹⁰² For example, an extremely attractive man may decide to gratuitously harm another man by alienating his wife's affections away from him—unless the husband pays the man one million dollars. To carry out his threat, the man proceeds to seduce the other man's wife. In this scenario, the seducer, who has no "conceivable justification" for his act, is deliberately seeking to harm another man to serve the seducer's goals. This is despicable, unjust, and immoral, but the man should nonetheless not be incarcerated. After all, he threatens (or actually carries out) not a rape but rather a seduction, which is defined as a voluntary act between consenting adults.¹⁰³ Gordon states that "[t]he violent and unlawful nature of a threatened act may make the extortionist's moral wrong more serious ('I will break your

29, at 84-86; Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 *MONIST* 156, 162-63 (1980)).

¹⁰⁰ Gordon, *supra* note 2, at 1758.

¹⁰¹ This seems to be the crux of Gordon's case against blackmail. If so, the author appears to have dropped her focus on "central case" blackmail so as to concentrate on the garden variety of this act.

¹⁰² A *reductio ad absurdum* is a critique that takes an argument to its logical conclusion to show its absurdity.

¹⁰³ See Walter E. Williams, *The Legitimate Role of Government in a Free Society*, in THE FRANK M. ENGLE LECTURES 633, 640 (Roger C. Bird ed., 1998). Williams argues:

The test for moral relations among people is to ask whether the act was peaceable and voluntary or violent and involuntary. Put another way, was there seduction, or was there rape? Seduction (voluntary exchange) occurs when we offer our fellow man the following proposition: I will make you feel good if you make me feel good. An example of this occurs when I visit my grocer. In effect I offer, "If you make me feel good by giving me that loaf of bread, I will make you feel good by giving you a dollar." Whenever there is seduction, we have a positive-sum game; i.e., both parties are better off in their own estimation.

Rape (involuntary exchange), on the other hand, happens when we offer our fellow man the following proposition: "If you do not make me feel good, I am going to make you feel bad." An example of this would be where I walked into my grocer's store with a gun and offered, "If you do not make me feel good by giving me that loaf of bread, I am going to make you feel bad by shooting you." Whenever there is rape, we have a zero-sum game, i.e., in order for one person to be better off, it necessarily requires that another be made worse off.

Id.

legs' as compared with 'I will disclose your secret'), but a threat may constitute a moral wrong even if the threatened act is neither wrongful nor unlawful."¹⁰⁴ In actuality, however, the law should ban only extortion because it threatens illegal acts, while blackmail does not. The fact that both are immoral should not be allowed to obscure this crucial distinction. In articulating her argument, Gordon continually allows the immorality of blackmail to obscure her reasoning. For example, the author highlights the fact that to commit blackmail is "to do an act that is wrong,"¹⁰⁵ but fails to realize that many people consider many legal acts to be wrong, such as smoking, homosexuality, and suicide.

B. Victimization and Outrage

Gordon, citing an article by Thomas Nagel for support, further asserts that a victim necessarily "feels outrage when he is deliberately harmed."¹⁰⁶ The author opines that, because blackmail is a harm that presumably impugns the worth of the targeted individual, it must be outlawed.¹⁰⁷ This reasoning, however, is problematic for several reasons. First, Gordon has not established that the blackmailee is a victim, and not a beneficiary, of the blackmailer. Second, whether the blackmailee feels outrage is irrelevant. So many people feel outrage regarding a wide array of subjects that the existence of the blackmailee's outrage in this scenario is not significant. Third, people do not necessarily feel outrage when deliberately wronged, or even when harmed. According to psychological research on the matter, people feel outrage not so much because of what happens to them, but instead because of what they *tell* themselves about those experiences.¹⁰⁸ Moreover, while people usually have limited control

¹⁰⁴ Gordon, *supra* note 2, at 1759 n.86.

¹⁰⁵ *Id.* at 1760.

¹⁰⁶ *Id.* at 1761.

¹⁰⁷ *Id.*

¹⁰⁸ See generally MICHAEL R. EDELSTEIN & DAVID RAMSEY STEELE, *THREE MINUTE THERAPY: CHANGE YOUR THINKING, CHANGE YOUR LIFE* (1997); ALBERT ELLIS & ROBERT A. HARPER, *A GUIDE TO RATIONAL LIVING* (1961). Psychotherapists of the Rational Emotive Behavioral Therapy School (REBT) put this in the form of A,B,C: A is an actual event that, purportedly, causes upset; for example, getting fired from one's job or losing one's girlfriend. C is the emotional consequence; for example, depression. Most commentators claim that A causes C. But the REBT theoretician claims that it is not A that causes C; rather, it is B, the person's belief about A. If he has an irrational belief (for example, that it is horrible to lose his job or girlfriend) then *this* is what causes the upset. In contrast, if he has a rational belief about what befalls him (for example, that such occurrences are indeed unfortunate, but he can live with them) then the A will *not* cause the C.

over their experiences, they tend to have almost total control (at least potentially) over what they think about those experiences.¹⁰⁹ Thus, if an individual thinks "I cannot stand to be treated unfairly," then that individual will probably feel outrage when he perceives that he has been slighted. In contrast, an individual's internal thoughts may travel along equally true but more psychologically healthy channels, such as thinking, when treated poorly, "It may be uncomfortable, but I can stand it, and indeed, I have stood far worse in the past." Such an individual is far less likely to experience outrage.¹¹⁰

C. Intent, Consequences, and the Doctrine of Double Effect

In the next section of her article, Gordon introduces a series of very fine distinctions, explaining that some deontological philosophers "distinguish between direct and oblique intention, between foreseen and intended effects or among effects that vary in their degree of 'closeness' with the intended effect."¹¹¹ Gordon attempts to use these distinctions to shed light on the puzzle presented by Guido Calabresi.¹¹²

At this point in her argument, Gordon discusses the Doctrine of Double Effect (DDE).¹¹³ Gordon explains that, according to the proponents of DDE, "it can sometimes be morally permissible to do an act that has bad consequences if they are outweighed by the good, so long as the harms are not directly intended."¹¹⁴ This doctrine may well be a powerful tool in some contexts, but it fails to support Gordon's arguments. First, the debate over the legalization of blackmail is not concerned with what is "morally permissible," but rather with what should be legal. This distinction is important because overeating, smoking, suicide, and homosexuality are all seen

¹⁰⁹ See generally EDELSTEIN & STEELE, *supra* note 108; ELLIS & HARPER, *supra* note 108.

¹¹⁰ See EDELSTEIN & STEELE, *supra* note 108, at 1. Edelstein and Steele explain that "[t]he way you feel emotionally, arises from the way you think. Your feelings come from your thinking." *Id.* The authors continue "[e]vents do not directly affect our psyches the way a needle in the arm causes pain (even then the pain has gone through our brain before we can feel it)." *Id.* at 2.

¹¹¹ Gordon, *supra* note 2, at 1761. The point is to focus more attention on motivations, as opposed to objective results. In gangster movies, when one gang member kills another, he sometimes declares that this it is "just business, it's not personal." In effect, he is attempting to obviate himself from the charge that the "harm is directly intended."

¹¹² See generally GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM (1985).

¹¹³ See Gordon, *supra* note 2, at 1763; see also *supra* text accompanying note 36.

¹¹⁴ Gordon, *supra* note 2, at 1763.

by many as morally impermissible, and yet, because none of them necessarily involves initiatory violence, they should not be legally proscribed. Second, no negative consequences follow from blackmail, at least as compared to gossip.¹¹⁵ The willingness, even eagerness, of the blackmailee to engage in this contractual agreement demonstrates this lack of negative consequences.

During the course of her analysis, Gordon essentially converts DDE into the "doctrine of single effect" (DSE).¹¹⁶ She explains that "when one's direct intent is to do harm, beneficial side-effects have little or no deontological significance" for purposes of analyzing blackmail.¹¹⁷ Elaborating on this point, Gordon continues:

Under my suggested correlative, DSE, one would ask if the actor would change his behavior if the *beneficial* effects were eliminated. Using that test, it appears that no significance should be given to either the lawful nature of the threatened disclosure or the potentially beneficial side effects of blackmail. Were the disclosure unlawful or impossible but the victim still capable of being frightened into paying, the typical blackmailer would extract the money anyway.¹¹⁸

Gordon's use of the phrase "were the disclosure unlawful" almost reaches the crux of the matter because, at first glance, this is precisely the point of the libertarian—the disclosure of gossip is patently *not* unlawful. This revelation is exactly the reason that banning the *threat* of that which is itself not unlawful—the disclosure of gossip—would be impermissible, and moreover illogical.

Gordon's characterization of DSE requires the inclusion of the word "properly" so that her assertion reads as follows: "Were the disclosure to be *properly* unlawful but the victim still capable of being frightened into paying, the typical blackmailer would extract the money anyway." With the addition of this qualifying phrase, Gordon's DSE conclusion logically follows. Under *these* conditions, even the libertarian would agree that blackmail, not merely extortion, should be illegal.

Consider an illustration. You hire me, among other things, to refrain from gossiping about you (for example, I am your private secretary). You pay me good money for this service, and I agree to undertake it. Then, instead of keeping my part of the bargain, I turn against you and threaten to expose your secrets unless you pay me an

¹¹⁵ See *supra* text accompanying notes 35-36.

¹¹⁶ See Gordon, *supra* note 2, at 1764-65.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1765.

additional (and very large) amount of money. Namely, I am now asking you to pay me for services for which you have already paid me (my secretarial salary). But this is the equivalent of theft.

Or consider this scenario. I blackmail you for x -dollars to keep your secret forevermore. One year later, I come back to you and demand more money as the price of my continued silence. Again, in effect, I am demanding additional money for doing what I have already contracted to do. Clearly, I am a crook.

Since stealing is a paradigm case of illegitimate behavior, at least for the libertarian, both actions should be proscribed by law on a deontological basis. If, then, Gordon accepts my "friendly" amendment, her views are fully congruent with libertarianism. But this means that people such as confidential secretaries and blackmailers too should be forced *not* to gossip, if they have contractually obligated themselves to refrain from speaking ill of the blackmailee.

Without the inclusion of the term "properly" in her discussion, Gordon's statement regarding DSE is either false or irrelevant. Gordon opines that *if* disclosure were unlawful, then the law would have to legally ban blackmail. In reality, though, disclosure is not (ordinarily) unlawful, and blackmail, therefore, should *not* be outlawed. Gordon rejects this analytical framework; she criticizes the blackmailer "because his intent is directed to the money, not to the disclosure or beneficial side effects that [the disclosure] might produce."¹¹⁹ The ordinary tradesman, such as a butcher or a baker, however, does not care at all about the benefits his customers derive from his products beyond the fact his goods will not sell unless they are pleasing to his customers.

Gordon states that "[m]y argument, by contrast, is that a threat with an immoral end can be condemned as coercive without reference to the nature of the threatened action."¹²⁰ The author fails to explain how an immoral but not coercive end possibly can be converted into a *coercive* one.¹²¹ The fact that "the blackmailer's end is harm"¹²² is of no consequence; the blackmailer's actions may be morally irredeemable, but they are certainly legal.¹²³

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1765 n.109.

¹²¹ See *supra* note 103 and accompanying text.

¹²² Gordon, *supra* note 2, at 1766.

¹²³ Gordon would punish people solely for their motives, not their acts. If she were a judge, and two blackmailers who acted identically were brought before her, she would presumably dismiss the case against the one whose motives she favored

D. *The Property Rights Objection*

As further support for the prohibition of blackmail, Gordon notes approvingly that Sir Frederick Pollack stated that "a general proposition of English law is that it is a wrong to do willful harm to one's neighbor without lawful justification or excuse."¹²⁴ This assertion, however, is an example of legal positivism.¹²⁵

Gordon mistakenly relies on malicious intent, but does not support this reasoning; for her, if there is any maliciousness involved, property rights have no relevance.¹²⁶ This would force jurists to get into the heads of defendants and begs the question of why an individual's motivations, and not his objective acts, should be made the bedrock of law. Nastiness, which has sociobiological survival value for the human race,¹²⁷ is a valuable human characteristic, fully worthy of being maintained in the panoply of our emotions. Furthermore, people have a *right* to act out of malicious motivation,

and not against the other, whose motives she opposed. This, to say the least, runs 180 degrees counter to Hayek's "The Rule of Law." See generally F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973). Gordon, presumably, would welcome the new hate crimes legislation, which would punish criminals not only for their acts, but also for their thoughts.

¹²⁴ *Id.* at 1767 (quoting Philip Halpern, *International Torts and the Restatement: A Petition for Rehearing*, 7 BUFF. L. REV. 21 (1957) (quoting FREDERICK POLLOCK, *LAW OF TORTS* (1st ed. 1887))).

¹²⁵ Legal positivism is the view that, because something *is* the law, it *should* be the law.

¹²⁶ See Gordon, *supra* note 2, at 1766. Gordon places quotation marks around the phrase "Property Right," an act that can be interpreted as her dismissal of this concept from her analysis. See *id.* More explicitly, she claims that "to demand a property right as a premise for giving protection against harm is topsy-turvy." See *id.* at 1768. This may be "topsy-turvy" in Gordon's view, but this is precisely the libertarian perspective, if her "harm" is substituted for rights violations. This is because, under the libertarian legal code, it is permissible to "harm" people in all sorts of ways (for example, competing for their customers or girlfriends), but it is always improper to violate their rights.

¹²⁷ See generally EDMUND O. WILSON, *SOCIOBIOLOGY* (1980). Sociobiology is the theory that, to a great degree, people act as they do because certain behavioral characteristics had survival value hundreds of thousands of years ago. For example, men are more aggressive than women because this enhanced the likelihood of survival of prehistoric prehuman tribes. A similar assertion can be made for nastiness. People presently are "nasty" because they are descended from ancestors who had this characteristic, which helped them survive earlier eras. If there were a tribe of "nice" humans, they became extinct because such a trait was not conducive to staying off extinction. For more on this, see generally R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984); *THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE* (J.H. Barkow et al. eds., 1992); D.M. BUSS, *THE EVOLUTION OF DESIRE* (1994); RICHARD DAWKINS, *RIVER OUT OF EDEN: A DARWINIAN VIEW OF LIFE* (1995); RICHARD DAWKINS, *THE SELFISH GENE* (1976); STEPHEN PINKER, *HOW THE MIND WORKS* (1997).

provided, of course, that they do not violate another person or the property rights of another person.¹²⁸

As her analysis continues, Gordon issues the following statement regarding the relevance of the legality of the information disclosure underlying blackmail:

It is irrelevant whether or not it would be proper for the blackmailer to disclose the information, and thus destroy something the victim may value at a price even higher than the goods demanded in the blackmail transaction. For no disclosure is intended and none occurs. Whatever justification might support disclosure, none supports a threat whose only motive and effect is to extract money or compliance.¹²⁹

If Gordon's basic premise (malicious motivations are the key to criminality, not objective invasive acts) could be accepted, at least some value could be placed on this assessment. There would, of course, still be the difficulty of discerning the blackmailer's motivation because no blackmailer would ever admit to being a central case blackmailer. Each blackmailer would claim at least some benefit, whether personal or for the "public good," in exposing the secrets of the blackmailee.

In any event, no actual blackmail can be defined as the "central case blackmail" because human motivations are so complex and multidimensional. Central case blackmail has all the earmarks of a theoretical construct, not an actual occurrence in the real world. The purpose of a theoretical construct is purely intellectual or heuristic—to sharpen our thinking or to clarify categories.¹³⁰ Anyone who expects to find a theoretical construct in the real world will be sadly disappointed. Gordon not only expects to find her theoretical construct in reality, she is basing her theory of blackmail's illegality on its presence, as well as its prevalence.¹³¹

¹²⁸ It is the essence of the libertarian philosophy that people can act out of the most base of human motivations, as long as they do not physically abuse, without permission, the persons or property of anyone else. See *supra* note 10.

¹²⁹ Gordon, *supra* note 2, at 1769-70.

¹³⁰ An example of a theoretical construct in economics is the evenly rotating economy of Ludwig von Mises. See generally LUDWIG VON MISES, HUMAN ACTION (1949). Another example in economics is the perfectly competitive model employed by most textbook writers in the field. Examples in other fields include the frictionless world in physics and the perfect vacuum in chemistry. In mathematics, examples are the line with no width or the point with neither length nor width. These constructs are all meant as nonexistent end points and can have intellectual value even though they are not found in reality.

¹³¹ See Gordon, *supra* note 2, at 1767, 1768, 1769.

Moreover, it is false for Gordon to claim, even of central case blackmail, that "no disclosure is intended."¹³² On the contrary, disclosure *is* intended, if the blackmailee remains obdurate and refuses to pay. The truth of the matter is that in this "case" the blackmailer obtains no psychic benefit from disclosure; his motive is only the money, and he receives no additional benefit from seeing the blackmailee squirm. It would be much more accurate to declare that the central case blackmailer intends no disclosure *unless* he is balked.

Furthermore, threats intended "to extract money" are not necessarily legally improper. According to Gordon's reasoning, though, the law would prohibit both bluffing in poker and hard bargaining in commerce. Thus, Gordon's critique indicates hostility to the free market, where people can buy and sell at any agreed upon price. In contrast, she implicitly supports a form of price controls, limited to whatever is necessary to preclude money "extraction."¹³³

In a successful poker bluff (for example, your victim folds even though he holds better cards than you), no disclosure of cards is intended, and none occurs, just as in central case blackmail. Why that should occasion legal opprobrium is not clear. In chess, the sacrifice of a pawn, let alone a queen, is akin to a "bluff." Were this view to become incorporated into the law of the land, it is difficult to avoid the implication that the Game of Kings would become far less interesting.

E. Comparing Blackmail with the Ordinary Commercial Transaction

Gordon next addresses directly the libertarian view of blackmail.¹³⁴ She is one of the very few mainstream writers on blackmail to have seriously considered the libertarian perspective on this matter.¹³⁵

¹³² *Id.* at 1769-70.

¹³³ *Id.* One might well argue that Gordon is doing a bit more than "implicitly" supporting price controls. When someone opposes money "extraction," he is indicating that certain prices should be illegal. For example, suppose it costs five dollars to manufacture a wristwatch, and Gordon is willing to concede that a profit of one dollar is not "extractive." If the manufacturer charges more than six dollars, the difference between that amount and six dollars would be an "extraction" of the customer. If the price is nine dollars, then the extraction is three dollars. Because Gordon opposes extraction, she must, if she is to be logically consistent, favor a price maximum (or price control) over the wristwatches of six dollars.

¹³⁴ See Gordon, *supra* note 2, at 1770-71.

¹³⁵ Gordon, however, is not the only mainstream writer to address the libertarian perspective. See, e.g., POSNER, ANALYSIS, *supra* note 26, at 1817-18, 1828, 1832.

Libertarians, Gordon correctly states, see no legal distinction between blackmail and ordinary commercial transactions. She disagrees with this view on three distinct grounds. First, Gordon maintains that "the central case blackmail transaction is nonallocative, while the ordinary commercial exchange is allocative."¹³⁶ Her claim is that "social welfare" would decrease under blackmail, but not under ordinary trade.¹³⁷ This concept, however, is logically incoherent without interpersonal comparisons of utility, and the latter are invalid.¹³⁸ The point is that, because one person's utility cannot be compared with another's, there *is* no such thing as social welfare. Without this latter concept, Gordon's criticism fails.

Gordon's second criticism of libertarianism is that "the blackmailer intends to harm."¹³⁹ This, however, is frequently true: it applies to Don Rickles, every nagging wife, every scolding parent, every boss chewing out an employee, every employee bad-mouthing the firm that employs him, every teacher upbraiding a student, every pupil criticizing a professor. Even Gordon, in the present context, "intends to harm" libertarianism, at least insofar as her argument pertains to blackmail.

Gordon's third critique of the libertarian perspective of blackmail is that "the buyer of silence in an extortion transaction suffers a net harm, while the buyer in an ordinary transaction is benefited."¹⁴⁰ This assertion, though, contains two errors. First, the victim of *extortion* is the buyer of *protection* against the threat of violence. In contrast, the buyer of *silence* is the target of *blackmail*. The victim of *extortion* does indeed suffer a net harm, but the *blackmailee*, as has been shown,¹⁴¹ is a net beneficiary of the blackmail transaction. Gordon herself admits this when she concedes that "the victim may value (silence) at a price even higher than the goods

¹³⁶ Gordon, *supra* note 2, at 1770.

¹³⁷ See *id.* at 1750 n.54.

¹³⁸ See ROTHBARD, UTILITY AND ECONOMICS, *supra* note 58, at 21. An interpersonal comparison of utility is of the following sort: Alice likes apples more than Bill likes beans. It is one thing to say that Alice is shorter or weighs less or can run faster than Bill; there are scientific measures of distance, weight, and speed. There are, however, no units of happiness, or likes and dislikes, on the basis of which interpersonal comparisons of utility can be made. Of course, such determinations are made as a matter of everyday living. This can hardly be the basis of sound public policy, which should be based on scientific considerations, not feelings and subjective estimations of the sort made in everyday life.

¹³⁹ Gordon, *supra* note 2, at 1770.

¹⁴⁰ *Id.*

¹⁴¹ See *supra* note 4 and accompanying text.

demand in the transaction."¹⁴² The second error in Gordon's third critique relates to her claim that the "buyer in an ordinary transaction is benefited." This is necessarily true in the *ex ante* sense only, not in the *ex post* sense. That is, the buyer must always anticipate that something about the purchase is worth more than the cost, but this need not be true from the historical perspective. While we usually are happy with the purchases we make, afterward, the existence of department store refunds is dramatic testimony to the fact that this is not always the case. But no less is true with blackmail. The blackmailee is, by definition, satisfied with his commercial interaction in the *ex ante* sense, and usually, but not always, in the *ex post*.

1. Intent to Harm

In her analysis, Gordon offers a somewhat peculiar definition of "exploitative";¹⁴³ according to her, the term means "getting something for nothing."¹⁴⁴ Gordon claims that "most person's sense of self respect"¹⁴⁵ would prevent them acting in such an improper manner and would require some degree of reciprocity in the bulk of their transactions.¹⁴⁶ This assertion is untrue. Israel M. Kirzner has carefully and exhaustively studied entrepreneurship.¹⁴⁷ According to Kirzner, the essence of entrepreneurship is precisely the ability to get something for nothing.¹⁴⁸ Moreover, people often wait in long lines

¹⁴² Gordon, *supra* note 2, at 1770.

¹⁴³ See *id.*

¹⁴⁴ *Id.* at 1771.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See generally ISRAEL M. KIRZNER, COMPETITION AND ENTREPRENEURSHIP (1973) [hereinafter KIRZNER, COMPETITION]; ISRAEL M. KIRZNER, DISCOVERY AND THE CAPITALIST PROCESS (1985); ISRAEL M. KIRZNER, DISCOVERY, CAPITALISM AND DISTRIBUTIVE JUSTICE (1989); ISRAEL M. KIRZNER, THE ECONOMIC POINT OF VIEW: AN ESSAY IN THE HISTORY OF ECONOMIC THOUGHT (1975); ISRAEL M. KIRZNER, MARKET THEORY AND THE PRICE SYSTEM (1963); ISRAEL M. KIRZNER, PERCEPTION, OPPORTUNITY AND PROFIT (1979). It is no exaggeration to say that, for Kirzner, the very *essence* of entrepreneurship is to "get something for nothing." The entrepreneurial act is, in effect, to seize a ten-dollar bill out of thin air (by noting unmet consumer needs and acting to satisfy them).

¹⁴⁸ See KIRZNER, COMPETITION, *supra* note 147, at 48. Kirzner states:

The pure entrepreneur . . . proceeds by his alertness to discover and exploit situations in which he is able to sell for high prices that which he can buy for low prices. Pure entrepreneurial profit is the difference between the two sets of prices. It is not yielded by exchanging something the entrepreneur values less for something he values more highly. It comes from discovering sellers and buyers of something for which the latter will pay more than the former demand. The discovery of a profit opportunity means the discovery of something obtainable for

at the opening of a new bank branch for a free toaster or at the establishment of a new restaurant in order to obtain a free hot dog. There is no reason why this is any "less desirable . . . than engaging in commercial activity that involves exchange."¹⁴⁹ And even if it were indeed "less desirable," why should this be an issue on which the law should cast its baleful eye?

In essence, Gordon sees extraction without reciprocity as exploitation, which is "less attractive" than an exchange.¹⁵⁰ Blackmail, however, is a mutual exchange, *not* an extraction, as Gordon characterizes it. Blackmail is a mutually agreeable contract according to which one party agrees to refrain from disclosing information and the second party agrees to compensate the first party for that silence.¹⁵¹

2. Harm and Benefit

Gordon rejects the notion that "a benefit . . . can be defined as . . . the return of something that the other party stole only a moment before."¹⁵² Even this is not strictly true, because if someone steals something from you, surely you would prefer that he gives it right back, rather than keep it. The former is bound to be more beneficial than the latter. Here, Gordon is correctly focusing on initial property rights; if an item is stolen and then returned, the owner is hardly better off if both occur than if neither did. Gordon's adherence to property rights analysis, however, is only superficial. Instead of looking at just ownership, Gordon offers three conditions that must be satisfied in order to determine that harm has occurred. These conditions are:

(1) the thing the seller wants the buyer/victim to purchase is such that the buyer would be better off . . . if the seller and his resources did not exist, (2) the buyer/victim would be better off if the transaction were impossible . . . and, (3) the buyer/victim has done nothing to the other party that would give that party a corrective justice right against her.¹⁵³

Indubitably, there are cases in which I would be better off if you did not exist, and thus your very existence is "harmful" to me, such as

nothing at all. No investment at all is required; the free ten-dollar bill is discovered to be already within one's grasp.

Id. (emphasis added).

¹⁴⁹ Gordon, *supra* note 2, at 1771.

¹⁵⁰ *See id.*

¹⁵¹ *See supra* note 4 and accompanying text.

¹⁵² Gordon, *supra* note 2, at 1771.

¹⁵³ *See id.* at 1772.

when two people have offered competing marriage suits for the same individual. Yes, you have harmed me by your very existence as a competitor of mine; I would be better off if you simply disappeared (an issue that should be irrelevant to law), but you have hardly violated my rights (which should be the entire focus of the legal system).

Gordon, as an illustration of the second criteria, considers a situation in which a plaintiff sues a defendant for damages created by a falling tree.¹⁵⁴ The author concludes that "[t]he landowner would be worse off if settling lawsuits were impossible."¹⁵⁵ While this seems reasonable over the long term, it is an empirical question. If the landowner is an old man who has no interest in what occurs to society after he dies, and the lawsuit will take away all of his money, and he is not likely to be a plaintiff in the future in any case, he may reasonably prefer a situation in which lawsuits are impossible.

On the basis of this idiosyncratic analysis, Gordon declares that "the injured passerby is not harming the landowner if he extracts money in settlement or suit."¹⁵⁶ This assumption, however, appears rather counterintuitive because the sole function of the landowner's lawyer is to help the landowner to avoid making any payment if at all possible. Why would he want to do that if the suit were not deemed harmful to his client? Here, Gordon is again conflating harm and rights violation. Whether the victim has done anything wrong to the victimizer is totally irrelevant. If I beat you out in my marriage proposal to the woman we both love, you are the victim, and I, the victimizer. You may never have violated any of my rights beforehand, such that I have a "corrective justice right" against you. Nevertheless, I am entirely within my rights to press my marriage suit, even if it greatly vexes you. Gordon similarly refuses to examine the property rights in question when she states:

[I]t does not matter whose resources the information is
[E]ven if, as libertarians contend, the blackmailer "owns" the information, it is clear that the purchaser/victim is worse off in a world where the blackmailer and that resource exist. The blackmailer is therefore using that information in a way that harms the victim.¹⁵⁷

¹⁵⁴ See *id.* at 1772 n.140.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1773. Only three possibilities exist regarding the rightful ownership of this information: either the blackmailer, the blackmailee, or third parties, such as a husband who would be interested in learning of his wife's infidelity. Lindgren claims that the information belongs to third parties, despite the fact that they did nothing

In some sense, the blackmailer does harm the blackmailee because the latter would vastly prefer that the former had never come upon his secret. Mere harm, however, should not be actionable, otherwise no competition of any sort could exist, whether in commerce, sports, or anything else.

Secondly, if the blackmailee is "harmed" by the blackmailer, he would be harmed to a far greater degree if, instead of the blackmailer unearthing his secret, it is revealed by the gossip. At least the former will allow the "victim" to buy his way out of his quandary—the latter will not. Surely, then, if Gordon is willing to imprison the blackmailer, she must favor punishing the gossip far more seriously. Curiously, she entirely avoids the case of the gossip.

But worse; if for Gordon it does not really matter who properly owns the secret information, then all talk of "chips"¹⁵⁸ is then just so much obfuscation; and so too vanishes any pretense of deontology. Contrary to her claims, Gordon's, then, is a theory of blackmail that rests entirely on utilitarian considerations. Matters of right and wrong simply do not enter into the picture.

V. CRIMINALIZATION

Having established, at least to her own satisfaction, that central case blackmail is harmful, unjustified, purposeful, wrongful, and immoral, Gordon then considers whether it should be criminalized.¹⁵⁹ This conclusion would appear to follow, in her opinion, from the "liberal view,"¹⁶⁰ at least as adumbrated by John Stuart Mill¹⁶¹ and Joel

to earn this information. See generally Lindgren, *Paradox*, *supra* note 17. In Jeffrie G. Murphy's view, this knowledge properly belongs to the blackmailee. See generally Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 *MONIST* 156 (1980). If this were true, gossip would be illegal because the gossipier, in effect, would be stealing this information from its rightful owner, the gossippee. No one, however, has followed this claim to its logical conclusion, which would call for the abolition of the right to free speech, as it involves gossip.

¹⁵⁸ Gordon, *supra* note 2, at 1777.

¹⁵⁹ *Id.* at 1775.

¹⁶⁰ *Id.* Gordon explains the "liberal view" as holding "that only the presence of harm toward others justifies criminal prohibition." See *id.* This, however, is nonsense. One baseball team can "harm" another by winning a game, but the members of the winning team should not be incarcerated for their actions. A far better way to characterize this view would be to consider the libertarian approach, in which only the violation of personal or property rights justifies criminal prohibition. Blackmail "harms" the blackmailee compared to the situation in which the potential blackmailer merely remains silent; blackmail, however, does not harm the blackmailee compared to the situation in which the gossip has unearthed the secret. All of this is irrelevant to the libertarian because blackmail does not violate any right possessed by the blackmailee.

Feinberg.¹⁶² In the author's analysis, however, the issue of whether gossips ought to be jailed never arises. Also, Gordon fails to reckon with the fact that drugs, cigarettes, gambling, alcohol, pornography, prostitution, and other such victimless acts would also seem to fit the "liberal" case for prohibition. Instead of addressing the criminality of these activities, Gordon veers off into an economic discussion of blackmail.

A. *The Effects of Blackmail Law on Victim Behavior and Perceptions: Character Formation*

Gordon claims that "blackmail prohibition . . . may encourage character-formation that discourages bad acts."¹⁶³ This is counterintuitive because criminalizing blackmail discourages blackmailers. Gordon concedes as much when she states that "criminalizing blackmail has an obvious goal of discouraging potential blackmailers from undertaking blackmail."¹⁶⁴ The blackmailer, though, with his ferret-like behavior, tends to strike terror into the man contemplating an immoral act. The blackmailer is, in effect, a police officer who is highly motivated and skillful because he is private.¹⁶⁵ Reducing the blackmailer's scope will increase such acts as cheating and philandering, at least if it is assumed that

¹⁶¹ See generally JOHN STUART MILL, ON LIBERTY (Gertrude Himmelfarb ed., 1988) (1859). This essay argues for liberty on utilitarian grounds; liberty is a good because it leads to the greatest amount of happiness for the greatest number of people. According to Mills, however, "[i]f all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind." *Id.* at 16.

¹⁶² See Gordon, *supra* note 2, at 1775 & n.151 (citing MILL, *supra* note 161, at 91-92); FEINBERG, *supra* note 40. Joel Feinberg, in articulating the different viewpoints as to the moral limits of criminal law, defined the "Harm Principle" as follows: "[i]t is always a good reason in support of penal legislation that it would be effective in preventing . . . harm to persons other than the actor (the one prohibited from acting), and there is no other means that is equally effective at no greater cost to other values." JOEL FEINBERG, HARMLESS WRONG-DOING: THE MORAL LIMITS OF THE CRIMINAL LAW xix (1988) (emphasis added). Feinberg then defined the "Offense Principle" as follows: "It is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offense to persons other than the actor and would be an effective means to that end if enacted." *Id.* Finally, Feinberg defined the "Liberal Position" as follows: "[T]he harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions." *Id.*

¹⁶³ Gordon, *supra* note 2, at 1776 n.154.

¹⁶⁴ *Id.*

¹⁶⁵ See generally WOOLRIDGE, *supra* note 10.

the greater the likelihood of being caught, the less likely a person is to engage in the act in the first place.

In contrast, Gordon's musings focus mainly on the notion that legalization "might not only increase the threat related use of information already possessed, but might also increase the expenditures made on acquiring new information."¹⁶⁶ Even if this is true, it is an empirical issue and would result in only the increasing exposure of a *decreasing* number of bad acts. Whether the incidence of blackmail ultimately would be greater or less is difficult to say, but Gordon's original claim that "blackmail prohibition . . . may encourage character-formation that discourages bad acts" is clearly unproven.

*B. The Effects of Blackmail Law on Victim Behavior and Perceptions:
Counterleverage*

Gordon claims that blackmail prohibition gives "victims" counterleverage in that "by threatening to go to the authorities *if and only if disclosure is made*, victims can discourage blackmailers from disclosing the contested information."¹⁶⁷ This assumption has several problems. For one, Gordon has not yet succeeded in showing that blackmail is legally horrendous. Because she leaves gossip unscathed, there is no justification for her efforts to condemn the blackmailer. Second, the information in question is not "contested." Rather, Gordon is on record as giving up on this "contest."¹⁶⁸

For argument's sake, assume that Gordon's argument is a worthwhile undertaking—that for some reason, the blackmailee must be protected from disclosure by law. Gordon thinks that the only way to accomplish this is to make blackmail illegal. This, however, is not so because the same goal can be obtained through legalization. Under a legalization scheme, the blackmailee would pay the blackmailer to keep his silence. If the blackmailer takes the payment and still threatens exposure, the blackmailee would then be able to avail himself of the courts, not for blackmail, but for contract violation. That is, while blackmail would be legal, it certainly would not be within the purview of the law to agree to this contract (silence for money) and then to turn around and break it (having taken the money, refuse to keep silent as so stipulated).¹⁶⁹

¹⁶⁶ Gordon, *supra* note 2, at 1776.

¹⁶⁷ *Id.* at 1777.

¹⁶⁸ See *id.* at 1773 ("[I]t does not matter whose resources the information is . . . even if, as libertarians contend, the blackmailer 'owns' the information.").

¹⁶⁹ Under Gordon's legal dispensation, the blackmailee would not have to make

Additionally, counterleverage, whether of the sort that our author favors or of the sort created by blackmail legalization, is itself *blackmail*. Gordon devotes an entire law review article to the iniquities and impropriety of blackmail and then champions a version of it herself. Gordon is not without a reply to this charge as she states:

Unlike the blackmailer, who uses the threat of disclosure to force the victim to give up something . . . to which the blackmailer has no right, the victim engaging in counter blackmail is using her threat to enforce her rights—to force the blackmailer to cease his wrongful behavior towards her. Since this is the victim's "own chip," and the use of the chip as leverage is neither "unproductive" nor an "unjustified harming," the victim should be permitted to make this counter threat.¹⁷⁰

This rationalization, however, is insufficient; blackmail is blackmail, whether for purposes of which Gordon approves or not. If the motivation of the blackmailer is at issue, one can concoct many cases in which the blackmailer acts for what Gordon might consider "good purposes." For example, consider a situation in which an individual refuses to repay a significant debt because the debt holder has no proof that any money is owed. The debt holder cannot proceed with a legal action, so instead he blackmails the recalcitrant debtor for the exact amount of money owed.

Another difficulty is that Gordon takes inconsistent positions within her article. At one point, she states that "it does not matter whose resources the information is. . . . [E]ven if, as libertarians contend, the blackmailer 'owns' the information."¹⁷¹ Later, Gordon claims that who owns the information matters very much; in her view, the counter blackmailer owns the information.¹⁷² Gordon's second position is correct in at least one point; all blackmailers, "counter" ones along with all the rest, own the information they use. Gordon has yet to show this does not apply in all cases.

the initial payment, but under that posited in this Article, he would be required to do so. In both cases, however, the blackmailee would then be safe from further demands for money. Thus, under the libertarian system, the blackmailer could legally obtain whatever funds he could bargain for, while under the present prohibition, he could not. The justification for making the blackmailer richer, and the blackmailee poorer, is that the former is the *legitimate owner* of the information that he employs to his own ends. Because Gordon explicitly refuses to challenge this claim, she should not question a logical implication made from it.

¹⁷⁰ Gordon, *supra* note 2, at 1777.

¹⁷¹ *Id.* at 1773.

¹⁷² *See id.* at 1777.

*C. The Effects of Blackmail Law on Victim Behavior and Perceptions:
Anger*

Gordon defends blackmail prohibitionism on the ground that it will stiffen the spines of blackmailees and make them more resistant to the threats of blackmailers. The author explains that "[i]f one assumes that acts of blackmail impose net costs on society, then the socially beneficial response to a blackmailer is to resist in order to convince potential blackmailers that blackmail never succeeds, and thus to silence their threats."¹⁷³ However, if one *really* wants to promote resistance, and is a utilitarian (for example, unconcerned with the niceties of justice), then one can go further. Why not make it illegal to pay blackmail? True, this, according to Gordon's perspective, would victimize the blackmailee a second time—once by the blackmailer and then by the government—but it would promote resistance.

Another difficulty is that acts of kidnapping certainly "impose net costs on society." If people never paid off kidnappers, and this were known for sure, this behavior would cease forthwith. Thus, according to Gordon's brand of utilitarianism, the state should imprison not only kidnappers, but also all those who cooperate with them by paying them off. This, it would appear, is the "honorable" thing to do.¹⁷⁴

Of course, libertarian law would give short shrift to such suggestions. It is the kidnapper who violates rights, not the family member of the kidnappee who merely wants the safe return of his loved one, and is willing to pay for it. Nor is the blackmailee who pays for silence guilty of any rights violation. Nor, for that matter, is the blackmailer.

Gordon asserts that "[s]ometimes we legislate against something in order to keep our sense of outrage alive."¹⁷⁵ As a report of legislative activities, this is unexceptionable; surely laws against drugs, pornography, and prostitution are instances of this tendency. Gordon, however, is not merely reporting on this phenomenon, but is instead supporting it, at least in the case of blackmail. But if for blackmail, why not for these other activities?

¹⁷³ *Id.* at 1780.

¹⁷⁴ *See id.* at 1779.

¹⁷⁵ *Id.* at 1780.

CONCLUSION

To sum up this critique of Gordon's argument for the prohibition of blackmail, central case blackmail is but a special case of this activity. Gordon's analysis, even if correct, would only reach this special case; all other forms of blackmail would still be justified. Gordon, however, has not succeeded even in this small area. The simple facts that the blackmailer derives no additional value from exposing the secret of the blackmailee and that his only motivation is pecuniary do not demonstrate that he is not the rightful owner of the informational "chip" of which Gordon speaks. Neither do these facts indicate that the blackmailer has invaded the person or property of the blackmailee. These assertions by Gordon cannot be maintained when compared to the actions of the gossip, whom Gordon never mentions in her analysis.