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## Article

### The Solution to the *Real* Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats

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*Disclosure of true but reputation-damaging information is generally legal. But threats to disclose true but reputation-damaging information unless payment is made are generally criminal. Most scholars think that this situation is paradoxical because it seems to involve illegality mysteriously arising out of legality, a criminal act mysteriously arising out of an independently legal threat to disclose conjoined with an independently legal demand for money. But this is not quite right. The real paradox raised by the different legal statuses of blackmail threats to disclose and disclosure itself involves a contradiction between our strong intuition that blackmail threats should be criminal and some equally strong arguments, all of which depend on the fact that disclosure is legal, that blackmail threats should be legal. So an adequate solution to the real Blackmail Paradox requires us either to drop the intuition or to refute the pro-legalization arguments. This Article will adopt the latter approach. It will explain why the six main arguments for legalizing blackmail threats all fail. In the course of refuting one of these arguments, it will also offer a novel positive justification for criminalizing blackmail threats. It will argue that they should be criminal for the same reason that menacing, harassment, and stalking are criminal—namely, because they involve the reasonable likelihood, and usually the intent, of putting the victim into a state of especially great fear and anxiety. Of course, one might object that disclosure itself is likely to have the same effect, if not malicious purpose. Yet, again, it is still legal. But this point shows only that we as a society value freedom of speech more than we value freedom from infliction of emotional injury. It does not show that we do not value freedom from infliction of emotional injury sufficiently to protect it when competing moral or institutional interests such as freedom of speech are not at stake.*

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# The Solution to the *Real* Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats

KEN LEVY\*

## I. INTRODUCTION

The so-called “Blackmail Paradox” starts with a simple legal fact: it is criminally punishable to make certain threats even though the threatened actions are by themselves perfectly legal. Consider the paradigmatic blackmail threat by “Blackmailer” against “Target”: “If you don’t give me \$1000, I will send these pictures, which prove that you are having an affair, to your wife, friends, neighbors, and boss.”<sup>1</sup> Blackmailer’s making this threat against Target constitutes a criminal act—even if Target *did* have an affair, Blackmailer *does* have the pictures, and Blackmailer obtained these pictures *legally*.<sup>2</sup> Yet if Blackmailer had not made the threat, it would have

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<sup>1</sup> This Article will continue to use money as the object sought by the blackmailer. But other benefits would work just as well—e.g., sex, a job, a job recommendation, a promotion, a recommendation for promotion, property, political liberties, a larger divorce settlement, more kindness in a relationship, favorable testimony, a pardon, or legislation. See RICHARD A. POSNER, *OVERCOMING LAW* 550 (1995); Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 864 (1998) (“[T]he blackmailer need not demand money. Nor need he even seek private advantage (narrowly defined).”); Walter Block, *The Crime of Blackmail: A Libertarian Critique*, 18 CRIM. JUST. ETHICS 3, 3–4 (1999); George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1621 (1993); Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905, 1910 (1993); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567, 1568 (1993); Kenneth Kipnis, *Blackmail as a Career Choice: A Liberal Assessment*, 18 CRIM. JUST. ETHICS 19, 20 (1999); Grant Lamond, *Coercion, Threats and the Puzzle of Blackmail*, in HARM AND CULPABILITY 215, 216 (A.P. Simester & A.T.H. Smith eds., 1996); James Lindgren, *More Blackmail Ink: A Critique of Blackmail, Inc., Epstein’s Theory of Blackmail*, 16 CONN. L. REV. 909, 917–18 (1984).

<sup>2</sup> See, for example, the New York criminal code, which includes blackmail under both its criminal coercion and larceny by extortion statutes. N.Y. PENAL LAW § 135.60 (McKinney 2004) (“Coercion in the second degree”) states in relevant part:

A person is guilty of coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

....

been perfectly legal for Blackmailer to send the pictures to Target's wife, friends, neighbors, and boss.

It is easy enough to explain why disclosure of Target's affair to third parties is legal. To be sure, it would very likely harm Target's reputation as a faithful, loving husband.<sup>3</sup> But, despite the damage that such a truthful disclosure will cause to Target's reputation (and other reputation-

4. Accuse some person of a crime or cause criminal charges to be instituted against him; or

5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule . . . .

And N.Y. PENAL LAW § 155.05 (McKinney 1999) ("Larceny") states in relevant part:

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

....

(e) By extortion. A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will:

....

(iv) Accuse some person of a crime or cause criminal charges to be instituted against him; or

(v) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule . . . .

Like N.Y. PENAL LAW § 135.60, MODEL PENAL CODE § 212.5 (Proposed Official Draft 1962) ("Criminal Coercion") states in relevant part:

(1) *Offense Defined.* A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:

....

(b) accuse anyone of a criminal offense; or

(c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute . . . .

And like N.Y. PENAL LAW § 155.05, MODEL PENAL CODE § 223.4 (Proposed Official Draft 1962) ("Theft by Extortion") states in relevant part:

A person is guilty of theft if he purposely obtains property of another by threatening to:

....

(2) accuse anyone of a criminal offense; or

(3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute . . . .

<sup>3</sup> Lawrence M. Friedman offers a study of the way in which reputation and the laws protecting it have evolved since the 19th century. See generally Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093 (2002). Notably, Friedman suggests that blackmail laws historically "protected (or tried to protect) reputation," *id.* at 1113, and that blackmail has a "more limited orbit," *id.* at 1126, than it did in the 19th and first half of the 20th century because what previously constituted a damaging secret is either (a) no longer (as) damaging due to ever-liberalizing norms of "respectability," *id.* at 1120, 1131, or (b) not a secret in the first place due to our ever-shrinking bubbles of privacy. See *id.* at 1119-32. Regarding (b), see also Michael Levin, *Blockmail*, 18 CRIM. JUST. ETHICS 11, 13 (1999) ("It is a cliché that privacy is already tenuous in a world of electronic billing and ubiquitous camcorders.").

dependent interests),<sup>4</sup> disclosure—whether in the form of gossip, tattling, or journalism—is justified by the institution of freedom of speech.

Still, if disclosure is legal, then it would seem that the threat to disclose should also be legal.<sup>5</sup> For both the threat and the threatened action are

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<sup>4</sup> While reputation may be the primary interest threatened by the blackmailer, secondary interests—interests that depend largely on reputation and therefore would likely also be injured if reputation were injured—include relationships and occupation or career. Scott Altman lists other interests that blackmailers may also threaten: “loss of dignity . . . safety, freedom . . . and other similarly central aspects of the individual’s life.” Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639, 1641 (1993).

<sup>5</sup> Conversely, some might argue that if the blackmail threat to disclose is illegal, then disclosure itself should be illegal as well. For different views on this point, see Altman, *supra* note 4, at 1652–53 (the wrongfulness of blackmail cannot be explained by the wrongfulness of disclosure); Berman, *supra* note 1, at 798, 843, 844–48, 849–51, 854 (only the blackmail threat, not disclosure, should be criminal because while both may lead to harm, (a) the blackmail threat is much more likely to arise from “morally culpable motives” and (b) enforcement of criminal law against disclosure with bad motives would involve a number of virtually insurmountable practical difficulties); Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225, 236 (1997) (the mere immorality of threatening to gossip is not sufficient for criminalization); Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 561 (1983) (“It is quite impossible to escape the problem of blackmail by redefining the property rights of [the victim] and/or [the third party] to make unlawful the disclosure of true information not itself acquired by wrongful actions.”); Hugh Evans, *Why Blackmail Should Be Banned*, 65 PHIL. 89, 93 (1990) (“In most cases, the right to free speech prevails over the right not to be harmed.”); Joel Feinberg, *The Paradox of Blackmail*, 1 RATIO JURIS 83, 89–94 (1988) (there is no paradox in criminalizing blackmail because the disclosure of embarrassing information is or should be illegal); Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFF. 43, 44, 47 n.13, 52–53, 56 (1992) (public disclosure is legally permissible only because of “practical considerations”—namely, the costs and difficulties of enforcement; without these practical problems, “the malicious unilateral disclosure of the information” is just as wrong and therefore would be just prohibited as the threat of disclosure); Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787, 1793 (1993) (“Any claim to outlaw blackmail might seem weak if at the same time the sale of embarrassing information on another to the press remains legal.”); Isenbergh, *supra* note 1, at 1913 (“For some [who support the prohibition of blackmail], I think, the prohibition of bargaining between [the blackmailer] and [the target] serves as a proxy for a prohibition of [the blackmailer’s] disclosure to [a third party]. That is, the premise that [the blackmailer] is free to disclose or keep secret private information about [the target] is not fully accepted.”); Lamond, *supra* note 1, at 232 (disclosure is not punished because its consequences are not “sufficiently serious”); James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597, 600 (1989) (“[I]f we changed the law so that it stopped the release of true information, then the [Blackmail Paradox] would disappear.”); Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2255–58, 2279–82 (1996) (“[G]ossip serves as a way of adjudicating disputes over norm violations, and this process, in turn, refines the content of norms to resolve specific concerns.”); Jeffrey Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 165 (1980) (even journalism does not morally justify deliberately embarrassing another, but “we allow it reluctantly as the lesser of two evils (the greater evil would be to chill the press.)”); David Owens, *Should Blackmail Be Banned?*, 63 PHIL. 501, 503 (1988) (“Do we really believe the threat of publication is so terrible? If so, why don’t we ban publication? Why do we forbid him to make the threat but not forbid him to carry it out? Surely, it is the carrying out of the threat that does the harm.”); Richard A. Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1835 (1993) (gossip is an “informal and very cheap system of deterring . . . lesser forms of wrongdoing”); Henry E. Smith, *The Harm in Blackmail*, 92 NW. U. L. REV. 861, 879–80 (1998) (there is no law against disclosure itself in part because disclosure, unlike the blackmail threat, will not lead to victim self-help and therefore to the harms that typically result from victim self-help).

normally on the same legal footing. If the threatened action is legal (or illegal), then the threat is also legal (or illegal). Conversely, if the threat is legal (or illegal), then so is the threatened action. And there is a reason for this correlation. On the one hand, if a particular threat is sufficiently dangerous or wrong to be criminalized, then surely the threatened action—which is arguably even more dangerous and therefore more wrong than the threat—should be criminalized as well. On the other hand, if a particular action is *not* sufficiently dangerous or wrong to be criminalized, then surely the threat of such an action—which is arguably even less dangerous and therefore less wrong than the threatened action itself—should not be criminalized either.<sup>6</sup> So blackmail threats curiously depart from this normal state of affairs. Again, while disclosure is perfectly legal, blackmail threats to disclose are illegal (criminal!).

Two arguments might be made here. First, one might argue that this departure from the norm is rather easy to explain. After all, the reason that disclosure is legal does not equally apply to the threat of disclosure. Again, disclosure is legal because it is supported by the institution of freedom of speech. And freedom of speech justifies *only* communication. It does not at all justify the *opposite* of communication—silence (including concealment). Nor, therefore, does it justify, or even relate to, a blackmailer's attempt to reap a profit from this silence.<sup>7</sup> This argument may be true as far as it goes. But it does not go far enough. It fails to explain why blackmail threats should be criminalized in the first place. Yes, blackmail threats are not justified by the institution of freedom of speech. But many activities are not supported by free speech and yet are perfectly legal. So why doesn't the same hold true of blackmail threats? Why are they singled out from all of these other non-free-speech-supported activities for criminal punishment?

Second, one might argue that there is nothing *paradoxical* about this departure from the norm. The fact that blackmail threats depart from the normal correlation between the legal statuses of threats and threatened actions hardly by itself constitutes a paradox. After all, there are

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<sup>6</sup> For a characteristically astute and highly nuanced approach to threats, see KENT GREENAWALT, *SPEECH, CRIMES, AND THE USES OF LANGUAGE* 90–109 (1989).

<sup>7</sup> See Altman, *supra* note 4, at 1653; Evans, *supra* note 5, at 93 (“The right to free speech . . . justifies [a journalist’s] harming [another] by publishing his secrets. It cannot permit harming him by extorting money for not publishing; the aims of free speech are not served thereby, and cannot give any justification for such an act.”); A. L. Goodhart, *Blackmail and Consideration in Contracts*, 44 *LAW Q. REV.* 436, 437 (1928) (quoting *R v. Denyer*, (1926) 2 *K.B.* 258, 268 (“There is not the remotest nexus or relationship between a right to [perform a harmful action A] and a right to demand [money] from [the target] as the price of abstaining from [performing A].”)); Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail’s Central Case*, 141 *U. PA. L. REV.* 1741, 1770 (1993); James Lindgren, *In Defense of Keeping Blackmail a Crime: Responding to Block and Gordon*, 20 *LOY. L.A. L. REV.* 35, 41 (1986) (emphasizing the distinction between suppression and release of information).

exceptions to every rule. And most such exceptions are not considered paradoxical. So why blackmail?

The most common answer to this question is that by criminalizing blackmail, we have mysteriously turned “two rights into a wrong.” That is, we have combined two perfectly legal acts—a demand (request) for money and a threat (warning) to perform a legal action (e.g., disclosure)—into one illegal act.<sup>8</sup> But contrary to the common wisdom, this explication of the Blackmail Paradox is far too metaphorical to capture its essence.<sup>9</sup> Yes, it might seem *odd* that an otherwise legal demand in conjunction with an otherwise legal threat to perform a legal action should be illegal. But odd is not paradoxical. Odd simply involves a *deviation* from the norm. Paradoxical involves a *contradiction* between intuition and argument.<sup>10</sup> So

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<sup>8</sup> See LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 133 (1996); Berman, *supra* note 1, at 796; Block, *supra* note 1, at 3; Walter Block, *Trading Money for Silence*, 8 U. HAW. L. REV. 57, 63, 69 (1986); Walter Block & Robert W. McGee, *Blackmail from A to Z: A Reply to Joseph Isenbergh's "Blackmail from A to C,"* 50 MERCER L. REV. 569, 569–71 (1999); Kathryn H. Christopher, *Toward a Resolution of Blackmail's Second Paradox*, 37 ARIZ. ST. L. J. 1127, 1130 (2005); Feinberg, *supra* note 5, at 84–85; Fletcher, *supra* note 1, at 1617; Hardin, *supra* note 5, at 1795; Katz, *supra* note 1, at 1567; Lindgren, *supra* note 5, at 598; Lindgren, *supra* note 1, at 909; James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 670–71, 680 (1984); Murphy, *supra* note 5, at 157; Ronald Joseph Scalise, Jr., *Blackmail, Legality, and Liberalism*, 74 TUL. L. REV. 1483, 1484, 1502 (2000); Smith, *supra* note 5, at 862, 887; Glanville L. Williams, *Blackmail*, CRIM. L. REV. 79, 163 (1954) (“The two things that taken separately are moral and legal whites together make a moral and legal black.”).

<sup>9</sup> For other critical views of this version, see Russell Christopher, *Meta-Blackmail*, 94 GEO. L.J. 739, 743–45 (2006); Michael Clark, *There is No Paradox of Blackmail*, 54 ANALYSIS 54, 55–56 (1994); Feinberg, *supra* note 5, at 85; Hardin, *supra* note 5, at 1795–96; Lamond, *supra* note 1, at 216 n.1 (“[T]here is nothing strictly paradoxical in treating the combination of two elements differently from the way each element is treated in isolation, nor in treating the *threat* of an action differently from the action itself.”); Saul Smilansky, *Blackmail*, in *ENCYCLOPEDIA OF ETHICS* 151, 151–52 (Lawrence C. Becker & Charlotte B. Becker eds., 2001) [hereinafter Smilansky, *Blackmail*]; Saul Smilansky, *May We Stop Worrying About Blackmail?*, 55 ANALYSIS 116, 116 (1995) [hereinafter Smilansky, *May We Stop Worrying*].

<sup>10</sup> In personal correspondence, some have taken issue with my conception of a paradox. One objection is that I am being overly technical; a paradox is nothing more than a proposition that is true but bizarre or counterintuitive or apparently self-contradictory. Another objection is that a paradox is a conflict not between intuition and argument but rather between one intuition and another. I do not necessarily reject either of these possibilities. For the time being, however, I maintain my position, which derives from classic paradoxes in Philosophy—particularly, Zeno’s Paradoxes and the Surprise Exam Paradox. Both kinds of paradox involve a contradiction between an intuition (e.g., there is motion) and an argument (e.g., because (a) every distance contains an infinity of sub-distances, (b) it is impossible to traverse an infinity of sub-distances, and (c) motion is just traversal of a distance, motion is impossible). (For helpful accounts of these paradoxes, see, for example, MICHAEL CLARK, *PARADOXES FROM A TO Z* 1–4, 7–8, 138–41, 159–60, 206–08 (2002)). My conception of paradox would explain why paradoxes may generally be resolved by maintaining the intuition and refuting the argument. As one author suggests, paradoxes “are resolved by pointing to the fallacy that generates them.” George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1263 (1985) (citation omitted). Fletcher, however, may diverge from me when he suggests in the preceding sentence: “[P]aradoxes are contradictions that result from overlooking an accepted canon of consistent thought.” *Id.* at 1263.

it remains to be seen what is *paradoxical* about the criminalization of blackmail.

The *real* paradox—the contradiction between intuition and argument—is this. On the one hand, we tend to think that blackmail threats are rightly criminalized. That is our strong intuition. On the other hand, there are some very good arguments—six in fact—that lead to the very opposite conclusion, the conclusion that blackmail threats should be perfectly legal.<sup>11</sup>

To solve this paradox—the *real* Blackmail Paradox—we have one of two choices. First, we may hold that our intuition is wrong, that the criminalization of blackmail is simply a giant legislative mistake, and therefore that blackmail threats should be just as legal as disclosure. A significant minority of scholars adopt this “pro-legalization” approach.<sup>12</sup>

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<sup>11</sup> For various formulations of the Blackmail Paradox, see Altman, *supra* note 4, at 1639; Berman, *supra* note 1, at 800 (“[B]lackmail is an exception to the general rule of law and morals that one may threaten to exercise one’s rights.”); Block, *supra* note 5, at 225; James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 CAL. L. REV. 1413, 1479, 1486 (1992); R. Christopher, *supra* note 9, at 743–45; Ronald Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 667–68 (1988); Epstein, *supra* note 5, at 561 (“The general proposition that a party may [not] threaten that which he may do makes blackmail an anomalous exception to the general pattern of both criminal and civil responsibility.”); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1849–50 (1993); Gordon, *supra* note 7, at 1742; Gorr, *supra* note 5, at 43, 52 (“[T]he most important cases in which there is likely to be a serious question about the legal permissibility of blackmail are those in which the act that would motivate the blackmail (1) is morally wrong, (2) involves some significant harm to another person, and (3) is (justifiably) [neither required nor forbidden by the criminal law].”); Isenbergh, *supra* note 1, at 1932; Katz, *supra* note 1, at 1567, 1595, 1598; Kipnis, *supra* note 1, at 19; Lamond, *supra* note 1, at 215–16, 230–31, 237 (how does the threat to do “what would otherwise be permissible” in conjunction with a demand for money constitute (a) a moral wrong, no less (b) a “serious criminal offence?”); James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1695 (1993); Lindgren, *supra* note 7, at 35; Lindgren, *supra* note 8, at 677–78; McAdams, *supra* note 5, at 2266–67; Murphy, *supra* note 5, at 160; Scalise, *supra* note 8, at 1502 (“[I]f blackmail simply presents one with two legal options (i.e., acquiesce to the demand or be subjected to the threatened action), how can increasing one’s options turn a legal transaction into an illegal one?”); Smith, *supra* note 5, at 864.

Different scholars have different opinions about the difficulty and legitimacy of the Blackmail Paradox. See, e.g., Block, *supra* note 5, at 228 (criticizing Lindgren for failing “to even consider that the legal proscription of blackmail could be mistaken and incomprehensible on rational grounds.”); Clark, *supra* note 9, at 55–56 (adopting the deflationary position that the Blackmail Paradox is not paradoxical at all); Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, 1665 (1993) (the Blackmail Paradox “may not yield to rational analysis.”); Gordon, *supra* note 7, at 1741 (the Blackmail Paradox is “neither puzzling nor paradoxical”; instead, it generates an “irony”); Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion and Robbery*, 141 U. PA. L. REV. 1877, 1902 (1993) (the Blackmail Paradox does not seem paradoxical “when viewed through the lens of economics.”).

<sup>12</sup> For articles advocating the view that blackmail should be either largely or entirely legalized, see MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 124–26 (1998); Walter Block, *Blackmail is Private Justice: A Reply to Brown*, 34 U. BRIT. COLUMBIA L. REV. 11, 11–12 (2000) [hereinafter, Block, *Private Justice*]; Walter Block, *Replies to Levin and Kipnis*, 18 CRIM. JUST. ETHICS 23, 23 (1999) [hereinafter Block, *Replies*]; Block, *supra* note 5, at 225, 236; Block, *supra* note 1, at 3–4;



Second, we may hold that our intuition is correct. The vast majority of scholars who discuss the issue adopt this “pro-criminalization” approach.<sup>13</sup>

Most pro-criminalizers believe that their primary, if not exclusive, task is to provide an adequate, positive justification for the criminalization of blackmail. And, indeed, they have been quite creative in this area. They have argued that the criminalization of blackmail is justified because:

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Walter Block, *Toward a Libertarian Theory of Blackmail*, 15 J. LIBERTARIAN STUD. 55, 55–57 (2001) [hereinafter Block, *Libertarian Theory*]; Block, *supra* note 8, at 62–63; Walter Block & Gary M. Anderson, *Blackmail, Extortion and Exchange*, 44 N.Y.L. SCH. L. REV. 541, 560–61 (2001); Walter Block & David Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37, 38, 54 (1985); Block & McGee, *supra* note 8, at 569, 569–71; R. Christopher, *supra* note 9, at 782–84 ((a) “meta-blackmail”—i.e., a threat to make a blackmail threat—is either more “serious” a crime, equally serious, or less serious a crime than conventional blackmail; (b) none of these three logically exhaustive answers is adequate; and (c) the only way to resolve this trilemma is to de-criminalize conventional blackmail); Feinberg, *supra* note 5, at 88–89, 94–95 (“on liberal grounds,” blackmail threats to disclose information that the target has engaged in “devious trickery or underhanded dealing” should be legalized); Gorr, *supra* note 5, at 48–49 (some “high-minded” blackmail—i.e., blackmail in which the blackmailer truly deserves what the blackmail target acquired “by legally permissible trickery and underhanded dealing”—should be legally permitted); Isenbergh, *supra* note 1, at 1908, 1926–32 (proposing a system that would prohibit only blackmail involving incriminating information, not blackmail involving merely embarrassing information); Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 273 (1982); Scalise, *supra* note 8, at 1486 (agreeing largely with Feinberg that “blackmail is not a justifiable crime under a liberal system . . . blackmail cannot legitimately be criminalized because no one’s rights are violated”). For various pictures of what society would look like if blackmail were legalized, see Block & Gordon, *supra*, at 45; Boyle, *supra* note 11, at 1478, 1487; Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1944–46 (1993); Epstein, *supra* note 5, at 562–64; Levin, *supra* note 3, at 13–14; McAdams, *supra* note 5, at 2245; Owens, *supra* note 5, at 503–04; Shavell, *supra* note 11, at 1891; and Smilansky, *Blackmail*, *supra* note 9, at 153.

<sup>13</sup> Another approach to blackmail that some scholars take is to propose not justifications but rather explanations of its criminalization. See Peter Alldridge, *Attempted Murder of the Soul: Privacy and Secrets*, 13 OXFORD J. LEGAL STUD. 368, 385–87 (1993) (blackmail is criminal because the kinds of threats it usually involves, threats to expose *sexual* secrets, are more frightening than any other kind of secret; they threaten to expose the “true” self behind the person’s public persona); Block, *supra* note 5, at 246 (“One theory [of why so many believe that blackmail should be prohibited] is that the prohibition of blackmail is hoary with tradition. Blackmail has been against the law for so long that commentator’s [sic] first instinct is to attempt to find explanations for this state of affairs, and by the very nature of all such efforts they soon enough come to resemble attempted justifications.”); DeLong, *supra* note 11, at 1691 (we share a communitarian ethic according to which “the blackmail story elicits a strong identification with the victim’s hopelessness and isolation” and “a blackmailer betrays . . . the victim by demanding money for silence and betrays the public by accepting it”); Friedman, *supra* note 3, at 1112, 1116 (blackmail was initially criminalized in part because a blackmailer’s act of threatening to expose a target’s secrets conflicted with the American value of “mobility”—i.e., “the right to start over again, to begin a new life, unencumbered by the debris of the old one.”); Murphy, *supra* note 5, at 156 (our strong moral distaste for blackmail is only an explanation, not a justification, of its criminalization); Scalise, *supra* note 8, at 1501–02 (“The moral intuition that blackmail is wrong appears to be . . . because the blackmailee’s situation is one for which empathy often exists. Everyone can imagine oneself in the unenviable position of the blackmailee. In such a situation, a reputable citizen seems to have very little choice—either pay the demanded amount or risk social opprobrium and societal shame.”); Smilansky, *May We Stop Worrying*, *supra* note 9, at 118–19 (“Part of the explanation for the perplexing attitude of common-sense morality on [blackmail] is probably cynical, e.g. that the thought of being blackmailed in the ordinary ways is frightening to the rich and powerful in society, who may be less concerned with e.g. the threats of employers or politicians.”).

- 1) it helps to maximize disclosure of incriminating information and thereby deter criminal activity;<sup>14</sup>
- 2) it helps to minimize wasteful, inefficient, or private law enforcement;<sup>15</sup>

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<sup>14</sup> For various positions on this issue, see GREENAWALT, *supra* note 6, at 93–94 (there are three “instances of blackmail”: those in which (a) disclosure would be “socially desirable”; (b) disclosure would be “socially undesirable but not illegal”; and (c) “the harm and benefit of disclosure are about evenly balanced”); POSNER, *supra* note 1, at 549, 549–50 (supporting proposition (1) but conceding that it is speculative); Berman, *supra* note 1, at 812–13 (prohibition of blackmail does not produce optimal deterrence and might even increase its incidence relative to legalization); Block, *Private Justice*, *supra* note 12, at 14 (Brown’s assumption that “in the absence of legalization of blackmail the blackmailer would have spilled the beans to the police . . . appears unwarranted”); Block, *supra* note 8, at 72–73 (“[O]ne cannot overlook the indirect effect of the blackmailer in reducing crime. [T]he more [the blackmailer preys on the criminal], the less . . . crime there will be. The law of economic incentive applies to shoplifters as well as blackmailers.”); Block & Gordon, *supra* note 12, at 39–44 (legalization of blackmail would “retard” crime because “miscreants would now have to share their ill-gotten gains with the blackmailer.”); Clark, *supra* note 9, at 58 (“It is a matter for empirical inquiry whether decriminalizing blackmail would mean that significantly more crime was concealed: and not only do we lack the evidence for this but it seems unlikely that we shall ever have it, considering the nature of the conduct involved.”); DeLong, *supra* note 11, at 1670–72 (criticizing Posner); Friedman, *supra* note 3, at 1112 (“[M]aking blackmail a crime might deter possible blackmailers.”); Ginsburg & Shechtman, *supra* note 11, at 1871–73 (blackmail is not always an efficient deterrent); Gordon, *supra* note 7, at 1751–53 ((a) legalization might actually lead to *more*, not less, disclosure; (b) not all of this disclosure will be socially valuable; and (c) while legalization might help to promote deterrence and some socially valuable disclosure, the transaction costs involved in blackmail transactions might outweigh these benefits); Gorr, *supra* note 5, at 49 (“[B]lackmail remains clearly paradoxical only in cases where the blackmailer (1) obtains her information innocently, (2) is under no special obligation to maintain confidentiality, (3) demands, in return for her silence, that the victim perform an act that is not itself either legally required or legally forbidden, and (4) threatens that, if her demands go unmet, she will perform an act that is not itself either legally required or legally forbidden.”); James Lindgren, *Blackmail: An Afterword*, 141 U. PA. L. REV. 1975, 1984–85 (1993) (it is wrong to assume that without an incentive to blackmail, embarrassing or incriminating information would not otherwise be disclosed because the simple fact is that people like to gossip); Lindgren, *supra* note 5, at 602–03 (same); McAdams, *supra* note 5, at 2268–69 (criminalization of blackmail does not necessarily lead to less overall crime because while criminalization leads to relatively greater disclosure than would legalization, legalization would lead to greater detection of crime—specifically, a greater incentive among private citizens to detect criminal activity among their fellow citizens; and it is not clear which of these—greater disclosure or greater detection—would serve as a stronger deterrent); Posner, *supra* note 5, at 1839–41 (it is not clear that severe punishment for blackmail is warranted “from a deterrent standpoint”); Shavell, *supra* note 11, at 1891–92, 1899–1901 (it is not clear what effect the prohibition of blackmail has on deterrence because while it is less probable that crime will be discovered and therefore punished, the magnitude of the punishment for the crimes that *are* discovered will be greater than if blackmail were legal); Smith, *supra* note 5, at 897–906 (while criminalization can help to increase the costs of enforcement, it does help to minimize the costs of victim self-help); Jeremy Waldron, *Blackmail as Complicity* 16–17 (1992) (unpublished manuscript, on file with Connecticut Law Review) (rejecting proposition (1) above).

<sup>15</sup> See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 2, 42 (1975) (blackmail is a crime because society prefers “to rely on a public monopoly of law enforcement in some areas of enforcement, notably criminal law”). For various positions on this issue, see POSNER, *supra* note 1, at 548 (“There is no completely adequate economic explanation for why [“regulatory” (i.e., private-law-enforcing)] blackmail is illegal.”); Block, *Private Justice*, *supra* note 12, at 17, 23–24, 30–37 (criticizing Landes and Posner and Brown); Boyle, *supra* note 11, at 1472

- 3) it helps to maximize disclosure of, and thereby deter, immoral activity;<sup>16</sup>
- 4) it helps to prevent a market in embarrassing information from developing, which itself helps to discourage wasteful and invasive efforts to discover embarrassing information about others;<sup>17</sup>
- 5) it helps to minimize wasteful or inefficient economic activity;<sup>18</sup>

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(criticizing Landes and Posner); Brown, *supra* note 12, at 1936–37, 1940, 1943–49, 1952–58, 1967–73 (criticizing Landes and Posner and taking a position similar to Epstein's); Epstein, *supra* note 5, at 561–62, 564 (while the legalization of blackmail would have a deterrent effect by encouraging some would-be criminals to refrain from criminal activity for fear of being blackmailed with this information afterward, the problems with "private justice" outweigh its deterrent benefits); Ginsburg & Shechtman, *supra* note 11, at 1874 (even if the private enforcement of social norms would be inefficient, this point would not explain why blackmail that does *not* involve social norms—i.e., blackmail involving information that is embarrassing yet not morally repugnant—is prohibited); Gordon, *supra* note 7, at 1753 (favorably mentioning Landes and Posner); Lindgren, *supra* note 1, at 911 (criticizing Landes and Posner); Lindgren, *supra* note 8, at 697–99 (same); Posner, *supra* note 5, at 1823–28, 1835, 1841 (surveying arguments for and against blackmail as a means of private law enforcement and concluding that they are not strong or certain enough to warrant legalization).

<sup>16</sup> See Block & McGee, *supra* note 8, at 584, 587; Isenbergh, *supra* note 1, at 1918–19, 1931–32. Berman rejects this point. Berman, *supra* note 1, at 807.

<sup>17</sup> See Altman, *supra* note 4, at 1659; Ginsburg & Shechtman, *supra* note 11, at 1860; Isenbergh, *supra* note 1, at 1914–15, 1924–26; Landes & Posner, *supra* note 15, at 43; Levin, *supra* note 3, at 12; McAdams, *supra* note 5, at 2246–49, 2268; Murphy, *supra* note 5, at 164–65. *But see* Coase, *supra* note 11, at 674 (while the prohibition of blackmail discourages wasteful investigations, this benefit by itself does not justify criminalization); Kipnis, *supra* note 1, at 20 ("Although some might worry that [the financial incentives of engaging in legalized blackmail] would unleash battalions of privacy-invading investigators, Block reminds us that our tabloids and private detective agencies have already loosed these legions upon us."). Lindgren rejects this proposal because of the possibilities of "adventitious" or "opportunistic" and "participant" blackmail. Lindgren, *supra* note 5, at 601; Lindgren, *supra* note 1, at 911; Lindgren, *supra* note 8, at 689–91, 694. Neither kind of blackmail involves information discovered through deliberate effort or investigation. Rather, the former involves information discovered accidentally, and the latter involves information learned through participation in the very same activity. See Berman, *supra* note 1, at 803–04, 806–07, 837; Boyle, *supra* note 11, at 1474–75.

<sup>18</sup> A number of scholars endorse this point. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 85 (1974) (blackmail constitutes an unproductive exchange because the target prefers either that she had not dealt with the blackmailer or that the blackmailer had not existed); POSNER, *supra* note 1, at 549 ("In the subset of cases in which the [blackmail] threat has no regulatory potential—when its only purpose and effect are to transfer wealth from the victim to the threatener—the case for prohibition can . . . be made. In fact it resembles the case against simple extortion. Both are cases of sterile, in the sense of unproductive, wealth transfers, producing a net social loss measured by the value of the resources used to make and defend against such transfers."); Altman, *supra* note 4, at 1643 (if blackmail were allowed, everybody would be worse off; conversely, there are few costs to prohibiting it); Coase, *supra* note 11, at 670–74, esp. 673–74; Ginsburg & Shechtman, *supra* note 11, at 1865 ("[A] legal system designed to maximize allocative efficiency would penalize not only (1) threats to do an act that the threatener has no right to do, i.e., that would occasion criminal or civil liability, but also (2) threats to do something that the threatener does have a right to do but that would (a) consume real resources, and (b) yield no product other than the enjoyment of spite or of an enhanced reputation as a credible issuer of threats. Reciprocally, it would not penalize the utterance of a threat to take an action

- 6) it helps to minimize victims' attempts at "self-help"—namely, retaliating with violence against blackmailers or third parties, turning to crime (theft or fraud) to pay off their blackmailers, and suicide;<sup>19</sup>
- 7) blackmail causes serious harm (other than or in addition to the harms listed above); and/or
- 8) blackmail is seriously immoral.<sup>20</sup>

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that is (1) lawful in itself, i.e., neither tortious nor criminal, and (2) would confer some material benefit on the party making the threat."); Gordon, *supra* note 7, at 1749–58, 1771–74, 1783–84; McAdams, *supra* note 5, at 2264–91 (while the "ban" on blackmail does not lead to a perfectly efficient distribution of information, it still leads to a more efficient distribution of information than legalization would); Posner, *supra* note 5, at 1818 ("[A]lthough ostensibly a voluntary transaction between consenting adults, [blackmail] is likely to be, on average, wealth-reducing rather than wealth-maximizing."); Scalise, *supra* note 8, at 1503 ("For unproductive, nonmarket-price blackmail, . . . [w]hile one's options appear to increase, in actuality, no increase occurs. Any apparent addition to the universe of one's options occurs in form only, not in substance."); Shavell, *supra* note 11, at 1894–95, 1897–99 (on balance, blackmail activity on the part of both blackmailers and targets is a "social waste").

<sup>19</sup> See generally Smith, *supra* note 5, at 862–63, 855–63, 866–84, 894–95, 896–97, 905–14. See also Epstein, *supra* note 5, at 564; Gordon, *supra* note 7, at 1776–78, 1783; Kipnis, *supra* note 1, at 21.

<sup>20</sup> Berman and Lindgren attempt to separate arguments that blackmail is seriously immoral from arguments that blackmail leads to serious injuries. Berman, *supra* note 1, at 799–833; Lindgren, *supra* note 8, at 680–701. This task is difficult because many arguments seem to fall into both categories. So they will simply be lumped all together here. See Altman, *supra* note 4, at 1640–46, 1648–51, 1661 (though only some, not all, blackmail threats involve "coercion, exploitation, breached obligation, and consequential harms," even relatively innocuous blackmail transactions should still be illegal because they are rare, hard to distinguish from the more virulent blackmail threats, and difficult to enforce); Berman, *supra* note 1, at 798, 833–52 (the blackmail threat itself is strong evidence that the blackmailer's threatened action, whether or not carried out, springs from morally unacceptable motives; and morally unacceptable motives in conjunction with actual or threatened harm amounts to a criminalizable act); Boyle, *supra* note 11, at 1485 ("[W]e do not think that we should commodify relationships in the private realm. To commodify is itself to violate the private realm. To commodify a violation of privacy, then, is doubly reprehensible." (citation omitted)); A.H. Campbell, *The Anomalies of Blackmail*, 55 LAW Q. REV. 382, 389 (1939) (a transaction is blackmail and should be criminal if the proposer surrenders an interest only to make a profit, not to promote a "lawful business interest"); Debra J. Campbell, *Why Blackmail Should Be Criminalized: A Reply to Walter Block and David Gordon*, 21 LOY. L.A. L. REV. 883, 887–91 (1988) (the target is entitled to non-interference with her secret); Fletcher, *supra* note 1, at 1626–28, 1634–35, 1637 (the blackmail transaction generates a relationship of domination and subordination); Ginsburg & Shechtman, *supra* note 11, at 1873 ("[I]t is almost surely against the disruption of social rather than trade relationships that the prohibition of blackmail is directed."); Gordon, *supra* note 7, at 1748–61, 1769–70, 1774, 1776–82 (in addition to the possible economic and law enforcement problems that legalization would create, blackmail is wrong because the blackmailer uses the target merely as a means to her selfish ends and should be criminalized because criminalization provides the victim with "weapons" against the blackmailer—namely, "counter-leverage" and a righteous "willingness to angrily refuse the blackmailer's demands"); Gorr, *supra* note 5, at 46 ("If it is wrong for me to harm you or your property, then it is generally wrong for me to seek advantage by threatening such harm." (citation omitted)); Isenbergh, *supra* note 1, at 1921 ("[W]hat is ultimately at issue in the prohibition of blackmail is transaction costs. There is no other way to explain the law of blackmail."); Katz, *supra* note 1, at 1595–1601, 1605–06 (just like a robber, the blackmailer uses "swinish" threats to steal from her target); Lamond, *supra* note 1, at 216,

This Article will not discuss these proposals in any further detail because they have already been amply covered in the literature.<sup>21</sup> But as a

234, 237–38 (blackmail produces the harm of interfering with the target’s control or personal autonomy without her valid consent); Lindgren, *supra* note 11, at 1706–07 (the blackmailer uses leverage that belongs to somebody else); Lindgren, *supra* note 5, at 606 n.34 (same); Lindgren, *supra* note 7, at 36, 38, 40–43 (same); Lindgren, *supra* note 1, at 923 (same); Lindgren, *supra* note 8, at 672, 694, 702–04 (same); McAdams, *supra* note 5, at 2249–64, 2278–86 (blackmail reduces or minimizes internalization, adjudication, refinement, criticism, reform, and enforcement of norms); Owens, *supra* note 5, at 507–13 (blackmail should be illegal because (a) generally speaking, the target cannot be reasonably certain that the blackmailer is the only one who knows her secret, that these others will not disclose it, and therefore that this particular blackmail transaction will succeed in delivering the benefit that she desires—namely, non-disclosure of her secret; (b) it is therefore irrational for the target to enter into such a transaction; and (c) the state should prohibit transactions into which it is irrational for at least one party to enter); Waldron, *supra* note 14, at 8 (the blackmailer should be punished “for exploiting the community’s sense of wrongdoing and turning that to his own advantage, even when that sense of wrongdoing is misplaced or misapplied.”); Williams, *supra* note 8, at 165, 168–70, 241–43 (blackmail should be illegal if and only if the threat is not motivated by an honest belief that the demand is justified). See also generally Feinberg, *supra* note 5 (while the criminalization of blackmail threats can sometimes be justified because they are exploitative, there are different categories of blackmail threats, one of which should be legalized and the rest of which should remain illegal on the ground that the threatened disclosure is or should be contrary to criminal or civil law). Of course, the relationship between (criminal) law and morality is complicated and controversial. Seminal accounts are offered by, among others, Ronald Dworkin, H.L.A. Hart, Robert Nozick, and Joseph Raz. Within the universe of the blackmail literature, see, for example, Lindgren, *supra* note 7, at 39 (“Although the precise relation of morality to criminal law is open to wide debate, most theories of the criminal law emphasize morality very heavily. . . . Most theories combine some notion of immorality with some notion of harm, disutility or inefficiency. . . . Immorality matters. . . . Again and again, morality comes up in setting the boundaries of the criminal law.”); Smilansky, *May We Stop Worrying*, *supra* note 9, at 120 (“I think that the moral and the legal are particularly entwined in the matter of blackmail. It is taken to be so odious in part as a result of the educative or symbolic effect of its criminalization. But the criminalization of ordinary blackmail can hardly be understood completely apart from the independent distaste that such practices create in most people.”); see also *infra* note 84.

<sup>21</sup> For criticisms of (5) generally, see Berman, *supra* note 1, at 802–14; Boyle, *supra* note 11, at 1472–77; R. Christopher, *supra* note 9, at 757–58; DeLong, *supra* note 11, at 1689; Fletcher, *supra* note 1, at 1618; Hardin, *supra* note 5, at 1806; Isenbergh, *supra* note 1, at 1920–21; Lindgren, *supra* note 14, at 1984–86, 1987; Smith, *supra* note 5, at 863. For criticisms of (7) generally, see Scalise, *supra* note 8, at 1487–89. For criticisms of (8) generally, see Block, *supra* note 5, at 236; Block & Gordon, *supra* note 12, at 47. For criticisms of Berman, see R. Christopher, *supra* note 9, at 765–67; Scalise, *supra* note 8, at 1492–1501. For criticisms of Brown, see Block, *Private Justice*, *supra* note 12. For criticisms of Coase, see Block, *Private Justice*, *supra* note 12, at 20–21, 27–28; Brown, *supra* note 12, at 1952–53; R. Christopher, *supra* note 9, at 755–56, 764–65; DeLong, *supra* note 11, at 1674–75; Lindgren, *supra* note 5, at 599–608. For criticisms of Epstein, see Berman, *supra* note 1, at 815–17; Block, *supra* note 1, at 7; Block & Gordon, *supra* note 12, at 46–47; Brown, *supra* note 12, at 1958–62; R. Christopher, *supra* note 9, at 760; Katz, *supra* note 1, at 1577–78, 1603; Lindgren, *supra* note 1, at 919–22; Lindgren, *supra* note 8, at 684–87. For criticisms of Feinberg, see Berman, *supra* note 1, at 821–22; Katz, *supra* note 1, at 1579–80, 1602. For criticisms of Fletcher, see Berman, *supra* note 1, at 824–26; R. Christopher, *supra* note 9, at 764–65, 763–64; Lindgren, *supra* note 14, at 1978; Smith, *supra* note 5, at 888–90, 897, 908–09. For criticisms of Ginsburg and Shechtman, see R. Christopher, *supra* note 9, at 755–56. For criticisms of Isenbergh, see Block & McGee, *supra* note 8, at 588–90, 597–600. For criticisms of Ginsburg, see Lindgren, *supra* note 5, at 601; Lindgren, *supra* note 1, at 911; Lindgren, *supra* note 8, at 695–97. For criticisms of Gorr, see R. Christopher, *supra* note 9, at 762–63. For criticisms of Katz, see Berman, *supra* note 1, at 827; K. Christopher, *supra* note 8, at 1140; R. Christopher, *supra* note 9, at 763–64; Lindgren, *supra* note 14, at 1977; Scalise, *supra*

whole, they tend to share one main problem: they do not fully resolve the *real* Blackmail Paradox. While they may or may not provide good reasons for thinking that blackmail should be criminalized, they fail to explain why the six arguments for legalization are incorrect. At best, then, we are left with two entirely opposed columns of arguments—those for criminalization and those against—and no means of deciding between them. No justification of criminalization can be successful until it provides these means. For, again, these six pro-legalization arguments help to generate the Blackmail Paradox. Without them, there would be nothing contradicting our intuition that blackmail should be criminalized and therefore no paradox in the first place.

What, then, are these six pro-legalization arguments? The first argument is simply that legal threatened action entails legal threat; that if one may legally perform or refrain from performing a given action, then it follows that she may offer to refrain from performing this action in exchange for money. The second argument suggests that blackmail does not instantiate any type of crime. The closest candidate, attempted theft, simply does not work. It cannot be said that the blackmailer is attempting to make the target pay for something to which she is already legally entitled. For, *ex hypothesi*, the target is *not* legally entitled to non-disclosure of her secret. The third argument suggests that blackmail threats are no different than any other legally permissible threat. Many legally permissible threats are also profit-motivated and threaten an interest that would be perfectly legal to harm. The fourth argument suggests that blackmail transactions are no different than any other legally permissible economic transaction. The blackmailer simply offers to sell a service—non-disclosure of the target's secret—for a price that the target is willing to pay. The fifth argument suggests that legalization of blackmail would help to make blackmail targets better off than they currently are in a system that

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note 8, at 1490. For criticisms of Lindgren, see Altman, *supra* note 4, at 1653–54; Berman, *supra* note 1, at 823–24; Block, *Private Justice*, *supra* note 12, at 20–21, 27–28; Block, *supra* note 5, at 237–39; Block & Gordon, *supra* note 12, at 52–53; Boyle, *supra* note 11, at 1481–82; Brown, *supra* note 12, at 1964–66; R. Christopher, *supra* note 9, at 767–68; DeLong, *supra* note 11, at 1680–88; Fletcher, *supra* note 1, at 1624–26; Gorr, *supra* note 5, at 60; Hardin, *supra* note 5, at 1792, 1805; Isenbergh, *supra* note 1, at 1917–18; Katz, *supra* note 1, at 1581, 1602; Scalise, *supra* note 8, at 1490; Smith, *supra* note 5, at 885–87, 907. Block and McGee defend Lindgren against Isenbergh's critique. Block & McGee, *supra* note 8, at 586. For criticisms of McAdams, see Smith, *supra* note 5, at 911. For criticisms of Nozick, see ROTHBARD, *supra* note 12, at ch. 29, esp. 245–49; Berman, *supra* note 1, at 828–32; Block & Gordon, *supra* note 12, at 48–50; Boyle, *supra* note 11, at 1479–81; R. Christopher, *supra* note 9, at 753–55; Isenbergh, *supra* note 1, at 1921; Katz, *supra* note 1, at 1579, 1602–03; Lindgren, *supra* note 1, at 910–11; Lindgren, *supra* note 8, at 699–700; Murphy, *supra* note 5, at 158–59; Owens, *supra* note 5, at 504–05. For criticisms of Posner, see Berman, *supra* note 1, at 809–10; Block & Gordon, *supra* note 12, at 39–44; Hardin, *supra* note 5, at 1806; Lindgren, *supra* note 14, at 1981–82. For criticisms of Shavell, see R. Christopher, *supra* note 9, at 757. For criticisms of Smith, see R. Christopher, *supra* note 9, at 760.

criminalizes blackmail. For while a system that criminalizes blackmail encourages disclosure over blackmail proposals, a system that legalizes blackmail encourages blackmail proposals over disclosure. And blackmail targets are more likely to prefer blackmail proposals to disclosure. For they would rather have the option of paying for non-disclosure than not to have it and simply be doomed to disclosure. Finally, the sixth argument suggests that because silence-for-pay transactions that the *target* initiates are legal and because they are substantively the same transactions that the *blackmailer* typically initiates, the latter should also be legal.

This Article will take up the task that most, if not all, pro-criminalizers have only partially accomplished: it will attempt to explain why *all* of these pro-legalization arguments fail. While most of the arguments will be critical, it will also incorporate a novel positive justification for criminalization into its response to the second argument—i.e., the argument that blackmail does not constitute attempted theft or any other type of crime. It will argue that while blackmail threats do not qualify as attempted theft, there is still another justification for criminalizing them. The criminal law is largely concerned with protecting people against deliberately inflicted harm to their *supremely valued* interests, to the interests that they generally most highly value—namely life, physical well-being, emotional well-being, family, liberty, and property. That is why we have criminal laws against homicide, manslaughter, rape, assault, battery, kidnapping, unlawful imprisonment, and theft.

The fact that emotional well-being is among the supremely valued interests explains why we have criminal laws against menacing, harassment, and stalking (not to mention civil laws against intentional infliction of emotional distress). Indeed, it is also the second reason that we have criminal laws against extortionate threats, laws that are often mixed among the larceny, coercion, menacing, harassment, and stalking codes. These laws are all designed to protect people, in one way or another, from undue *fear* and *anxiety*. As it turns out, for the same reason, there should be laws against threats to reputation. For, like emotional well-being, reputation is also a supremely valued interest. Its owners tend to value it just as much as, if not more than, any of the other supremely valued interests (life, physical well-being, etc.). So threats to it are just as likely to inflict the same level of fear and anxiety as extortionate threats, menacing, harassment, and stalking. And, if this likely consequence is sufficient to criminalize these latter kinds of threats, then it is also sufficient to criminalize the former kind of threats—i.e., blackmail threats.

Of course, objections may be raised against this argument. For example, one might argue that that reputation must not be as highly valued as life, physical well-being, etc. because it is not legally protected in the same way that they are. Again, true, but reputation-damaging disclosures are perfectly legally permissible. In response to this objection, this Article

will suggest that what has kept reputation out of the family of legally protected interests is not the fact that it is less highly valued than life, physical well-being, etc. Rather, what has kept reputation out of the family of legally protected interests is the fact that it *happens to* have a competitor that society *happens to* regard as even more important—again, freedom of speech. Life, physical well-being, etc. were simply lucky enough not to have such competitors. So the fact that reputation is not legally protected is *not* an indication that reputation is less highly valued than *life, physical well-being, etc.* Rather, it is a reflection only of the fact that reputation is less highly valued than *freedom of speech*. And this proposition is still perfectly consistent with the possibility that reputation is equally, if not more, valued than life, physical well-being, etc.

## II. FOUR INITIAL CLARIFICATIONS

Four initial clarifications are in order. First, blackmail may be conceived narrowly or broadly. The narrow conception incorporates only *informational* blackmail—i.e., threats to (a) report *incriminating* information (i.e., information about another's illegal activity) to the authorities<sup>22</sup> or (b) reveal *embarrassing* information (i.e., non-incriminating information that the target has violated a social or moral norm and therefore the disclosure of which would likely harm the target's reputation) to a third party or parties (e.g., one's lover, spouse, family, boss, and/or the public in general).<sup>23</sup> The broader conception incorporates

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<sup>22</sup> Blackmail threats to report incriminating information include threats to report incriminating information about one's legal adversary in order to obtain a more favorable settlement from the adversary. I owe this point to Judge Jed Rakoff.

<sup>23</sup> See 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 241 (1990) ("In ordinary discourse . . . blackmail has come to be identified with only one type of wrongful coercion, namely the attempt to extract money or advantage by means of a threat to disclose information about the victim, which, since it would embarrass or discredit him, he very much prefers to keep secret."); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 283 (1981) ("Blackmail is the practice of threatening to disclose discreditable information about a person unless he pays the blackmailer to suppress it."); Block & Gordon, *supra* note 12, at 37 (restricting blackmail to "a demand for money or other valuable consideration under the threat of exercising one's right of free speech by publicizing someone else's secret *without* use of the threat of force or violence."); Friedman, *supra* note 3, at 1110, 1111; Gordon, *supra* note 7, at 1746 (referring to (b) above as "central case blackmail"); Landes & Posner, *supra* note 15, at 42 ("Blackmail may be defined as the sale of information to an individual who would be incriminated by its publication, and at first glance appears to be an efficient method of private enforcement of the law (the moral as well as the positive law)."); Mack, *supra* note 12, at 274 (blackmail is "the acceptance of payment (in cash or kind) for not revealing damaging information about somebody"); Scalise, *supra* note 8, at 1485 ("[B]lackmail, in formalistic terms, should be defined as an otherwise *legal threat* to reveal coupled with an otherwise *legal demand* for compensation not to reveal."). Feinberg acknowledges (a) and splits (b) into four different categories: (b1) false accusations, (b2) information that an individual has performed legal but "underhanded" actions, (b3) information that an individual has performed actions that are perfectly innocent but would still be repudiated by others who are "benighted," and (b4) information that an individual, who has now reformed her character, previously committed serious indiscretions. See Feinberg, *supra* note 5, at 85-



both informational and *non*-informational blackmail.<sup>24</sup> Leo Katz argues that it is possible to threaten to perform a legal but interest-injuring action *other than* disclosing damaging information.<sup>25</sup> Katz's examples include threatening to: seduce another's fiancé; persuade another's son that it is his patriotic duty to volunteer for combat duty in Vietnam; give another's high-spirited, risk-addicted nineteen-year-old daughter a motorcycle for Christmas; hasten our ailing father's death by leaving the Catholic Church; call a strike; flunk another on her exam; and cause bad blood at the next faculty meeting.<sup>26</sup> Still, Katz argues that it is not an accident that the literature concentrates on informational blackmail: "Most immoral misconduct at the noncriminal level is of an informational nature. If the misconduct is more tangible than that, it probably is a crime. If it is less tangible than that, it falls below the threshold of serious immorality."<sup>27</sup> Whether or not Katz's explanation is correct, this Article will continue to follow the literature's lead and concentrate on informational blackmail as well.

Second, the blackmail literature tends to distinguish between blackmail and extortion. It suggests, if not simply assumes, that, while extortion involves a threat to perform an illegal action or legal action by illegal means, blackmail involves a threat to perform a legal action by legal means.<sup>28</sup> It should be noted, however, that this distinction reflects only the thinking of contemporary scholars, not contemporary jurisdictions or history, according to which blackmail is/was a species of extortion.<sup>29</sup>

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95. Gorr and Scalise follow Feinberg's classification. See Gorr, *supra* note 5, at 46–48; Scalise, *supra* note 8, at 1511.

<sup>24</sup> Some definitions of *blackmail* make no mention of information, no less legality/illegality. For example, one authoritative source defines blackmail as simply "[a] threatening demand made without justification." BLACK'S LAW DICTIONARY 180 (8th ed. 2004).

<sup>25</sup> Katz, *supra* note 1, at 1567–68, 1569–73, 1578, 1581, 1602; see also Berman, *supra* note 1, at 852, 866–67; Lamond, *supra* note 1, at 216; Lindgren, *supra* note 1, at 923.

<sup>26</sup> Katz, *supra* note 1, at 1567–68; see also Fletcher, *supra* note 1, at 1619.

<sup>27</sup> Katz, *supra* note 1, at 1603.

<sup>28</sup> See Alldridge, *supra* note 13, at 370–71; Berman, *supra* note 1, at 806–07, 853; Block, *Private Justice*, *supra* note 12, at 13; Block, *supra* note 1, at 4; Block, *supra* note 8, at 61–62; Block & Gordon, *supra* note 12, at 38; R. Christopher, *supra* note 9, at 743–44; Feinberg, *supra* note 5, at 84; Friedman, *supra* note 3, at 1111; Gorr, *supra* note 5, at 59; Mack, *supra* note 12, at 274; Scalise, *supra* note 8, at 1484, 1485, 1506–07, 1510–11; Smilansky, *Blackmail*, *supra* note 9, at 151; Smilansky, *May We Stop Worrying*, *supra* note 9, at 118; Smith, *supra* note 5, at 864.

<sup>29</sup> See POSNER, *supra* note 1, at 548–49; Alldridge, *supra* note 13, at 371–73, 381–83; Friedman, *supra* note 3, at 1111–12; James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 881–82 (1988). *But see* FEINBERG, *supra* note 23, at 240 ("The terms 'blackmail' and 'extortion' . . . were once the names of quite distinct crimes."). The Model Penal Code categorizes blackmail under the heading of "Theft by Extortion." See *supra* note 2; see also Lindgren, *supra* note 11, at 1696 ("Coercive extortion is often called blackmail, particularly where hush money is involved, but few blackmail statutes remain on the books. Usually, blackmail behavior is covered under extortion, theft, or coercion statutes."); Smith, *supra* note

Third, blackmail threats to disclose embarrassing information cannot be illegal simply because they involve "trafficking in private information."<sup>30</sup> Some perfectly legal transactions involve such trafficking. These transactions typically involve either (a) the sale of private information (e.g., by private detectives, police informers, and reporters)<sup>31</sup> or (b) the sale of secrecy (e.g., "an attorney's promise not to disclose the confidences of a client, a departing employee's agreement not to disclose the trade secrets of an employer, [and] a settling litigant's agreement not to disclose what she learned during civil discovery."<sup>32</sup>

Fourth, it is much easier to explain why blackmail threats to report incriminating information are criminalized than it is to explain why blackmail threats to report embarrassing information are criminalized.<sup>33</sup> Suppose the following: "Troublemaker" has committed a crime, Troublemaker's enemy—"Enemy"—has ample evidence to prove it, and Enemy did not herself participate in this criminal activity.<sup>34</sup> The criminal prohibition against blackmail threats to report incriminating information derives from a moral and civic duty on Enemy's part. This derivation proceeds in three parts. First, given that Troublemaker committed a crime, it is Enemy's moral, civic, and arguably legal duty to report Troublemaker to the authorities.<sup>35</sup> And the more morally reprehensible, the more morally

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5, at 862 ("[B]lackmail or extortion can be defined as the obtaining of something of value by means of a threat that is not associated with the immediate physical coercion required for robbery.").

<sup>30</sup> Lindgren, *supra* note 8, at 688.

<sup>31</sup> See Block, *supra* note 1, at 6; Lindgren, *supra* note 8, at 688, 692, 705-06.

<sup>32</sup> DeLong, *supra* note 11, at 1666; see also Block & Gordon, *supra* note 12, at 52-53; Block & McGee, *supra* note 8, at 582; Epstein, *supra* note 5, at 559, 561; Hardin, *supra* note 5, at 1807; Isenbergh, *supra* note 1, at 1913; Landes & Posner, *supra* note 15, at 42-43, 44-46; Lindgren, *supra* note 1, at 914-15; Owens, *supra* note 5, at 509.

<sup>33</sup> Waldron, *supra* note 14, is more ambitious than I am insofar as he tries to provide one, all-encompassing explanation of why both blackmail threats to report incriminating information and blackmail threats to disclose embarrassing information are criminalized. The justification offered here for criminalizing blackmail threats to report incriminating information is very different from the justification that will be provided in Parts IV.B-C for criminalizing blackmail threats to disclose embarrassing information.

<sup>34</sup> This example was borrowed in part from Lindgren, *supra* note 11, at 1701, and Lindgren, *supra* note 29, at 826-27.

<sup>35</sup> Failure to report knowledge of another's crime constitutes misprision of felony. See Clark, *supra* note 9, at 57. For different views of misprision, see Berman, *supra* note 1, at 861 ("Modern statutes have tended to ignore [misprision of felony] entirely" because silent witnesses may have morally acceptable motives—namely, "fear of retaliation, . . . friendship and loyalty toward the criminal, and . . . fear of the police."); Block, *Private Justice*, *supra* note 12, at 18 ("Why should a person who has committed no crime go to prison for failure to report the misconduct of another? Unless he has agreed to do so, this amounts to a draft, in effect forced enslavement, of police personnel."); Block, *supra* note 1, at 8 ("[W]hatever moral duty might be claimed to report the crimes of another (and not to profit from them), nevertheless there is no basis for *legally* requiring that the crimes of another should be reported. Such positive duties—like the positive duty to be a good Samaritan—have no place in criminal law."); Block & Gordon, *supra* note 12, at 38 n.9 ("Just as the law cannot properly compel the individual to be a good Samaritan, so can it not compel him to acquaint

and “civically” obligatory. Second, the moral and civic duty to report incriminating information entails a moral and civic duty not to conceal this information—especially not for the self-serving purpose of making a profit.<sup>36</sup> Such a profit would come at the expense of the public’s interest in law enforcement.<sup>37</sup> Third, the moral and civic duty not to conceal this information for profit is sufficiently important to the public’s interest in law enforcement that it translates into a *legal* duty not to conceal this information for profit.

Because this argument adequately explains why blackmail threats to report incriminating information are criminalized, the remainder of this Article will assume that this issue has been dealt with and focus entirely on what is the much *harder* problem—the question why blackmail threats to disclose *embarrassing* information should also be criminalized.

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the legal authorities with the facts concerning crimes he knows to have taken place. Turning in the criminal may thus be an act over and above the call of duty, but it is not an act of duty itself.”); Block & McGee, *supra* note 8, at 595–96 (keeping silent about another’s crime, whether or not for compensation, does not amount to complicity); Feinberg, *supra* note 5, at 86–87 ((a) misprision of felony requires “some affirmative act of concealment”; (b) similar to misprision of felony is “compounding crime,” which involves “accept[ing] money under an agreement not to . . . bring charges against, a person [one] knows to have committed a crime”; (c) misprision statutes have most likely fallen into “desuetude . . . because of practical difficulties in enforcement, especially fear of underworld revenge”; and (d) even if we have no legal duty to report incriminating information, we still have a *civic* duty to “cooperate with law enforcement” (internal quotation marks omitted)); Scalise, *supra* note 8, at 1509 (“The duty to report crime . . . is very limited . . . . [It] extends only to those acts which, if one did not report, would result in one being rightfully considered an accomplice to the original crime.”); Waldron, *supra* note 14, at 8, 12–13, 20–21 (agrees with Feinberg that reporting incriminating information is a civic duty, lists a number of other civic duties that we have, and suggests that there is no reason in principle against criminalizing their violation).

Lindgren takes two different positions on this issue. On one hand, he states: “[U]nder federal law we all have a duty to report people who commit federal felonies. Yet it would still be extortion for a private citizen to threaten to report a federal felon unless he is paid off, despite the threatener’s breach of his legal duty to report.” Lindgren, *supra* note 11, at 1701. On the other hand, he states: “In most jurisdictions, [a church secretary who has been raped by an evangelist] may . . . threaten to reveal the information to the police or the press unless he pays restitution.” Lindgren, *supra* note 5, at 605 & n.30. Still, Lindgren’s latter point does not necessarily *contradict* his former point. For while the former concerns federal felonies, the latter concerns state crimes. See Lindgren, *supra* note 11, at 1701 n.21; Lindgren, *supra* note 5, at 605 n.30.

<sup>36</sup> This last clause arguably lends some support to Berman’s thesis that motives are important in accounting for the illegality of blackmail. Berman, *supra* note 1, at 797–98.

<sup>37</sup> See Feinberg, *supra* note 5, at 86 (“No citizen can be allowed to barter away his duties for personal advantage, or even to offer to do so (the offer in this case being very much like an *attempt* at crime, itself punishable.”); Friedman, *supra* note 3, at 1112 (“If a person knows about a crime, she has a duty to report it to the authorities, and not to use the knowledge for private gain, selling silence to the criminal for cash.”); Gorr, *supra* note 5, at 48, 51, 56–57, 62; Isenbergh, *supra* note 1, at 1927–29; Murphy, *supra* note 5, at 165; Smith, *supra* note 5, at 864–65. Waldron proposes an alternative explanation: the blackmailer should be punished “roughly for the same reason that an enterprising trader’s offer to purchase stolen goods should be condemned: he is proposing to make a profit out of someone else’s wrongdoing.” Waldron, *supra* note 14, at 7, 11–18. Waldron then attempts to broaden his theory from situations in which the target has committed wrongdoing to more difficult situations in which the target has violated a morally questionable community norm. *Id.* at 24–30.

### III. SIX ARGUMENTS FOR LEGALIZING BLACKMAIL

This section will explicate the six strongest arguments for legalizing blackmail.

#### A. *Legal Threatened Action Entails Legal Threat*

Walter Block and David Gordon argue that legal threatened action entails legal threat.<sup>38</sup> As long as the threatened action is legal, the threat itself should be legal as well. More precisely, as long as an individual has the right to perform or refrain from performing a particular action A, she has the right to threaten to perform A. And the right to threaten to perform A is equivalent to the right to demand payment in exchange for refraining from performing A.<sup>39</sup>

#### B. *Blackmail Threats Are Not Attempted Theft*

The argument in this section is that the legality of disclosure entails that a blackmail threat to disclose does not constitute attempted theft. And since attempted theft seems to be the only plausible candidate for the type of crime that blackmail might instantiate, blackmail should not be criminalized.

Consider, first, the *extortionate* threat. The extortionate threat involves one of two kinds of illegality. It is either a threat to perform an illegal action (e.g., to inflict non-immediate violence) or a threat to perform an action that would involve illegal means (e.g., to disclose embarrassing information that was illegally obtained).<sup>40</sup> It is easy enough to see why the actual *carrying out* of either kind of threat—i.e., extortion itself—is illegal.<sup>41</sup> For the target's freedoms from violence and invasion of privacy

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<sup>38</sup> Block & Gordon, *supra* note 12, at 38.

<sup>39</sup> See *id.* at 38, 44–45; see also ROTHBARD, *supra* note 12, at 124; Block, *Private Justice*, *supra* note 12, at 12; Block, *supra* note 5, at 225; Kipnis, *supra* note 1, at 19; Owens, *supra* note 5, at 504.

<sup>40</sup> Threats to reveal to a third party's private information (e.g., information about one's credit rating, social security number, home address, or phone numbers) or representations (photographs or recordings) of private activity (e.g., having sex with one's wife or taking a shower) are not commonly discussed in the blackmail literature most likely because privacy laws forbid such disclosure or the means by which such information or representations were obtained, in which case threats to disclose such information or representations constitute extortion rather than blackmail. Kent Greenawalt suggests that some threats to perform criminal actions—namely, minor criminal actions like trespass—should be constitutionally protected speech. Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1100, 1108, 1121 (1984); see also GREENAWALT, *supra* note 6, at 255.

<sup>41</sup> *Black's Law Dictionary* defines *extortion* as the "act or practice of obtaining something or compelling some action by illegal means, as by force or coercion." BLACK'S LAW DICTIONARY, *supra* note 24, at 266. Likewise, the Hobbs Act, 18 U.S.C. § 1951 (2000), which is based largely on New York's criminal code, states in relevant part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or

are legally protected. She has the legal right not to have these freedoms infringed by others. And this point explains why mere *threats* to commit extortion are illegal. If the extortionist comes along and demands money in exchange for continued enjoyment of any of these freedoms, she is committing *attempted theft*. She is attempting to coerce<sup>42</sup> the target into paying for something to which the target is already legally entitled and therefore something for which the target does not have to pay.<sup>43</sup>

Now consider a *blackmail* threat—i.e., a threat to perform an otherwise *legal* action by *legal* means. The classic blackmailer threatens her target with disclosure of true and legally obtained but damaging information about the target.<sup>44</sup> Like the extortionate threat, this kind of threat is also

threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined . . . or imprisoned . . . or both.

(b) As used in this section—

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(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

See also Block, *supra* note 5, at 228; Block & McGee, *supra* note 8, at 571; Ginsburg & Shechtman, *supra* note 11, at 1852, 1858; Gorr, *supra* note 5, at 45–46; Isenbergh, *supra* note 1, at 1905–06; Lindgren, *supra* note 29, at 825; Smilansky, *Blackmail*, *supra* note 9, at 151.

<sup>42</sup> By *coerce*, I mean presenting a target with the option of either performing a certain action or facing a highly probable risk of being subjected to what the coercer correctly believes the target will perceive as a harm. The more serious the harm, the more coercive the option (or threat). See Altman, *supra* note 4, at 1642 ("Threats deprive the recipient of an important option available in some alternative situation. . . . The removal of important available options to alter someone's actions is coercion."); Comment, *Coercion, Blackmail, and the Limits of Protected Speech*, 131 U. PA. L. REV. 1469, 1472–73 (1983) ("A coercive speech analysis would justify prosecution of a gangster under a criminal coercion statute if the gangster threatened to break a tavern owner's legs unless he voted for a certain political candidate. The threat forces the tavern owner to choose between two things—the right to be free from physical assault and the right to vote according to individual conscience—when the tavern owner has a legitimate claim to both things." (citation omitted)); Greenawalt, *supra* note 40, at 1096 ("One person coerces another by putting him under such great psychological pressure that a rational decision is impossible, by creating unfair conditions of choice, or by manipulating belief about relevant facts; informing someone of true but disquieting facts beyond one's control is clearly not to coerce.").

<sup>43</sup> Greenawalt offers a different explanation:

[A]nother basis for punishing a warning threat is the wrongfulness of the harm threatened. If the threatened harm is imminent and could itself achieve the threatener's objective, as when immediate physical force is threatened, the threat should be viewed like the harm itself, even if the particular threatener is inclined naturally to use force to get his way.

GREENAWALT, *supra* note 6, at 253–54.

<sup>44</sup> If the information that the blackmailer threatened to disclose were *false*, then the blackmailer would be threatening to perform the illegal act of defamation or false accusation, in which case she would be not a blackmailer but an extortionist. See Feinberg, *supra* note 5, at 94; Gorr, *supra* note 5, at 47; Lindgren, *supra* note 5, at 600; Scalise, *supra* note 8, at 1507–09, 1513; Smilansky, *Blackmail*, *supra* note 9, at 151; see also ROTHBARD, *supra* note 12, at 126–28 (stands alone in arguing that libel

illegal if it is conjoined with a demand for money in exchange for concealment. But we cannot offer the same kind of justification for its criminalization.<sup>45</sup> We cannot say that, like extortionate threats, blackmail threats also amount to attempted theft. For the blackmailer is not attempting to make the target pay to continue enjoying an interest—freedom from injury to reputation—to which she is already legally entitled. The fact of the matter is that the target is *not* legally entitled to freedom from injury to reputation. As long as the blackmailer's information about the target is true and legally obtained, she is within her legal rights to disclose it to whomever she wants, no matter how much injury this disclosure will cause to the target's reputation.<sup>46</sup>

The natural response to this argument is: Fine, blackmail is not attempted theft. But attempted theft is not the only possible type of crime that blackmail might instantiate. There are plenty of other types of crime that might work. The problem with this response, however, is that there does seem to be any other such type of crime out there. As Walter Block

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should be perfectly legal (!!); Smith, *supra* note 5, at 877–78 (discussing the connection between libel and blackmail).

<sup>45</sup> Contrary to several scholars. See D. Campbell, *supra* note 20, at 885, 887–92 (blackmail transactions start out with a coercive proposal, a proposal that forces the target to choose between two of her rights); Evans, *supra* note 5, at 89 (“[B]lackmail is illicit because it harms the victim by extorting money from him.”); Feinberg, *supra* note 5, at 90–92 (it is not paradoxical to criminalize blackmail threats because the threatened action, disclosure, generally violates privacy torts, in which case the blackmail threat constitutes “an attempt at *theft* (by extortion)”); Gordon, *supra* note 7, at 1769 (“The central case blackmailer . . . seeks to extract something from the victim that is properly the victim’s, usually money, or to make the victim do something (for example, sleep with him) that is ordinarily a behavior that the victim is at liberty not to engage in.”); Gorr, *supra* note 5, at 53, 54 (blackmail involving legal but underhanded practices amounts to theft); Murphy, *supra* note 5, at 159–60 (there is a “plausible ring” to the notion that part of what makes the blackmail threat wrong is that it involves “trying to sell back to the victim something which is really his already (his life)”); Posner, *supra* note 5, at 1834–35 (in some cases, blackmail is “the economic equivalent of theft”; so we may no more legalize blackmail on the basis of its speculated benefits than we may legalize extortion on the basis of its speculated benefits).

<sup>46</sup> See Block, *supra* note 1, at 5, 8; Block, *supra* note 5, at 234, 242–45; Block, *supra* note 8, at 73 (“[B]lackmail is not akin to theft, not an invasive act, nor threat thereof . . .”); Block & McGee, *supra* note 8, at 572 (blackmail and extortion “resemble each other only superficially. They are as distinct as rape and seduction or trade and robbery.” (citation omitted)); Katz, *supra* note 1, at 1576 (“[The robber] sells back what he doesn’t own, the victim’s life and limb. Not so the blackmailer threatening to disclose the victim’s infidelity. The victim doesn’t own the right to control the blackmailer’s communications with his wife; the blackmailer does. The blackmailer, unlike the robber, is selling something he owns. Or so it seems.”); Levin, *supra* note 3, at 12 (the blackmail target does not “own” his marriage; a “voluntary association such as a marriage, terminable by either partner, belongs to neither . . . . Nor . . . is blackmail extortion. . . . Since you have a right not to have your arm broken, refrainment from assault is not [the vendor’s] to sell. I on the other hand have no duty to refrain from showing your wife my videotape. The tape is mine to do with as I please.”); Lindgren, *supra* note 5, at 599 (“[P]recisely what makes blackmail paradoxical . . . [is the fact that] the victim does not own or control the information.”). But see Lindgren, *supra* note 7, at 37 (“[M]ost states treat blackmail as a species of theft . . . . Thus a blackmail threat typically violates the victim’s civil right to keep his property and be free of duress.”).

argues, at least according to libertarianism, the only other justifications for criminalization in addition to (attempted) theft are other personal and property invasions such as fraud and force.<sup>47</sup> And they do not work either. Blackmail does not necessarily involve fraud, at least not by the blackmailer against the target.<sup>48</sup> And while it may involve *pressure* on the target to pay for non-disclosure, this pressure does not amount to force or coercion. For the target's option of refraining from paying and thereby risking disclosure is not necessarily so horrible that a reasonable person could not be expected to choose it.<sup>49</sup> So blackmail is a square peg

<sup>47</sup> See, e.g., Block, *Private Justice*, *supra* note 12, at 11; Block, *supra* note 1, at 3.

<sup>48</sup> Epstein argues that blackmail should be criminal because it involves fraud and deceit. Epstein, *supra* note 5, at 565–66. But this fraud and deceit is perpetrated not—as is commonly thought—by the blackmailer against her target but rather by the target against the third party from whom she wishes to hide information. *Id.* at 563–66; see also Alldrige, *supra* note 13, at 369–70 (sympathizing with Epstein's view that the blackmail target is more morally culpable than the blackmailer insofar as the former perpetrates fraud against third parties and the latter only asks for payment “for joining in the fraud.”); Scalise, *supra* note 8, at 1515 (“[I]t is arguable that the party engaging in malicious revelation does society a service by preventing the continual exercise of fraud upon members of the community.”); Smith, *supra* note 5, at 888 (Epstein “focuses on excessively on the blackmailer's actions” and neglects the much greater harm that blackmail induces the target to inflict on others (or herself)).

<sup>49</sup> See Block, *Private Justice*, *supra* note 12, at 19–20; Block, *supra* note 1, at 5; Block & Gordon, *supra* note 12, at 38; Brown, *supra* note 12, at 1950 n.32 (“That the blackmailee may be faced with a hard choice between the consequences of disclosure and paying the blackmailer does not necessarily make the blackmail any more coercive than the choice facing many parties to wholly legitimate economic transactions.”); Levin, *supra* note 3, at 11 (“[T]he sale of silence involves no coercion, for however the negotiations for it begin, the buyer remains free to choose between two bundles of goods. You can have my silence and be out a certain amount of money, or keep the money and be out one marriage. It is your move.”); Murphy, *supra* note 5, at 156 (the blackmailer's threats are not obviously coercive); Posner, *supra* note 5, at 1818 (“Blackmail is, in the usual case, a voluntary transaction between competent adults.”). *But see* Berman, *supra* note 1, at 852 (“[T]he blackmail victim is just as coerced as the holdup victim.”); D. Campbell, *supra* note 20, at 887–92 (the blackmailer coerces the target to choose between two rights, her right to her money and her right to keep her secret); Feinberg, *supra* note 5, at 84 (the target's “choice to pay the blackmailer is considerably less than fully voluntary”); Lamond, *supra* note 1, at 216, 218–23, 232–33, 237–38 (a blackmailer's threat “invalidates the victim's consent” to deprivation of property and interference with personal autonomy; offers in-depth discussion of coercion); Lindgren, *supra* note 14, at 1976, 1977, 1986, 1988–89 (sympathizing with Katz's proposal that coercion, and therefore blackmail, are properly criminalized although they “increase[ ] a victim's options and follow[ ] a victim's preferences”); Lindgren, *supra* note 7, at 38 (“Although the victim may agree with the blackmailer, that does not undercut society's consensus that the blackmailer is taking unfair advantage of the victim.”). For intermediate positions, see Altman, *supra* note 4, at 1641–43, 1645–46 (while some blackmail should be criminal because it involves coercion or exploitation, rarer instances of blackmail that do not involve coercion or exploitation should be criminal for independent moral and practical reasons); Scalise, *supra* note 8, at 1504–05 (“While the acquiescence of the blackmailee is not a product of coercion, the blackmailee clearly has no reasonable alternative other than to acquiesce. Because the blackmail situation leaves the blackmailee with no reasonable alternative, it clearly limits the liberty of the acquiescing party.” (internal citation omitted)). Of course, in order to constitute criminally punishable coercion, the threat must be *sufficiently* coercive. Consider, for example, the threat “your money or I will not like you anymore.” No matter who the threat-maker is, losing her affection cannot be *so* bad that the target cannot be reasonably expected to risk losing it in order to hold on to her money. See GREENAWALT, *supra* note 6, at 100–01; Block & McGee, *supra* note 8, at 577; Isenbergh, *supra* note 1, at 1910; Katz, *supra* note 1, at 1597, 1605–07; Lamond, *supra* note 1, at 223.

surrounded by nothing but round holes. It does fit any niche in the criminal law.

As we saw above, the only reason why extortionate threats of non-immediate violence are criminalized is because they amount to attempted theft, attempts to make individuals pay for what they are already legally entitled to. No other justification for criminalizing these threats exists. Since this justification does not equally apply to blackmail threats to disclose embarrassing information, and since this was the most plausible such justification, it follows that blackmail must be de-criminalized.

### C. *Blackmail Threats Belong to the Family of Legally Permissible Threats*

Blackmail threats seem to fit perfectly well into the larger family of *legally permissible* threats.<sup>50</sup> Clearly, blackmail cannot be condemned simply on the ground that the blackmailer is making a profit-motivated threat. For the permissibility, no less desirability, of making profit-motivated threats lies at the heart of contract law, capitalism, and power negotiations.<sup>51</sup> Examples of such legally permissible threats include: every seller's implicit threat not to sell a given product or service, even if it is desperately needed or desired, unless paid the asking price;<sup>52</sup> consumer pressure through advertising;<sup>53</sup> consumer boycotts;<sup>54</sup> a seller's threat to sell

<sup>50</sup> Indeed, not all threats are criminal or even immoral. See Fletcher, *supra* note 1, at 1618-19, 1621; Greenawalt, *supra* note 40, at 1108; Lamond, *supra* note 1, at 230; Lindgren, *supra* note 14, at 1986; Murphy, *supra* note 5, at 158; Shavell, *supra* note 11, at 1893-94.

<sup>51</sup> See GREENAWALT, *supra* note 6, at 100; Block, *supra* note 8, at 72 ("[A]s Adam Smith concluded, it is 'not from benevolence' that many economic actors accomplish beneficial, but unintended goals. And so it is with the blackmailer."); Murphy, *supra* note 5, at 160, 166; see also Greenawalt, *supra* note 40, at 1099.

<sup>52</sup> See FEINBERG, *supra* note 23, at 240; GREENAWALT, *supra* note 6, at 100; Altman, *supra* note 4, at 1658-59 ("rescue bargains," hard bargains for desperately needed products or services, are not exploitative or coercive); Berman, *supra* note 1, at 800-02, 819; Block, *supra* note 5, at 235-36, 239; Boyle, *supra* note 11, at 1417, 1419, 1428, 1471, 1477; Brown, *supra* note 12, at 1973; D. Campbell, *supra* note 20, at 886-92 (blackmail cannot be distinguished from legitimate economic transactions on the basis that only the former involves threats because the latter may involve threats as well); DeLong, *supra* note 11, at 1666; Epstein, *supra* note 5, at 557-58 (explaining why threats are essential to successful commerce); Fletcher, *supra* note 1, at 1619, 1625; Ginsburg & Shechtman, *supra* note 11, at 1849; Hardin, *supra* note 5, at 1792-93, 1795, 1797, 1803-05, 1807, 1813-14 (whether or not "mutual advantage" or "exchange" blackmail should be legal depends *not* on an *a priori* analysis of individual blackmail transactions but rather on an empirical analysis of how blackmail transactions interact with laws, institutions, and other kinds of transactions); Isenbergh, *supra* note 1, at 1906, 1921; Lindgren, *supra* note 8, at 701-02 (the "main problem" of the Blackmail Paradox is to explain the difference between blackmail and "legitimate bargaining"); Mack, *supra* note 12; Murphy, *supra* note 5, at 156-60 (asking why blackmail threats are illegal when hard bargains are legal); Shavell, *supra* note 11, at 1901 (explaining why threats are essential to successful commerce); Smilansky, *May We Stop Worrying*, *supra* note 9, at 116-17; Smith, *supra* note 5, at 865, 892.

<sup>53</sup> See Boyle, *supra* note 11, at 1477-78.

<sup>54</sup> See Mack, *supra* note 12, at 281-83; see also GREENAWALT, *supra* note 6, at 256-57; Block, *supra* note 8, at 66-68; Greenawalt, *supra* note 40, at 1115; Smilansky, *May We Stop Worrying*, *supra* note 9, at 118. Smilansky still sees a psychological difference between the targets of boycotts and the targets of blackmail; the rich and powerful are seriously "frightened" only by the latter. Smilansky,



to a buyer's competitors if the buyer does not pay the asking price;<sup>55</sup> a buyer's threat to a seller that she will not buy unless the price is lowered;<sup>56</sup> a company's threat to extend business into a new area unless potential competitors in that area pay it the money that it could expect to make;<sup>57</sup> employers' threats to lay off employees even if these layoffs would impose an "intolerable financial burden" on them;<sup>58</sup> an employee's threat to quit her job unless she receives a pay raise or promotion;<sup>59</sup> employee strikes for better wages or working conditions;<sup>60</sup> a neighbor's threat to build or maintain a *property* nuisance unless paid compensation;<sup>61</sup> a politician's threat to cut funding to groups that do not support her;<sup>62</sup> threats of force or economic sanctions in international relations;<sup>63</sup> prosecutors' threats to argue for harsher counts or sentencing unless suspects cooperate;<sup>64</sup> and a civilian's threat to bring a legitimate lawsuit (i.e., a lawsuit based on a genuinely believed "claim of right") unless paid compensation.<sup>65</sup>

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*Blackmail*, *supra* note 9, at 152; Smilansky, *May We Stop Worrying*, *supra* note 9, at 118–19. Gorr argues that the distinction between blackmail and boycotts cannot be reduced to the difference between a threat of harm and a threat of withholding benefits. Gorr, *supra* note 5, at 58.

<sup>55</sup> See Epstein, *supra* note 5, at 557; Isenbergh, *supra* note 1, at 1906; see also Block & McGee, *supra* note 8, at 571; Ginsburg & Shechtman, *supra* note 11, at 1849.

<sup>56</sup> Shavell, *supra* note 11, at 1893.

<sup>57</sup> See A.H. Campbell, *supra* note 20, at 388, 390. Smilansky thinks that this threat is arguably blackmail. See Smilansky, *Blackmail*, *supra* note 9, at 151; Smilansky, *May We Stop Worrying*, *supra* note 9, at 117–18.

<sup>58</sup> See Boyle, *supra* note 11, at 1478; Smilansky, *May We Stop Worrying*, *supra* note 9, at 118.

<sup>59</sup> See A.H. Campbell, *supra* note 20, at 388; Coase, *supra* note 11, at 664; Isenbergh, *supra* note 1, at 1906; Williams, *supra* note 8, at 172.

<sup>60</sup> See GREENAWALT, *supra* note 6, at 100; Williams, *supra* note 8, at 172.

<sup>61</sup> See KATZ, *supra* note 8, at 133; NOZICK, *supra* note 18, at 84–85; ROTHBARD, *supra* note 12, at 246 (using this point to criticize Nozick); Berman, *supra* note 1, at 866 n.230 (admitting that this situation may constitute an exception to his evidentiary theory of blackmail); A.H. Campbell, *supra* note 20, at 388; Coase, *supra* note 11, at 664, 670–71; Ginsburg & Shechtman, *supra* note 11, at 1861–64; Goodhart, *supra* note 7, at 440; Isenbergh, *supra* note 1, at 1906, 1920–22; Lindgren, *supra* note 8, at 696, 701; Shavell, *supra* note 11, at 1893–94; Smilansky, *Blackmail*, *supra* note 9, at 152; Williams, *supra* note 8, at 172. Isenbergh points out that "if [the blackmailer] has no interest in building for its own sake and wants only to profit from selling an easement to [the target], [the blackmailer]'s announced intention to build is blackmail as defined in the Model Penal Code." Isenbergh, *supra* note 1, at 1921–22. Block and McGee criticize Isenbergh on this issue. Block & McGee, *supra* note 8, at 571, 590–91.

<sup>62</sup> See Smilansky, *Blackmail*, *supra* note 9, at 152; Smilansky, *May We Stop Worrying*, *supra* note 9, at 118.

<sup>63</sup> See sources cited *supra* note 62.

<sup>64</sup> See Hardin, *supra* note 5, at 1790–91.

<sup>65</sup> See Block, *supra* note 8, at 72; A.H. Campbell, *supra* note 20, at 387–88; Fletcher, *supra* note 1, at 1618; Lindgren, *supra* note 5, at 605; Lindgren, *supra* note 1, at 910–11, 920; Lindgren, *supra* note 8, at 688, 713–14; Shavell, *supra* note 11, at 1893, 1901; Smilansky, *Blackmail*, *supra* note 9, at 152; Smilansky, *May We Stop Worrying*, *supra* note 9, at 118; Smith, *supra* note 5, at 880; Waldron, *supra* note 14, at 17–18; Williams, *supra* note 8, at 164–68; see also Berman, *supra* note 1, at 863 (threats to bring legitimate lawsuits are more morally acceptable in civil law than in criminal law); Gordon, *supra* note 7, at 1776 (referring to "anecdotal evidence . . . suggesting that persons threatened with blackmail may have some hope of maintaining confidentiality even if they report the crime.");

Blackmail threats belong in this list because they share the same basic characteristics: they too (a) are profit-motivated, or at least self-interest-motivated, and (b) threaten actions that are perfectly legal to carry out.<sup>66</sup>

#### D. *Blackmail Constitutes an Ordinary Economic Transaction*

It has been argued that the transaction between the blackmailer and the target is wasteful and inefficient—an “unproductive exchange” in Robert Nozick’s words.<sup>67</sup> Blackmail transactions are thought to be wasteful and inefficient because only one of the two parties receives a positive benefit from the blackmail transaction. While the blackmailer profits, the blackmail target suffers net harm. She has (a) paid money and (b) gained nothing; her secret is just as concealed before the transaction as afterward.

But this argument assumes without justification that the proper baseline against which to compare the target’s present situation (after paying off the blackmailer) is the target’s situation before the blackmailer threatened her. One might very plausibly argue that the proper baseline should instead be the target’s situation just *after* the blackmailer threatened her. Compared with *this* situation, the target is *better off* after she pays off the blackmailer. Indeed, the notion that the blackmailer’s proposal is a threat obscures the fact that it is equally an *offer*—an offer to conceal the reputation-damaging information if payment is made.<sup>68</sup> Just as with any other economic transaction, the target is being offered something that she desires—in this case, concealment—in exchange for payment. So if she accepts this offer, she is arguably better off than she would have been in a situation where the blackmailer knew her secret and she did *not* receive the blackmailer’s agreement to conceal.<sup>69</sup>

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Landes & Posner, *supra* note 15, at 43 (referring to this threat as “lawful bribery”); Posner, *supra* note 5, at 1828 (threatening to bring a civil lawsuit unless paid off is less likely to be considered blackmail than threatening to report incriminating information unless paid off because the former allows the defendant a greater opportunity to maintain confidentiality).

<sup>66</sup> If this argument were correct, blackmail threats would be constitutionally protected speech. But Greenawalt argues that blackmail threats are not protected speech because they are “situation-altering” and situation-altering speech is not supported by any of the various justifications underlying freedom of speech. Greenawalt, *supra* note 40, at 1091–95, 1098–1100, 1103.

<sup>67</sup> See proposition (5), *supra* note 21, and accompanying text.

<sup>68</sup> For two different accounts of the difference between threats and offers, see Katz, *supra* note 1, at 1574 (the distinction between threats and offers is that while the former “shrink” the target’s opportunity set, the latter enlarge the target’s opportunity set); and Lamond, *supra* note 1, at 225–27 (what distinguishes threats and offers is that offers anticipate welcome consequences and threats anticipate unwelcome consequences, where welcomeness or unwelcomeness is to be analyzed terms of the target’s subjective interests or desires (for positive actions) and objective baselines or norms (for omissions)).

<sup>69</sup> See GREENAWALT, *supra* note 6, at 99; ROTHBARD, *supra* note 12, at 246 (“Jones is paying not for Smith’s making him better off, but for *not* making him worse off. But surely the latter is *also* a productive contract, because Jones is still better off making the exchange than he *would have been* if the exchange were not made.”); Block & Gordon, *supra* note 12, at 38–39 (“The payment extracted

One might object that while the blackmail target pays for concealment, which is a kind of omission, the buyer in an ordinary economic transaction pays for a positive something, either a product or service.<sup>70</sup> But this point fails to undermine the argument above because (a) the blackmailer's omission to disclose is itself a service and (b) it is perfectly legal in some situations for people to pay others to preserve their secrets. As was mentioned in Part II, clients pay their attorneys, among other things, to preserve their confidences, and employees formally agree that they will not directly or indirectly reveal their employers' trade secrets to their employers' competitors. Moreover, Richard Posner points out that it is perfectly legal to "conduct research into people's pasts and sell the results to the newspaper."<sup>71</sup> So why should it be any less legal, no less criminal, to try to sell such research to the subject herself?<sup>72</sup>

### E. *Legalization Would Help to Make Blackmail Targets Better Off*

The argument in Part III.D above was that blackmail transactions (legal or not) help to make blackmail targets better off than they were prior

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must be worth less to the victim than the costs of having his secret uncovered."); Evans, *supra* note 5, at 92 ("[H]ow can it be illegal to give the victim the choice of being put in a better position than if the blackmailer had harmed him in a lawful manner?"); Hardin, *supra* note 5, at 1806; Katz, *supra* note 1, at 1598 ("If revealing [another's marital] infidelities is only a minor immorality, then how can the taking of money which the victim prefers to that minor immorality be anything more than a minor immorality itself?"); Levin, *supra* note 3, at 12 ("In fact, the straying husband does get something from the blackmailer: better odds that his wife will stay with him than would obtain without the blackmailer's silence."); Lindgren, *supra* note 8, at 691 (a successful blackmail transaction is arguably less an invasion of privacy than actual disclosure); Owens, *supra* note 5, at 502. According to some scholars, whatever we might think about "ordinary" blackmail, "market-price" blackmail—the situation in which an author offers the subject of her prospective publication "market price" in exchange for omitting embarrassing information about the subject—constitutes an ordinary economic transaction and therefore should be legalized. See ROTHBARD, *supra* note 12, at 125; Berman, *supra* note 1, at 857–60 (after offering a complicated analysis of market-price blackmail, concluding: "the particular reasons for legalizing the unconditional sale by [the blackmailer] to [a tabloid] should, on consequentialist reasoning, entail also legalizing the conditional sale offer by [the blackmailer] to [the target]."); Murphy, *supra* note 5, at 164–65 (market-price blackmail transactions should be legalized for "public persons"). *But see* POSNER, *supra* note 1, at 546–47 (supporting this argument but calling it "incomplete" because it ignores blackmail's "regulatory aspect"); Altman, *supra* note 4, at 1647–49 (while market-price blackmail, not to mention "payer-initiated bargains," is "less wrong than most blackmail," it should still be prohibited for "prophylactic reasons"—i.e., because such transactions are (a) hard to detect or distinguish from regular blackmail and (b) difficult to enforce); Lindgren, *supra* note 8, at 693–94 (criticizing Murphy's theory). Other scholars who discuss market-price blackmail include: Owens, *supra* note 5, at 501–03; and Smilansky, *May We Stop Worrying*, *supra* note 9, at 116–17.

<sup>70</sup> See Gorr, *supra* note 5, at 58 (while the blackmailer threatens to cause harm (the flip side of which is offering to refrain from inflicting this harm for money), the seller in an ordinary commercial transaction threatens (only) to withhold a positive benefit (the flip side of which is offering to confer this benefit for money)).

<sup>71</sup> POSNER, *supra* note 23, at 284.

<sup>72</sup> *Id.*

to the transactions. For they gain something that they did not have before making payment—namely, the blackmailer's agreement to conceal their secret. The argument in this section is that *legalization* of blackmail transactions would make blackmail targets better off than they are in the current system, a system that criminalizes blackmail. For, whether or not blackmail is legal, there will always be a huge market for reputation-damaging information about not only public figures but also many private individuals as well.<sup>73</sup> And how this market operates will largely depend on whether or not blackmail is legal. On the one hand, if there is a law against blackmail, then many would-be blackmailers will simply bypass the targets and instead go straight to the public with their reputation-damaging information. On the other hand, if there were *no* law against blackmail, then these same would-be blackmailers would be much more likely to offer their targets secrecy in exchange for money. And many, if not most, targets would prefer the latter situation. For in the latter situation, they at least have the option of purchasing non-disclosure. In the former situation, they have no such option.<sup>74</sup>

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<sup>73</sup> See Lindgren, *supra* note 8, at 691–93; Mack, *supra* note 12, at 280–81. All else being equal, we are generally a bit less sympathetic to public figures than we are to private individuals. There are three reasons. First, we tend to think that public figures assumed the risk when they entered the public arena with the knowledge that, by so entering, they would risk exposing their lives and mistakes to the world. Second, we may be jealous of their fame, power, and money. Third, rightly or wrongly, we regard this fame, power, and money as legitimate compensation for their consequent loss of privacy.

<sup>74</sup> See ROTHBARD, *supra* note 12, at 124–25; Altman, *supra* note 4, at 1650; Berman, *supra* note 1, at 828–29; Block, *supra* note 8, at 63, 69; Block & Gordon, *supra* note 12, at 39; Block & McGee, *supra* note 8, at 584; Boyle, *supra* note 11, at 1475, 1480; DeLong, *supra* note 11, at 1663–64, 1673 (this argument is what makes the Blackmail Paradox a *paradox*); Gordon, *supra* note 7, at 1779 (this argument depends on the “image” of a blackmail victim who prefers payment to disclosure and surreptitiously ignores the image on which the prohibition of blackmail rests—namely, “one who is put into mental pain and fear by blackmail threats, but who will nevertheless have no truck with dishonor.”); Gorr, *supra* note 5, at 62 (“Although . . . we would have to acknowledge that there are likely to be some regrettable instances in which the victim will be disadvantaged by a ban on blackmail, such a ban is still justified since permitting blackmail would almost certainly produce far more injustice.”); Hardin, *supra* note 5, at 1794; Katz, *supra* note 1, at 1595–97 (the blackmailer is blameworthy even if she accommodates the target’s preference and allows her to purchase silence or non-disclosure); Lindgren, *supra* note 14, at 1987 (market-price blackmail is still blackmail and therefore should still be illegal); Mack, *supra* note 12, at 275; Murphy, *supra* note 5, at 158–59, 160, 164–65 (accepting this argument to some extent); Owens, *supra* note 5, at 501–02; Posner, *supra* note 5, at 1841; Smilansky, *Blackmail*, *supra* note 9, at 151; Smilansky, *May We Stop Worrying*, *supra* note 9, at 117.

Notice, this argument assumes that the reputation-damaging information in question is not something that citizens clearly have a right to know, information such as the fact that a public official violated her public duty. For legalizing blackmail in these situations would violate citizens’ right to know. See Murphy, *supra* note 5, at 165. Lindgren criticizes Murphy on this point. Lindgren, *supra* note 8, at 694.

F. *If Target-Initiated Blackmail is Legal, then Blackmailer-Initiated Blackmail Should Also Be Legal*

As blackmail statutes stand, Blackmailer cannot be guilty of blackmail unless she *initiates* the blackmail transaction. So if Target correctly believes that Blackmailer possesses damaging information about Target, approaches Blackmailer, offers to purchase Blackmailer's silence, and Blackmailer agrees, no crime has taken place. Target has committed a form of legal bribery. But if such a transaction is legal, then the reverse transaction—i.e., the transaction in which Blackmailer first approaches Target and offers to keep silent about Target's secret in exchange for money—should also be legal. For they are substantively the same transaction. It does not matter who first approached whom. That is merely a formal consideration. What matters is that, in both situations, Target is equally purchasing Blackmailer's silence.<sup>75</sup>

#### IV. OBJECTIONS AGAINST THE SIX ARGUMENTS FOR LEGALIZING BLACKMAIL

This section will challenge the six arguments in Part III for legalizing blackmail.

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<sup>75</sup> See DeLong, *supra* note 11, at 1664–65 ((a) no solution to the Blackmail Paradox can be successful unless it also solves the “second paradox of blackmail”—i.e., provides an explanation of why target-initiated bribery is legal when it is substantively the same transaction as blackmailer-initiated blackmail, which is illegal; (b) none of the extant economic justifications of blackmail's criminalization satisfy this criterion; and therefore (c) none of the extant economic justifications solves the Blackmail Paradox). For responses to DeLong's argument—or at least to this *kind* of argument—see ROTHBARD, *supra* note 12, at 129–30 (“Legally, there should be a property right to pay a bribe, but not to take one,” for it is usually only the bribe-taker who violates some contractual obligation to a third party); Berman, *supra* note 1, at 867–70 (arguing that DeLong's “puzzle” . . . is not very puzzling” on the basis that bribery should not ordinarily be criminalized); Gorr, *supra* note 5, at 63–64 (initiation is an indication of whether or not the individual who preserved the secret in exchange for money *intended* to blackmail the victim and therefore to whether or not the transaction counts as blackmail); Lamond, *supra* note 1, at 235 (“The explanation of why it is significant which party initiates the transaction follows from the role of threats in constituting the wrong in blackmail. Where [the target] initiates the transaction there is no reason to question the validity of her consent to that transaction.”); Lindgren, *supra* note 14, at 1979–80 ((a) the answer to DeLong's argument “may lie in coercion or the threat” and (b) “an exploitation theory should be able to handle it fairly easily”); Posner, *supra* note 5, at 1836 (“[E]conomic analysis may explain why it is not blackmail for a person who gets wind that another is about to disclose damaging information about him to approach that person and pay him to keep mum. Allowing such transactions is unlikely to give rise to an industry of dirt-seekers, with all the squandered resources thereby implied, since the dirtseekers could not advertise for or otherwise seek out customers (which would be blackmail) but would have to wait for the latter to come upon them by chance.”); Smith, *supra* note 5, at 908 (“[T]he legality of [target-initiated] transactions makes sense. If the potential victim feels secure enough to initiate the transaction, there is more reason to think the victim is not the type to undertake violent self-help.”). For critiques of most of these responses, see K. Christopher, *supra* note 8, at 1137–44.

A. *We Have No Reason to Believe that Legal Threatened Action Entails Legal Threat*

As was pointed out in the Introduction, what generates the Blackmail Paradox is the fact that threats and threatened actions normally have the same legal status. Block and Gordon go one step further and argue that this correlation *must* be the case, that the legal status of the threatened action *entails* the legal status of the threat.<sup>76</sup> But, first, it is not clear why they hold this principle and not the converse—namely, that the legal status of the threat entails the legal status of the threatened action, in which case the illegality of blackmail threats rather than the legality of disclosure would be the starting point.

Second, Block and Gordon's point is less an argument than a stipulation. They do not support their point that one entails the other; they simply assert it. To be sure, if they were correct, they would have proven that blackmail threats should be legal. But we have no reason to believe that they are correct in the first place. We have no reason to believe that there is an entailment relation rather than simply a virtually, but not fully, exceptionless correlation between the legal statuses of threats and their threatened actions. Until such a reason is given, we may conclude that Block and Gordon's point at best restates the Blackmail Paradox rather than solves it.<sup>77</sup>

B. *The Central Argument: Blackmail Threats Should Be Criminalized—and Therefore Do Not Belong to the Family of Legally Permissible Threats—Even Though They Do Not Qualify as Attempted Theft*

The argument in Part III.B above suggests that there are two different families of interests. Into the first family fall interests of which our continued enjoyment is legally protected. Call this the "LP"—"Legally Protected"—family. They include such interests as life, physical well-being, emotional well-being, family, liberty, and property. Into the second family fall interests either (a) that one does not already enjoy or (b) to which her continued enjoyment is not legally protected. These interests include affordable products and services (for consumers); freedom from competition (for buyers and sellers); freedom from being sued (for citizens); freedom from consumer boycotts, strikes, and employee shortages (for businesses); pay raises, promotions, and freedom from firing (for employees); freedom from governmental funding cuts (for funding recipients); and freedom from force or economic sanctions (for countries). Call this the "NLP"—"Not Legally Protected"—family of interests. To be sure, they may be regulated with regard to time, place, and manner. But

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<sup>76</sup> See *supra* notes 38, 39.

<sup>77</sup> For another critique of Block & Gordon, see generally Lindgren, *supra* note 7.

they are not protected to nearly the same degree as life, physical well-being, emotional well-being, family, liberty, and property.

*Why*, then, do life, physical well-being, etc. find themselves in the LP family rather than in the NLP family? This is certainly not an arbitrary categorization. It is not as though we could easily “pluck” one or more of these out and throw them into the NLP family with any ethical or rational impunity. There is a deeper reason underlying the superficial legal fact that these interests are legally protected and that those in the NLP are not. But what might this deeper reason be? What distinguishes life, physical well-being, etc. from all of those interests in the NLP family—and therefore the deeper reason in virtue of which these interests enjoy legal protection when the NLP interests do not—is quite simple: LP interests are generally more valuable to their owners than NLP interests. They are simply on two different “value tiers.” On the one hand, LP interests are on the top value tier—generally *supremely* valued (or *cherished* or *venerated*) by their owners and rarely, if ever, in competition or conflict with another’s supremely valued interests. That is, it is rarely the case that one confronts the situation where she may continue to enjoy her LP interests only at the expense of another individual’s LP interests. On the other hand, NLP interests are on the second value tier. They are generally *highly* valued, but simply not to the same degree as LP interests, and they are often in competition or conflict with other individuals’ equally highly valued NLP interests. It is often the case that one may enjoy or continue to enjoy her NLP interests only at the expense of another’s NLP interests.

It follows from this distinction between LP interests and NLP interests that there are not just one but two different justifications for criminalizing threats to LP interests. The first we already saw in Part III.B above. Extortionate threats against another’s life, physical well-being, etc. are illegal because they constitute attempted theft. They attempt to coerce the target into paying for something to which she is already legally entitled—the continued enjoyment of the particular interest being threatened. But there is a second justification for punishing extortionate threats. Indeed, it is a justification that also applies to three other crimes as well—menacing, harassment, and stalking. These kinds of acts are criminalized primarily because they involve the reasonable likelihood, and often the intent, of putting the target into a state of great fear and anxiety.<sup>78</sup> And criminal law

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<sup>78</sup> In New York, the laws against menacing are designed to protect people from “reasonable fear of physical injury, serious physical injury or death” and “fear of death, imminent serious physical injury or physical injury.” N.Y. PENAL LAW §§ 120.14, 120.15 (McKinney 2004). The laws against harassment are designed to protect people from “reasonable fear of physical injury” and “annoyance or alarm.” *Id.* §§ 240.25, 240.26, 240.31, 240.32. And the laws against stalking are designed to protect people from “reasonable fear of material harm to the physical health, safety or property of such person, a member of such person’s immediate family or a third party with whom such person is acquainted”; “material harm to the mental or emotional health of such person”; “reasonabl[e] fear that his or her

rests in part on the bedrock assumption that people are entitled—*qua* people, *qua* members of the moral community—to freedom from this kind of deliberately inflicted harm to their emotional well-being.

Why would the criminal law care about people's emotional well-being in the first place? Again, the criminal law is largely concerned with protecting people against deliberately inflicted harm to their supremely valued interests. And, as we have already seen above, emotional well-being is supremely valued by most people. Again, the other supremely valued interests are life, physical well-being, family, liberty, and property. Indeed, that is why we see the criminal law protecting people against deliberately inflicted harm to these interests in the form of criminal laws against homicide, manslaughter, rape, assault, battery, kidnapping, unlawful imprisonment, and theft.

If this argument is correct, and if reputation qualifies as a supremely valued interest, then threats to reputation should also be criminalized. Well, as it turns out, reputation *does* qualify as a supremely valued interest. For better or worse, reputation is generally supremely valued by its owners—just as much, if not more in many cases, than life, physical well-being, family, liberty, and property. Many people would rather give up their money, freedom, and even their lives or “right arms” than lose their reputations. Indeed, that is why we have civil laws against defamation—i.e., against dissemination of false, reputation-damaging information—and sometimes even criminal laws against maliciously ruining a person's reputation with *true* information.<sup>79</sup> So threats against reputation are likely to put the target into as much, if not more, fear and anxiety than threats against these other supremely valued interests. And if this likely

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employment, business or career is threatened”; “reasonabl[e] fear [of] physical injury or serious physical injury, the commission of a sex offense against, or the kidnapping, unlawful imprisonment or death of such person or a member of such person's immediate family”; and “reasonable fear of physical injury, serious physical injury or death.” *Id.* §§ 120.45, 120.50.

<sup>79</sup> For example, N.Y. Penal Law §§ 135.60 (McKinney 2004) and 155.05 (McKinney 1999), both indicate that “an asserted fact, *whether true or false*, tending to subject some person to hatred, contempt or ridicule” constitutes grounds for criminal punishment. For statutory text, see *supra* note 2 and accompanying text (emphasis added); see also ROTHBARD, *supra* note 12, at 121 (“The current libel laws make [dissemination of a truthful statement] illegal if done with ‘malicious’ intent, even though the information be true.”); Berman, *supra* note 1, at 843–44 (prior to the Supreme Court's decision in *Garrison v. Louisiana*, 379 U.S. 64 (1964), “a majority of states had constitutional or statutory provisions” according to which defendants who had disclosed embarrassing information about others were subject to prosecution for criminal libel *even if the information was truthful* if these disclosures were not “published with good motives and for justifiable ends”); Feinberg, *supra* note 5, at 90, 93–94 ((a) in the United States, there is (and should be) a tort for public disclosure of private information about another “even though it is true and no action would lie for defamation”; and (b) this tort requires at least four conditions to be satisfied: public disclosure, the damage consists in the public disclosure, the public does not have a “legitimate interest in having the information made available,” and the information “would be highly offensive and objectionable to a reasonable person of ordinary sensibilities”).



consequence in conjunction with the moral assumption that people do not deserve deliberately inflicted damage to their emotional well-being is sufficient to criminalize extortionate threats, menacing, harassment, and stalking, then it is also sufficient to criminalize threats to reputation—i.e., blackmail.<sup>80</sup>

The most obvious objection against the position that reputation qualifies as a supremely valued interest is that it does not fall into the LP family. Rather, it falls squarely into the NLP family. We generally enjoy it, but, again, we are not legally entitled to its continued enjoyment—i.e., to freedom from the non-disclosure of true but reputation-damaging information. We are at most entitled only to freedom from the non-publication of *false* reputation-damaging information. This much seems right.<sup>81</sup> But it is not conclusive. For (a) what puts reputation into the NLP family and keeps it out of the LP family is merely a superficial legal fact; and (b) there is a deeper, normative reason why reputation should be treated with the same reverence as members of the LP family.

Regarding (a), the superficial legal fact that puts reputation into the NLP family and keeps it out of the LP family is society's determination that the institution of freedom of speech outweighs or "trumps" the harm that some true disclosures may do to people's reputations. This fact is superficial because it does not reflect the intrinsic value or worth of reputation, only a contingent societal judgment about the relative weights of reputation and freedom of speech. I say *contingent* because it does not strain reason to think that society might very well have adopted the reverse judgment and made truthful but reputation-damaging disclosures illegal. Indeed, as indicated just above, some states *do* prohibit true, reputation-damaging disclosures that are maliciously motivated.<sup>82</sup>

Regarding (b), reputation is generally also supremely valuable to its owner. It is just as valuable, if not more so, to its owner as life, physical well-being, etc. So while reputations seem to meet the "letter" of the NLP family, they meet the deeper normative "spirit" of the LP family. While a superficial societal judgment denies them certain legal protection, they are normatively of a kind with other supremely valued interests. As a result, a blackmailer's threat against a target's reputation is morally equivalent to a

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<sup>80</sup> See Greenawalt, *supra* note 40, at 1115 ("In the ordinary situation in which a single harm, say disclosure of embarrassing information, is threatened, a judgment may reasonably be made that the harm itself is socially acceptable, but that a threat to engage in it coupled with a demand puts socially unacceptable pressure on the victim to comply with the demand.").

<sup>81</sup> *But see supra* note 79.

<sup>82</sup> *See supra* note 79 and accompanying text.

threat against any other LP interest. And since the latter is serious enough to merit criminal punishment, so is the former.<sup>83</sup>

It is very tempting to think that because blackmailers threaten legal actions (truthful disclosure) and extortionists illegal actions, blackmail is not as "bad" or wrong as extortion. But this first appearance is false. Blackmail threats are *just as* wrong as extortionate threats.<sup>84</sup> Given that reputation may be just as, if not more, socially, economically, and psychologically important to its owner than other LP interests, a threat to spread reputation-damaging information is arguably more wrongful than a threat to kidnap, steal, defraud, vandalize, or, possibly in some more extreme cases, even kill or maim.<sup>85</sup> This is why Ronald Coase refers to

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<sup>83</sup> See Shavell, *supra* note 11, at 1903 ("I suspect that most individuals view blackmail as deserving of punishment . . . because blackmail involves the calculated imposition of suffering upon its victims.").

<sup>84</sup> One might argue that threats to injure another's reputation (with truthful information) cannot be wrong. For disclosure itself is not wrong. And we know that disclosure is not wrong because it is perfectly legally permissible. But this argument simply does not work. Just because a given action is legally permissible does not mean that it is morally permissible. Even though disclosure is legal, it is often morally *impermissible*. (Conversely, concealment is often morally *permissible*—contrary to its otherwise derogatory connotations. See Lindgren, *supra* note 1, at 914–16.) Freedom of speech may permit revealing another's secrets and thereby embarrassing her. But it does not necessarily make such activity *right*. See Gordon, *supra* note 7, at 1759, 1764–66 (using the Doctrine of Double Effect to show that the fact that the threatened action is legal does not make the blackmailer's threat any less wrong); Hardin, *supra* note 5, at 1808 ("The fact that there is nothing illegal about my actions might be the ground for thinking that there is nothing wrong with them . . . But unless the principle of rightness or goodness is very broadly conceived, this [Hobbesian or positive law] view is conspicuously false to the historical facts of many laws."); Lindgren, *supra* note 7, at 40 ("[N]ot all immoral behavior is criminal. This may be because either the behavior is not sufficiently immoral, it does not cause serious enough harm or it is not a traditional concern of the criminal law."); Owens, *supra* note 5, at 501 (it is within the rights of, but not necessarily right for, an editor to publish injurious gossip or to sell it to other editors); Waldron, *supra* note 14, at 23 ("[T]he law recognizes wider categories of wrongdoing than it penalizes. The criminal law does not exhaust the legal system's designation of certain actions as 'wrong' . . . . The law . . . recognizes certain principles of public morality even though it is not prepared—for various reasons—to enforce them directly through the criminal law.").

<sup>85</sup> See POSNER, *supra* note 23, at 287 ("Reputation . . . has important economic functions in a market system . . . . It reduces the search costs of buyers and sellers and makes it easier for the superior producer to increase his sales relative to those of inferior ones . . . . It is just as vital to the functioning of the 'marriage market,' the market in friends, the political market, and so on." (citation omitted)); Alldridge, *supra* note 13, at 375 ("[T]o most men the idea of losing their fame and reputation is equally, if not more terrific than the dread of personal injury." (quoting *R. v. Hickman*, [1784] 1 Leach 278)). For an eloquent account of the close connection between reputation and another arguable LP interest, privacy, see generally JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000).

This point is not as hard to accept when we consider that some lawful acts can be morally worse than some unlawful ones. Indeed, it is arguably morally worse maliciously to drive a company out of business, which is sometimes legal, than to steal a few thousand dollars from it, which is always illegal. Likewise, if we may be permitted to compare apples and oranges, it is arguably morally worse to perform the legal act of refusing to visit one's beloved, fatally ill mother for frivolous reasons than it is to perform the criminal act of purchasing marijuana, especially for medicinal purposes.

blackmail as “moral murder”;<sup>86</sup> why Lord C.J. Lane states that “in the calendar of criminal offences, blackmail is one of the ugliest . . . because it involves what really amounts, so often, to *attempted murder of the soul*”;<sup>87</sup> and why Bechhofer Roberts states that “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.”<sup>88</sup>

C. *Objections Against My Justification for Criminalizing Blackmail in Part IV.B*

*Objection 1:* Life, physical well-being, etc. are not trumped out of the LP family by any social value in the way that reputation is trumped out of the LP family by freedom of speech. Therefore life, physical well-being, etc. must be more highly valued by their owners, in which case reputation does not belong even normatively to the LP family.

*Reply:* It is merely a contingent fact that no other social value trumps life, physical well-being, etc. out of the LP family. For example, it is easy enough to imagine that society might have decided that national security is more important than individual liberty; that, given the tragic events of 9/11, it would be preferable to restrict, if not eliminate, people’s various liberties (religious exercise, assembly, privacy, etc.) for the sake of safeguarding the nation from spying, terrorist plots, and other hostile threats. If this were the case, if liberty had been trumped out of the family of LP interests in this way, our individual liberties would have suffered dramatically. But we might still continue to value—indeed, miss—them just as much as we value life, physical well-being, emotional well-being, and property. The fact that we decided to make national security our top priority would not necessarily have made us value individual liberties any less than the other LP interests. Likewise, then, with reputation. The fact that we value freedom of speech even more than reputation does *not* necessarily mean that we value reputation any less than the other LP interests.

*Objection 2:* Yes, the “blackmailer’s actions generate fear and anxiety.”<sup>89</sup> But many perfectly legal threats generate fear and anxiety too. So why should blackmail threats be singled out? As Walter Block argues:

Causing anxiety is not, per se, a ground for criminal prohibition. A great number of human activities—from

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<sup>86</sup> Coase, *supra* note 11, at 675.

<sup>87</sup> Alldridge, *supra* note 13, at 382 (quoting R v. Hadjou, [1989] 11 Crim. App. 29).

<sup>88</sup> Coase, *supra* note 11, at 674 (quoting THE OLD BAILEY TRIAL SERIES, THE MR. A CASE 9 (C.E. Bechhofer Roberts ed., 1950)).

<sup>89</sup> Coase, *supra* note 11, at 675; see also Levin, *supra* note 3, at 12 (blackmail should remain illegal because “legal blackmail would create too much anxiety”); Shavell, *supra* note 11, at 1894, 1898.

exams to hangliding to investing in the stock market to being 'victimized' by 'hate' speech—are anxiety-producing, but we do not see such anxiety as a legitimate reason for seeking to prevent such activities. Almost any change is potentially anxiety-producing, and a policy of anxiety reduction would be a prescription for maintaining the status quo. If anxiety is a problem, it is better to see a psychiatrist.<sup>90</sup>

*Reply:* If Objection 2—and Block's argument—worked, then extortionate threats, menacing, harassment, and stalking should not be criminalized. For, again, the main reason why these kinds of acts are criminalized is because they tend to cause especially high levels of fear and anxiety.<sup>91</sup> Yet they clearly *should* be criminalized. So Objection 2 is wrong.

Where, then, does it go astray? There are two significant differences between (a) fear-and-anxiety-generating threats or activities that are legal and (b) fear-and-anxiety-generating threats that are criminal (i.e., extortionate threats, menacing, harassment, and stalking). First, the level of fear and anxiety that the latter are thought to generate is significantly higher than the level of fear and anxiety thought to be generated by the former. Second, while the fear and anxiety generated by legally permissible threats or activities may be counter-balanced by a sufficiently strong justification—e.g., capitalism, competition, or education—the fear and anxiety generated by extortionate threats, menacing, harassment, and stalking are not compensated for by any such moral or institutional justification.<sup>92</sup>

*Objection 3:* A person is morally entitled to whatever reputation accurately reflects her norm-violations. If, for example, a certain man has a reputation for being a faithful husband and yet has cheated on his wife, then he is not morally entitled to this reputation. On the contrary, he is morally entitled to the very *opposite* reputation—the reputation of an adulterer.<sup>93</sup> So it is tough luck if threats to disclose true but reputation-

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<sup>90</sup> Block, *Replies*, *supra* note 12, at 23; *see also* Lindgren, *supra* note 5, at 604–05.

<sup>91</sup> *See supra* note 78.

<sup>92</sup> At least in society's judgment. Legislatures did a balancing test and decided that the pleasure that a stalker derives from stalking does not come close to justifying the fear and anxiety that it causes the stalker's target. The same is true of blackmail. Legislatures deemed that the capitalist nature of blackmail threats do not justify the fear and anxiety that they cause the blackmailer's target.

<sup>93</sup> *See* Gorr, *supra* note 5, at 63 (“[I]t hardly seems likely that [an adulterer] is morally entitled to complain” about being exposed); Murphy, *supra* note 5, at 162 (we are not entitled to a good reputation if we have performed actions inconsistent with it); Scalise, *supra* note 8, at 1508, 1511 (“One’s right in one’s reputation is limited to disclosure of acts he has committed and to nondisclosure for acts he has not committed. [One] may try to hide the fact that he committed act X, but he cannot be said to have a right of nondisclosure concerning act X. . . . While an individual generally has a right to her reputation, she does not possess a right to a reputation of a person she is not.”).

damaging information will cause him severe emotional distress. He is getting precisely what he deserves. He made his bed; now he must lie in it.<sup>94</sup>

*Reply:* Objection 3 is far too puritanical. It holds people to the very difficult, if not impossibly high, standard of acting at all times in complete conformity with their unblemished public appearance. A person is *not* necessarily morally entitled to a reputation that perfectly tracks each and every one of her norm-violations. The mere fact that one has violated a social or moral norm does *not* necessarily mean that that she deserves disclosure of this fact to third parties or the public in general. Indeed, if this were the case, most of us would have much worse reputations than we currently enjoy.<sup>95</sup> Yet most of us who have good reputations still feel that we *deserve* them, despite whatever mistakes we have made or weaknesses we may have.

Whether or not a norm-violator deserves disclosure of embarrassing information depends on many different things, including *what* norm she violated, whether or not the norm is morally correct, the internal (psychological) and external circumstances under which she violated it, how often she has violated it, the magnitude (or egregiousness) of the violation, and the reasonably foreseeable consequences of disclosing the violation. In many situations, this combination of factors will lead us to conclude that the norm-violator does *not* deserve disclosure and even that such disclosure would be morally despicable.

For example, we may reason that the norm should not be a norm in the first place. Consider the stigma that often attaches to homosexuality. Many feel that this attitude is morally wrong and therefore that it is morally proper to keep homosexuals' sexual orientation a secret rather than to disclose it and let them be subjected to unfair discrimination.

A second example: even if an individual does deserve disclosure, she may not deserve the degree of reputation injury that disclosure will cause. For the degree of reputation injury is often well out of proportion to the norm-violation itself. One need only read Nathaniel Hawthorne's *The*

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<sup>94</sup> Objection 3 actually rests on *four* unstated assumptions: (a) the husband is responsible for cheating, (b) he therefore deserves the reasonably foreseeable consequences of cheating, (c) a reasonably foreseeable consequence of cheating would be its public disclosure, and (d) a reasonably foreseeable consequence of public disclosure would be injury to his reputation as a faithful husband.

<sup>95</sup> See ROSEN, *supra* note 85, at 12 ("[T]he sociologist Erving Goffman argued that individuals, like actors in a theater, need backstage areas where they can let down their public masks, collect themselves, and relieve the tensions that are an inevitable part of public performance. In addition to protecting freedom and self-expression . . . the privacy of the backstage protects us from the unfairness of being misjudged by strangers who don't have time to put our informal speech and conduct into a broader context." (citation omitted)); Levin, *supra* note 3, at 12 ("If you are like me, you have done things you hope remain hidden. Not terrible things—nothing criminal, . . . but . . . you want the lid to stay on. . . . All pertinent physical evidence and memories dissolved long ago in the cosmic increase in entropy, thank God.").

*Scarlet Letter* to see how severely society may stigmatize an arguably minor, or at least common, norm-violation (in that case, adultery).<sup>96</sup>

A third example: we might feel that what an individual did *was* wrong but not *that* wrong, that she does not therefore deserve to lose her job, that her employer will still fire her if he finds out, and therefore that it is better that her norm-violation be concealed than disclosed.

Finally, a fourth example: we might feel that what an individual did was *very* wrong but that it would still be better for her and those around her if she learned from her mistake on her own rather than from the overly harsh consequences that would ensue from disclosure.

*Objection 4:* But what about situations in which the blackmail target's actions *are* egregious and therefore public disclosure is *clearly* warranted? Consider, again, the man who has a reputation as a faithful husband even though he cheats on his wife. Suppose now that he cheats on his wife not now and then but all the time. For years during his marriage, he has slept with hundreds of different women (or maybe only a few women hundreds of different times). Yet his reputation as a faithful husband remains untarnished. Clearly, he *deserves* to lose this reputation; his reputation therefore does not normatively belong to the family of LP interests; and the blackmailer is not committing a wrong comparable to menacing, harassment, or stalking by threatening to expose him and thereby give him the reputation that he deserves.

*Reply:* Moral egregiousness is not a legal category. So the law cannot draw a sharp line between egregious and non-egregious behavior and therefore between instances in which one deserves to lose her reputation and those in which she does not.<sup>97</sup> Instead, legislatures have a choice to make. On the one hand, they may establish the presumption that blackmail targets generally fall into the "egregious" category and therefore that threats to their reputations are not presumptively as wrong as threats to life, physical well-being, etc. On the other hand, legislatures may establish the presumption that blackmail targets generally fall into the "non-egregious" category and therefore that threats to their reputations *are* presumptively as wrong as threats to life, physical well-being, etc. If they choose the former, then there would seem to be little reason to make blackmail criminal. After all, the blackmail targets would simply be getting what they presumptively deserve. If they choose the latter, then most or all blackmail would be illegal. The historical and empirical fact is that legislatures have overwhelmingly, if not universally, adopted the latter

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<sup>96</sup> NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (1850).

<sup>97</sup> *But see* Friedman, *supra* note 3, at 1100 (referencing late 19th century Florida statutes that punished "flagrant" fornication more harshly than more occasional or clandestine fornication and late 19th century California statutes that punished "open and notorious" adultery more harshly than more occasional or clandestine adultery).

approach. And this is very strong evidence indeed that these same legislatures regard blackmail as a serious and unjustified threat to a supremely valued interest (i.e., emotional well-being).

*Objection 5:* Suppose that Seducer threatens to seduce Wife away from Husband unless Husband makes payment to Seducer. Because Husband loves Wife very much, she qualifies as one of his supremely valued interests. So, based on the argument in Part IV.B, Seducer's threat should be criminalized. Yet this is absurd. Freedom of speech alone justifies Seducer's making a profit-motivated threat against Husband to seduce Wife.<sup>98</sup>

*Reply:* There are two significant disanalogies between threats to ruin reputations by disclosing true information and threats to seduce spouses. The first disanalogy: all else being equal, the target of the threat of disclosure has little, if any, power to inhibit the disclosure. Without performing criminal acts like kidnapping or unlawful imprisonment, it is difficult, if not impossible, to keep others from talking about them. In contrast, Husband has greater power to inhibit Seducer's seducing Wife. Husband may try to weaken or undermine Seducer's seduction efforts not merely by trying to pressure or persuade Seducer not to make the attempt in the first place but also by trying to pressure or persuade Wife not to be seduced if Seducer does try. So while the potential victim of disclosure may hope only to keep the would-be gossip from disclosing, Husband has not merely one but two different avenues to pursue.

The second disanalogy: partly because of the first disanalogy above, disclosure of information has a (much) higher likelihood of producing the desired result (damage to reputation) than do attempts at seduction. As we all know from dating, the latter are much more susceptible to failure than the former. Put more archaically, there is much more of a "necessary connection" between disclosure of reputation-damaging information and damage to reputation than attempts at seduction and actual seduction. While the former requires only people who are aware of social norms and have a cognitive understanding of the disclosure, the latter requires something more difficult to come by—namely, a willing object of seduction.

For both these reasons, the target of the seduction threat is likely to feel less powerless and vulnerable—and therefore less threatened—than the target of a disclosure threat. So society may assume as a general rule that threats of seduction are not likely to produce the especially high levels of fear and anxiety that threats to life, physical well-being, family, liberty, property, and—yes—reputation will cause.

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<sup>98</sup> I owe this objection to Walter Block.

#### D. *Blackmail Is Not an Ordinary Economic Transaction*

The argument in Part III.D suggests that there are no substantive differences between blackmail transactions and other ordinary economic transactions. In response to this argument, this section will simply draw upon the efforts of other scholars and borrow the assortment of substantive distinctions that they have argued exist between blackmail threats and ordinary economic transactions. While the reader may not agree with all of them, the aggregate collection certainly helps to cast doubt on the notion that the former may be easily assimilated into the latter:

- 9) In a legitimate business transaction, the seller "is offering consideration in the form of abstaining from some profit or advantage which he might legitimately enjoy, and is quite different from the common blackmailer who surrenders no profit or advantage of his own in return for the money he receives."<sup>99</sup>
- 10) "One test whether there was a lawful business interest is whether some material advantage would come to the [blackmailer] through the carrying out of his threat. If so, he is usually entitled to renounce the advantage in return for the payment of money."<sup>100</sup>
- 11) "The demands made by a businessman are constrained by the competition of other businessmen, by the fact that the party threatened is likely to have a good idea of whether the threat has to be taken seriously and by the adverse effects on future business of being difficult in negotiating. None of this applies in the ordinary blackmail case. There is no competition. The victim has to deal with the blackmailer."<sup>101</sup>

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<sup>99</sup> A.H. Campbell, *supra* note 20, at 388.

<sup>100</sup> Williams, *supra* note 8, at 172; *see also* Altman, *supra* note 4, at 1640 (blackmailers differ significantly from other sellers since, unlike other sellers, they would give away their product were they not able to sell it); Comment, *supra* note 42, at 1478 ("[T]he blackmail transaction, unlike the [sale of newspapers], does not have a communicative purpose. The blackmailer uses the threat of communication only as a sanction to obtain property. It is irrelevant to the blackmailer whether the communication occurs.").

<sup>101</sup> Coase, *supra* note 11, at 675; *see also* Kipnis, *supra* note 1, at 21 ("In a Libertarian utopia, it will be very, very lucrative to be alone in offering urgently needed goods and services to those who have only hideously unattractive alternatives. This is blackmail's distinctive economic beauty."); Owens, *supra* note 5, at 505 ("[T]he blackmailer is a monopolist and is in a position to dictate unfair terms of trade."). *But see* Lindgren, *supra* note 5, at 605 (rejecting this point as a distinction between blackmail and legal transactions); Waldron, *supra* note 14, at 14 ("It is sometimes said that a blackmailer bargains from a monopoly position. But he doesn't. What he depends on is the 'victim's understanding that, whatever the likelihood (short of certainty) of his being exposed by someone else, he is *more* likely than that to be exposed by the blackmailer if he doesn't give him what he asks.").



- 12) “[C]oncern for future business will not moderate a blackmailer’s demands. If this factor has any influence, it pays the blackmailer to be unreasonable and even to carry out his threat, since this would make future victims take his threats more seriously.”<sup>102</sup>
- 13) “‘Ordinary blackmail’ is singled out [from other legitimate economic transactions], not because its bad features are unique, but because there is nothing good about it to overcome the badness. . . . ‘Ordinary blackmail’ is coercive, exploitative, invasive, etc., like many other social practices, but the point is that there is very little good about it.”<sup>103</sup>
- 14) “We could inhibit transactions in privacy without thereby inhibiting economic life and bargaining in general . . . . [But t]he kind of worries which [criminal restrictions on ruthless but legal economic transactions] would introduce into economic life might well inhibit those general incentives which are, for better or worse, the lifeblood of a capitalistic economy.”<sup>104</sup>
- 15) “[The blackmail victim] cannot appeal to the law, since this would involve that disclosure of facts which he is anxious to avoid.”<sup>105</sup>
- 16) “[T]he [ordinary commercial] transaction will be above board and so any illegal consequences will be more likely to be visible to the law.”<sup>106</sup>

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<sup>102</sup> Coase, *supra* note 11, at 675. Lindgren rejects this point as a distinction between blackmail and legal transactions. Lindgren, *supra* note 5, at 605.

<sup>103</sup> Smilansky, *Blackmail*, *supra* note 9, at 153.

<sup>104</sup> Murphy, *supra* note 5, at 166.

<sup>105</sup> Coase, *supra* note 11, at 675; *see also* Hardin, *supra* note 5, at 1814 (“A motivating factor of the intellectual debate over blackmail may be not its supposedly paradoxical aspect but merely the perverse quality of much blackmail: one cannot go to law to block its use and potential effects because law is public.”); Kipnis, *supra* note 1, at 22 (“[T]he mark must waive the very secrecy he or she is contractually entitled to in order judicially to secure that same entitlement to secrecy: one must waive secrecy in order to secure secrecy . . . . [B]lackmail contracts can require the client who seeks judicial relief to forfeit thereby all the entitlements explicitly guaranteed to him or her under the terms of the contract . . . . Contracts calling for the concealment of guilty secrets have precisely that flawed structure.”); Levin, *supra* note 3, at 13 (“[S]ecret contracts are hard to enforce; suing a blackmailer would announce that the plaintiff has something to hide and, almost inevitably, what it is—as blackmailers would fully realize . . . . For that matter, most blackmailers would threaten disclosure to victims demanding a contract.”). *But see* Block, *Replies*, *supra* note 12, at 26 (“Blackmail secrets are in fact not so different from trade secrets. In both cases, there are dangers that attempts to force a contractual partner to live up to his obligations will boomerang.”); Lindgren, *supra* note 5, at 605 (rejecting this point as a distinction between blackmail and legal transactions).

<sup>106</sup> Smith, *supra* note 5, at 912.

- 17) In the ordinary commercial transaction, the seller "is not using shame to his advantage and the offeree has no resulting interest in secrecy."<sup>107</sup>
- 18) Blackmail threats much more commonly motivate their targets to resort to harmful "self-help" tactics—i.e., retaliating against the threat-makers or third parties with violence, turning to crime (theft or fraud) to pay off their blackmailers, and committing suicide.<sup>108</sup>
- 19) "Business negotiations (which may also cause anxiety) either lead to a breakdown of the negotiations or they lead to a contract. There is, at any rate, an end. But in the ordinary blackmail case there is no end. The victim, once he succumbs to the blackmailer, remains in his grip for an indefinite period."<sup>109</sup>
- 20) Blackmail does not constitute a valid contract because the agreement to refrain from exercising "immoral liberties"—

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<sup>107</sup> *Id.*

<sup>108</sup> See *supra* note 22 and accompanying text.

<sup>109</sup> Coase, *supra* note 11, at 675; see also Clark, *supra* note 9, at 60; DeLong, *supra* note 11, at 1690–91; Fletcher, *supra* note 1, at 1626 ("The essence of [the blackmailer's] dominance over [the target] is the prospect of repeated demands . . . . Blackmail occurs when, by virtue of the demand and the action satisfying the demands, the blackmailer knows that she can repeat the demand in the future. Living with that knowledge puts the victim of blackmail in a permanently subordinate position."); Hardin, *supra* note 5, at 1800; Isenbergh, *supra* note 1, at 1930; Levin, *supra* note 3, at 14 ("[O]nce the buyer of an automobile drives it off the lot, the dealer is powerless to make further demands, whereas the blackmailer will almost always retain some leverage . . . . [T]he desire (or need) to which blackmail services cater persists after the service is rendered. After you have bought the blackmailer's silence, you still want him to be silent . . . . Obtaining the object of any standard desire eliminates the desire itself. But not with blackmail . . . . When I pay him not to tell, I *still* want (or need) him to refrain . . . . But once the silence of the blackmailer is something to buy . . . there is no end of it. The blackmailer's goods, one might say, can never be consumed."); Murphy, *supra* note 5, at 166 (blackmail transactions are "*unending* in nature. Unlike other economic transactions, blackmail transactions often put the target in a position where she is never really sure if she has finally bought the commodity or service—i.e., the silence, the freedom from exposure. The blackmailer is like the person who sells you shoes for an agreed price of \$20, sneaks them out of your closet every week or so, and then sells them back to you (perhaps for \$30 and then \$40) again, and again, and again—endlessly."); Posner, *supra* note 5, at 1840; Shavell, *supra* note 11, at 1878, 1884–87, 1888, 1890 (in-depth discussion of the problem of repeated demands). For critical responses, see Altman, *supra* note 4, at 1655–56 (making a similar point but later criticizing Fletcher); Berman, *supra* note 1, at 824–25 (the potential for repetition does not explain why blackmail is a crime); Block, *supra* note 1, at 6–7; Lindgren, *supra* note 5, at 605 (rejecting the potential for repetition as a distinction between blackmail and legal transactions); Smith, *supra* note 5, at 889, 908–09 (the potential for repetition does not explain why blackmail is a crime). Block suggests that a possible solution to the problem of potential for repetition is to rent rather than sell silence on a "renewable" or "renegotiable" basis. Block, *Replies*, *supra* note 12, at 24.

i.e., from committing a violation “of a moral, although not a legal, duty”—does not constitute consideration, as it “would make the law a tool for extortion” and is therefore contrary to public policy.<sup>110</sup>

- 21) The difference between blackmail and legally permissible threats is that the former threaten to exercise “immoral liberty”—i.e., morally wrong but legally permissible actions—while the latter threaten to exercise only “moral liberties.”<sup>111</sup>
- 22) While “central case blackmail” is “nonallocative,” the ordinary commercial exchange is “allocative.”<sup>112</sup>
- 23) The blackmailer intends to harm the target.<sup>113</sup>
- 24) While even the hard economic transaction starts out with a non-coercive proposal, a proposal that does not force the target to choose between two of her rights, the blackmail transaction starts out with a coercive proposal, a proposal that *does* force the target to choose between two of her rights;<sup>114</sup>
- 25) “[T]he avenues open to the [target] in the [ordinary commercial transaction] are more extensive and less harmful than the options of the blackmail victim.”<sup>115</sup>
- 26) We cannot expect blackmailers and their targets to weigh the costs, benefits, and risks of their transactions in a rational manner.<sup>116</sup>
- 27) “[O]ur intuitions, for better or worse, probably lead us to sympathize with the [target of an expensive but desperately needed offer] more than with a blackmail victim.”<sup>117</sup>

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<sup>110</sup> Goodhart, *supra* note 7, at 436, 440–42, 448–49.

<sup>111</sup> *See id.* at 436, 440–42, 448–49. Lindgren rejects Goodhart’s position because it fails to explain why profit-motivated threats to perform morally permissible or obligatory actions (e.g., reporting incriminating information) are also considered blackmail. Lindgren, *supra* note 1, at 910; Lindgren, *supra* note 8, at 681–82.

<sup>112</sup> Gordon, *supra* note 7, at 1770.

<sup>113</sup> *Id.* at 1771.

<sup>114</sup> *See* D. Campbell, *supra* note 20, at 885, 887–92. I articulated the opposite position toward the end of Part III.B.

<sup>115</sup> Smith, *supra* note 5, at 912.

<sup>116</sup> *Id.* at 866, 872, 875–76, 879, 906.

<sup>117</sup> *Id.* at 913.

It would take too much space for me to express my opinion about each of these points. Suffice it to say that I believe that the majority of them are mostly, if not entirely, plausible. And all it takes is one or two of them to be correct to show that there are substantive differences between blackmail transactions and ordinary economic transactions and therefore that the two kinds of transactions may warrant different legal treatment.

E. *Legalization Would Not Help to Make Blackmail Targets Better Off*

The main problem with the argument that legalization of blackmail threats would help to make blackmail targets better off is that it is speculative and therefore counter-balanced by equally speculative considerations. First, if blackmail were legal, a greater number of people would be threatened than would have been threatened in a blackmail-illegal society. For if blackmail were legal, there would be a greater incentive—hopes of profit *minus* the risk of criminal punishment—to “dig up” damaging information; and this greater incentive would translate into more people digging up more damaging information about more people.

Second, if blackmail were legal, a greater amount of damaging information would be disclosed than would have been disclosed in a blackmail-illegal society. There are three reasons. The first reason is simply that a much greater pool of damaging information and a greater number of people sharing this information would be “dug up” than in a blackmail-illegal society. And where there is both more information and more people who know this information, there is a greater chance of “leakage”—accidental or deliberate.

The second reason is that, in a blackmail-illegal society, there would be less incentive to dig up damaging information in the first place. So a greater fraction of the total (smaller) pool of damaging information would very likely have been obtained accidentally rather than deliberately. And, all else being equal, those who obtain damaging information accidentally are less likely to be malicious—and therefore less likely maliciously to disclose this information—than those who would deliberately dig up this kind of information.

The third reason is that there is less of a disincentive in a blackmail-legal society to disclose damaging information than in a blackmail-illegal society. In both societies, the same incentives for disclosure exist: to teach blackmail targets who do not make payment a lesson and to make their threats of disclosure all the more convincing to other actual and potential blackmail targets. But only in a blackmail-illegal society are these incentives counter-balanced by a significant disincentive: the heightened risk of criminal punishment. Disclosure heightens this risk because it potentially constitutes evidence of a prior blackmail threat.

F. *If Blackmailer-Initiated Blackmail is Illegal, Then Target-Initiated Blackmail Should Be Illegal as Well*

If we assume that Blackmailer is guilty of criminal activity only when she initiates the silence-for-pay transaction with Target and not when Target initiates it, then we may proceed in one of two directions. We may either attempt to justify this asymmetry or we may argue that the law should, contrary to fact, treat Blackmailer-initiated silence-for-pay transactions in just the same way as Target-initiated silence-for-pay transactions. Importantly, however, this second approach may proceed in either direction. We may argue that because Blackmailer is not guilty of blackmail in Target-initiated transactions, she should not be guilty of blackmail in Blackmailer-initiated transactions either. Or we may argue the other way—that because Blackmailer is guilty of blackmail in Blackmailer-initiated transactions, she should be equally guilty of blackmail in Target-initiated transactions.

This last approach is correct.<sup>118</sup> And the reason is simple: the very same principle applies in extortion law. If Target approaches some person P and asks P not to commit an illegal act against her in exchange for money and P then accepts the money, P has committed extortion just as much as if the same transaction had been initiated by P.<sup>119</sup>

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<sup>118</sup> See FEINBERG, *supra* note 23, at 264 (“One wonders why the legal consequences should be different when the same [silence-for-pay] transaction is initiated through [the blackmailer’s] generosity rather than [the target’s] guilty anxiety.”).

<sup>119</sup> *But see* K. Christopher, *supra* note 8, at 1132, 1143–44, 1147–48. See Lindgren, *supra* note 11, at 1703, 1716 (“Nor is extortion always initiated by the official. Even if extortion were limited to coercion (which it isn’t), a citizen may begin discussing extortion if she correctly anticipates that she can’t get fair treatment without making a payoff . . . . This is consistent with the historical approach to extortion, an approach unconcerned with the precise method of wrongful taking—bribery, coercion, or false pretenses.”); Lindgren, *supra* note 29, at 835–36 (“[T]he Hobbs Act punishes the person obtaining the property. It puts as little emphasis as possible on what or who does the inducing. The statute focuses instead on who does the obtaining.”); Smith, *supra* note 5, at 907 (“[M]uch of what we call ‘extortion’ . . . has the feature of preserving criminality in the mirror-image transaction. In official extortion, an official B demands a payment from A in return for not harming A . . . . [A]s in bribery, both A and B are guilty regardless of whether A or B initiated the transaction.” (citation omitted)).

In personal correspondence, Mitch Berman suggests that I may be contradicting myself. Berman suggests that my central thesis that blackmail threats should be criminalized because (a) they cause undue fear and anxiety and (b) acts that cause undue fear and anxiety should be criminalized may commit me to the (absurd) position that even P’s *rejection* of Target’s offer should be criminalized. For P’s rejection of Target’s offer may cause Target undue fear and anxiety that P will go ahead and reveal her secret. My response to this very clever argument, however, is that I do not subscribe to (b). The mere fact that a particular (kind of) action causes serious fear and anxiety does not by itself warrant the conclusion that it should be criminalized. As I have argued above, the action must also not have a sufficiently counter-balancing moral or institutional justification. In this case, P’s rejecting Target’s offer *does* have a sufficiently strong justification—namely, a moral and contract-law-sanctioned right voluntarily to reject economic offers that are made to her.

## V. CONCLUSION

The Blackmail Paradox has survived for so many decades because scholars have misconstrued its essential nature. It is not essentially an amorphous metaphorical question about how two independently legal components—a legal threat and a legal demand—may add up to an illegal act. Rather, it is essentially a question of which is correct—our intuition that blackmail threats should be illegal or some very strong arguments that, given the legality of disclosure, blackmail threats should also be legal. This Article has offered both refutations of these arguments as well as a novel positive justification for criminalizing blackmail threats. Once again, blackmail threats should be criminal for the same reason that menacing, harassment, and stalking are: they involve the reasonable likelihood, not to mention intent, of putting the target into a state of especially great fear and anxiety. And we as a society have decided that—like life, physical well-being, family, liberty, and property—emotional well-being is a supremely valued interest and therefore should be protected from deliberately inflicted injury when no competing moral or institutional interests, such as freedom of speech, would themselves be compromised.