Blackmail, Inc.

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Although the crime of blackmail seldom has been the subject of appellate litigation, it has received an extensive analysis within the scholarly literature.[1] It might be expected that this analysis would focus upon the traditional concerns of criminal law: mens rea, permissible defenses, burdens of proof, and modes of sentencing. But in fact the query has been posed at a far more fundamental level: why is blackmail a crime at all? The frequent appearance of this question is troublesome, for it implicitly identifies a powerful cleavage between our most cherished instincts about criminal responsibility and our collective ability to justify them, even to ourselves. To be sure, the failure to come up with a well-accepted account of why blackmail is both wrong and criminal has not yet had any practical consequences, for to date no legislature or judge has sought to remove blackmail from the list of criminal offenses. But at the same time, it would surely count as a welcome step toward public understanding if we could explain first, why intellectual doubts over the criminal nature of blackmail persist, and second, how to resolve those doubts in favor of the popular sentiment for its criminality, a sentiment that in my view rests on far firmer foundations than has generally been appreciated.

I. The Moral Dilemma

The basic question of criminal theory is to justify making certain classes of conduct criminal. One might suppose that the entire matter could be solved by an appeal to the supremacy of legislative decisions about what constitutes criminal conduct. After all, detailed statutes can be passed, and with them full notice can be

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[1] *See, e.g.*, A.L. Goodhart, Essays in Jurisprudence and the Common Law 175-89 (1937); Campbell, *The Anomalies of Blackmail*, 55 L.Q. Rev. 382 (1939); Williams, *Blackmail*, 1954 Crim. L. Rev. 79; J. Lindgren, Unraveling the Paradox of Blackmail (1981) (unpublished manuscript) (on file with *The University of Chicago Law Review*). Passing references to the problem are made as parts of other works in R. Nozick, Anarchy, State, and Utopia 84-86 (1974); Landes & Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 42-43 (1975).

given of the types of activities condemned as criminal. Individual citizens then can steer clear of conduct made illegal, thereby escaping all criminal sanctions. At a theoretical level, however, the appeal to legislation only pushes back, but does not avoid, the central moral inquiry: why is it that certain forms of activity—here blackmail—should be singled out for criminal punishment? It is a grave mistake to confuse the necessary conditions of notice and codification with the sufficient substantive conditions for criminal responsibility. If the legislature sought to declare marriage, schooling, or gardening criminal offenses, in all likelihood it could define their content with sufficient precision to avoid any procedural challenges based upon the want of notice. But even in a system that placed no constitutional limitations upon the legislative power (as is still the case in England, where much of this debate has originated) to declare a certain activity criminal, we should still demand some explanation of why this particular activity, but not others, should be classified as illegal.

The difficulties with blackmail as a criminal offense arise precisely at this level of theory. On first look the basic doctrinal structure—the protection of the individual in his person and property against the force or misrepresentations of others—condemns murder, larceny, and lying, while allowing marriage, prayer, schooling, and gardening. This basic proposition, however, appears to group much of what counts as blackmail with the set of legal activities rather than with the set of illegal ones. In order to account as a normative matter for the illegal nature of blackmail, therefore, we must be able to do one of two things. Either we must break the hold of the moral theory or, alternatively, we must introduce some secondary considerations that render it inapplicable in this particular instance. Both lines are fraught with dangers. As regards the first, blackmail turns out to be a case that shows the power of a moral theory to discriminate between lawful and unlawful acts. If the theory can be twisted so as to allow any result thought desirable in a particular instance, it then loses its moral force because it no longer operates as an independent constraint against the generation of new criminal offenses. By the same token, the second course of action is also filled with pitfalls, for if it is possible to generate a secondary set of considerations that undercuts the basic moral position, then those considerations become the only decisive ones, reducing the asserted moral theory to a preliminary maneuver of no substance or importance.

It is not possible, I believe, to resolve these quandaries in the abstract. Instead we must develop a theory that accounts for

blackmail in the interplay between normative and practical considerations. It is also necessary to show why the combined force of these two types of considerations accounts for its uneasy incorporation into the criminal law.

II. The Moral Theory

It is best to begin with a brief account of the moral theory of criminal responsibility. That theory requires that we identify both the interests to be protected and the types of invasions against which the protection is required. In this connection theft forms the simplest case from which others must be principled extensions. With theft we have the total deprivation of property from its owner by a deliberate act of the thief. Given that theft itself is regarded as (prima facie) unlawful, the question is, what types of analogous actions are to be regarded as unlawful as well? Blackmail does not lay heavy pressure on one element of criminality, that of mens rea.[2] Gross negligence and negligence are not needed to make blackmail a crime, nor need the spectre of a strict criminal responsibility ever be invoked. The element of intent is always present in vivid form in blackmail cases, often with exquisite fullness.

Greater attention must be paid to the other side of criminal responsibility—actus reus—and its permutations to locate the crux of the theoretical difficulty. One variation on the core case of theft is the destruction of property that is not first reduced to the possession of the wrongdoer. The wrongdoer does not take possession of the thing itself but denies its possession to its owner. The reasons for this action may be economic as, for example, to forestall the use of the thing by a competitor. Alternatively, they may be unrelated to economic concerns, as with indiscriminate vandalism. The reasons for the destruction (like the reasons for a theft) are in general immaterial to the basic question of responsibility. What is decisive is what is done, not the motive for doing it.

Blackmail is, of course, an activity that does not involve the use of force. Even so, it need not fall outside the scope of criminal activity. One may still argue that it falls within some principled extension of the basic concepts of criminal responsibility. One such extension involves the *threat* of the use of force against another individual. In armed robbery, the criminal may hold a gun to the

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[2] *See, e.g.*, Hall, *Interrelation of Criminal Law and Torts: I*, 43 Colum. L. Rev. 753 (1943); Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401 (1958). For my own view on the general subject, see Epstein, *Crime and Tort: Old Wine in Old Bottles*, in Assessing the Criminal 231 (R. Barnett & J. Hagel eds. 1977).

head of the victim while taking the victim's wallet, thereby engaging in little more than an aggravated form of the theft, as the actions of the owner of the wallet are not necessary to complete its transfer to the wrongdoer. On the other hand, the robber may hold the gun to the head of his victim and say, "your money or your life," thereby giving his victim the choice of whether or not to keep his wallet. The victim's handing over the money to the gunman does not cleanse the transaction, as the threat of force precludes any characterization of the transfer as a gift. Instead, the transaction is still regarded as a robbery even though the participation of the victim was necessary to its completion, for the victim is compelled to choose between two alternatives, both of which are his as of right.[3] The *threat* of the use of force is itself the action that attracts the criminal sanction. The duress of the gunman makes a mockery of the claim that the act of the victim is voluntary.

A theory of criminal conduct reaches not only the threat or use of force but also the use of misrepresentation to achieve the stated ends. The con man may be resisted more easily than the gunman, but he is nonetheless in principle guilty of a criminal offense if he succeeds in acquiring property by false pretenses. To get a person to sell or destroy his car by false reports that it is contaminated with deadly poisons is a criminal offense, albeit one of lesser severity than crimes that involve the threat or use of force.[4] The moral stand against force and fraud provides a powerful theory to generate the standard set of criminal offenses: larceny, taking by false pretenses, and embezzlement all presuppose that we have (and we do have) a clear sense of who owns what before the transaction in question takes place;[5] with that settled, given transactions are characterized as criminal not by some hap-

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[3] The analogue in ordinary civil cases is the doctrine of the duress of goods. In the traditional cases it arises when, for example, a party demands additional consideration to perform a task that he has already agreed to undertake. In ordinary circumstances a party is free not to do certain acts unless he consents. But having consented, he is then bound to perform them as promised. Therefore, even if the innocent party agrees to the renegotiation as coerced by the threat of breach he may, at least if he acts promptly, demand recovery of any excess payment even after he has performed. For a discussion of the doctrine, and the differences between it and the more general principle of economic duress, see generally Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293, 295-98 (1975).

[4] *See, e.g.*, Model Penal Code § 223.3 (Official Draft and Revised Comments 1980); W. LaFave & A. Scott, Handbook on Criminal Law § 90, at 655-72 (1972).

[5] The questions of original entitlement can be heavily debated, especially insofar as they rest upon the first possession rules. For my views, see Epstein, *Possession As the Root of Title*, 13 Ga. L. Rev. 1221 (1979). But for these purposes it is not necessary to legitimate the institution of property as such, but only to determine who owned what in any given case under the current rules.

hazard formula, but because they conform to the implicit pattern of entitlements and their violations outlined above. The great problem with blackmail is that it cannot be made to fit easily into this general framework, even after we take into account the acceptable extensions from the core case of theft.

One way to see the central point is to inquire into the relationship between blackmail and a hard bargain. In the ordinary commercial negotiation individuals are allowed, indeed encouraged, to make explicit threats to their trading partners. Thus a seller of widgets can threaten not to sell them at all or to sell them to a competitor of the prospective purchaser unless he is paid a certain price, since the universal prohibition against force and fraud does not reach this transaction. By the same token the buyer can threaten the seller by saying that unless his price is met, he will close up shop or take his business to a competitor of the seller. To ban commercial threats outright is to insist that there is no place for commerce, for without the process of threat and counterthreat—offer and counteroffer—it would be quite impossible in the ordinary course of business to reach any voluntary agreement: what other consequence would be possible with a rule that a prospective buyer was under a duty to accept any offer made to him by a prospective seller, or the reverse?

We can therefore reach a second critical conclusion about the relationship between acts and the threats to commit them. It is the converse of the proposition set out above: where a person *has* the right to do a certain act—for example, not to sell goods at a particular price—he has the right to threaten to do that act.[6] Indeed, as

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[6] As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence. So, as to "compulsion," it depends on how you "compel."

Vegelahn v. Guntner, 167 Mass. 92, 107, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting) (quoting Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 133 (1842)). For the exception, see Holmes's opinion in Silsbee v. Webber, 171 Mass. 378, 50 N.E. 555 (1898), where Holmes, over three dissents, held that the plaintiff had presented a question for the jury as to whether she could set aside on ground of duress an assignment of her interest in her father's estate. The assignment had been made because the plaintiff's son had embezzled funds from the defendant. When the embezzlement was discovered the plaintiff wanted to keep the defendant from going to her husband for fear that the knowledge would, in light of his irritable condition, drive him insane. *Id.* at 379, 50 N.E. at 556. Note that there was no suggestion of blackmail, as the plaintiff sought out the defendant for the transaction. In effect Holmes admitted the weakness of his position when he insisted without explanation that different principles were involved because the plaintiff sued to recover moneys paid on a note rather than to recover tort damages for illegal threats. His language, however, is always quotable. "When it comes to the collateral question of obtaining a contract by

a general matter this rule is essential to the preservation of any system of liberties, for if one person does not have the right to threaten actions that he may or may not do, he has to act without giving warning. This in turn will work to the disadvantage of the other party, who is now deprived of the choice that the threat would have otherwise given him. Thus if I am entitled to sell apples to my buyer's competitor at ten cents a pound, I do not do my buyer any service if I simply sell them to that competitor without first giving my buyer the option to match the price. It would work only to our mutual disadvantage, therefore, to say that the sale to the competitor is itself proper but that the threat to sell them is illegal as against my buyer.

How then does the law of blackmail fit into this general framework? Here, of course, the basic situation is that the defendant (*D*) obtains information that, if revealed, would lower his victim (*V*) in the estimation of some third party (*T*). It may well be that *D* learns that *V* has committed adultery, a point of some interest to *T*, here *V*'s wife. Or it could be that *V* was in earlier times a gambler, which might be sufficient to induce *T*, his fiancee, to call off their planned marriage. The pattern is of course not limited to personal affairs. An employee, *D*, may know that the employer *V*, has not paid his back taxes, a matter that is of some interest to *T*, the Internal Revenue Service, or that the employer was a gambler, a matter of some distress to *T*, the high-class clientele of the firm.

In each situation the first question is whether it is permissible for *D* to disclose the information to *T* against the will of *V*. It is easy to regard blackmail as a criminal offense whenever the disclosure is itself regarded as wrongful. In some, but not all, cases the disclosure itself could be wrongful. To start with the simplest cases, suppose first that it could be shown that *D* had acquired his information by illegal means from *V*, say by theft of his personal papers.[7] Here the disclosure itself would be unlawful, such that by

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threats, it does not follow that, because you cannot be made to answer for the act, you may use the threat." *Id.* at 381, 50 N.E. at 556.

[7] Even here it is possible to introduce additional levels of complication, as when the information is used by a transferee and not the original thief. In Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 497 (1969), two former employees of the plaintiff (then-Senator Thomas Dodd of Connecticut) rifled his papers without his permission and thereafter handed over certain information to the columnist Drew Pearson, who then published the information in his column. The plaintiff's action for invasion of privacy was denied, as the court was unprepared to "establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort." *Id.* at 705. The reason not to insulate the recipient of the information (especially after he uses it to his own benefit) does not, however, require any novel doctrinal developments.

the major premise, the threat to disclose also would be unlawful. To make matters a bit more complex, consider the case where *D* acquires the information legally but is not legally free to disclose it. One example might be where an attorney learns that his client had committed criminal acts in his youth, and then threatens to inform the client's employer unless he is paid money to keep silent. Here the duty of confidentiality arising out of the attorney-client privilege makes any disclosure of information acquired from his client unlawful, and so too the demand for money. The client is entitled to have his communications confidential; he should not have to purchase that right a second time in a subsequent transaction. In these two cases, therefore, we do not have to go beyond the basic principles of criminal responsibility to condemn *D*'s conduct.

Other transactions can generate greater difficulty. Suppose that the attorney, *D*, learns information about *V* from his client, *C*. *C* wants the information kept confidential, but *D* nonetheless demands payment from *V* to remain silent. Here there is a clear breach of *D*'s duty to *C*, but the mysteries of the privity doctrine make it difficult to determine whether *V* would be entitled to sue *D* for his breach of his duty to *C* if *D* should disclose the information to *T*.[8] Not only is *V* not a party to the arrangement, but typically he is not even a third-party beneficiary of the *D*-*C* relationship. We might be prepared to take the position that *D* is answerable to the world for his breach of duty. But it seems more likely that (disciplinary sanctions apart) the only consequence of *D*'s breach is to provide *C* with a cause of action against *D*, or perhaps a defense against *D*'s suit for the collection of legal fees.[9]

But here we are concerned with a criminal action and not a civil suit for damages. In light of his fraud, there is good reason to treat *D*'s deliberate breach of a duty of confidentiality as criminal,

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Let the information in question be analogized to property, and the only person who acquires it free of trust is the bona fide purchaser for value without notice of the illegal origin of the information. The first amendment might be a bar against a suit to enjoin further publication of the information, as it is in all defamation cases, *see, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964), but it is far from clear that it should preclude the damage actions otherwise available, be it for restitution or tort. And in any event, if Pearson had demanded payment from Dodd to keep the information quiet, then in my view it is a case of blackmail, even on the premise that the threat to disclose is illegal only when the disclosure itself is illegal.

[8] On the privity doctrine generally, see MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). For my views on the subject, see Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982).

[9] Cf. Snepp v. United States, 444 U.S. 507 (1980) (per curiam), where the government prevailed in its restitution action against a former CIA employee who published inside information about the CIA in violation of his contract of employment.

but it is a far more delicate question whether the crime itself should be aggravated because of the use to which *D* put the information. One could treat the blackmail as "parasitic" upon the wrong in question, but at most this would be a bare conclusion, not a justification for what is done.[10]

For our purposes, however, we can assume that in some cases blackmail is illegal because it in essence involves the effort of *D* to sell to *V* what he has just taken from him. This explanation is insufficient to cover all the acts that are included in the usual definition of blackmail. Thus by chance *D* may have seen that *V* was out with an attractive woman at an intimate out-of-town hotel. There is no invasion of privacy by the chance discovery and no obligation to refrain from telling *T* of what he has learned. Yet it is clear that the common conception of blackmail covers the case where *D* demands payment from *V* to remain silent. In some instances at least we are prepared to make criminal the threat to do certain acts that if done would by common consent be lawful.

One way to counter this problem is to argue that the threat to disclose is illegal precisely because the disclosure itself, if made, ought to be illegal. But this argument jettisons the basic theory of criminal responsibility by holding that deliberate acts, not involving the use of force or fraud, may themselves be regarded as criminal. In this context, that course of action seems highly unappealing. The law of torts has witnessed some effort to argue that disclosure of true facts about *V* to *T* is a tort against *V*.[11] But the development of this tort has been sharply limited in its own terms to disclosures about events long past, and the tort has never been applied to true disclosures of recent happenings, no matter how much they bring *T* into hatred, ridicule, and contempt.[12] In addi-

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[10] The idea of "parasitic" damages has had an especially large part to play in the law of mental distress. There the pattern of evolution first allowed mental distress as an element of damages in a tort otherwise established and later allowed recovery for mental distress in itself, without, for example, physical invasion. *See* 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 466, 470 (1906).

[11] The position has some support in the RESTATEMENT (SECOND) OF TORTS § 652D (1976), which deals with the subject of "Publicity Given to Private Life."

[12] See, e.g., the early case of Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), which denied the action to a former child prodigy whose subsequent career was dissected in a merciless account in *The New Yorker* magazine, and Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), where the California Supreme Court allowed the cause of action on behalf of a man whose involvement in criminal activities some 11 years before was revealed in a *Reader's Digest* article. The latter case, however, came up on motion to dismiss, and was on remand removed to federal court where it was dismissed. *See* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1263 n.273 (1976).

tion, even efforts to render tortious disclosures about past but true events have met with academic hostility in some circles.[13] They also run counter to the general thrust of the first amendment, which in a fashion consistent with the basic theory of criminal responsibility has been interpreted to afford extensive protection to true statements of fact. The idea that the privacy of the individual encompasses so much that no one can possess information about him without his consent is far too broad to be the basis of any coherent theory of individual rights. There is nothing in the current law of crime or tort that prohibits *D* from voluntarily disclosing to *T* true information about *V*. So too nothing prohibits *D* from selling that information to *T*, or indeed from becoming a private eye in the employ of anyone who wishes to learn about *V*. Nor is there any reason why this conduct should be regarded as either tortious or criminal solely because it is deliberate, as is almost always the case. It is quite impossible to escape the problem of blackmail by redefining the property rights of *V* and/or *T* to make unlawful the disclosure of true information not itself acquired by wrongful actions (e.g., force, fraud, or disclosure in breach of confidence). The general proposition that a party may threaten that which he may do makes blackmail an anomalous exception to the general pattern of both criminal and civil responsibility.

III. Blackmail, Inc.

What then can be done to account for the criminality of blackmail? Here, since we cannot look at the matter as one of pure substantive theory, the question is whether there is something about the structure of human institutions and behavior that helps fill the void. At one level the endeavor is odd. There are very few prosecutions for blackmail precisely because a person who pays to keep certain information quiet is not likely to step foward to orchestrate a public prosecution that of necessity reveals the very information that he wants to suppress.[14] If we look at the matter from a straight economic point of view, there is still the tantalizing possibility that some good might come of blackmail after all. If allowed, blackmail could serve as a kind of private enforcement of the criminal law,[15] for individuals are less likely to engage in illegal prac-

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[13] *See, e.g.*, Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 Ga. L. Rev. 455 (1978); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 Law & Contemp. Probs. 326 (1966); Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393 (1978).

[14] J. Lindgren, *supra* note 1, at 5.

[15] See Landes & Posner, *supra* note 1, at 42-43, where it is suggested that blackmail is

tices if they know that wholly apart from criminal sanctions they face the risk of monetary payments as well.[16] To be sure, this argument will not work where the concealed information is that in which the public authorities have no interest—as for example with cases of sexual activities that are today outside the scope of the tort or criminal law. But notwithstanding their limitations, the economic arguments do offer a commentary about blackmail that makes it possible to argue in favor of its legality.[17] One need only believe that the assistance blackmail might give to the current regime of public enforcement would outweigh any dislocations that its legalization might create. This formula leads to a high, if not intolerable, uncertainty in any individual context. But more to the point, far from supplying general reasons why the conduct should be made criminal, it opens up the possibility of the unsuspected virtues of blackmail as a means of social control.

Therefore, there is still a need to account for the powerful sentiment that blackmail should be criminal. In addressing this inquiry, it is useful to note one feature of the standard discussions of the subject: they concentrate in isolation upon the actions taken by the blackmailer *D* against the victim *V*. As such the discussions resemble morality plays done on a small stage, without any regard to the way in which the actors and the stage fit into the larger social framework. But suppose now the framework is changed, and one question, not part of the general discussion, is asked: *what would the world look like if blackmail were legalized to the extent that seems to be required by our general moral theory?* The first point to note is that there would then be an open and public market for a new set of social institutions to exploit the gains from this new form of legal activity. Blackmail, Inc. could with impunity place advertisements in the newspaper offering to acquire for top dollar any information with the capacity to degrade or humiliate persons in the eyes of their families or business associates. There-

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not tolerated, especially where the state has a public monopoly on enforcement, because it might lead to the over- or underenforcement of the law. In support of this position they note that the collection of private information is allowed in areas in which there is no state criminal involvement, for example, the collection of information of adulterous activities of one's spouse, which could be disclosed in divorce proceedings. Their explanation, however, presupposes that we have reason to believe that the current level of public enforcement is optimal by some standard. Standing alone, it cannot explain why blackmail is considered criminal without regard to mode or levels of public enforcement.

[16] Note, however, that the sanctions might not be purely additive, as the private party might (if left unconstrained by other sanctions) prefer to help *V* keep the information secret. See *infra* pp. 564-66 on the significance of the point for the general theory.

[17] *See* J. Lindgren, *supra* note 1, at 20-22.

after, Blackmail, Inc., as a commercial organization, could negotiate contracts with its sources to suppress the information acquired.

A useful question is, what would these contracts look like? One point that is clear is that these agreements would have to be somewhat complex. If Blackmail, Inc. is to make a profit out of the transaction it must be certain that the information turned over to it, as it were, for collection, cannot thereafter be used by its original source, or sold to some rival organization. Blackmail, Inc. would also have to be sure that the information was accurate and acquired in a lawful manner. Yet this means that actions for breach of express or implied warranty would have to be allowed the blackmailing firm against the supplier of its information. In addition there would be further disputes over who was entitled to what information, whether the fees that were earned were to be paid in a lump sum or only periodically, and whether they were owing absolutely or only conditionally upon collection from *V*. In spite of these difficulties, we should expect Blackmail, Inc. to obtain a fair bit of business, if only because professional blackmailers are likely to be able to extract greater sums from *V* than could an amateur like *D*. Where the costs of negotiation did prevent Blackmail, Inc. from obtaining business, there would still be the possibility of *D* himself entering into an enforceable contractual arrangement with *V* to divide the gains that result from *T*'s ignorance.

The administrative problems might be multiplied without difficulty, but no matter how great there is a real question of whether they lie at the root of the problem. Here the signals conflict. I have no doubt that one reason why baby selling is so frowned upon is that no one wants to have litigated questions of whether a buyer (under the U.C.C.?) can reject a baby six months after transfer because of a latent birth defect. In addition, the veil of secrecy that must be placed over the litigation is quite inconsistent with the idea that courts conduct their deliberations in public. Yet these points cannot be decisive. Trade secrets, after all, are routinely protected in courts, by in camera hearings where necessary. To be sure there is at least one difference between blackmail and trade secrets. Let a person use the trade secret of another and an injunction is a perfectly good remedy: he can no longer use the information acquired in the operation of his own business. Yet the injunction is of little value if the secret information about *V* is somehow disclosed to *T* who cannot but use it to alter his estimation of *V*. At this point, however, one might argue that the complications of blackmail are only those endemic to any complicated commercial transaction. As such our initial effort to place blackmail in context

has borne only limited fruit. We still need another practical explanation to help explain the condemnation of blackmail, and with it Blackmail, Inc., on moral grounds.

It is here that a second contextual argument has greater bite. The distinctive nature of blackmail comes more to the fore when we consider the next link in the blackmail transaction, that between Blackmail, Inc. and *V*. Recall that *V* is subject to blackmail precisely because there is something about his past that he wishes *T* not to know. Even apart from the possibility of blackmail, *V* will in the normal course of business take steps to keep from *T* the information that he does not want divulged. He will destroy or remove papers that tend to incriminate himself, try to steer *T* away from persons who might have the information he wants concealed, or lie about the past when the discussion veers too closely to the forbidden subject matter. Indeed, not to put too fine a point upon it, *V* is engaged in a type of long term, systematic fraud against *T* that if disclosed would allow *T* some type of relief against *V*—be it a divorce or a money judgment.

Now note what the blackmail does to this relationship. At one level, it simply allows Blackmail, Inc., on behalf of *D* and itself, to collect a fine equal to some portion of the gain that *V* enjoys from the continuing relationship with *T*. But why believe that matters stop there? *V* may not have the money to satisfy the demand. What then is to prevent Blackmail, Inc. from hinting, ever so slightly, that it thinks strenuous efforts to obtain the necessary cash should be undertaken? Do we believe that *V* would never resort to fraud or theft given this kind of pressure, when the very nature of the transaction cuts off his access to the usual financial sources, such as banks or friends, who would want to know the purpose of the loan? ("To pay Blackmail, Inc.," he would say in a burst of candor.) Moreover, suppose Blackmail, Inc. recognizes that its ability to extract future payments from *V* depends upon *T* being kept in the dark. As it is a full-service firm, it can do more than collect moneys from *V*. It can also instruct him in the proper way to arrange his affairs in order to keep the disclosures from being made, as there are mutual gains from trade—greater wealth for Blackmail, Inc. and *D*, and greater serenity and peace of mind for *V*. What Blackmail, Inc. can do is participate in the very fraud that *V* is necessarily engaged in against *T*. This is not a case, like driving, where we are uncertain whether a teenager will speed if granted a license. Continued fraud against *T* is a precondition for blackmail against *V*.

We now see the critical difference between blackmail and kin-

dred transactions, such as the protection of trade secrets. Only blackmail breeds fraud and deceit. To make the point clear, consider some of the close alternatives to blackmail that are not regarded as illegal. The actual disclosure of the information to *T* causes no difficulty under this theory, for it will end any past secrets and thereby eliminate the possibility of future fraud. By the same token, suppose that *D* tells *T* (not *V*) that certain information is available to him for sale. *T* is not in a position of already committing a continuing fraud against any one else, so whether or not the information is sold, fraud is not endemic to the transaction. *D* may be concerned that others will provide *T* with the information that he wishes to sell; still, he cannot protect himself against that competition by force or fraud without exposing himself to criminal sanctions.

There is still one difficulty with the theory. Why does not this theory require that criminal responsibility attach to *V*, who after all engaged in the deceit of *T* even before the appearance of *D*? Indeed, given the basic moral outlook of the criminal law, it is difficult to find reasons why *V*'s conduct should not be criminal. One possible doctrinal distinction is that the crime of taking by false pretenses, for example, requires not only deception by the wrongdoer, but also the receipt of some tangible benefit, some "property," as a direct consequence of his behavior—as is the case, for example, with the ordinary confidence man. Yet as a matter of moral theory it is difficult to see why a person who deceives in order to obtain reputational advantages should be preferred to someone who has designs on tangible property, as reputation and property are both means to increase the level of personal satisfaction. And even if this is true, it is a criticism not of the criminality of blackmail, but at most of the inadequacy of the criminal law of deception and false pretenses. Nor, ironically, is *V* a particularly attractive party to plead duress, as he is subject only to blackmail, not to threats of force or fraud. But whatever the right results here, the strong restrictions upon the punishment of fraudulent conduct nonetheless may help to explain why only *V* can obtain refuge from the criminal law. *D*, but not *V*, *has* sought direct and obvious gains as a result of his conduct. The puzzle, accordingly, is somewhat transformed, as the question might be better asked, why is it that *V* escapes criminal punishment for deception, not why is *D* punished for blackmail.

As a moral matter, therefore, blackmail is criminal because of its necessary tendency to induce deception and other wrongs. Nor should it be supposed that its criminalization has no effect upon

primary behavior. We have already noted that if blackmail were legal we should expect Blackmail, Inc. to emerge to service the available market. Making blackmail criminal has the very powerful effect of shutting down Blackmail, Inc. even before it can open its doors. That there are few prosecutions for blackmail is hardly decisive on the question of whether the conduct should be criminalized. A substantial deterrent effect exists even though no prosecutions take place.

Looked at in this way, the ambiguous status of blackmail in the common view becomes understandable. Blackmail is made a crime not only because of what it is, but because of what it necessarily leads to. The popular sentiment is wrong to the extent that it insists that the demand for money to remain silent when there is a right to speak counts as coercion or deception. But it is correct when it senses that the demand will not take place in isolation, but will be part of an overall scheme of abuse, itself rife with coercive and fraudulent elements. Clearly, it would be overstated to suggest that the arguments developed here reproduce the pattern of justification that ordinary people themselves use to support the criminalization of blackmail. To them the point is quite simply that blackmail is sneaky and dirty, perhaps without more. The arguments raised here do, however, help explain why that common sentiment remains so powerful even after subjected to intellectual counterattack. Blackmail should be a criminal offense even under the narrow theory of criminal activities because it is the handmaiden to corruption and deceit.