BLACKMAIL: AN AFTERWORD

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The struggle to understand blackmail is a struggle for the soul of the criminal law. Is the criminal law efficiency-based or morality-based? Is it based on harm or exploitation? What constitutes coercion? All these problems are explored in this Symposium on blackmail. I believe that the ultimate contribution of these papers will reach far beyond the confines of blackmail. They represent a significant step on the road toward understanding coercion in a broader sense than that which prevails in the philosophical literature, and toward seeing exploitation as a principle competing with harm as a basis for the criminal law.

This Symposium collects papers on blackmail by economists, philosophers, and theorists of the criminal law. They were presented at a conference at the University of Pennsylvania Law School on January 29, 1993.[1] The problem they tackle is one of the most elusive intellectual puzzles in all of law—the paradox of blackmail. Why doesn't the law allow you to threaten to take an action that you have a moral and legal right to take while seeking something that you have a moral and legal right to seek? For example, I commit blackmail if I seek a job or money by threatening to expose a crime or extramarital affair. Why do two rights make a wrong?[2]

Reading the articles, I am struck by the playfulness, creativity, and enormous analytical abilities of the participants. Indeed, I chose to write an afterword rather than a foreword because I didn't want to accept the responsibility for introducing such an illustrious group of participants and articles to the world. The authors can speak far more eloquently for themselves—and probably more accurately. I feel a bit like the little man who follows after a parade, cleaning up after the elephants.

Relieved of the normal responsibility of introducing the articles, I can now indulge myself in an idiosyncratic analysis of the issues

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[1] The conference was conceived by Leo Katz and me and sponsored by the University of Pennsylvania Law School and its Law Review.

[2] *See* James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984).

that brought out the strongest responses in me. Despite the unusually high quality of the papers, one common line of argument seems unwarranted. A large number of the papers, both morality-based and efficiency-based ones, seem to assume that the information that is the subject of blackmail wouldn't be released without the incentive for blackmail. This assumption is necessary for some moral theorists to find blackmail coercive and for some economic theorists to find blackmail wasteful. But the empirical claim that the information otherwise wouldn't get out is probably false. This questionable assumption leads to a related problem in some papers—the assumption that blackmail is coercive in the sense of limiting options. Perhaps the most interesting contribution of this conference (found in Leo Katz's paper in particular) is the doubt raised that blackmail—and the criminal law in general—is based on coercion in the option-limiting Nozickian sense. Perhaps restricting the victim's legal options is just one kind of coercion.

In this Afterword, I will defend my own theory of blackmail, which is both the most complimented and the most criticized of the theories discussed in the Symposium. I would like to say that every good thing said about my theory is true and that every bad thing said about my theory is false; I would like to say that, but I can't. I won't bore readers with a point-by-point answer to all charges. Rather, I will cover the more interesting and challenging criticisms—criticisms that illustrate both how far we've come and how far we've left to go.

I. MORALS

In the first two articles, Leo Katz and George Fletcher offer the comforting suggestion that the crime of blackmail isn't so strange after all. Katz argues that, in other areas of the criminal law, we have no problem criminalizing the harms that defendants do to their victims, even if the victims choose the harm. Fletcher argues that blackmail involves domination by the blackmailer over his victim, the most traditional of reasons for making behavior criminal.

In *Blackmail and Other Forms of Arm-Twisting*, Leo Katz makes the case for a moral approach to the criminal law. Undoubtedly, his major contribution is the solution he offers to what he terms the "punishment puzzle." If, as in blackmail, someone adds to the victim's choices, how can he be said to have done a wrong? Katz answers this puzzle by proceeding through several examples from other areas of the criminal law to show that we punish someone for

the underlying wrong they do even when they give the victim an additional option. For example, assume that a thief who breaks in to steal some jewelry beats the victim rather than robs him because the victim prefers that course. There is no problem here in punishing the thief for battery. Katz is on to something important. Even someone who is increasing a victim's options may be coercive in a larger sense of threatening or doing harm. Nozick's definition of coercion is too narrow to catch the full range of what the criminal law counts as coercion, including the kind of coercion present in blackmail.

Katz and I part company over his solution to the paradox. Katz assumes that what the blackmailer threatens to do is immoral. But this merely assumes away the paradox, which is in part that often what the blackmailer threatens to do is a moral right. Exposing a serial killer or a tax evader is almost always a good thing, not a moral wrong. Other actions are not clearly right or wrong: telling a woman friend that her husband is cheating on her, or reporting a worker for being late to work. What's wrong is to threaten to take money for silence.

Consider two variations of the following situation: A worker comes late to work and misses an important meeting, a lapse for which she might or might not be fired:

> Variation 1. The worker's supervisor threatens to report her to higher management unless she comes to work on time every day for the next six months and does her job exactly as the supervisor requests. The result: No Blackmail.
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> Variation 2. The supervisor makes the same threat unless she pays him $50. The result: Blackmail.

In the first situation, the threatener uses the firm's leverage for the firm's gain—hence, no blackmail. In the second situation, the threatener uses the firm's leverage for individual gain, hence, blackmail. This misuse of other people's leverage for personal gain seems to me to be the heart of blackmail. Yet contrary to Katz's theory, the disclosure itself would be neither right nor wrong. Unless one accepts some version of this theory concerning misuse of other people's leverage,[3] I think that it's hard to distinguish these two situations.

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[3] For a long excerpt presenting this theory in this Symposium, see James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1705-07 (1993).

These examples also pose problems for George Fletcher's theory of blackmail, presented in *Blackmail: The Paradigmatic Crime.* In his domination explanation for blackmail, Fletcher seems to have accurately caught part of blackmail, but I think that one still needs to distinguish permissible domination from impermissible domination. In the first (legal) variation above, the dominance seems to be greater than in the second (illegal) variation. Indeed, the supervisor's commission of a crime in Variation 2 gives the worker countervailing power over the supervisor.[4] What distinguishes these two variations isn't the degree of domination, but rather the misuse of employer leverage. It's not that Fletcher is wrong. It's just that his analysis may be incomplete.[5]

In *A Patchwork Theory of Blackmail,* Scott Altman is clearly on the right track. He sees blackmail as being based on exploitation and coercion. I agree. Although my theory had based blackmail on (1) wrongful gain and (2) coercion or a threat, Altman is far clearer than I was on the presence of both elements. While I see coercion as being much broader and vaguer than he does (almost any threat of harm will do), I see exploitation as being much narrower (only threats of unlawful harm and the misuse of leverage count in blackmail). I do disagree with Altman's claim, made more absolutely by others, that "[w]ithout the opportunity to negotiate, most blackmailers would not reveal the information."[6] And, as he admits, where information would have been released anyway, blackmail isn't coercion in his sense.

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[4] Even if this weren't a crime, the act would still be immoral because of the misuse of the employer's leverage for personal gain.

[5] Fletcher also correctly distinguishes two similar situations—if someone who might embarrass a politician during a campaign accepts a payoff to go away, it isn't criminal, while someone who threatens to stay and embarrass the politician unless paid off commits blackmail. If the latter example is in fact criminal, the reason Fletcher gives is the right one. One involves domination (or at least a threat). The other doesn't. Where Fletcher goes awry is his suggestion that my theory can't handle this distinction because both involve bargaining with someone else's chips. What he, DeLong and Altman appear to have overlooked is that my theory of blackmail first requires a threat. Admittedly, in my 1984 article, I didn't spend much time analyzing that element, quickly moving to the main question: "The problem is to distinguish legitimate threats from illegitimate ones." Lindgren, *supra* note 2, at 702. Yet I further distinguished legitimate examples of receiving money to help conceal information from blackmail, because "Without a threat or coercion, blackmail has not been committed." *Id.* at 706. My theory has always required a threat or coercion of some sort, which is comparable to Fletcher's domination requirement.

[6] Scott Altman, *A Patchwork Theory of Blackmail,* 141 U. PA. L. REV. 1639, 1641 (1993).

Sidney DeLong's and my article in this Symposium are virtual mirror images of one another. I look at bribery law to show that the same misuse of other people's chips that I think explains blackmail is present in bribery. Thus, what seems a weak normative argument for criminalizing blackmail may be nearly as strong as the normative arguments for criminalizing other misuse-of-leverage crimes: bribery, commercial bribery, payola, and insider trading.

DeLong's paper, *Blackmailers, Bribe Takers, and the Second Paradox*, stands my argument on its head, and represents to my mind the most powerful challenge to my blackmail theory to date. He agrees that bribery involves the same use of other people's chips as blackmail, but draws the opposite conclusion. If both voluntary payoffs to individuals and blackmail involve the same wrong, then why are many voluntary payoffs to individuals not criminal? The answer to the question may lie in coercion or the threat, the element of my original theory that I didn't analyze and that some commentators seem to have overlooked in their criticisms. That area is where further work most needs to be done.[7] DeLong suggests that the crucial distinction is who is the real initiator or actor, the person knowing the secret or the person paying to suppress it. One wonders how he fits the many cases in which bribes are solicited.[8]

One of DeLong's odder arguments is that my theory is incomplete because, supposedly, my theory can't explain the following situation:

> [I]n order to protect his mother's feelings, a son pays a menace who threatens to expose his father's marital infidelity to his mother. The victim, the son, is not exposed to any leverage by his mother, who cannot use the information in any way to harm him. Nor is the son acting as an agent on behalf of his father to protect him from his mother's leverage.[9]

It is certainly true that I didn't try to explain this case (nor has anyone else who I'm aware of). But, since my theory involves a blackmailer who insinuates himself into a potential dispute that is

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[7] Perhaps the philosophical distinction that I raise for public official extortion applies in the private sphere. *See* Lindgren, *supra* note 3, at 1695. Bribes become criminal when they buy unfairly positive treatment (such as perjured or no testimony). Private blackmail involves threats to make the victim worse off than she is now worse off than she expects to be, or worse off than she deserves to be.

[8] *See id.* at 1703 n.28.

[9] Sidney W. DeLong, *Blackmailers, Bribe-Takers and the Second Paradox*, 141 U. PA. L. REV. 1663, 1681 (1993).

less his than someone else's, I would think that my theory would do a particularly good job of explaining such cases. Although my language would have to be slightly altered to reflect the odd situation, I had concluded in 1984 that

> [w]hat makes his conduct blackmail is that he imposes himself parasitically in an actual or potential dispute in which he lacks a sufficient direct interest. What right has he to make money by settling other people's claims?
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> . . . Under my theory, blackmail is the seeking of an advantage by threatening to press an actual or potential dispute that is primarily between the blackmail victim [here the victim's mother for whom the son is acting as agent] and someone else. The blackmailer turns someone else's power . . . to personal benefit. The bargaining is unfair in that the threatener uses leverage that is less his than someone else's.[10]

Although DeLong has come up with a new wrinkle in fact situations, an exploitation theory should be able to handle it fairly easily.

Wendy Gordon does her usual dazzling job of playing with some of the ironies and inconsistencies in our thinking about blackmail. In *Truth and Consequences: The Force of Blackmail's Central Case*, she takes a decidedly moral approach, bringing deontological thinking to bear. She argues that resistance to evil is a fundamental virtue. She explores, as does Judge Posner, the counter-leverage problem. By committing the crime of blackmail, the blackmailer gives his victim counter-leverage that strengthens the victim's hand in bargaining. Gordon also brings her intellectual property work to bear by pointing out that both the criminal law, and more commonly the tort law, recognize invasions of nontangible, nonproperty interests—assault, intentional infliction of emotional distress, interference with prospective advantage, and New York's prima facie tort.

Russell Hardin's *Blackmailing for Mutual Good* chides me and others for jumping from the description of particular judgments about cases to conclusions about the morality of blackmail. Hardin, a utilitarian philosopher, argues that: "We must go to the larger institutional level to grasp the full implications of a rule of law for the general incentives it produces and other effects it may have."[11]

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[10] Lindgren, *supra* note 2, at 702-03.

[11] Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787, 1788 (1993).

Most philosophers of the criminal law are not so instrumentally driven as Hardin. Further, if one takes the standard idea that the criminal law is based on harm plus wrongful intent, I think that whether something counts as harm often turns on whether it's wrong. One can't always know whether a law leads to harmful consequences without simultaneously knowing whether those consequences are unfair or wrong. My method is that of the analytic philosopher—trying to carefully explain what's in the concept, what's not, and why borderline cases are borderline cases.[12]

With considerable sophistication and insight, Hardin explores blackmail bargains for mutual advantage, suggesting that perhaps they ought not to be criminal. In keeping with his overall approach to establishing the criminality of behavior, he's not sure of the right answer, for he believes that the right answer turns on how things work out in practice.

Hardin also finds blackmailing in the public interest to be difficult to explain. His example is the threats by prosecutors in the Spiro Agnew case to remove him from the line of succession should President Nixon resign or be impeached. My "chip" analysis would explain this use well. To the extent that prosecutors need public leverage for public benefit, there is no blackmail. With his consequentialist approach, Hardin serves as a transitional figure to the second group of contributors—the economists and their fellow-travelers.

II. ECONOMICS

In *Blackmail, Privacy, and Freedom of Contract*, Richard Posner takes up, expands, and alters his brief 1975 treatment of blackmail in *The Private Enforcement of Law*,[13] co-authored with Bill Landes. I have always liked Posner's theory better than most of the others (except my own), despite our different world views. Both of us see someone who threatens to expose criminality or tortious behavior as trading on leverage that properly belongs to others. Where we differ most substantially is in the treatment of threats to expose voluntary immoral, but not illegal behavior. There I use the same

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[12] For an example of this mode of reasoning, see the Cambridge philosopher, JOHN WILSON, THINKING WITH CONCEPTS (1963).

[13] William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 42-44 (1975).

leverage theory, but Posner takes several other approaches to try to explain this type of blackmail. I think that he sacrifices descriptive and conceptual accuracy to try to get a stronger normative explanation of harm, while my theory sacrifices normative strength for conceptual accuracy. With more honesty than most of the rest of us can muster, he admits that his arguments against this form of blackmail are "hardly conclusive."[14] But then, neither are the arguments for decriminalizing it.[15] Posner is also one of the few theorists who recognizes the importance of gossip in spreading information.

We are particularly fortunate to be publishing for the first time Douglas Ginsburg's seminal article on blackmail, *Blackmail: An Economic Analysis of the Law*. Ginsburg presented the article publicly in 1979, but for whatever reasons, refrained from publishing it until now. Nonetheless, Ginsburg's article stimulated me to first write about blackmail in the fall of 1981 (published in 1984)[16] and Richard Epstein to write his blackmail article in 1982 (published in 1983).[17] It may have also influenced Ronald Coase in his 1988 article,[18] though Coase had first introduced Ginsburg to blackmail while Ginsburg was Coase's student in law school. Ginsburg argues that allowing blackmail would encourage the waste of resources in digging up dirt only to suppress it or at least promote wasteful bargaining with no net social gain. I have examined Ginsburg's article in some detail elsewhere,[19] but he has added an epilogue here that refines his argument further to close most (but not all) of the gaps I identified. Where we ultimately disagree is in our assumptions about whether threats of disclosure would tend to be carried out, except to increase one's reputation for doing harm. Ginsburg looks to the costs of publicity rather than the psychic benefits, and concludes that people would remain silent.

In *An Economic Analysis of Threats and their Illegality: Blackmail, Extortion, and Robbery*, Steven Shavell provides the most careful and thoughtful analysis in the literature of bargaining incentives in blackmail. He brings in some of the fascinating literature on how to make threats credible, particularly in repeat bargaining. And,

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[14] Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1835 (1993).

[15] *See id.*

[16] *See* Lindgren, *supra* note 2.

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

[18] *See* Ronald H. Coase, *Blackmail*, 74 VA. L. REV. 655 (1988).

[19] *See* Lindgren, *supra* note 2, at 694-97.

unlike many other contributors to this Symposium, he assumes that the direct cost to a blackmailer of actually carrying out his threat is ordinarily trivial. He doesn't argue that the information that is the subject of blackmail would be likely to be exposed in any event, but he comes close. His discussion of incentive effects suggests that, if blackmail were legal, resources would be wasted by individuals solely to protect their privacy even from inadvertent exposure and subsequent blackmail.

Joseph Isenbergh, in *Blackmail From A to C,* uses Coasean analysis to ask who has the highest value for the information. Normally, in a world of positive transaction costs, one should assign a right to the one who would value it most. This follows because transaction costs will usually be too large to lead to optimal bargains. He tentatively argues for a different scope for blackmail: blackmail bargains to suppress information about crimes or torts would be criminal, while bargains to suppress information about other information would be allowed. I am always skeptical about the wisdom of proposals to decriminalize classic blackmail situations. But, showing his usual creative liveliness, Isenbergh makes an interesting case for increased bargaining over information to allow it to pass to its highest-paying use. Oddly enough, Isenbergh draws the opposite conclusion from Shavell's about the increased precautions that a blackmail victim might take to guard her own privacy if blackmail were legal. Shavell views these as wasted precautions, while Isenbergh argues that when A is likely to be the lowest cost-avoider of untoward disclosure, there is no obvious reason to protect A from bearing the full cost of preserving his own secrets. " Thus, contrary to Shavell, Isenbergh concludes that increasing the victim's incentives to guard his own privacy would represent an efficiency gain.

In *Blackmail as Private Justice,* Jennifer Gerarda Brown analyzes the potential increase in criminal law enforcement that might result from allowing the blackmail of criminals. Certainly, if we ask whether we have enough deterrence of crimes, too much, or too little, the answer is too little. She examines, and ultimately tentatively rejects, an affirmative defense in a blackmail prosecution that the victim had committed a crime. Note that this is the opposite of the possible scope of the law suggested by Isenbergh; he examines a proposal that would leave threats to expose crimes as blackmail, but allow threats to expose noncriminal, nontortious indiscretions. Also, as Shavell points out, the blackmailer may exact a far smaller punishment than the state, which might make bounties

paid to informers more efficient in setting the proper level of punishment than legalizing blackmail. Brown ultimately rejects her proposal on moral rather than economic grounds. She argues that the fear is not that blackmail precludes public justice or reduces the *quantity* of public involvement. Rather, Brown asserts that the concern is that we fundamentally alter the *quality* of justice when we take enforcement away from a public audience.

III. PROBLEMS

A. *Waste, Coercion, and What Would Happen in the Absence of Blackmail*

Several theorists in this Symposium assume that, in the absence of a possibility for a blackmail bargain, the damaging information wouldn't be released, while other theorists assume that the information would be released. Those who assume nondisclosure argue that the blackmailer has nothing to gain besides increasing his reputation as someone who carries out his threats (which flows only from the chance of bargaining) and may incur costs in disclosing information. If the bargain involved information that wouldn't be released, then the bargain would become merely manipulative, pointless, and wasteful. And it would restrict rather than expand the victim's options.

Yet damaging information often passes in explicit markets for information, such as tabloids, and most damaging information that doesn't implicate the gossiper passes by gossip. Many classic kinds of blackmail are of the type that people frequently gossip about—extramarital affairs or homosexuality. It isn't costly to pass this information and the gossiper either receives gossip in return or gets pleasure by seeming to be knowledgeable about an issue the hearer wants to know about. Gossip is understandable in economic terms much as one would understand paying to attend a sporting event. What the person gets in return is pleasure. Occasionally, a gossiper is doing a good turn by informing those who would want to know of a crime or indiscretion before deciding to deal with the subject of the gossip. And the release of information isn't limited to gossip. When an employee I supervise makes an error, I may or may not tell the administration about it. I wouldn't consider it gossip if I did. The information may or may not be passed. But it would be blackmail if I threatened to expose the information unless paid off.

The assumption that damaging information doesn't otherwise pass leaves me wondering how all the embarrassing acts I read about in my daily newspaper happen to get there. Most informants are not paid and are not repeat blackmailers. If the hope of blackmail bargaining is the primary trigger for releasing damaging information, how does the damaging information get out? The information gets out because people talk.

Perhaps some insight into the motivation for gossiping or releasing information can be gleaned from adapting an explanation from a different source, George Orwell's essay, *Why I Write*.[20] Putting aside monetary reasons, Orwell admits why he writes:

> 1. Sheer egoism. Desire to seem clever, to be talked about, to be remembered after death, to get your own back on grown-ups who snubbed you in childhood, etc[.] etc. It is humbug to pretend that this is not a motive, and a strong one. Writers share this characteristic with scientists, artists, politicians, lawyers, soldiers, successful businessmen—in short, with the whole top crust of humanity . . . .
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> 2. Aesthetic enthusiasm . . . .
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> 3. Historical impulse. Desire to see things as they are, to find out true facts and store them up for the use of posterity.
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> 4. Political purpose—using the word "political" in the widest possible sense. Desire to push the world in a certain direction . . . .
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> . . . My starting point is always a feeling of partisanship, a sense of injustice. When I sit down to write a book, I do not say to myself, "I am going to produce a work of art." I write it because there is some lie that I want to expose . . . .
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> Looking back through the last page or two, I see that I have made it appear as though my motives in writing were wholly public-spirited. . . . One would never undertake . . . [writing a book] if one were not driven on by some demon whom one can neither resist not understand. For all one knows that demon is simply the instinct that makes a baby squall for attention.[21]

Among Orwell's motives for producing some of this century's great literature are several reasons that may explain less lofty activities such as gossip: the desire to feed an ego, to seem clever, to be

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[20] George Orwell, *Why I Write*, *in* 1 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 1 (Sonia Orwell & Ian Nagus eds., 1968).

[21] *Id.* at 3-7.

talked about, to see things as they are, to find out the truth, to push the world, to reveal injustice, to expose a lie, and ultimately, to squall for attention. If an economic theory is not rich enough to accommodate such motivations, then I don't think that it will persuade blackmail to yield up its mysteries.

By assuming without warrant that damaging information doesn't pass without a hope of blackmail bargaining, some economic theorists are able to conclude that the money spent on bargaining produces no net gain and is thus wasted. But if the information would have passed anyway, then the bargain appears efficient. Each party gains from the blackmail bargain and their gains more than offset the bargaining costs. Their net gain would normally become society's net gain. The wrong for at least this kind of blackmail must lie elsewhere.

Moral theorists who make the same questionable assumption about information not passing argue that blackmail is coercive in that it reduces rather than enlarges the victim's choices, since release wouldn't have been within the expected outcomes. This line of argument seems designed to fit their theories within the large literature built on Robert Nozick's theory of coercion, a literature that usually posits that coercers limit their victims' choices.[22] If one rejects the empirical assumption about information release as implausible, then I think one is faced with a dilemma. Either blackmail isn't coercive or most of the traditional definitions of coercion are too narrow. I choose the latter.

Perhaps a broader definition of coercion could be constructed out of the principle that I believe describes the lay conception of public official extortion. Coercion by words usually involves a threat to make you worse off than you are now, worse off than you expect to be, or worse off than you deserve to be. It has three baselines. Such a definition would lead to calling many innocent threats coercive (e.g., to foreclose on a mortgage), but when coupled with a misuse of other people's leverage, it would describe blackmail well. Perhaps within this larger definition of coercion, one would need an additional reason for making something illegal, such as limiting victims' options or blackmail in my sense.

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[22] *See generally* Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (Sidney Morgenbesser et al. eds., 1969); Peter Westen, *"Freedom" and "Coercion": Virtue Words and Vice Words*, 1985 DUKE L. REV. 541 (reviewing a large number of baseline explanations for coercion and suggesting his own two-baseline theory).

B. *Descriptive Accuracy of Theories*

I am skeptical of theories that would take ordinary kinds of blackmail and make them noncriminal. Several theories in this Symposium take this approach, if only tentatively. The most common exception urged is the one for market-price blackmail. If the blackmailer asks only for what he could sell the information to others, then he has, according to some theorists, not committed blackmail. An example is *People v. Fox*,[23] where a blackmailer was convicted of threatening to release damaging information to a wife in a divorce action unless the husband paid what the wife was willing to pay. This seems like classic blackmail, yet some theories would exclude it because it doesn't fit their theories. Given the lack of agreement over the rationale for blackmail, I tend to think that it's the theory rather than the law that's inadequate.

A related problem is the argument, all too common in law and economics, that behavior that's efficient (or moral) and behavior that's inefficient (or immoral) must both be made criminal because it would be too costly (or difficult) to separate the two. This argument is theoretically possible and almost impossible to disprove, but I am skeptical of this kind of argument for two reasons. First, in criminal law, where defendants can face twenty years in prison, the state usually spends the money to determine whether what the defendant did was right or wrong. The state could provide the defendant with an affirmative defense, for example, that he stumbled over the information or would have released it anyway, if those facts negated the wrong or waste of blackmail. Even if having such a defense would encourage other bad behavior in other cases, that's usually not a sufficient reason to punish this defendant, who has done nothing wrong under their theories.

Second, I am skeptical of the argument about the difficulty of sorting good cases from bad because it allows any result to fit the theory. If a crime fits the theory, fine, the theory explains it. If the crime doesn't fit the theory, it's too close to behavior that fits the theory to be worth sorting out. Thus, when a theory explains any outcome, a thing or its opposite, then the theory actually explains nothing. Any data fits the theory and the theory predicts either outcome. I am not asking that theories be perfect, and I may have

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[23] 321 P.2d 103 (Cal. Ct. App. 1958).

been too dismissive upon finding defects in the past, but substantial nonfit for a serious crime is a reason for grave concern.

CONCLUSION: TOWARD COERCION

I have no idea where this Afterword leaves you, but I can tell you where it leaves me. I think that the economic theories have considerably closed the gap between the crime of blackmail and their theoretical explanations. Under some theories, for example, perhaps the only remaining unexplained set is casually or inadvertently acquired information that the blackmailer would expose even without the incentive for a blackmail bargain. The blackmailer might have someone who would pay for the information or it may be information that usually passes by gossip—an extramarital affair or homosexuality. Here the bargain benefits both parties and the social waste of the bargaining costs isn't obvious. Possible explanations for this kind of blackmail might lie in the precautions that the victim might take or a broader economic theory that credits pain and anxiety.[24] Some theories which assume that private information wouldn't be released without the incentive for blackmail or that market-price blackmail ought to be allowed, however, strike me as highly questionable in that regard.

Among the moral theories, I hope I will be forgiven for thinking that my original theory still stands as the most robust explanation for blackmail. I am glad to see several of the theories tending roughly in the same direction, even as they criticize various features of my analysis. My original view of my theory is that it's a description of a concept in which is embedded a weak normative argument. Although others reading this Symposium may conclude otherwise, this Symposium has strengthened my conviction that it's descriptively accurate. Yet the Symposium has increased my doubts about its already weak normative claims.

In my view, blackmailers threaten their victims with harm and use other people's leverage for their own gain. While neither may always be wrong in itself, the combination is wrong. That neither is always wrong may raise what Sidney DeLong calls the second paradox of blackmail. The papers in this Symposium show the need to flesh out the coercive part of a theory—a threat, domination,

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[24] Even a theory based on anxiety may need an analysis of chips to explain why mortgage lenders or injured rape victims may cause great pain and anxiety in the people they threaten without committing a crime or tort.

initiation by the threatener, or simply coercion. Unfortunately, the most systematic examinations of coercion here have tended to assume that a blackmailer restricts a victim's chances rather than expands them. If that were so, then blackmail bargains would be merely manipulative, pointless, and wasteful. But again, if as seems likely, the information would often have been released even without the possibility of a blackmail bargain, then we need a different definition of coercion. I suspect that the key to a solution may lie along the road that Leo Katz takes, explaining how a criminal who increases a victim's options and follows a victim's preferences may still be punished for what he has done.

At the end of the day, then, blackmail looks less strange, paradoxical, or inexplicable than in the morning. Yet the papers suggest that much work is yet to be done on the nature of coercion. Perhaps a better understanding of coercion would unravel the mysteries of blackmail—or a better understanding of blackmail would unravel the mysteries of coercion. It is to that quest that this Symposium is dedicated.