BLACKMAIL FROM A TO C

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Spymaster: Did you dig up something I can use against Firefly?
Chico Marx: We follow him to a roadhouse where he meets a married lady.
Spymaster: A married lady? Now we are getting somewhere.
Chico Marx: Yeah. I think it was his wife.
Spymaster: Firefly has no wife.
Chico Marx: No?
Spymaster: No.
Chico Marx: Then you know what I think, Boss?
Spymaster: What?
Chico Marx: I think we follow the wrong man.¹

INTRODUCTION

The term “blackmail” has been attached to a number of relations where one person extracts something of value from another with pressure. My concern here is limited to “pure” or “informational” blackmail: the sale of silence by someone who is otherwise free to disclose what he knows. The cast of characters in a blackmail must number at least three. I call them “A,” “B,” and “C.” “B” (for “blackmailer”) is the holder of information that he threatens to disclose unless compensated. “A” is the person to whom B offers to sell his silence, and is usually the subject of the information to be kept silent. “C” is the person or persons to whom B threatens to disclose the information, absent agreement with A. C may be an individual, a group, the public, or a representative of the public such as a prosecutor. In this triangle, B is an intermediary who, depending on the legal regime, may advance or impede the flow of information concerning A to C.

A key element of “pure” blackmail, which has led some to question whether it should be treated as a crime, is that B is initially free to make the disclosure over which he bargains with A. Blackmail, as addressed here, does not include threats of disclosure barred by statute or contract, such as a doctor’s threat to reveal a patient’s loathsome disease, which belong to the broader class of

¹ Professor of Law, University of Chicago.
² DUCK SOUP (Paramount 1933) (slightly paraphrased).

(1905)
"extortion." Extortion, obtaining something with the threat of inflicting unlawful harm, is a form of theft by force. Much violent crime has an element of extortion. "Kiss me or I will kill you" is a threat to do something that is no more permitted absent the threat than with it. In contrast, B’s bargaining lever in blackmail is something that normally is within B’s right. The criminal prohibition of blackmail—essentially a prohibition on bargaining between B and A over control of information—denies B the right to seek compensation from A for not doing something B is otherwise free to do.

On first encounter there is no obvious reason for this restraint of B’s (and A’s) freedom: Why impede the allocation of rights in information that unconstrained bargaining would otherwise produce? That question is one way of framing what is called the “paradox of blackmail.” In most contexts other than the disclosure of information, people are free to bargain over permissible courses of action. It is through bargaining that rights in property (and information is property of a kind) migrate to the hands of owners who value them the most. When A and B own contiguous parcels of land on which building is allowed, for example, it is no crime for B to threaten to build on his lot and impair A’s view unless A pays him not to do so.2 The case of contiguous lots serves in the literature as a standard counterpoint to informational blackmail.3 Numerous other transactions recognized as legitimate or even salutary involve “threats” to do something lawful unless paid or otherwise rewarded to abstain. “Pay me higher wages or I will go on strike or quit,” “pay me the price I am asking for this good or I will sell it to someone else,” and “marry me or I will shave my head and join the Foreign Legion” are, I think, permissible threats almost anywhere, while “paint my house or I will tell your boyfriend about your sex change operation” and “if you fire me I’ll tell the IRS about your secret Swiss bank account” are blackmail.

Threats of the latter type often elicit a strong aesthetic reaction. Indeed blackmail has drawn unusually intense condemnations from otherwise sober sources. “The blackmailer is both contemptible and dangerous; from the standpoint of his victim he is more to be feared than a burglar or a thief.”4 This response resists fully

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2 A possible outcome of bargaining between B and A in this situation, among many, is A’s purchase from B of a scenic easement.


4 Arthur L. Goodhart, Essays in Jurisprudence and the Common Law 175
satisfactory explanation, however, even upon prolonged introspection. Scholarly accounts of the prohibition of blackmail are widely contradictory; none seems to me entirely satisfying. But despite the obvious difficulty of explaining the crime of bargaining over permissible conduct, commentators have generally defended the prohibition of blackmail.

Two broad ideas run through the writing on blackmail. One condemns the threat to privacy. In this view A is B's victim, forced to pay to protect a personal sphere that should remain private. The other finds in blackmail the opposite vice of concealing wrongs that should be revealed. In this view of blackmail B and A are cooperating, conspiring even, to keep valuable information from C. In fact—and this is where the paradox of blackmail ultimately lies—the prohibition of blackmail serves both ends to a degree. My concern in this Article is whether prohibition of blackmail serves these ends well enough, or whether some other legal regime for bargaining over private information might be preferable.

The prohibition of blackmail affects the allocation of rights in information. I argue in this Article that the prohibition of blackmail leads to relatively greater disclosure of a smaller body of information, because on the one hand B is more likely to disclose information about A to C when prevented from bargaining with A, but on the other hand, not being able to extract the full return from bargaining with A, B has less incentive to seek out information about A in the first place. In a frictionless world (one in which it were costless to bargain over the value of information), prohibition of blackmail would surely not be correct. For most rights in property other than information, even in our world of significant transactions costs, both analysis and experience suggest that prohibition of bargaining is likely to impede the appropriate allocation of those rights.

The justification for the prohibition of blackmail, if there is one, must therefore lie in the particular nature of information. The transactional difficulty and cost of bargaining over the disclosure of information are greater than for other forms of property. Unrestricted blackmail might lead to much vexatious and ultimately

(1931). Also widely quoted is the following—deliberately overblown—statement of Bechhofer Roberts: "Blackmail is by many people considered the foulest of crimes—far crueler than most murders, because of its cold-blooded premeditation and repeated torture of the victim; incomparably more offensive to the public conscience than the vast majority of other offenses which the law seeks to punish . . . ." Coase, supra note 3, at 659.
sterile bargaining. This is especially so if the cost of bargaining over information is understood broadly to include the inducement of effort by would-be blackmailers to unearth information destined simply to be reburied. Even with such an extended notion of cost, however, the prohibition of blackmail is not self-evidently justified. The costs saved under prohibition must be weighed against the possibly better allocation of rights in information under a regime of freer bargaining.

I conclude in this Article that across-the-board prohibition of blackmail, although likely not of momentous effect on behavior, may not be the best regime. A possible alternative would be to retain the prohibition of blackmail for: 1) information, however acquired, held by B concerning a prosecutable crime or tort committed by A against C; and 2) information acquired by B outside a prior course of dealing with A. For these classes of information, a further alternative to the criminal prohibition of bargaining would be simply to make B's agreement with A not to disclose information unenforceable and to treat B's receipt of compensation for silence as a form of complicity in whatever is kept silent. Agreements to keep other kinds of information silent would, by contrast, be both valid and enforceable. The present law of blackmail would be replaced by a regime concerned with distinguishing two types of contracts of confidentiality, enforceable and nonenforceable. The idea behind the regime would be to impose on blackmailers part of the social cost of the concealment of information when the information were more valuable disclosed, while not inducing an untoward increase in efforts to uncover private information.

I. BLACKMAIL AS PROHIBITED BARGAINING

What is prohibited under the law of blackmail is a certain type of bargaining over the disclosure of information, rather than the bare result, which is some sort of compensation given for silence. It is B's threat of disclosure that is barred, not any and all reward from A for B's discretion. Thus if A spontaneously offers to reward B's discretion regarding private information, or simply does so without bargaining, there is no prohibited blackmail, even if it is likely that B's discretion would end with the withdrawal of the reward. The law of blackmail is in this respect like that of prostitution, which usually bars specific bargaining over the sale of sex.

rather than all transfers of wealth in consideration of sex.\textsuperscript{6} If a
sexual relationship is sustained by gifts (either from gratitude or
from concern that it would not continue if the gifts were ended or
reduced), few legal regimes that otherwise allow the kind of
relations involved would pursue the transaction. Once $B$ has
acquired private information about $A$, blackmail is, much like
gambling, prostitution, trade in narcotics, etc., a victimless crime.\textsuperscript{7}
$A$ (who is often identified as $B$'s "victim") would almost invariably
prefer the possibility of bargaining with $B$ over the alternatives. If
there is a victim of a blackmail in the conventional sense (someone
who bears the uncompensated external cost of a transaction
benefitting others), it is $C$.

II. THE EXTENT OF BLACKMAIL

Blackmail is not a major day-to-day concern of the criminal
justice system. On first encounter, in fact, blackmail seems a matter
of mainly academic concern. Scholars have written about it with
some regularity, but on any given day there are probably a thousand
times more prisoners serving time in our jails for crimes related to
cocaine than for blackmail. For all I know at this writing there may
be no one in an American jail convicted of what might be called
"classical" or pure "informational" blackmail.\textsuperscript{8} Popular fiction, on
the other hand, views blackmail as rampant. In the archetypical
soap opera \textit{Dallas},\textsuperscript{9} for example, a blackmail, often successful, was
de rigueur in at least every other episode. The actual extent of
blackmail in daily life is not readily knowable to an academic
observer, but is very likely greater than the sparsity of appellate
decisions on the subject might indicate. Certainly many proscribed
acts are carried out beyond the immediate attention of the criminal

\textsuperscript{6} See id. § 251.2.
\textsuperscript{7} This may not be so, however, if the antecedents of the blackmail bargaining are
taken into account. If $B$ has made a specific effort to uncover information concerning
$A$, then $A$ can plausibly be viewed as a victim of the transaction as a whole. $A$ would
certainly not prefer $B$'s pursuit of his secrets to $B$'s engaging in some other endeavor.
\textsuperscript{8} There are, of course, convicts who have extorted money or property from others
with threats of violence. That is not informational blackmail.
\textsuperscript{9} \textit{Dallas} (CBS television broadcast).
A successful blackmail (one in which $B$ and $A$ come to agreement) by its nature tends to remain hidden, and never appears on television's *Unsolved Mysteries*. A further difficulty is determining the point at which ubiquitous minor threats molt into prohibited blackmail. A parent's threat to tell a child's playmates that he sleeps with a nightlight unless he cleans his room falls literally within the Model Penal Code's definition of criminal coercion. So does an employee's threat to inform the IRS of his employer's concealed income unless promoted. A prosecutor would be perhaps more likely to pursue the latter threat, if it became known. I suspect, without having any systematic empirical basis for the belief, that the largest single class of blackmails, both subtle and overt, involve tax obligations that $A$ has slighted in some way and that $B$ knows about. The Model Penal Code clearly makes it a crime for an employee to seek advantage by threatening to reveal an employer's tax evasion and would also, as I read it, make it a crime for a spouse to seek a larger divorce settlement with a similar threat.

### III. BLACKMAIL AND PROPERTY RIGHTS

Property rights are largely shaped by the law of crimes. The assignment of property rights to those who value them most reduces the necessity of exchanges or other transactions to bring them to higher valued uses. An important function of a legal regime is, therefore, to maintain property rights in the hands of owners who value them most. The definition of most crimes is easily understood in light of these principles. The prohibition of murder accords an individual the property right in his own life; the prohibition of battery frames an individual's rights in his body; the prohibition of theft sets the contours of other property rights. That life is worth more a priori to its owner than to any other

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10. Prostitution, for example, although prohibited in most states, is visibly widespread. Those engaging in it are frequently arrested, but few spend much time in jail after conviction. The total prison population of those convicted of prostitution and related crimes is probably small. The number of appellate cases dealing solely with the crime of prostitution is probably as sparse as those on blackmail.


13. See id. § 212.5(1)(b).

14. Criminal prohibitions do not exhaustively define property rights, of course. There are also tort laws, liability rules, etc.
person is revealed by the rarity of exchanges in which someone consents to being killed for a payment from another who would enjoy doing it. That people value their bodies more than batterers can similarly be inferred from the infrequency of their consenting to being beaten for a fee. If homicide and accidental killing were legal, people would have to take far greater pains to protect their lives through individual force, bargaining, and other transactions aimed at regaining control over survival. Relations between people in such a world would have the character of blackmail. People would abstain from killing each other in consideration of some advantage implicitly or explicitly bargained for.

At issue in blackmail is the right to control the disclosure of information. The starting point of any blackmail is B’s possession of information, usually about A, that A does not want communicated to C. Specifically, A will suffer a cost from the disclosure of this private information to C. Almost always, C will gain something from learning the information. One way for B to derive a benefit from the information, absent the prohibition of blackmail, is to offer not to disclose the information to C in exchange for payment from A. The most B can get from A with the threat of disclosure is what disclosure would cost A. This cost may involve money (an income tax deficiency and fraud penalties, for example), jail time, embarrassment, loss of a marriage, loss of a job or a coveted elective position such as the Presidency, and much more. I call the full cost to A of disclosure the “value” of the information to A. B will bargain for something like the monetary equivalent of this value, but in practice, given the uncertainties of measurement and A’s likely limited means, B is bound to settle for less.\[15\] The value of the information to C is what C stands to gain from learning the information. Depending on who C is, this value may be the collection of a tax deficiency and penalties, a larger divorce settlement, a tort recovery, the satisfaction of intellectual curiosity, the titillation of prurient curiosity, the vindication of an ideological concern, or simply the requital of animosity against A. The value of the information to C may even be negative. That is, it may concern something that would compel some sort of change in C’s actions or attitude toward A and that C would accordingly rather not know.

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\[15\] This lesser value can be measured in money, utility, or some combination of both.
A predicate of blackmail is that B's disclosure would be costly to A, whether or not the underlying information is of value to C. Also necessary is that B value the information less than A. Often the element of greatest uncertainty is the value of the information to C. If we could determine the flow of information costlessly from some sort of meta-vantage point, we would want the information held by B to be disclosed to C when its value to C was greater than its value to A, but to be kept private when it was worth more to A. There being no omniscient traffic controller, we generally leave it to private bargaining to steer property rights to owners who value them most. In the case of private information, however, the prohibition of blackmail prevents bargaining between B and someone with a large stake in controlling the information, namely A. Immediate questions are: 1) whether the prohibition thereby prevents the flow of information to those who value it most; and 2) if it does, what is gained.

IV. ESTABLISHED THEORIES OF BLACKMAIL

A first place to look for answers to these questions is in established explanations of the law of blackmail, which fall into five broad classes.

A. Prohibition of Blackmail as Protection of Privacy

Under this view, the prohibition of blackmail represses B's maltreatment of A by denying B a reward for threatening A's privacy. The principal concern here, albeit given effect somewhat paradoxically, is the privacy of A, who is viewed as a victim. In this view of blackmail, the defining pattern is the case where the information held by B is worth more to A than to C. It might, for example, cause A deep pain for C to know the information, while C would benefit little. The vileness of B's threats and the lurid rhetoric of B's "slow torture" of A are enlisted in support of prohibition. The natural habitat of such blackmail is nineteenth century fiction. A, now a paragon of virtue in all respects, had an

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16 Were it otherwise, B would use the information to his advantage rather than seek to sell control over it to A or C.

17 I use the word "value" here to denote the cost to A of disclosure.

18 For a more detailed discussion of the role privacy concerns play in blackmail's prohibition, see Jeffrie G. Murphy, Blackmail: A Preliminary Inquiry, 63 MONIST 156, 163-64 (1980) (arguing that in the absence of criminal sanctions prohibiting blackmail, there would be incentives for invasions of privacy).
illegitimate child given up for adoption long ago. A is engaged to marry C, who is loving and kind, except inclined to be a touch inflexible on the subject of bastardy. B learns of all this. The prohibition of blackmail prevents B from making demands of A.

For some of the proponents of this view of blackmail, I think, the prohibition of bargaining between B and A serves as a proxy for a prohibition of B’s disclosure to C. That is, the premise that B is free to disclose or keep secret private information about A is not fully accepted. At least one commentator, who calls B’s freedom to disclose an “immoral liberty,” ¹⁹ clearly believes that an honorable person in B’s position would keep silent gratuitously. But instead of prohibiting B’s disclosure of private information, the law of blackmail denies B a profit from the threat of disclosure. ²⁰

There are numerous cases where the holder of private information—a doctor or lawyer, for example—is under an express or implied contractual obligation to hold it in confidence. ²¹ Someone outside the fiduciary relationship—a patient named B, for example, who overhears a doctor blurt out sensitive medical information about another patient named A ²²—is not bound by this restraint. The law of blackmail creates an obligation of sorts from B to A in this situation, which is not to threaten A with demands in exchange for silence. Those whose main concern is with protection of privacy would perhaps want to impose on B an obligation not to disclose at all, which is equivalent to according A an absolute

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¹⁹ GOODHART, supra note 4, at 179. Goodhart classes such liberties with the right to get drunk at home, sleep around, or tell tall tales. See id.

²⁰ In fact, by virtue of the prohibition of blackmail, B is freer to disclose than to conceal, because B cannot use concealment as the basis of an exchange with A, but may use disclosure as the basis of an exchange with C.

²¹ With doctors and lawyers, confidentiality is unequivocally, albeit customarily, understood and backed up by codes of professional conduct. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (stating that “[a] lawyer shall not reveal information relating to representation of a client unless the client consents”); PRINCIPLES OF MEDICAL ETHICS § 4 (Am. Med. Ass’n 1984) (stating that “[a] physician . . . shall safeguard patient confidences within the constraints of the law”). In other cases it is less clear. The proprietor of a bath house with a homosexual clientele could well be understood to have undertaken to keep the names of his customers confidential, especially if he ever made representations of providing discreet service. A customer of the bath house, however, would have no such obligation to another customer, unless the terms of patronage implied keeping all encounters anonymous or confidential.

²² Thinking he is alone, the doctor muses, “My God, A is HIV positive! Who would have thought it?” Or, if you think that the doctor’s indiscretion somehow affects B’s obligations in this situation, suppose instead that it is A who says, “My God, I’m HIV positive!” within B’s earshot.
property right in all information concerning A. Such a measure, given the fluidity of rights in information, would quickly reveal itself impractical.  

The protection of A's privacy by the prohibition of blackmail in such situations is, on first encounter, perverse. Once B learns of the information, the prohibition of bargaining most likely endangers A's privacy. The only benefit now available to B from the information lies in disclosure to C. The prohibition of blackmail in this instance thus sacrifices A's privacy to the end of denying B the best return from knowledge of the information, because once B has the information the prohibition makes disclosure more likely. But to deny B the right to bargain with A (the one who values the information the most) reduces the return B can derive from discovering the information in the first place and may therefore deter B from sniffing around for compromising secrets. Thus, while the privacy of any specific A may succumb on the altar of prohibition, over time the privacy of generic As is less likely to be invaded by predatory Bs, who may find other investments of their time and effort more profitable than digging up scandal that cannot be sold to the probable highest bidder.

This theory of blackmail seems aimed above all at professionals who make a business of obtaining secrets for the purpose of selling them back to those concerned. The approach is colored by the suspicion that, given free rein, blackmailers would obtain information in unpleasant or even illegal ways, by prying, snooping, or burglary. A closely correlated view is that the force of legal sanctions against these ancillary evils is far too weak. Thus, in addition to the concern for the protection of A's privacy, there is a concern for the unattractive and harmful predicate of legalized blackmail that would transform a certain number of Bs, now otherwise engaged, into legally licensed predators. True, A may

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23 Even rights in proprietary information break down once the information passes into the hands of someone not in some sort of contractual privity with the subject of the information. In most situations of potential blackmail, B is a party to no actual or implied contract with A.

24 Perhaps the cleaning crews in office buildings would routinely comb the files of doctors and lawyers for compromising secrets. Or perhaps Bs would pay court to affluent As, smothering them with kisses and other kindness to the sole end of gaining their confidence. Please note, however, that any given A who has no guilty secrets will gain mightily from all this kind attention, while Bs will be out the time and effort of a fruitless search.


26 For a lurid view of the outpouring of fraud and deceit that would follow the
suffer most from the prohibition once $B$ has the information, but prohibition will deter $B$ from sniffing around, to the ultimate benefit of others with shameful secrets.

A problem with this view of blackmail is that prohibition of bargaining tends to force $A$'s secrets into the open where $B$ is an amateur who has come upon the compromising information in the normal course of events. This objection is not fatal, however, because an amateur $B$ may in any event be more interested in a nonpecuniary gain that can more easily be derived from disclosure to $C$. If, in the first example above, $B$ is another suitor of $A$, or $A$'s rival for $C$'s affection, $B$ may well prefer to disclose the information to $C$ without making any demand on $A$. To generalize, the prohibition of blackmail achieves the end of protecting private information if its deterrence of would-be professional blackmailers outweighs the greater difficulty for $A$ of retaining control over information adventitiously discovered by the likes of $B$.

B. Prohibition of Blackmail as an Instrument of Disclosure

Under this theory, the prohibition of blackmail promotes disclosure of information. Bargaining between $B$ and $A$, to the extent it is successful, denies to $C$ information in which $C$ has an interest. If the information has greater value to $C$ than to $A$, the bargaining leads to a net loss. In this theory of blackmail, $A$ and $B$ are to some degree in complicity as wrongdoers and $C$ is their victim. $B$'s wrongdoing consists of cooperating with $A$ against $C$, while $A$'s wrongdoing includes cooperation with $B$ as well as having done whatever it is that $A$ and $B$ agree to keep quiet. An example of blackmail well accommodated by this theory is $B$'s threat to disclose knowledge of $A$'s income tax evasion. $C$ in this case is the public, represented by the U.S. Treasury. Another example is $B$'s knowledge of $A$'s hidden assets that $A$ might lose to $C$ in a pending divorce action if $C$ also knew of them. In such cases, the

legalization of blackmail, see id. ("Only blackmail breeds fraud and deceit."). Witchcraft, money lending, alcohol, and homosexuality have all, at various times, been criminally prohibited. Imagine the lurid scenarios that could have been devised—and doubtless were—to stave off their legalization.

27 This explanation of the prohibition of blackmail puts greatest weight, at least implicitly, on the cases where the information has greater value to $C$ than to $A$.

28 The pecuniary value to the public of information on $A$'s tax evasion is at least equal to $A$'s pecuniary benefit from concealment. Knowledge of $A$'s tax fraud would gain the Treasury $A$'s delinquent taxes, plus penalties, along with the value of future deterrence of $A$ and others.
prohibition of bargaining between B and A makes it more likely that B will disclose the information to C.\textsuperscript{29} The prohibition of blackmail is thus an instrument of disclosure.

It is not, however, a very powerful one. Often B cannot get from C an amount close to the full value of the information. The U.S. Treasury, for example, pays informants a maximum of ten percent of the back taxes collected from the tax evaders they turn in.\textsuperscript{30} More broadly, it is often difficult for B to communicate to C the value of the information without communicating the information itself. Moreover, there are ways B can deal or attempt to deal with A short of prohibited blackmail. Without ever threatening A, B can let A know of his exemplary discretion and expect to be rewarded for it. If B is A's employee, B's knowledge of A's tax evasion (if A knows that B knows) may do much for B's job security. Still, there is doubtless some margin at which the prohibition of blackmail brings more private information to C than C would get if B and A could easily agree to suppress it.

C. The Blackmailer as Rogue Agent

In this theory of blackmail, B should not be allowed to profit from information in which others have a greater interest. The idea here is that rights in information should somehow be reserved to those for whom it has "inherent" value rather than value derived from bargaining. In the standard blackmail situation, B's only interest in the information is what A or C will pay for it. B neither suffers A's loss from the disclosure to C nor can make as profitable use of the information as C. In this view of blackmail, the value of the information—what Professor Lindgren calls the "leverage" it brings—does not belong to B, who is therefore prohibited from bargaining over it with A.\textsuperscript{31} When B bargains with A, B is capturing a benefit that more properly belongs to C, or, again in Professor

\textsuperscript{29} No law of blackmail that I know of prohibits B from bargaining with C.

\textsuperscript{30} See I.R.C. § 7623 (1992) (authorizing the Secretary of the Treasury to "pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial . . . persons guilty of violating the internal revenue laws"); Rewards for Information Given to the Internal Revenue Service, 6 IRS Manual (CCH) Exhibit 9970-3, Pub. No. 733, at 28,195 (providing that the District Director shall pay informants "10 percent of the first $75,000 recovered, 5 percent of the next $25,000, and 1 percent of any additional recovery").

\textsuperscript{31} See James Lindgren, Unraveling the Paradox of Blackmail, 84 COLUM. L. REV. 670, 672 (1984).
Lindgren's terms, is using "leverage that belong[s] more" to another.32

Under this theory of blackmail, B is a usurper. Professor Lindgren describes blackmail as B's "misuse of [another's] leverage."33 This implies a greater right in someone else, and enlists B into some sort of agency relationship with this other person, C. Professor Lindgren describes B's bargaining with A as "unfair."34 But unfair to whom? To C, it would appear. B, although apparently not required in this view of blackmail affirmatively to advance C's cause,35 may not seek to gain from keeping C in the dark.

This theory of blackmail largely assumes its own conclusion. The premise that B's leverage "belongs more" to C essentially contains the conclusion that B's gain from bargaining with A should be barred, because the leverage belongs more to C than to B only if blackmail is a form of prohibited theft in the first place, or because some sort of fiduciary obligation of B to C is implied. C has no leverage simply by virtue of B's possession of private information about A before any bargaining has occurred, and will not get any unless B gives or sells him some. By C's "leverage" Professor Lindgren means, I think, information that has in some way a greater intrinsic value to C than to B. In the situation that sets the stage for blackmail, however, the immediate pecuniary value of the information is greater to B, because until C discovers the information, C cannot derive much benefit from it.36 One can also question whether under this theory of blackmail B should be allowed to bargain with C, rather than simply turn over the information free of charge. Here, though, I think the theory does not require B to give the information away to C. B can reasonably ask to be compensated for having served C in an agency relationship, albeit involuntary.

This theory of blackmail starts by finding existing leverage in C, but does not account for how or why it is there. What, beyond the prohibition of blackmail itself, gives C leverage that C would not otherwise have with respect to information concerning A? A practical aspect of the problem is figuring out who has what

32 Id.
33 "Id.
34 Id.
35 Professor Lindgren does not, I believe, question B's right to remain silently aloof. If it is wrong, however, for B to use leverage against A that belongs more to C, isn't it also at least wrongish to deny to C (by total silence) the leverage that more properly belongs to him?
36 See Lindgren, supra note 31, at 672.
leverage to begin with. Suppose B recognizes A as a fellow death camp guard and seeks money to keep it quiet. Is the C to whom that leverage properly belongs an immigration official or prosecutor? What if A no longer has any exposure to legal sanction and faces only loss of reputation? Does the leverage belong to no one? To Jews and Gypsies because they have some strands of DNA in common with A's victims? Or perhaps to historians? Suppose instead that A was a death camp commandant and that B, a former camp inmate, recognizes him and demands that he dedicate himself to the relief of holocaust victims as a condition of nondisclosure. Is this now B's leverage?37 Is it different if B asks A for money in this situation? Is it different if B uses the money for a good cause? The question "whose leverage?" is likely to be answered by the fortuity of the questioner's a priori sympathy with the person and plight of A, B, or C respectively.

D. Blackmail as Private Enforcement of Criminal and Moral Rules

The only theory of blackmail surfacing in academic writing that would not prohibit the transaction finds in the blackmail bargain a mechanism of private enforcement—through the agency of B—of criminal laws or moral standards.38 If A has done a bad thing that B knows about, B's threat to disclose it is a form of punishment of A. B is collecting a fine of sorts, as well as inflicting a measure of pain. Blackmail could conceivably serve as a useful check on the sort of bad actions of A against which C (who would in this instance often be the public) has poor means of discovery or enforcement.

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37 B may have decided, for example, that there is more social good to be gained from A's future good works than from A's exposure and prosecution.
38 No published writing that I know of embraces this view, but it is considered, and taken fairly seriously, in William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. OF LEGAL STUD. 1, 42 (1975) (noting that "practices indistinguishable from blackmail... are permitted in areas where the law is enforced privately... because the overenforcement problem is not serious"). Several of the papers presented in this Symposium acknowledge the possibility of blackmail as a mode of private enforcement, but none endorses the idea fully. See, e.g., Steven Shavell, An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery, 141 U. PA. L. REV. 1877, 1879-94 (1993) (discussing how potential victims will reduce their vulnerability to threateners); Jennifer G. Brown, Blackmail as Private Justice, 141 U. PA. L. REV. 1935, 1937 (1993) ("Even if one could demonstrate with certainty that blackmail could efficiently deter crime, most people would probably resist decriminalization."); Richard A. Posner, Blackmail, Privacy, and Freedom of Contract, 141 U. PA. L. REV. 1817, 1825 (1993) (stating that "blackmail is a form of private law enforcement, so in areas where private law enforcement is banned... blackmail should be banned").
These might include white collar crimes, or acts widely considered immoral or dishonorable although not legally prohibited.

In this view, blackmail would serve the ends of social control, and a blackmailer could be considered an agent of the public. If blackmail were permitted, the possibility of being blackmailed might deter A from engaging in conduct that would give B a lever with which to pry out some compensation. People might commit fewer crimes if, in addition to risking public prosecution and penalty, they risked having to share the benefit with some private person who found them out. This is the only theory of blackmail I have encountered that is concerned to any extent with the effects on A’s behavior.

Any benefit from blackmail in the form of an incentive for good conduct by A, however, is likely to be marginal. For most crimes, private persons have even lesser means of discovery than the public. B is not going to get rich tracking down bank robbers and shaking them down for blackmail. B is far more likely to get dead in this line of work. The idea of blackmail as private enforcement is somewhat more plausible when it is directed at conduct beyond the reach of criminal laws or tort law, but, as discussed at greater length below, the most that can be expected from exposing private conduct to blackmail may only be somewhat greater discretion in people’s private conduct.

E. Blackmail as Deadweight Loss

This theory of the prohibition finds in blackmail a source of deadweight social loss. Suppose that, absent any legal restraint on blackmail, B were successful in bargaining with A over his silence. Their agreement would leave the same distribution of information as before they bargained. B and A would therefore have invested time and effort in a transaction that brought nothing new. It would be as though they had dug a hole and filled it up again. So viewed,

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59 Certain crimes—mostly white collar crimes such as tax evasion—may in fact more easily be detected by a private person than by public enforcers. To permit blackmail of tax evaders could conceivably, therefore, reduce their return from the evasion.Offsetting this, however, would be the greater ease for tax evaders of buying silence and hence avoiding detection.

40 If individuals were accorded investigative powers for “hard” crimes, the state’s monopoly on force would be considerably modified. While this may not be wholly untenable, to espouse such a regime in the sole context of blackmail seems contrived. If you take seriously the idea of blackmail as private enforcement, why not adopt the idea of private enforcement of crime across-the-board?
bargaining between B and A to the end of keeping information known only to them undisclosed is a pure waste. The prohibition of blackmail curtails sterile transactions of this sort by removing the incentive to acquire private information for the sole purpose of keeping it undisclosed. In contrast, bargaining between B and C is all right in this view, because it tends toward a new distribution of information.

In the form just stated, this theory of blackmail proves too much. Unless qualified in some way, it would, for example, prohibit bargaining between B and A over B's plans to build on a lot contiguous to A's land. If A buys a scenic easement from B, the physical condition of their lots remains the same as before. Their bargaining is nonetheless not pure waste. What has changed, beneath the surface, is their property rights. And because A values a view more than B values the right to build, their combined rights are more valuable. More broadly, something does happen in a blackmail bargain: a refraining of property rights between A and B. It is part of the transactional cost of life that a possible outcome of any bargaining is to leave things the same.

To be sure, one ought not to encourage pointless bargaining, but across a broad range of situations there is no substitute for bargaining to shift property rights to new owners who value them more. It is therefore not decisive that nothing conspicuous happens if B and A conclude a bargain over information. A has more secure control over the information than before as a result of the bargain. All transactions entail transaction costs, which are at worst a necessary evil. It would be paralyzing to prohibit all bargaining aimed at leaving the surface of things undisturbed. The allocation of social cost is permeated with bargaining that looks very much like what is called "blackmail."

There is an early version of this theory of blackmail in the writing of Robert Nozick, who casts the blackmail bargain as an "unproductive" exchange, and contrasts it with the payment to a next-door neighbor to abstain from building, which he views as "productive." Nozick deems even the transaction with the neighbor "unproductive," however, if the neighbor has no interest in building and "formulates his plan and informs you of it solely in

41 See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 84-85 (1974) ("Though people value a blackmailer's silence, and pay for it, his being silent is not a productive activity. His victims would be as well off if the blackmailer did not exist at all...".)
order to sell you his abstention from it." Nozick's assertion notwithstanding, the latter exchange is in fact productive given the more valuable allocation of property rights that results. In more recent writings, Ronald Coase, the acknowledged godfather of legal analysis based on transaction costs, propounds the prevention of wasteful transacting as the only plausible basis for the law of blackmail, but also recognizes that prohibition of bargaining, without more, throws out the baby with the bath.

Although clearly overbroad, this theory of blackmail gives a better account of the prohibition than the others, because it recognizes that what is ultimately at issue in the prohibition of blackmail is transaction costs. There is no other way to explain the law of blackmail. The distribution of rights in information under prohibition is not the one we would choose in a frictionless world. If prohibition achieves the best result possible in the real world, it does so paradoxically, by eliminating a substantial part of the property rights of holders of private information. Since we normally seek to approximate through the choice of a legal regime the same distribution of property rights as in a frictionless world, the prohibition of blackmail is justified only if there is something uniquely different about bargaining over information compared to other bargaining.

V. BARGAINING OVER BUILDING ON CONTIGUOUS LOTS

Where rights other than in information are at issue, it is hard to see what is gained from constraints on bargaining. Consider, again, the case of contiguous lots owned by A and B. If B has the right to build on his lot in a way that would impair A's view, B might seek compensation from A for not building. This transaction falls into the formal pattern of blackmail. Indeed, if B has no interest in building for its own sake and wants only to profit from selling an easement to A, B's announced intention to build is blackmail as

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42 Id. at 85.
43 Nozick's landowner is better off than if the neighbor had sold his lot to someone else who wanted to build on it, a possibility that is now permanently foreclosed.
44 See Coase, supra note 3, at 671-72. As Coase also notes, there is in the writings of Pigou the extraordinary suggestion that all bargaining should be prohibited because, taken by itself, it is a pure cost. See A. C. PIGOU, THE ECONOMICS OF WELFARE 201 (4th ed. 1932) ("It is obvious that intelligence and resources devoted to . . . [bargaining] . . . yield no net product to the community . . . . These activities are wasted.").
defined in the Model Penal Code. B's bargaining with A ought, nonetheless, not be prohibited, no matter what the intrinsic value B attaches to building. When A values an open view more than anyone else values building on B's lot, prohibition of bargaining only interferes with the best outcome. If prevented from bargaining with A, B might go ahead and build even though he values building less than A values a scenic view. Moreover, as a practical matter, B can always assert or feign some interest in building on the lot. Or B may seek out some potential buyer of the lot, C, who does want to build. If B cannot bargain with A, B can benefit from the right to build only by selling to C. As an owner who does attach inherent value to the right to build, C can go ahead and build, or sell the right to A. If A values a disengaged view more than B gains from the sale to C, a sale of B's lot to C simply increases the chances that things will turn out wrong.\(^{45}\) Finally, A is likely to welcome B's offer of a bargain. A would almost certainly prefer to have the chance to buy an easement than to wake up one morning to the sound and sight of bulldozers on B's lot. In the end, the prohibition of bargaining between B and A only complicates the course of transacting and only makes it harder for the one who values it most to gain control over the right to build on B's lot.\(^{46}\)

One possible response to the pattern just elaborated is that the initial assignment of the property right—here the assignment to B of the right to build—was wrong. In a given case, to be sure, an initial assignment to A of the right to prevent B from building might have worked out better, that is, might have led to an appropriate final distribution of rights at less transactional cost. But generally, if the desire to build and the craving for a disengaged view are distributed

\(^{45}\) If A values the right to build more than C, A might then buy the right from C and C might resell the lot (now no longer for building) to yet another who does not want to build. C's gain would be the amount by which A values the right to a view more than C values the right to build (which will have been reflected in the price paid by C to B). It would appear that part of what B could originally have gotten from A has been diverted to C, who has in effect served as a conduit for the right from B to A. B might even be able to get from C some part of the additional value of the view to A, if it is absolutely certain that C can sell an easement to A at full value. In fact, the bargaining will be complicated at every stage by uncertainties of value and the possibility that someone else down the line will have a change of heart. The prohibition of bargaining almost surely increases the chance of a bad outcome, that is, that the right to build ends up with someone who does not assign the highest value to it.

\(^{46}\) Bargaining also permits a broader range of resolutions—such as B's agreement to build less obtrusively—aimed at maximizing the combined value of A's and B's lots.
randomly, no initial assignment of rights imposes itself. As long as
the opportunity and difficulty of bargaining are symmetrical, the
transactional burden in cases where \( B \) sells \( A \) an easement under
one regime is no greater than the burden under the other regime
of sales by \( A \) to \( B \) of the right to build.

VI. BARGAINING OVER INFORMATION

When the right at issue between \( A \) and \( B \) (and ultimately \( C \)) is
control over information, the same outcome is desirable in the
abstract. \( B \)'s information should be controlled by \( A \) or disclosed to
\( C \) according to whether \( A \) or \( C \) values the information more. Unlike
the case of contiguous lots, however, the regime of free bargaining
between \( B \) and \( A \) does not clearly tend toward that result. What
shapes the particular course of bargaining in blackmail is that the
underlying rights consist entirely of information, a form of property
different from others in significant respects. Information is less
susceptible to exclusive ownership than other property; it is hence
more costly to appropriate and to transmit, and the return from
information is generally independent of the amount invested in
it.\(^{47}\) Bargaining over information raises unique problems.

If allowed to bargain without constraint, \( B \) would be more likely
to sell silence to \( A \) than to disclose the information to \( C \), regardless
of the value of the information to \( C \). With information concerning
\( A \), the course of bargaining between \( B \) and \( A \) is by far the easier. \( B \)
and \( A \) already know the information; \( C \) does not. Indeed, in the
normal setting of blackmail, \( A \) knows more of the value of the
information than \( C \) knows of its very existence. Regardless of who
ultimately values the information the most, at the time of a potential
blackmail bargain, \( B \) stands to gain more from the effort of
bargaining with \( A \), who already knows the value of the information.
\( B \) cannot bargain with \( C \) over the value of the information without
revealing some part of it, thereby reducing the amount still
undisclosed. If \( C \) is the public, \( B \) must bargain with some proxy,
such as a newspaper or magazine that will pay for a circulation-
boosting story. If blackmail were legal, in short, \( B \) would tend

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\(^{47}\) See Kenneth Arrow, *Information and Economic Behavior*, reprinted in *A COLLECTED PAPERS OF KENNETH J. ARROW* 136, 142-43 (1984). Another aspect of bargaining between \( B \) and \( A \) over information is that it approximates a bilateral monopoly. To be sure, \( C \) is to some extent in the picture, but to a less significant degree than in other kinds of bargaining. With information, the bargaining is more completely contained between \( B \) and \( A \).
consistently to try to sell silence to A rather than disclosure to C.\textsuperscript{48} The outcome of bargaining that leaves no change in the surface distribution of rights is more likely when information is at issue, regardless of the values assigned to the information by A and C. Concerns over deadweight loss are thus especially acute in bargains over information. The simplest way to make the point is that a bad outcome is a more likely result of bargaining over information than of other bargaining, so that the transactional cost of the bargaining itself is less obviously justified.

Information is a ubiquitous source of transaction costs, to be sure, and complicates the course of many kinds of bargaining. In bargaining over building on contiguous lots, for example, A and B may need (and in any event will likely gain from) information about market values, potential buyers, and the like. The cost of such information may well affect the course of bargaining. B is more likely to bargain initially with A, who is close at hand, than seek out some unknown buyer. But the bias toward bargaining with A is less systematic than in cases involving pure information. In blackmail, the bargaining raises problems of information about information. In analyzing blackmail, we cannot assume a world of perfect information without assuming away the entire problem, whereas with other problems (including, I think, A’s and B’s contiguous lots) the assumption of perfect information is a step toward uncovering the best legal regime.

We can safely posit, therefore, that unfettered bargaining between B and A would not lead to the same allocation of rights as in a world of perfect information. That does not mean, of course, that prohibition of bargaining induces the best possible allocation of rights in information. In practice, the prohibition of blackmail prevents bargaining from following its natural course between B and A and, indirectly, strengthens C’s hand in acquiring information held by B. With B denied the (legal) benefit of bargaining with A, disclosure to C is more likely. B also has less to gain from acquiring information about A in the first place. The prohibition of blackmail, therefore, leads to more disclosure from a smaller body of information held by B. Perhaps that is why defenders of privacy and proponents of disclosure both find merit in the prohibition of blackmail. Whether the absolute amount of information disclosed to C is greater or lesser than under the regime of free bargaining is

\textsuperscript{48} This is probably so even with the prohibition of blackmail, just somewhat less.
hard to say. While the prohibition of blackmail is likely to have little effect on the type of information adventitiously discovered by $B$ about $A$, it may bear on what sort of information $B$ deliberately seeks out. Under prohibition, $B$ has more reason to seek out information of interest to $C$ than information merely costly to $A$. This effect is likely to be small, however, because it is difficult in any event for $B$ to get full value for information in dealings with $C$.

The prohibition of blackmail creates for $C$ leverage that $C$ would not otherwise have with respect to information concerning $A$. And this at $B$'s expense. The prohibition of blackmail, in broad terms, shifts rights in private information discovered by $B$ to $C$. While it is not a tax, it is similar to one in that it reduces the value to $B$ of a certain kind of economic activity—the discovery of information—and has the same likely effect of reducing the extent of that activity, to the advantage of $A$'s privacy. The "tax" also reaches information obtained by $B$ as a windfall, and shifts part of the windfall advantage to $C$. Some part of the potential windfall—possibly larger than $C$'s on average—goes back to $A$ in the cases where $B$ simply remains silent without seeking compensation from anyone. Across the full range of situations both $C$ and $A$ get part of the value that is denied to $B$, which is why the prohibition of blackmail can plausibly be viewed as serving the ends of disclosure and privacy.

VII. AN ALTERNATIVE REGIME FOR BARGAINING OVER PRIVATE INFORMATION

While the particular nature of rights in information lends plausibility to the prohibition of blackmail, it by no means disposes of the question whether prohibition leads to the best practical allocation of those rights. In weighing a change in the legal regime for blackmail, three considerations come into play. The most important concern in framing a regime for bargaining over private information is to enhance the likelihood that it will be controlled by the one who values it most. Two other concerns, both related to the main concern, involve the effect of a given regime on underlying conduct: first, the incentives to invest resources in discovering information and bargaining over it (in our triangular scenario these are the incentives for $B$); and second, the incentives for those whom the information concerns ($A$ in our alphabet) to leave it exposed to discovery by $B$ in the first place. These elements are specifically correlated under different regimes for bargaining over information. Prohibition of blackmail limits cooperation between $B$ and $A$ to
keep C uninformed, thereby apparently increasing disclosure to C; the prohibition, however, also likely cuts down effort by B to acquire information concerning A, thereby reducing the body of disclosable information, and thus may in the end make it somewhat easier for A to engage costlessly in the course of action that gives rise to the information. These three effects are, I imagine, increasingly attenuated in the order just given. If blackmail were permitted, C would on balance find out less of the information concerning A held by B, B would invest more effort in uncovering information about A, and A would accordingly want to be somewhat more guarded in leaving a trail of information, either by changing conduct or by engaging in the same conduct more discreetly.

A regime of wholly unrestrained bargaining over private information would, on balance, bring little or no advantage. It would, at the outset, give A more control over the disclosure of private information held by B. Since the blackmail bargain taken by itself is efficient when it involves information worth more to A than to C, at least something would be gained. On the other hand, the greater ease of suppressing information more valuable to C than to A would entail a loss. Furthermore, a regime of wholly free bargaining over private information would have ancillary effects on the conduct of B, and even A. Any gains from A's greater control over private information must therefore be weighed against the possible cost of B's increased efforts to unearth information and A's own cost of preserving privacy. Once B is allowed to bargain with A, he would surely have a stronger incentive to seek out private information about A that he might otherwise leave alone. While there may be scant cause to fear that Bs would give up productive economic activity in droves and instead frantically comb their environment for guilty secrets about As, there would doubtless be some effect, little of it good.49

It is not necessary, however, to take free bargaining absolutely or not at all. Between flat-out prohibition of bargaining and wholly untrammeled bargaining are numerous gradations of freer bargain-

49 Journalists, for example, might be somewhat more inclined to uncover stories for the sole purpose of covering them up again, while it would be better for them to pursue stories that can be more profitably sold to the public. A journalist employed by another (a newspaper publisher, for example) is, to be sure, obligated as an agent not to usurp the information for personal gain, wholly independently of the law of blackmail. Concerns about information professionals therefore involve mainly freelance journalists, owners of newspapers, and similarly entrepreneurial gatherers of information.
ing than is now allowed. Sketched below is the outline of a regime for bargaining over private information that is preferable, in my view, to the present unqualified proscription of blackmail.

The first objective of any regime for bargaining is to leave control over information with the one who values it the most. Ideally, $B$ would be free to bargain with $A$ over information that is more valuable to $A$ than to $C$. At the same time, $B$ would be discouraged, if not more forcibly prevented, from bargaining to suppress information more valuable to $C$. The threshold question of blackmail can therefore be restated: is there any way a priori to determine what information is more valuable kept private and what information is more valuable disclosed?

To do so is certainly not easy, and may ultimately be impossible. Some inferences can be drawn, however, about the respective public and private value of some information. These arise in identifiable situations where the disclosure of information, rather than its suppression, is more consistent with the assumptions underlying the definition and allocation of other property rights. Consider, for example, information about prosecutable crimes. If the public benefits from the prohibition of a crime—and generally it does—it follows that the public gains more from the discovery of the crime than the criminal gains from concealing it. An arithmetically clear example of this principle is tax evasion: the public (through the Treasury) gains at least what the evader loses by discovering the fraud. Similarly, most tort law reflects a preferred allocation of social cost. If $B$ knows of a tort committed by $A$ against $C$, $C$'s acquisition of the knowledge will likely bring a better allocation of social cost than the suppression of that knowledge by $A$ and $B$. The existence of a compulsory process for obtaining information in criminal proceedings and tort actions assumes a net social advantage from the discovery of this information. To the extent the underlying crimes and torts are appropriately defined, this advantage is real. Information about a crime or a tort committed by $A$—which is the class of information commonly subject to compulsory process—is among the most likely to be of greater value to $C$ than to

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50 It is true that if a given criminal prohibition is inefficient, to prohibit blackmail against those who have committed the underlying crime makes things worse. A dévoué of freedom who thinks, for example, that gambling and prostitution ought not to be illegal would be likely also to think that gamblers and prostitutes ought to be able to buy their privacy.
A. In other cases, it is at least possible that information held by \( B \) will be more valuable to \( A \) than to \( C \).

In this light I offer the following tentative first rule for bargaining over private information: \( B \) cannot legally bargain with \( A \) to suppress information about a prosecutable crime or tortious act committed by \( A \).\(^{51}\) Although perhaps not obvious, it is unnecessary to treat as crimes bargains that are invalid under this rule. It is sufficient, indeed preferable, simply to make them unenforceable. \( A \) gains no real control over disclosure from an unenforceable bargain with \( B \). And if \( B \) cannot assure \( A \) of any increased control over disclosure, \( B \) cannot extract much from \( A \), and therefore has little reason to invest much effort in bargaining. In contrast, if blackmail is made a crime, \( A \) gains considerable control over disclosure from entering into a bargain with \( B \), because \( B \), by incurring the criminal exposure of a blackmailer, can now sell \( A \) a much higher likelihood of silence. To be sure, after a blackmail bargain between \( B \) and \( A \), \( B \)'s disclosure is not literally proscribed. But \( B \)'s disclosure also exposes the blackmail, and so may be costly to \( B \). If the penalty for blackmail is severe, \( B \)'s disclosure after having bargained to agreement with \( A \) is in fact prohibitive.\(^{52}\) The criminal prohibition of blackmail, therefore, makes the blackmail bargains entered into across the threshold of prohibition highly enforceable.\(^{53}\) If \( A \) and \( B \) both want to bargain, they will often do

\(^{51}\) It might further be helpful to frame the information over which bargaining is unlawful as information that \( C \) could obtain from \( B \) through compulsory process in an action based on the underlying crime or tort. I am not sure at this writing, however, that the availability of compulsory process to \( C \) is ultimately a workable touchstone of the line between lawful and unlawful bargaining. The problem is that in certain grand jury proceedings, according to academic colleagues, a broad range of information can be elicited by a prosecutor. The test therefore should be limited at all events to information discoverable by compulsory process at trials for crimes and tort actions, where the information is bounded by a requirement of relevance to the matter at hand.

\(^{52}\) In nineteenth-century English law, blackmail was a felony punishable by life in prison. See Goodhart, supra note 4, at 179. That is more than enough to give \( B \) pause over revealing himself a blackmailer.

\(^{53}\) Taken literally, the prohibition of blackmail makes \( A \)'s use of \( B \)'s risk of prosecution in order to deter \( B \)'s disclosure a form of blackmail itself. “If you disclose my secret, I'll expose you as a blackmailer and you'll go to jail” is yet another threat encompassed by the Model Penal Code's definition of blackmail. See Model Penal Code § 223.4(3) (Proposed Official Draft 1962). In the standard blackmail situation, however, \( A \) does not have to make this threat, because it is implicit in the situation. But if \( B \) is a very stupid blackmailer, \( A \) may have to bring the point home explicitly. For connoisseurs of blackmail paradoxes, I offer this one: a blackmailer with a very low I.Q. may drag his “victim” into committing blackmail.
so despite the prohibition of blackmail. When they do, the prohibition, on balance, strengthens A’s hand. To make blackmail agreements unenforceable is likely, in sum, to cut down bargaining and increase disclosure compared to the alternative of making them crimes.

A possible further element of this regime, in addition to making the blackmail bargain unenforceable when it involves crimes or torts, would be to treat B’s compensated silence as a form of complicity in whatever is kept silent. This would expose B, in the event of disclosure, to some part of the legal consequences befalling A. The blackmailer who has been compensated for concealing knowledge of a crime or a tort would thus be exposed to criminal penalties or tort liability, as the case may be, if these were ultimately visited on A. The idea would be to impose on blackmailers part of the social cost of the concealment of information in cases where the information was more valuable disclosed. If, in contrast, it was disclosure that brought net social cost because the information was of a type more valuable kept secret, B’s cooperation in the concealment would bring no liability.

The point of this proposed regime is to curtail bargaining over information that should be disclosed, while permitting it when the likely result of bargaining—concealment—is significantly preferable to disclosure. Some bargaining between B and A over disclosure of information not involving A’s crimes or torts would therefore be permitted. A concern in framing permitted bargaining, however, is not to open the door to systematic information-farming by blackmailers bent only on profit from suppressing what they have uncovered. To this end, we would want to distinguish, if possible, between information already held by B (or obtained fortuitously) and information generated by B’s special efforts for the purpose of blackmail. While it is difficult to find a perfect touchstone

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54 The consequences of disclosure to B need not, of course, be exactly the same as for A. They should in general be milder.

55 The present law of blackmail, to an extent, already tends in this direction. Because A, but not B, may initiate bargaining, present law leaves a relatively open path to bargaining when A and B have a prior course of dealing from which A can figure out how much B knows. If, for example, A has written B a compromising letter, A can offer to buy it back, while B cannot offer to sell it. A is far more likely to know of information growing from a course of dealing with B, and thus be able to initiate bargaining, than to know of information acquired by B through anonymous investigation. To this extent, present law is more favorable to bargaining over information already held by B (which is bargaining that can be initiated by A) than to bargaining generated by B’s information-farming.
identifying these two classes of information, a possible proxy for the distinction would be to permit $B$ and $A$ to bargain over information (not concerning crimes and torts, of course) only when $B$ and $A$ have a pre-existing relationship. This test, admittedly imperfect, goes some distance nonetheless toward separating information obtained fortuitously from information deliberately farmed.\textsuperscript{56} $A$ would not be exposed to blackmail from someone with whom he had never dealt.

In summary, the new legal regime for bargaining over private information would be the following:

1. Contracts not to disclose knowledge of prosecutable crimes and torts would be invalid and unenforceable. To enter into such a contract would in addition imply a measure of complicity in the underlying crime or tort.
2. Contracts not to disclose private information entered into between persons with no prior course of dealing would also be invalid and unenforceable.
3. Other contracts not to disclose private information would be valid.

This regime would give rise, between persons who have had some prior dealing, to a new class of enforceable contracts of silence. The existence of a binding obligation between $A$ and $B$ would largely eliminate the "slow torture" routine that arouses the indignation of commentators. Once $B$ has been compensated for remaining silent, $B$'s subsequent try for a second helping with the threat of disclosure can be countered by $A$'s own threat of a damage action or even prosecution, depending on the strength of the sanctions backing the enforceability of contracts of silence. $A$ is no worse off than if there had been no initial agreement.

Given our small experience with contracts of silence, it is hard to say exactly what such a contract might look like. A likely feature, though, along with the obvious element of $B$'s silence, is some provision for the event of disclosure of the underlying information from a source other than $B$. For example, if $C$ discovered the information from any source (other than $A$) within a period of time, $A$ possibly circumvention of the test would be for $B$, having dug up information on $A$, to enlist an associate of $A$'s, $B_1$, to bargain with $A$, or perhaps simply for $B$ to sell the information to $B_1$ for $B_1$'s own use. Even assuming, however, that such indirect transactions could not be prevented by qualifications of the test, the return to $B$ from unearthing information, now shared with $B_1$, would be reduced enough to make the undertaking less attractive.
B would owe A a partial or total refund of the contract price. An agreement without such a clause would give A little protection from other disclosures or other blackmailers and would accordingly be worth much less. With it, both B and A stand to gain from the preservation of A's privacy.

With some protection (albeit less than perfect) from the purely predatory blackmailer, A would have a significant measure of control over his own privacy. A might, to be sure, have to deal with threats of disclosure of information by opportunistic friends, acquaintances, associates, even enemies. But A has at the outset some control over what each of them may know. With respect to this class of information, A is likely to be the lowest cost avoider of untoward disclosure, and there is no obvious reason to protect A from bearing the full cost of preserving his own secrets. Under this regime, A would have somewhat more to gain than under current law from attending to his own privacy by such measures as weighing his casual disclosures in advance and choosing his friends, confidants, and sexual partners carefully. In contrast, the prohibition of blackmail reduces the advantage of those who are careful of their own privacy compared to those who are reckless with it.

The kind of private information B might hold over A, even excluding information on A's crimes and torts, covers a broad range. Some involves actions that are immoral or socially harmful, such as lying, cruelty, and unrestrained self-indulgence. Other information involves actions or conditions not bad in themselves (or even voluntary), such as private sexual predilection or illness, that are nonetheless embarrassing or painful when made public. The former class is more likely to involve dealing with others in some way, if only as victims, than the latter. The test I have suggested

57 In his talk at the Symposium for which this Article was written Judge Posner described the following recent instance of blackmail. B, intending to blackmail a married homosexual, spent time at a place where homosexuals habitually rendezvous, where he met A, ascertained that A was married, and invited A to his house nearby, where they had sex. B videotaped this sexual encounter with A and blackmailed A with the tape. B's blackmail was discovered when he unthinkingly sent the tape to A's home (where A's wife found it), and B was convicted and jailed. Judge Posner offered the case, United States v. Lallemand, No. 92-2178, 1993 U.S. App. LEXIS 6423 (7th Cir. Mar. 29, 1993), as an instance of the vulnerability of married homosexuals to blackmail.

However that may be, Lallemand is not a case of blackmail for an involuntary condition (homosexuality). A's exposure to blackmail did not flow simply from his homosexuality. A chose to marry someone from whom he concealed his sexual orientation, and to seek out other sexual partners at a place of anonymous encounters. The predicate of the blackmail in this case, being fully of A's own
for permissible bargaining therefore favors privacy in more purely private matters, while placing the cost of potentially harmful conduct more fully on those who engage in it.

CONCLUSION

As its title indicates, this Article is not the last word (or even letter) on blackmail. The problem of blackmail belongs to the broader problem of framing a legal regime for rights in information. The analysis of social cost in blackmail transactions is, for this reason, more difficult than for other crimes. The paradox of blackmail, restated in these terms, is that the prohibition of bargaining leads to a distribution of rights in information which, though not optimal in a world of zero transactions costs, may nonetheless be the best attainable.

Several commentators concerned with social cost have concluded that the prohibition of bargaining is desirable because agreements to suppress information are nonproductive. But when the information is worth more to A (that is, concealed) than to C (that is, revealed), the blackmail bargain, viewed in isolation, is productive. A's control of the information is more secure, and the alternative—disclosure—leaves A, B, and C in the aggregate worse off. Possible gains from blackmail bargains viewed atomistically do not in themselves, however, justify the regime of free bargaining over private information, which is worthwhile only if the larger cost of bargaining (which includes the creation of incentives for would-be blackmailers to seek out private information) is offset by a more valuable allocation of information resulting from the bargaining. The balance of advantage between these two regimes is not self-evident.

making, was anything but involuntary. It is not immediately obvious why the law should have protected A from an ill-considered, or even unlucky, choice of extramarital lover.

Because A and B had a voluntary course of dealing (even though B in fact deliberately set out to acquire compromising information about A) B's demands on A here would be permissible under the regime proposed in this Article. It is clear from this instance that the test I have proposed would not weed out all blackmail based on deliberately cultivated information. But to permit the blackmail in Lallemend would quite possibly be the right result on balance, measured by social cost. B's acquisition of information entailed little more cost or effort than the activity that A might otherwise have carried on with a different companion not bent on blackmail. The net investment of resources in the information over which B and A bargained was therefore likely to have been small. B's opportunism hardly inspires admiration, to be sure, but it entailed little net social cost.
Across-the-board prohibition of blackmail has the advantage of simplicity. Its cost lies in the potential denial of control over private information to the one who values it most. To permit bargaining without restraint might also, however, given the asymmetry of bargaining opportunities between $B$ and $A$, and $B$ and $C$, lead to the suppression of some information that would be profitably disclosed. Furthermore, unrestricted blackmail might induce excessive investment in the discovery of, and bargaining over, information of lesser value to $C$ than to $A$. Nonetheless, I think a plausible case can be made for freer bargaining between $B$ and $A$ over the disclosure of private information, not concerning $A$'s crimes or torts, when $A$ and $B$ have had a prior course of dealing. I reach this conclusion even though it may well be that the gains from improved allocation of rights in information would be roughly balanced by a possible increase in costly transacting. What tips the scales in my mind toward freer bargaining is, first, the suspicion that the prohibition of blackmail is widely ineffective. Much bargaining over private information, explicit and implicit, doubtless goes on in the teeth of prohibition, which itself adds a measure of anxiety and risk to the process. Second in the balance favoring freer bargaining are possible gains, little noticed in the literature on blackmail, in $A$'s incentives to guard his own privacy.

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58 Except in the passing notice of blackmail as a method of private enforcement.