THE SECOND PARADOX OF BLACKMAIL

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Abstract: One so-called paradox of blackmail concerns the fact that "two legal whites together make a black." That is, it is licit to threaten to reveal a person's secret, and it is separately lawful to ask him for money; but when both are undertaken at once, together, this act is called blackmail and is prohibited A second so-called paradox is that if the blackmailer initiates the act, this is seen by jurists as blackmail and illicit, while if the blackmailee (the person blackmailed) originates the contract, this is commonly interpreted as bribery and is not illicit

But these are paradoxes only for legal theorists innocent of libertarian theory. The authors use that perspective to reject the claim that blackmail should be unlawful. If this act were legalized, then both paradoxes would disappear, precisely their contention

I. Introduction

Zeno, the ancient Greek philosopher, was the author of a number of famous paradoxes, including this one: how can the rabbit ever catch the turtle? The turtle has a head start but the rabbit is faster. Zeno reasoned that since the hare would hop to the place the tortoise had last occupied, he would never draw even, for in that time the latter could move (very slightly) forward. So the slower animal would still be ahead of the faster one. The process could be repeated again and again, in ever smaller and quicker steps. But each subsequent step takes some amount of time, and there are an infinite number of such steps. It would therefore seem to take an infinitely long time to complete the infinite number of steps needed to catch up to the turtle.

If we accept the premises of the argument. there is no way in which the bunny could ever catch up to his racing competitor. And yet we also believe, from common experience, that the rabbit *could* overtake the turtle; hence the paradox.[1] The solution to the paradox, of course, is to call into question the basic premise of the argument, which amounts to the assumption that an infinite number of steps, no matter how small in duration, cannot be accomplished in a finite amount of time. As any student of calculus knows, however, an infinite series *can* have a finite sum (Edwards and Penney 1982, chap. 12). Each smaller gap between tortoise and hare also requires a smaller time, and the sum of this infinite series

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of ever-smaller time intervals is a *finite* time interval, at the end of which the hare reaches, and passes, the tortoise. Once it is realized that Zeno's argument rests on a false assumption, the paradox of how the faster animal can catch the slower disappears.

According to some scholars, the crime of blackmail provides a famous paradox in the legal field.[2] It is licit to gossip about someone else's secret (e.g., marital infidelity), and it is legal to *threaten* to publicly reveal such information. It is also permissible to ask that person for money. But the combination of the two acts, each of which, on its own, is legal, is illegal. That is, there is a prohibition against threatening to reveal this secret unless you are paid. This is called blackmail, and is widely considered criminal behavior, and thus is uniformly outlawed today.[3] Yet it seems paradoxical to outlaw an action the component parts of which (threatening to reveal information; asking for money) are separately legal. As Lindgren (1993b, p. 1975) summarizes the paradox, "Why do two rights make a wrong?"

A second paradox regarding blackmail has also been identified by some theorists. If the unfaithful spouse approaches the gossip and offers to pay him not to disclose the infidelity, *that* would be considered legal. As DeLong (1993, p. 1664) explains, "it is not unlawful for one who knows another's secret to accept an offer of payment made by an unthreatened victim in return for a potential blackmailer's promise not to disclose the secret." It is considered paradoxical that the sale of secrecy is legal if it takes the form of a bribe, yet is illegal where the sale of secrecy takes the form of blackmail. Why should the legality of a sale of secrecy (secrecy agreement) depend entirely upon who initiates the transaction? Why is bribery legal but blackmail not?

The second paradox arises, then, because both the bribe taker and the blackmailer are paid money for their silence. Both the bribe giver and the blackmailee[4] are thus presumably ill treated. Yet one type of secrecy agreement (blackmailer-initiated) is proscribed by law, and the other (bribe giver-, i.e., blackmailee-, initiated) is not. As a real-world example, consider the fate of Autumn Jackson, who was convicted of extortion for threatening to tell the tabloids that she was entertainer Bill Cosby's out-of-wedlock child unless he paid her $40 million.[5] Many commentators noted with irony that if Jackson had first filed a paternity suit and then settled the suit in exchange for money and silence—essentially, being bribed—no crime would have been committed.[6]

Most mainstream commentators believe both of these situations to be paradoxical; first, the fact that two rights (a threat to gossip and a request for money for silence) can make a wrong, and second, that the legality of a secrecy agreement depends entirely upon who initiates it. For them, it is taken as a given that blackmail *should* be illegal. This leaves them with the task of resolving the apparent paradoxes generated when blackmail is illegal yet its component parts are not, and when blackmail is legal when it takes the form of bribery and illegal otherwise.[7]

Theorists who support the outlawry of blackmail have thus spilled much ink generating contorted arguments trying to resolve these paradoxes. They endeavor mightily to explain why it makes sense to outlaw blackmail while not outlawing its component parts, and why it matters who initiates the exchange. As DeLong (1993, p. 1664) notes, contemporary theories attempt to justify blackmail and resolve its paradoxical nature "by arguing that blackmail exchange only appears to be mutually beneficial, but is in fact either wrongful or wasteful. They justify the law prohibiting blackmail as a way of preventing this exchange from taking place." These arguments are often couched in terms of economic efficiency or similar notions.

As we will argue, these attempts are doomed to failure. There *is* an inconsistency involved in outlawing blackmail, if bribery, gossiping, and asking for money are permissible. With respect to the second paradox in particular, the subject of this paper, it is impossible to justify the discriminatory treatment of blackmail and bribery. The way to resolve the alleged paradoxes is not to attempt to distinguish the undistinguishable, but to recognize that blackmail *should* be legal.

If it is true that blackmail should be legal, the paradoxes vanish and there is nothing to explain.[8] It is legal (and we contend that it *should* be) to gossip about other people, even concerning their infidelities.[9] It is not against the law to threaten to gossip, nor to demand or request money.[10] If it is legal to bribe someone, to pay them for silence, it should not matter whether the blackmailer or briber (blackmailee) approaches the other to initiate the transaction. If it is licit to make a threat, is should not be a crime, either, to decline to carry it out, for a fee. In short, blackmail does not involve aggression, i.e. the initiation of force. It therefore does not violate individual rights, and the state is consequently not justified in using the force of the law to outlaw this non-aggressive action.[11]

It is the claim of most commentators on blackmail that the blackmailee is indeed a victim. This is exactly why they support the outlawry of blackmail and futilely attempt to resolve blackmail's paradoxes rather than simply admit that blackmail should be decriminalized. In this paper, we use the term "blackmailee" to refer to the person being blackmailed, rather than "victim," for two reasons.[12] First, referring to the blackmailee as a victim begs the question of whether blackmail should be illegal, by presupposing the blackmailee truly is a victim. Second, as we shall argue, the blackmailee is a *beneficiary* of the blackmailer, not a victim, in that he would far prefer his secret be in the hands of the blackmailer than the gossip.[13] For in the former case, at least there is the possibility that he may buy silence. (And if so, it must of necessity be at a price below the value placed on the secret by the blackmailee; otherwise, the deal would not be consummated.)[14] In the latter, the secret will be publicized no matter how much he would have been willing to pay for silence.[15]

It is our contention, therefore, that blackmail should not be a crime. If there is any paradox, it concerns only why so many otherwise astute commentators on the law should have not only failed to see this, but written vociferously to deny

it.[16] In what follows we critique various economic theories that attempt to resolve the paradoxes of blackmail, with a focus on the second paradox. We will show that it is, indeed, inconsistent to outlaw blackmail while permitting bribery, and will argue that the blackmailee is not properly considered as a victim of the blackmailer.

II. A Critique of Some Economic Theories of Blackmail

A. The Economics of Secrets

1. Internalizing Externalities

The so-called economic analysis[17] of blackmail explains (and justifies) its outlawry as an attempt to maximize wealth. This is problematic on the face of it. For one thing, the conventional economic considerations of profit and loss hardly apply to courts and legislatures. In the ordinary case of candles, ships, and sealing wax, if the entrepreneur does not act in a manner that maximizes wealth, he faces loss of profit and eventual bankruptcy. It is difficult to see how this could apply to the official bodies charged with law making.[18] For example, it could be argued that many policies would increase overall utility or wealth, such as reinstituting slavery, censoring all anti-Christian or pornographic publications, or outlawing frivolous time- and money-wasting activities like collecting Beanie Babies®.[19] Yet it does not follow that it is proper to institute such policies (and, indeed, libertarians would oppose such policies, and Austrian economists would deny that such wealth-maximization claims are true or even meaningful).

Another problem with supporting blackmail outlawry on economic grounds is that blackmail contracts would appear to satisfy the usual conditions for ex ante gains from trade. Each party to the transaction, necessarily, benefits from a blackmail agreement, that is, from both blackmail and bribery. The blackmailer values the money received from the blackmailee more than the psychic income that could be obtained by blabbing; the blackmailee, for his part, regards the silence of the blackmailer more highly than the money he must pay to obtain it. This is the classic path toward wealth maximization.[20] One would think, given their focus on this benefit, that advocates of the "economic approach" would embrace the legalization of blackmail with enthusiasm. Yet the very opposite is the case.

What is the complaint of the "economists" who defend the legal ban on blackmailer-initiated blackmail agreements? They resort to the notion of externalities. As explained by DeLong (1993, pp. 1665–1666):

> In economic terms, both blackmail and non-criminal bribery are exchanges that internalize an externality. The risk of negative externalities arises whenever one person (a "menace") has the power to act in a way that would inflict harm on another person (a "victim") without violating any legal rule and without incurring legal liability to pay compensation for the harm. Because the law does not require the menace to take the victim's loss into

> account in deciding whether to act. the menace may act in ways that create net social costs.

DeLong attacks the "economic approach" on the ground that blackmail and bribery are, in fact, ways to internalize externalities. In a very powerful analysis of this subject, DeLong (1993, p. 1666) brings blackmail under the purview of forbearance exchanges. Selling the service of silence when one has a right to speak is but one among many instances in which menaces, who have a legal right to harm their victims, are nevertheless constrained to desist. As long as the value they place on the pleasure of engaging in the harm is less than that placed on it by the victim, a bargain can typically be struck.

For example, suppose I am legally allowed to maintain my tree at its present (and even growing) height. Yet it blocks my neighbor's view. I legally "menace" him with this tree. He may offer me $1000 to top it off, say, at 40 feet. If I value the money more than the extra height for the tree, we can both be made better off. In this way the external diseconomy I impose upon him is internalized.[21] As DeLong (1993, p. 1666) states:

> A frequent subject of forbearance exchanges is secrecy: actual or potential menaces sell promises of secrecy to actual or potential victims. Examples include 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, a settling litigant's agreement not to disclose what she learned during civil discovery, *or a blackmailer's agreement not to disclose the secret of her victim.*" (emphasis added)

Thus, the economists who argue that blackmail should be banned based on the risk of negative externalities overlook the fact that both bribery and blackmail are types of forbearance exchanges. Both bribery and blackmail are sales of the service of silence when one otherwise has a right to speak. Selling the service of silence when one has a right to speak is but one among many instances in which menaces, who have a legal right to harm their victims, are nevertheless constrained to desist. Thus, such forbearance exchanges serve to *internalize* externalities.

2. Problems with Neoclassical Monopoly Theory

Insightful as it is, however, DeLong's placing of blackmail under the rubric of forbearance contracts is marred by his acceptance of the neoclassical economist's distinction between monopoly and perfect competition. States DeLong (1993, p. 1667):

> The market power of a seller of secrecy depends upon whether she knows the secret at the time of the sale. At the time of the fee agreement, for example, the attorney has not yet learned the client's secret. If she sells her services in a competitive market, she must bid against others who might also offer secrecy. The price she will charge for confidentiality—the portion of the fee necessary to compensate her for this promise—will be a function of her opportunity cost in forgoing the future ability to disclose the secret. In the case of the attorney, it will usually be small.

> By contrast, the departing employee, the litigant, and the blackmailer have learned the secret before the sale. A menace who has learned her victim's secret is a monopolist because her disclosure alone is sufficient to harm to victim and she is the only person who can sell protection from that disclosure. The price she will charge usually tends to be a function of the harm that disclosure would cause the victim rather than a function of her opportunity cost in forgoing the disclosure.

In other words, those who learn the secret ahead of time are "monopolists," as opposed to those, like attorneys, who are not told the secret until first agreeing to keep it secret. These "monopolists" would thus tend to charge a higher price for silence than those who agree to silence before knowing the secret.

There are several difficulties here. First, the reason the departing employee, the litigator, and the blackmailer are in a better position vis-a-vis the potential blackmailee than is the attorney vis-a-vis the potential client has nothing to do with monopoly and competition.[22] Instead, as DeLong recognizes, it depends upon the time dimension. More specifically, the client who holds a secret is in a position to contractually tie up the attorney, in effect to swear him to secrecy as a precondition of hiring him. This has absolutely nothing to do with the number of lawyers available. There may be only one,[23] but this is irrelevant. As long as this lawyer stands to lose, and lose heavily[24] if his client's secret gets out, the secret-holding client has little to fear.

Further, although some of the leverage of the secret holder depends upon timing, this is at best a sufficient, not a necessary condition. For suppose there were a firm called "Blackmail, Inc." (see Epstein 1983). Its mission is to ferret out people's embarrassing secrets (through detective work, following people around, lurking in hotels in the afternoon, and the like) and then to charge them for keeping silent about this purposefully acquired information. Blackmail, Inc. need not have the goods on anyone, initially; if its employees uncover hitherto concealed facts later on, this will be perfectly satisfactory from their point of view. Thus "time of sale" is hardly all-important. Nor does it much matter how many such firms exist. One or two will do quite nicely, but so will hundreds or thousands, for those who think nose counting lends insights into the competitiveness of markets.

Then there is the fact that once the lawyer hears the secret, he is no longer in a "competitive market." At least according to the advocates of blackmail outlawry, the attorney is just as able to blackmail his client as is any other blackmailer. Lawyers know their clients' intimate secrets, often ones that would expose the latter to a risk of jail. No matter what the initial bid, now that the attorney knows the client's secret, he can blackmail him with impunity. As nothing in the DeLong analysis would prevent such an occurrence, it must be at least incomplete, on this one ground alone. There must be something more to the story.

At the very least, the client, in becoming such, must thereby attain some countervailing power. We suggest it is at least in part the ability to counter-blackmail any blackmailing lawyer by complaining to the bar association about

him.[25] By spreading the news about the attorney's blackmailing attempts, the attorney's reputation can suffer, and he can lose clients and livelihood, and be disbarred. Further, the blackmailee-client could sue the attorney for damages for breach of contract.

The problem that this analysis poses for advocates of blackmail criminalization, however, is that it implies there can be substantial disincentives for a blackmailer to engage in repeat blackmail. Many blackmailers, not just attorneys, can suffer monetary and other damage if they lose their reputation; and any blackmailer is conceivably subject to legal damages for breach of the secrecy agreement. In a society having a proper legal system, an attorney or other blackmailer may be liable for even more severe penalties or punishment, such as a jail sentence. Nor need such a sentence be limited to only a few months, as mentioned by Sir Arthur Conan Doyle's Sherlock Holmes (see below). For broadcasting a secret very harmful to the client blackmailee, while under contractual obligation to do no such thing, the penalty might be much more severe, since it would have to be commensurate with the harm suffered by the blackmailed client.[26] Even without the prospect of corporal punishment or detention, however, the danger of repeat blackmail is thus not a serious risk and therefore not a strong reason in support of blackmail outlawry.[27]

Another difficulty with the neoclassical monopoly analysis concerns the fact that "the departing employee, the litigator, and the blackmailer" need not necessarily be the only ones in each of these categories. There may be, for example, several employees, litigators, and blackmailers. If so, there will be more than one person "who can sell protection from that disclosure."

In addition, DeLong's analysis of opportunity costs is problematic. Yes, the price paid by the blackmailee will undoubtedly be a function of how important it is to him that light is not shed on his secret doings, on the blackmailee's wealth, and also on the cost to the blackmailer of disclosing this information (both positive and negative).[28] But there is no reason to believe that this price will not depend upon these first two considerations in the case of the attorney. Nor does it logically follow that even when there is only one seller of silence, the price will depend mainly on the importance placed upon the secret by the blackmailee. Why can't opportunity costs loom large in this calculation? This seems reasonable if the blackmailer is somehow involved in the secret, or fears being labeled a blackmailer, or is bluffed by the blackmailee into thinking that silence is less important than it really is.

DeLong (1993, p. 1667, n.13) adds a lagniappe to his analysis of monopoly and the gains from trade:

> If the seller is a monopolist, however, as in the typical case of blackmail, then the price of confidentiality may capture almost all the utility that the victim would obtain from the exchange. Thus, in the typical situation in which the blackmailer "bleeds" the victim repeatedly, the exchange is only *slightly* beneficial from the victim's point of view.

This opens up a Pandora's box of objections. Why call the blackmailee a "victim" if he *benefits*, no matter how "slightly" from an exchange? Surely, a better appellation would be "beneficiary." Second, it is impossible to tell who gains more or less from any trade, let alone who gains precisely how much—in fact the concept of one party gaining "more" or "less" than another in a trade is literally meaningless—because of the impossibility of interpersonal comparisons of utility.[29]

These difficulties with neoclassical monopoly theory aside, however, DeLong admits (1993, pp. 1667–1668):

> Even though it may involve such monopoly power, however, a confidentiality agreement is presumptively beneficial to both parties. Any price the parties agreed upon would be less than the cost to the victim of suffering disclosure and more than the value to the menace of making disclosure. Therefore a confidentiality exchange, in the absence of other effects, would increase social utility, since each party would be better off after the exchange than before it.

Thus, despite the foregoing confusion regarding the neoclassical conception of monopoly and perfect competition, even DeLong acknowledges that confidentiality agreements, of which blackmail contracts are an example, are mutually beneficial to *both* parties, blackmailer as well as blackmailee.

B. Blackmail and Efficiency

Even from the "law and economics" viewpoint, therefore, a blackmail agreement is presumptively beneficial to both parties, even if it be conceded that such an agreement involves "monopoly power." That is, "in the absence of other effects" (DeLong 1993, pp. 1667–1668). Unfortunately, according to the law and economic crowd, these "other effects" are all too present, and undermine the argument for laissez-faire capitalism (the legitimacy of all non-invasive contracts such as blackmail).

States DeLong (1993, p. 1668), on behalf of the "economists":

> [T]he confidentiality agreement may be allocatively inefficient because third parties would have valued disclosure of the secret more than the victim values secrecy. In a world of third parties, incomplete information, and transaction costs, a confidentiality exchange might be inefficient despite both parties' willingness to enter it. First, confidentiality may create its own externality by being more costly to third parties than beneficial to the two contracting parties. Second, the exchange might be wholly unnecessary because the menace would not have disclosed the secret in its absence. Third, the possibility of such an exchange might lead the parties to make strategic, nonproductive investments in bringing it about or preventing it. Finally, because the relationship between the menace and victim constitutes a bilateral monopoly, the exchange might be so costly to negotiate and enforce that the gains from the exchange would be exceeded by transactions costs.

As DeLong (1993, pp. 1668–1669) incisively notes, however, these criticisms are also true of the bribe taker, and yet the latter is legal. These concerns do not help to justify the anomalous distinction between blackmail and bribery. And yet more remains to be said about the deficiencies in the "economist's" arguments.

One problem is that their contentions are over-inclusive. If we ban blackmail on this ground, we will end up prohibiting almost all trades, if we follow through in a logically rigorous manner. Take the rather pedestrian sale of a can of beer for $1.00. Probably, in this imperfect world, there "would have been" some other buyer who valued this commodity even more highly. As well, there is probably someone who valued the money to a greater degree, that is, who would have been willing to sell a product with the same specifications for less than $1.00. In either case, this trade is "inefficient" based on the criterion employed by these unnamed "economists."

This argument can also be put forth in terms of information, to bring us closer to the case at hand. A journalist works for newspaper A at the wage of W_A: he could have been employed by B, at higher wage W_B; unfortunately, the two parties were unknown to each other, and were not able to consummate the deal. Inefficient? Yes, on the assumption that the information and transaction costs were lower than the present discounted value of the difference between W_A and W_B.

A further example. It is always possible that the husband of an adulterer might have been willing to pay even more for this information to the blackmailer than was his wife. But if so the blackmailer is a poor businessman; he didn't sell to the best customer for his wares. Such mistakes occur every day, every second, in real-world markets.

The implication of the "economists" (apparently accepted also by DeLong) is that just because something is economically "inefficient" we should ban it. If so, we might as well ban all markets, all enterprises touched by human hands for that matter, since they are all inefficient in this sense. Of course, when we ask, With what shall we replace them? the ludicrousness of the scheme becomes apparent.

Efficiency, moreover, is a value-laden term; there is always an implicit goal in mind, which takes us out of positive economics and deposits us into the normative realm. Here, the economist qua economist can make no contribution whatever.

We do not argue that all commercial arrangements agreed upon by two parties ought to be legally enforced. There are, of course, exceptions. For one, A hires B to murder C. For another, fractional reserve banking.[30] But the overwhelming presumption must be that contractual agreements enhance economic welfare, so long as the contract has a lawful and possible object.[31]

The criticism of unnecessariness[32] is likewise over-inclusive. Yes, the blackmail exchange might not be beneficial to the blackmailee, if the secret would not have been revealed in any case. However, this, too, can apply to virtually every trade. You go to the store to purchase a loaf of bread. There is a small chance that the owner might have given this foodstuff away to you for free, or for a

nominal price, had you but enquired. But you didn't. You just paid the sticker price. Similarly with bluffing or "puffing." In the field of real estate, there is rarely a seller who does not imply he has other anxious buyers, nor a buyer who does not indicate he has other attractive options. Are all such transactions to be labeled inefficient and legally proscribed on that basis?

We have already called into question the application of the term "monopoly" to the blackmail situation. First of all, there may be many blackmailers and many "victims" (i.e., "blackmailees"). If so, bilateral monopoly does not enter into the picture even on neoclassical structuralist grounds. Second, if "the relationship between the menace and victim constitutes a bilateral monopoly," so does that between buyer and seller, landlord and renter, and so forth, whenever there are not numerous buyers and sellers, a homogeneous good, full information, zero profits, equilibrium, and all the other unrealistic assumptions of perfect competition. Since this model *never* applies to the real world, we have here the perfect case of over-inclusiveness: this criticism applies to *every* commercial interaction without exception.

1. Blackmail-Caused Inefficiencies in Criminal Law Enforcement

Landes and Posner (Posner 1992, Landes and Posner 1975) have offered another economic critique of legalized blackmail based on inefficiencies it supposedly introduces into criminal law enforcement. They argue that government must have a monopoly of law enforcement, and that under legalization, blackmailers would interfere with optimization of these expenditures, as well as be "preventing appropriate levels of illegal activities from taking place" (DeLong 1993, p. 1671).

DeLong (1993, p. 1670) powerfully rebukes these authors on the ground that "the state can never have a monopoly on crime prevention, which include such diverse phenomena as neighborhood watch programs, surveillance cameras, burglar alarms, armored cars and karate lessons." As well, he taxes them on the ground that their "rationale for blackmail statutes would equally justify outlawing bribery, and so fails to account adequately for current law" (1993, p. 1670).

However, DeLong could have gone further in his denigration, and commits several errors in his own analysis. First, the DeLong who here upbraids Posner and Landes is inconsistent with the DeLong (1993, p. 1667) who brought blackmail under the rubric of forbearance exchanges. The former DeLong accepted the argument that what the neoclassicals call monopoly was inferior to their version of competition. The latter DeLong allows Posner to get by, unscathed, in arguing for government monopolization of law enforcement, demurring only slightly in his objection that "the state can never have a monopoly on crime prevention." The implication, here, though, is that if somehow the government *could* attain this status, that would be efficient. But this means that DeLong goes along with Posner's and Landes's trashing of the structuralists' views of monopoly now, after he has previously accepted this perspective. The point is, what is sauce for the market goose is sauce for the government gander: if monopoly leads to inefficiency in the market sector, this applies, as well, to government.

Monopoly is monopoly is monopoly. Neither Landes, nor Posner, nor DeLong should be allowed to get away with assailing monopoly in one context while championing it in another, unless they can show a relevant difference between the two.[33]

Then there is a difficulty about the "optimal amount of crime." Let this be said once and for all, loud and clear, contrary to both DeLong and the "economic perspective" he otherwise criticizes: the optimal amount of crime is zero![34] True, the optimal amount of crime *prevention* is *not* the amount that would bring the crime rate down to zero. This can hardly be optimal, given that it might take the entire GDP (or more) to attain. But abstracting from crime *prevention* expenditures, the optimal level of *crime itself* can never be greater than zero. If it were, this would imply—at least as far as the "economists" are concerned—that the stolen goods are greater in value to the criminal than to the rightful owner, a conclusion that relies on illegitimate interpersonal comparisons of utility even for coherence.[35]

2. Wasteful Investments of Resources

Economists such as Coase (1988) and Ginsburg and Shechtman (1993) argue that blackmail ought to be illegal in order to economize on resources. Which resources? The ones that would be frittered away by would-be blackmailers in attempting to unearth embarrassing secrets, and the ones wasted by those guilty of shameful acts in an effort to keep them secret.

However, the waste-reduction theorists have neglected to take account of the resource-enhancing elements of legalized blackmail. As explained by DeLong (1993, p. 1673):

> In all cases in which the menace would otherwise have disclosed the victim's secret, a blackmail exchange is at least presumptively efficient from the perspective of the menace and the victim. The victim is able to purchase secrecy, a benefit to which he is otherwise unentitled, and that would be unavailable in the absence of the exchange.

DeLong (1993, p. 1673) exposes another flaw in the arguments based on waste:

> Waste reduction theorists ignore this benefit [the ability to purchase secrecy from a blackmailer] by assuming that most blackmailers would not disclose the secret if they could not blackmail the victim. Yet this assumption is quite doubtful. Given the very low costs of disclosure to most blackmailers, the social rewards of disclosure, and the blackmailer's typical disregard for the victim's feelings, it seems likely that many if not most people who would threaten blackmail would happily disclose their victim's secret if blackmail were prevented.

The waste theory also "fails to account for the differentiation between bribery and blackmail" (DeLong 1993, p. 1673).

DeLong's critique hits the mark, but it only scratches the surface. First of all, why, just because an act is "wasteful" of resources, should it be banned? Surely, there is nothing more wasteful than watching soap operas or sports, or listening to rap music, or being a tourist, or drinking alcohol, or playing any sport other

than handball; should all of these things be legally proscribed? Hardly. Second, one man's dissipation is another man's pleasure. Just because a given individual finds the aforementioned activities wasteful does not mean they are intrinsically so. Since there is and can be no objective criterion for "waste," any more than there is or can be for utility, this seems a weak reed upon which to rest criminal law.[36]

Third, there are many cases where one person acts in an "aggressive" manner, and another adopts a defensive posture. If both of them would simply refrain from their behavior, wealth would presumably be increased, at least according to the faulty criterion employed by mainstream economic theorists. For example, in football, basketball, baseball, hockey, and many other sports, there are those intent upon advancing the ball (or puck) in an entirely aggressive manner. They are usually deemed the "offense." On the other hand, there are those, many of them, equally intent that this shall not occur. Millions of dollars, and much time, sweat, tears, and even blood are "wasted" on such defensive maneuvers. If only they would cut this out, *both* of them, our society would surely be the richer for it. DeLong (1993, p. 1673) concurs with Coase (1988) and Ginsburg and Shechtman (1993) to the effect that blackmail consists of "pointless deadweight losses and economically sterile exchanges." But these examples are identical in all relevant respects to blackmail. If blackmail should be outlawed, should these other frivolities?

This, however, is only the tip of the iceberg. Gossips expend effort to try to ascertain who is doing what to whom who shouldn't be; but those who are doing these things also take precautions to keep them secret. Are we to criminalize both sides so as to reduce "waste"? Who else acts incompatibly with someone else? Cooks, chefs, restauranteurs; the sugar, chocolate, baking, and fast food industries all act in a way which makes us fatter and unhealthier. On the other hand there are vegetable growers, nutritionists, doctors—to say nothing of those in the diet and exercise industries—who are struggling, valiantly, to undo the efforts of the first set of economic actors. Let us incarcerate all such people for the "crime" of acting incompatibly with one another, and thus "wasting" resources.

In like manner, insurance companies take great pains to reduce motor vehicle accidents, for which they are financially responsible; while Detroit makes cars that can go faster and faster, and are hence more dangerous, and Milwaukee brews beer to the same latter end. Divorce lawyers have an interest in marriage breakup, clergymen in the strengthening of this institution; librarians and newspaper owners in literacy, cartoonists in the very opposite; repairmen of all stripes and varieties in the breakdown of machinery, those who offer guarantees and warrantees in their soundness. Locksmiths are internally contradictory in this manner; on the one hand their reputation rests on the durability of their wares, on the other hand if they could never be breached, and no one, therefore, even tried, this industry would be bankrupt. Let us incarcerate the whole lot of these people in the name of "the economic approach."[37]

3. Costly Reallocative Exchanges

As discussed by DeLong (1993, pp. 1674–1675), Coase (1960, 1988) "also sees the law of blackmail as assigning to the victim a 'right not to be blackmailed'" based on efficiency reasons. Under the Coase Theorem, legal entitlements should be allocated to parties that value them most, to save transaction costs of reallocative bargaining. Coase assumes that the victim is likely to value the right to not be blackmailed more than the blackmailer would value the right to blackmail. Thus blackmail is inefficient and should be prohibited. There are numerous problems with this view.

In traditional jurisprudence (Hoppe 1993, Kinsella 1997), property rights are first vested in human beings, each to his own, one to a customer. That is, I own myself, you own yourself, he owns himself, they own themselves. Then, in the Lockean (1955, 1960) tradition, each of us can mix his labor with previously unowned or virgin territory, farm animals, etc., and come to own them in this way. A third source of property rights stems from trade or gifts. You homestead land and grow wheat; I domesticate a cow. We then trade milk for bread and come to own things we did not produce—but that can be traced back to legitimate title transfer (Nozick 1974). All legitimate property, at least theoretically, can be understood as having taken part in such a process (Rothbard 1978). As Hoppe (1993, p. 66) notes, "One can acquire and increase wealth either through homesteading, producing and contractual exchange, or by expropriating and exploiting homesteaders, producers, or contractual exchanges. There are no other ways."

If you and I are having a dispute as to the ownership of a jacket, the judge steeped in this tradition of jurisprudence will engage in a bit of historical analysis, predicated on this theory of private property. He will look backward, asking each of us to produce a receipt for this article of clothing (or, if we claim to have made it ourselves, then a receipt for the cloth, buttons, zipper we used in its construction). Or he will in some other way attempt to weigh our (conflicting) claims. But he will do so guided by this traditional theory of property rights and their creation.[38]

We belabor the obvious only to show how radical a departure from this familiar territory is Coase's perspective. For him, property rights are not at all based on historical antecedents. Rather, they are established on the basis of predictions about the future! The justification of property titles, here, is not past actions, but rather the maximization of wealth in the future. If you and I are contesting the ownership of the jacket, the Coasian judge will not ask either of us to verify how it happened to come into our hands in the past. On the contrary, he will award the garment to whichever party he deems will be able to use it in future so as to increase wealth by the greatest amount. If, for example, this is your only jacket and you will use it to ward off cold and thus save the life of a highly productive worker; and if I am awarded this article of clothing it will only sit in my closet along with the rest of my gigantic wardrobe; then, presumably, the Coasian judge will award it to you since social wealth will be maximized in this way.

How does all this pertain to our present concerns? The traditionalist will interpret ownership of a secret in one way, the Coasian in an entirely different manner. If I come to know of your predilection for taking a bath with a rubber duckie legitimately (you yourself bragged to me about this, you even gave me a picture of you in this act, when you were younger and more foolish), I then properly own this information. I may gossip about it if I choose. If you later come to be ashamed of this behavior, I can sell you my silence about it (i.e., I can blackmail you about it), or you can initiate matters and buy my silence about this episode from me (blackmailee-initiated blackmail, or, in conventional phraseology, bribery).

For Coase, however, matters are very different. Under rare circumstances, perhaps, if the judge thinks I value the right to gossip about the duckie more highly than you regard silence about it, then he may conceivably award this right to me. In the more likely case,[39] the Coase-influenced jurist will ban me from speaking about this, since you value silence about the rubber duckie more than I the right to gossip about it. In this way, wealth will be maximized.

Coase (1988, p. 673) argues:

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

DeLong (1993, p. 1674) quite properly rebukes Coase for having "gotten it backwards. Laws against blackmail *prohibit* a reallocative bargain that is made necessary because the right to disclose the secret has been assigned to the menace."

But this is only the beginning of the problems with Coase. Our claim is that despite what Coase specifically says, his claim is really about ownership of secrecy rights, not blackmail per se. Coase's is preeminently a theory about ownership. Secrets can be owned (gossip can be declared illegal) but blackmail cannot itself be owned. Rather, blackmail is itself a way of *transferring* such ownership rights from one person (blackmailer) to another (blackmailee). Coase, then, not only has "gotten it backwards," he has also gotten it inside out. That is, Coase (1988) is inconsistent with Coase (1960).[40] In his 1960 article, Coase waxed eloquent about, in a low or zero transactions cost world, the irrelevancy of judicial findings regarding resource allocation (but not wealth distribution). If property was mistakenly given to the "wrong" man, the "right" one, who really valued it more and thus if put into his hands would more greatly increase wealth, could always bribe him out of it. (If I was awarded the jacket, but you valued it more, you could purchase it from me. If you were given it, I would not be able to buy it from you since you value it more than me.) But blackmail is the preeminent way of transferring titles to secrets.

For not appreciating this, Coase has indeed "gotten it backwards." Typically, in such situations, there are only two parties, the blackmailer and the blackmailee. So transaction costs must perforce be low. If Coase (1988) was consistent with his own Coase Theorem, he would have favored the legalization of blackmail, not its prohibition. For it is only in this way that resources may shift from those who value it less to those who value it more—something quite important for wealth maximization in the zero-transactions-costs world when the judge errs in his findings. Instead, Coase (1980, p. 675, quoted in DeLong 1993, p. 1689) calls blackmail "moral murder," thus getting it "inside out."

But even this by no means exhausts the problems with Coase's analysis. This is neither the time nor the place for a full-scale critique of this doctrine. Suffice it to say that "no man's property will ever be safe" when the Coasian court is in session. For at any time, any person can seize your car, or your jacket. He will not be treated as a thief if he can convince the judge that leaving your property in his hands will better increase wealth than allowing you to keep your own possessions. Comparing how two or more people value a car or a jacket or anything else is essentially a subjective exercise. No matter how fully steeped in the Coase Theorem, judges can and will disagree with each other on these matters. This being the case, no longer is there any fixed demarcation between mine and thine. Since that is the main function of property rights, it is no exaggeration to claim that under Coasian rule there will *be* no property rights. At best there will be only a shifting pattern of temporary ownership; title is legitimate only until the next claimant comes along.

This analysis follows logically from the Coasian premise that "the value of production would be maximized if rights were deemed to be possessed by those to whom they were most valuable, thus eliminating the need for any transactions" (Coase 1988, p. 673, quoted in DeLong 1993, p. 1674, n.27). Under the Coasian rule, all justice and law break down. For example, the defendant in a rape case would have an altogether new defense available in the Coasian world: his utility in forcing sex upon the victim was greater than her disutility from the attack. Even the concept of self-ownership with which we began this section (and apologized over for belaboring the "obvious") can now be called into question. For example, given that O. J. Simpson valued his wife's life more than she valued it on her own account (let us assume that she had low self-esteem), in the real world of high transactions costs, the Coasian judge would award him the ownership rights over her. Since he is the legitimate owner, and may dispose of his *property* in any way he wishes, he is innocent of murder even if he did indeed kill her (Block 1996b).

Clearly, Coasian reasoning is unhelpful in deciding normative issues, like whether or not one has a right to not be blackmailed. Even if the victim values the right to not be blackmailed "more" than the blackmailer, this does not imply that blackmail should be unlawful. Additionally, even granting for the sake of argument the Coasian logic that high transaction costs warrant different initial

rights allocations, in the blackmail context there are only two parties and transaction costs are low. Thus, instead of outlawing blackmail, it should remain legal so that secrecy can be purchased in situations where the blackmailee actually does value the secret more than the blackmailer.

4. Market Price Blackmail: The Attack on Profit

We next move to a consideration of so-called market price blackmail. The view here is that blackmail should be legal as long as the price charged is no higher than that which the blackmailer could have received from an alternative (non-blackmailee) bidder.[41] The presumption is that if price is restricted in this way, the blackmailer is not really taking advantage of or exploiting the blackmailee; he is only covering his (opportunity) costs. The usual example is that of a journalist who can sell the story to a newspaper for a modest amount, say $100. As long as he charges the blackmailee no more than that, "market pricers" advocate legalizing such blackmail transactions.

There are several practical problems with this approach, mainly stemming from subjectivist considerations (DeLong 1993, p. 1675). For example, "victims" (i.e., blackmailees), as well as police and courts, "will often be unable to discern a true market price blackmailer . . . from a false" one. As well, "the subject matter of the sale, the secret itself, cannot be described to the buyer for purposes of valuation without disclosing the secret" (DeLong 1993, p. 1676).

DeLong (1993, p. 1675), however, is incorrect that, if these pragmatic difficulties are overcome, "market price blackmail seems to be justifiable." DeLong is wrong because the market price blackmail program suffers from a host of other deficiencies as well as the practical ones he has noted. For the initiative is really a disguised attack on the institution of profit. If the blackmailer can charge no more than his alternative cost (e.g., the price he could have obtained from the newspaper), he can earn no profit. But why should profits be illegal? To prohibit non-market price blackmail just because a higher price is charged is to confuse profit making with extortion or invasiveness.

This is a common confusion of socialism, of course, but that pedigree alone should be enough to make one suspicious of arguments that depend upon attacking the institution of profit. Many mainstream or neoclassical economic theorists (e.g., DeLong 1993, Altman 1993, Nozick 1974, Fried 1981) seem to think that if a price incorporates profit it cannot be considered a market price. Nothing could be further from the truth. It is only equilibrium prices, not market prices, that exclude profits.[42]

A more basic problem is that legalizing so-called market price blackmail and criminalizing blackmail beyond this point is to conflate a legal wrong with the price charged for a legal wrong. Compare murder, a real crime, not a victimless one, in this regard. Suppose A hires B to kill C for $100,000. This should be legally forbidden *not* because the price is too high, or because someone makes a *profit* on the deal, but because murder is an invasive act, an act of aggression.

The act of murder would be no less invasive, by even one iota, if the price charged for the "hit" was instead $10, or $1 or even were done for free.

Indeed, the fact that the price charged is even relevant to determine whether a crime has been committed indicates that the blackmail theorists are not discussing a real crime, such as murder (on this see Block and McGee 1999b). If we were discussing a real crime, price would be irrelevant. Even advocates of blackmail outlawry do not seem to take seriously the idea that blackmail is really a crime. If they did, they would not bring price into it, any more than they would hand-wring over the price charged for an assassination.

III. Other Explanations of Blackmail Outlawry

In addition to economic-based theories in support of blackmail criminalization, a variety of other defenses are often offered, including various appeals to emotion or intuition. DeLong, for example, who has criticized many of the conventional, economic defenses of blackmail outlawry, ends up making such an appeal in an attempt to explain what he sees as the widespread revulsion against blackmail. He (1993, p. 1689) very properly dismisses as a "bizarre conclusion" and a "provocation" the claim by some economists[43] that the law as presently constituted is best understood merely as an attempt to economize on resources. Instead, he seeks a "social meaning" and not only for blackmail but for bribery[44] as well.

DeLong (1993, pp. 1688, 1689) begins with a quote from Doyle (1960, pp. 481, 572–573), which bears repeating:

> "But who is he?"
>
> "I'll tell you, Watson. He is the king of all the blackmailers. Heaven help the man, and still more the woman, whose secret and reputation come into the power of Milverton! With a smiling face and a heart of marble, he will squeeze and squeeze until he has drained them dry. . . . I have said that he is the worst man in London, and I would ask you how could one compare the ruffian, who in hot blood bludgeons his mate, with this man, who methodically and at his leisure tortures the soul and wrings the nerves in order to add to his already swollen money-bags?"
>
> . . .
>
> "But surely," said I, "the fellow must be within the grasp of the law?"
>
> "Technically, no doubt, but practically not. What would it profit a woman, for example, to get him a few months's imprisonment if her own ruin must immediately follow? His victims dare not hit back."

By not commenting further on this bit of wisdom from Sherlock Holmes, DeLong indicates he thinks this is a definitive critique of legalization. Actually, this constitutes an argument in favor of *decriminalization*. For if the unhappy

woman is in such a poor condition under present legal arrangements—and her well-being seems to be the entire point of the law—her plight can hardly be worsened were blackmail to be decriminalized.

In contrast, DeLong's implication is that if the blackmailee's situation is desperate under present institutional arrangements, it would be far more critical were blackmail to become legal.

Let us consider such a situation. A woman falls into the clutches of Milverton, who leads her to pay him, and perhaps, in addition, do unspeakable things in order to protect her secret. Worse, the blackmailer could keep coming back for more payments, over and above those initially agreed to; he would "bleed" her.

But this tug at the heartstrings will not do. Let us posit that the reason the woman is in Milverton's clutches is because she committed adultery. Is her being blackmailed so horrible a result? On the contrary, one might argue, this will teach women to think first before committing this illicit act. Were Milverton's hold over this unhappy woman to be widely publicized in the newspapers, just once, thousands of women who might otherwise have engaged in marital infidelity will now not do so. In other words, there are other things worthy of consideration in law beside the feelings of blackmailees.

Paradoxically, the position of the woman might be improved under legalization. For then, when Milverton initially approaches her, threatening her with exposure (or, when she initially approaches him, and offers to pay him for his silence), the demand is likely to be slight—how else can be explained the increasing severity of the demands, the continual "coming back for more" and "bleeding"? If so, they will sign a contract stipulating that Milverton will keep silent about the woman's secret in return for a relatively modest payment. Now, if he "comes back for more" making new demands, she has him tied up contractually. True, if she sues him, her secret will be lost. But it will no longer be true that "His victims dare not hit back." As discussed in Section II.A.2 above, the repeat blackmailer will indeed pay a severe penalty. This need not at all be limited to the "few month's imprisonment" mentioned by Doyle. Instead, if the punishment is to fit the crime, and the contract violation of the blackmailer will be a severe hardship to the blackmailee, as stipulated to by Doyle and DeLong, then the penalty imposed on Milverton will be equally harsh.[45]

But the best answer to the "Milverton" challenge is to compare the woman's plight when she is in the power of this "king of all the blackmailers" with her situation had a gossip got hold of her secret. Would the woman be in a better position? Far from it. At least Milverton, this "moral murderer," had the decency not to let the cat out of the bag before enquiring as to whether the woman would rather pay him off to refrain. But once we introduce the gossip, all is lost. If Milverton deserves to be damned to hell, then the gossip deserves to occupy an even lower rung in the nether world. But our author fails to call for the legal prohibition of gossip! How could he, given that gossip is worse for this woman than blackmail, after he has jerked our tears via Sherlock with her plight.

DeLong (1993, p. 1689) asks "Why does blackmail strike us as so wrongful?" and seeks an answer in terms of "social meaning," which can, in turn, be discerned through "intuition" (1993, p. 1690). DeLong's intuition tells him that blackmail cuts off the ties between the individual and his community.

Consider, however, the case where the parent says to the child: "If you don't do your homework, you can't get on the Internet." Although this is hardly the paradigmatic case, this nonetheless fits all the criteria for blackmail. There is a demand for valuable consideration (homework, in the eyes of the parent). This is coupled with a threat (no Internet) that parents have every right to enforce.

We venture to submit that most individuals' "intuition" in this case, in contrast to DeLong's, is that this is very far from Coase's "moral murder." What is threatened here is not to reveal a secret, but it indubitably "cuts off the ties between the individual and his community." The Internet, like the telephone in an earlier age, is a key element in the teenager's communication with his community. Normal intuition, very different from that of DeLong, sees this parental blackmail threat as harmless, even salutary. To place this in an even more commonplace context, my purchase of a newspaper is an exercise in mutual blackmail. I "threaten" the vendor that unless he turns over the paper to me, I will not pay him 50 cents. He, for his part, "threatens" me that unless I tender him the money, I will have to do without his product. DeLong (1993, p. 1690) may see this as "an oppressive relationship," but this commercial interaction is instead mutually beneficial; indeed, it forms the very bedrock of our civilization.

It might be objected that the blackmail of the parent and child, or newspaper sale, does not really fit this model. This is erroneous, since the essence of blackmail is the combination of a demand for money, coupled with a threat to do something that is itself lawful, and all of the reductio examples considered herein under the rubric of blackmail fit that bill. DeLong then resorts to profit bashing in an attempt to explain why we should feel a particular revulsion for blackmail. He (1993, p. 1691) focuses on "our condemnation of the menace's attempt to profit from her threat." But why is it so disgusting to earn a profit? We have seen that the gossip, who earns no profits, renders the blackmailee's position far more precarious. If we are not ready to legally condemn the latter, logic prohibits us from doing so to the former.

Profit, in any case, is far more ubiquitous than DeLong and other profit-bashers seem to realize. Strictly speaking, it is the difference in value between what we give up in taking an action, and what we receive (Rothbard 1993, chap. 8.1, 4.5.C; Mises 1966, chap. XV, section 8, p. 289). For example, you, gentle reader, in reading this article, are profiting, at least in the ex ante sense. You are giving up some of your time for this enterprise, and gaining insights into a different perspective (or perhaps seething in indignation, but enjoyably so, you masochist, otherwise you would long ago have put down this article). The difference in value to you between these two is profit. It is positive, if you are still tuned in. Profit, defined in this broad manner, rules not only the free economy, but even

our everyday activities, such as eating, brushing our teeth, sleeping, and so forth. In fact, as Mises points out. "[t]o make profit is invariably the aim sought by *any* action."[46] It will take more than a socialist attack on profits to undermine the case for legalizing blackmail.

DeLong (1993, p. 1691) identifies "isolation from the community" as a main reason that blackmail is considered to be a crime: "Blackmail . . . entails a double isolation and a double crime against community." But why is this so important as to render criminal an otherwise legal series of acts, e.g., blackmail? There are many people who are isolated from their communities to greater or lesser degrees. For example, monks in a monastery, nuns in a nunnery, fishermen, sailors, hunters, and farmers who live by themselves in out-of-the-way places. The most extreme case, of course, is the hermit. Isolation may not be psychologically healthy, at least for most people, but to elevate this fact and make it the basis of law seems outlandish.

DeLong (1993, p. 1691), however, equates isolation with submissiveness:

> [T]he purpose of the law of blackmail is to protect the community against the conspiratorial agreement of blackmailer and victim, which isolates the victim and subjects him to a submissive relationship with the blackmailer.[47]

This comes with ill grace from a DeLong (1993, p. 1668) who states: "The victim is able to purchase secrecy, a benefit to which he is otherwise unentitled, and that would be unavailable in the absence of the exchange." If the blackmailee "benefits," in what sense is he a "victim"? And if the blackmailee is a beneficiary of the blackmailer (certainly compared to the situation where the secret is held by an unbribable gossip), in what sense is he "submissive"? But we don't have to range widely over DeLong's article, 23 pages above, to find a contradiction. On the very page (1993, p. 1691) that DeLong is castigating the blackmailer for isolating the blackmailee, and making him "submissive," he also mentions the "victim's eagerness to buy secrecy." If this is so, and it certainly is, from whence springs all this talk of submissiveness and victimization? Does the rape victim "eagerly" embrace the rapist? Does the murder victim "eagerly" interact with the murderer? Not a bit of it. There is a clear difference between true victims, who are never eager to be victimized, and victimless blackmailees, who benefit from the silence of the blackmailer.

Next, DeLong (1993, p. 1691, note 68) opines as follows:

> An often overlooked reason for outlawing blackmail is to avoid the violence that might be engendered by the victim's desperation. The intensity of a victim's reaction to blackmail may be something that the law simply wants to avoid.

But this is absurd. As we have already established, the desperation of the man whose secret is unearthed by a gossip is even worse than that felt by the person in the clutches of a blackmailer. At least the latter gives you a choice. Therefore, the violence "engendered" by gossip can be expected to be even greater. We cannot but conclude, then, that gossip should be outlawed; indeed, that if we

could legally proscribe only one of them, gossip or blackmail, it should be the former that is given such treatment. DeLong, however, never calls for any such public policy.

Further, if avoiding violence is the be-all and end-all of the law, why don't we ban unions, or the Ku Klux Klan, or the Communist Party, or the Nazis, or even soccer games? All of them are heavily associated with violence. With regard to "desperation," this can hardly be exceeded by the plight of the drug addict in need of a fix, who cannot get it because of the prohibition of narcotics,[48] and who then turns to violence. If DeLong were correct in his surmise, we would long ago have legalized these substances.

DeLong's (1993, p. 1692) remarks seem puzzling when he addresses the difference between blackmail and bribery: "While blackmail is something the menace does, bribery is something the victim does. The blackmailer threatens; the briber offers. Blackmail makes the victim worse off; bribery makes him better off."

The puzzle is that even according to DeLong, both blackmail and bribery are the same economic interaction; the only difference between them, the only reason DeLong even calls them by different names, is the former is blackmailer-initiated, the latter is begun by the blackmailee. But the deal consummated is identical in both cases! In each, the person with the secret to hide pays the person with the secret to tell so that the latter will desist. In both cases there is a trade of money (or other valuable consideration) for silence. There is simply no other difference between the two cases. To call for the legalization of one and the prohibition of the other is difficult to understand.

Whether the farmer advertises for a golf course manager after he has decided to divert some pastureland for this new purpose, or a firm specializing in golf courses approaches the farmer to buy or rent his land, or act as his agent, makes not one slight bit of difference. In either case, the identical trade takes place. It matters not one whit who initiates the deal—at least in terms of whether it should be lawful. Yet, using the considerations put forth by DeLong, one is in danger of concluding that one of these should be allowed, the other banned. Here we have a distinction without a difference. Amazingly enough, DeLong (1993, p. 1692) seems to admit this point: "the focus on agent and action peculiar to the two stories[49] obscures the *substantive equivalence* of the exchanges" (emphasis added). But if blackmail and bribery are "substantially equivalent" what is the reason for banning the one and allowing the other?

IV. Conclusion

As we have pointed out, the various economic approaches to justify blackmail laws are flawed. The blackmailee is not a victim, but is instead a beneficiary. There is no justification for treating the bribe taker differently from the blackmailer. Other attempts to explain the blackmail crime, such as DeLong's intuitionist views that perhaps outlawing blackmail helps to minimize isolation from the community and desperation and violence, are also unsatisfactory.

Ultimately, the only way to resolve the nagging paradoxes of blackmail is to recognize that the paradox is unresolvable. With regard to the second paradox, for example, there is simply no way to reconcile the differing treatments of blackmail and bribery. Blackmail, like bribery and gossiping and asking for money, *should* be legal. Economically, the blackmailee is a beneficiary of the blackmailer, and blackmail is economically indistinguishable from other, licit, relationships.

Morally, we must recognize that government has no right to outlaw blackmail, and we have no right to advocate this, any more than we have a right to outlaw, or advocate the outlawry of, other "capitalist acts between consenting adults" (Nozick 1974, p. 163). The reason is that outlawing anything—any use of the state—involves using force against individuals to compel them to avoid the outlawed behavior. As the use of force is presumptively criminal, its use is legitimate only when used defensively, or in response to force. In other words, as libertarians have long pointed out, the only true crimes are those that involve the initiation of force, i.e., aggression. Nothing else violates rights, i.e., justifies legal, responsive force.[50] Thus, anything lying outside the ambit of aggression is permissible, including blackmail, since the blackmailer simply does not initiate force against the blackmailee; rather, he foregoes, for a price, his right to blab.[51] It is for this reason that blackmail and bribery should be treated alike: neither are aggressive actions.

Thus, blackmail outlawry cannot be justified, and it cannot even be explained while one mistakenly assumes it is justified. Once we realize it cannot be justified, we can seek an explanation of why society chooses to criminalize behavior that should not be criminalized. But the answer to this question is no different in kind from explanations of why all sorts of unjust policies, from taxes to conscription to licensing to anti-drug laws, are in place. Ultimately, the populace advocate or acquiesce in such unjust laws due to ignorance of sound economics, and due to unclear and unprincipled thinking about individual rights.

Notes

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[1]See Flew 1984, p. 262, defining "paradox."

[2]*See* Feinberg 1988b, Gorr 1992, Lindgren 1984b, and Ginsburg and Shechtman 1993. For an alternative view that blackmail is not truly paradoxical, see Gordon 1993, and Block and Gordon 1985

[3]In modern criminal codes, blackmail is usually defined as a special type of extortion, theft, or other offense (Lindgren 1993b, p. 1696), despite the fact that blackmail and extortion are clearly distinguishable, since extortion involves a threat to perform an *unlawful* act while blackmail involves a threat to take otherwise legal action. See, e.g., Louisiana Revised Statutes, Title 14:66 (1998), defining one type of extortion as "A threat to expose any secret affecting the individual threatened or any member of his family or any other person held dear to him." See also *State of Louisiana v. Felton*, 339 So. 2d 797, 800 (1976), explaining that the general scope of the crime of extortion is intended to include what is commonly known as "blackmail."

[4]We prefer the term "blackmailee" to "victim" for the reasons given below.

[5]"Autumn Jackson begins 5-year jail sentence for Cosby extortion plot," CNN Interactive, April 23, 1998 <http://cnn.com/US/9804/23/briefs.on/autumn.jackson/index.html>

[6]See, e.g., Walter E. Williams, "Was it extortion—or merely free speech?" Tuesday, August 26, 1997 <http://www.jacksonvilledailynews.com/stories/1997/08/26/xjmmjbnt.shtml>

[7]As Fletcher (1985, p. 1269) notes, "When a [legal] paradox is uncovered, we can restore consistency in our legal structures . . . by finding or constructing a distinction . . . that dissolves the paradox."

[8]It would be no paradox if one claimed that "2+2=5." All attempts to resolve the contradictions emanating from such a statement would be doomed to irrelevancy. Our claim is that the "paradoxes" of blackmail—both of them—resemble such cases. By recognizing that blackmail indeed should not be illegal, one realizes there is no paradox to resolve. Only by accepting a false political notion (that blackmail should be illegal) does one generate a paradox that needs resolving. Note that other apparent legal paradoxes can be resolved by the use of the libertarian sword to cut the Gordian knot. For example, it seems paradoxical that is legal to give sex away for free but not to sell it (prostitution). It seems paradoxical that it is legal to accept a job offer at a very high wage, or at no wage (e.g., an intern who works for free), but not at some wage between zero and the minimum wage. It seems paradoxical that alcohol is legal while marijuana is not. The solution is not to attempt to justify the unjustifiable, but to simply admit that anti-prostitution laws, minimum wage laws, and anti-drug laws are immoral and should be repealed. See generally Rothbard 1978, 1998; Block 1976; Hoppe 1989, chap. 7; Hoppe 1993, chaps. 8–11; Kinsella 1997.

[9]Of course, some gossipers can incur liability if the gossip amounts to defamation. Laws against defamation (libel and slander) are problematic as well from a libertarian perspective, although a discussion of this topic is beyond the scope of this article.

[10]There is less to this distinction than meets the eye. I can "request" money from you in the most threatening circumstances; e.g., holding over your head my intention, unless you pay, to gossip about your embarrassing secrets. Alternatively, I can "demand" money from you in the least threatening of situations. I demand $20 from you as the cost of a ticket to the concert; unless you pay, I will deny you admission. (In this article, we will occasionally use the singular terms "I" and "my" for simplicity of illustration.)

[11]On the libertarian non-aggression principle, its justification, foundations, and applications, see Rothbard 1978, 1998, Hoppe 1989, chap. 7; Hoppe 1993, chaps. 8–11; Kinsella 1997.

[12]We shall also refer to the agreements resulting from either blackmail or bribery as secrecy agreements. We shall distinguish between the two different types of secrecy agreements, where necessary, by referring to them as blackmailee-initiated secrecy agreements (bribery) or blackmailer-initiated secrecy or blackmail agreements (classic blackmail).

[13]The person gossiped about may be referred to as a "gossipee" or "subject of gossip."

[14]See Rothbard 1993, chap. 1.5.A, chap. 2, Rothbard 1997, Mises 1966, chaps. IV.4 and X.

[15]Moreover, even if one ignores the fact that the blackmailee is a beneficiary of the blackmailer, the blackmailee is not "victimized" in a way that justified outlawing blackmail. The

only type of victimization that justifies the use of the legal force and thus outlawing the victimizing activity is physical aggression But the act of blackmail does not involve such aggression and thus the blackmailee is not a victim

[16]Alldridge 1993; Altman 1993; Becker, unpublished; Boyle 1992; Brown 1993; Campbell, D 1988; Campbell 1939; Coase 1988; Daly and Giertz 1975, DeLong 1993; Ellsberg 1975; Epstein 1983; Evans 1990; Feinberg 1988a, 1988b, 1990; Fletcher 1993; Fried 1981; Ginsburg and Shechtman 1993; Goodhart 1931; Gordon 1993. Gorr 1977, 1992, Haksar 1976; Hale 1923, 1943; Hardin 1993; Hepworth 1975; Isenbergh 1993; Jandoo and Harland 1984; Katz 1993; Katz and Lindgren 1993; Landes and Posner 1975; Lindgren 1984a, 1984b, 1986, 1989a, 1989b, 1989c, 1993a, 1993b; Lyons 1975; Murphy 1980; Nozick 1974; Owens 1999; Posner 1986, 1993, Shavell 1993; Tooher 1978; Waldron, unpublished: Williams 1954; Winder 1941. For the alternative perspective, see Block 1976, 1986, 1997, 1998, 1999B, 1999C, 1999D, 1999E , 1999F, 1999G, 2000, forthcoming A, forthcoming B; Block and Gordon 1985; Mack 1982; Rothbard 1998; Rothbard 1993, chap. 2, sec 13, n.49 and accompanying text

[17]This is a bit of a misnomer. It implies that all economists see wealth maximization, not justice, as the main desiderata of the law. Worse, the implication is the utilitarian one that there is essentially *no difference* between wealth and justice

[18]To be sure, this applies in a somewhat attenuated manner to politicians. They can be voted out of office for various reasons, including failure to adequately represent their electorates. But the political process is so vastly less efficient than its economic counterpart so as to render this almost a difference in kind, not merely degree. In the former, the political vote takes place only once every four years; in the latter, the dollar "vote" occurs each day. In the political arena, apart from referenda, we are forced into a package deal: candidate A, who represents policies a1, a2, a3, etc., or candidate B, with b1, b2, b3, etc. We can never "fine tune" our choices, and select, for example, a1, b2, a3, b4, etc. And this is to say nothing of judges, who are insulated from the process at one further remove. The only control the populace has over them is indirectly, via the politicians who appoint and approve of them.

Even worse for the analogy, economic trades represent "capitalist acts between consenting adults" in the felicitous phraseology of Nozick (1974, p. 163). Here, there is always unanimous agreement between all (e.g., both) trading partners. In contrast, the political sphere is one of force and compulsion, where the minority must go along with the wishes of the majority against their will. For a further elaboration of the disanalogy between voters in the political "market place" and consumers in the economic market place, see Rothbard 1978, Hoppe 1993, Spooner 1966, and Benson 1990.

[19]Although any of the present authors would be pleased to receive a Ludwig von Mises beanie baby.

[20]For the Austrian approach to Pareto-type wealth maximization and the "unanimity" principle, see Rothbard 1993, chaps 1.5.A and 2; Rothbard 1997; Mises 1966, chaps. IV.4 and X.

[21]DeLong is correct in crediting Coase (1960) as furnishing numerous examples of forbearance exchanges. However, for critiques of this article of "Coase Theorem" fame, see Block 1977, 1995, 1996; Cordato 1989, 1992a, 1992b; North 1990, 1992; Krecke 1992

[22]For a critique of this distinction, see Rothbard 1993. Armentano 1972, 1982, Armstrong 1982; Block 1994; DiLorenzo 1996; High 1985; McChesney 1991; McChesney and Shugart 1995; Shugart 1987; Smith 1983.

[23]In which case only the structuralists would call it a monopoly; as long as there were no legal barriers to entry, the behaviorists would characterize an industry with even only one firm in it as competitive.

[24]E.g., by being disbarred for violating attorney-client privilege, as discussed in further detail below.

[25]DeLong (1993, p. 1690–1691, n 65) later shows he is aware of this possibility, but does not apply it to this case

[26]On libertarian punishment theory, see Rothbard 1998, chap 13; Kinsella 1996, 1997

[27]Many advocates of blackmail outlawry base part of their argument on the claim that were blackmail legal, the blackmailer would "come back for more" money after a blackmail contract had been signed, or that he would continue to "bleed" the blackmailee repeatedly See, e.g., Fletcher (1993, p. 1626), who zeroes in on "the prospect of repeated demands" as generating an impermissible "relationship of dominance and subordination."

[28]The positive costs include being implicated in the negative publicity; the negative costs (benefits) concern the psychic income obtained by the blackmailer in turning gossip, should the blackmailee balk at paying.

[29]Rothbard 1978, chap 7, Rothbard 1993, 1997b, 1997c, 1997d, Mises 1966; Herbener 1997.

[30]See in this regard Hoppe, Hülsmann, and Block 1998

[31]The Louisiana Civil Code, for example, provides: "Parties are free to contract for any object that is lawful, possible, and determined or determinable." La Civ Code art 1971

[32]To wit, the economists' second ground that a confidentiality agreement may be "allocatively inefficient" even if both parties desire to enter into it, because "the exchange might be wholly unnecessary because the menace would not have disclosed the secret in its absence" (DeLong 1993, p 1668)

[33]For an Austrian economic critique of the very concept of a non-government "monopoly," see Rothbard 1993, chap. 10.3; Hoppe 1989, chap. 9

[34]This is for real crime, of the uninvited border crossing variety, not victimless crime, such as sales of sex or drugs from and to consenting adults, or, for that matter, the type currently under discussion

[35]Rothbard 1978, chap. 7, Rothbard 1993, 1997b, 1997c, 1997d; Mises 1966; Herbener 1997.

[36]See also the discussion in section II.A.1 above with respect to the prohibition of "wasteful" or "frivolous" activities

[37]Friedman (1960) argued that the gold standard is inefficient and wasteful; it involves digging up this metal in one place (the mine) and burying it in another (Fort Knox) That is one way of looking at the matter. Another is to see these expenses as an insurance policy against governmental inflation. On this see Block 1999d Against what is blackmail an insurance policy? Against gossip.

[38]See Barnett (1998, chap. 6, pp. 109–121), discussing the use of abstract legal principles as general guidelines used to critique and help develop concrete legal rules or precepts.

[39]Although, as we have seen, given the subjectivity of predictions about the future, no clear implication emerges from the Coase Theorem.

[40]It is the latter from whence sprang the Coase Theorem, the former is but an application, and a mistaken one, at that.

[41]Advocates of this doctrine include Altman (1993), Nozick (1974), and Fried (1981)

[42]Profit above and beyond the pure rate of interest, that is. See, e.g Rothbard 1993, chap 8.1; Mises 1966, chap. XV, sections 8 and 9, pp 289–301, discussing entrepreneurial profit and the evenly rotating economy.

[43]Mainly those clustered around the University of Chicago and the "Law and Economics" movement it has spawned

[44]I.e., blackmailee-initiated secrecy or blackmail agreements.

[45]See discussion and references in Section II A.2, above

[46]Mises (1966, chap. XV, section 8, p. 289, emphasis added) Mises also states: "Profit, in a broader sense, is the gain derived from action; it is the increase in satisfaction (decrease in

uneasiness) brought about; it is the difference between the higher value attached to the result attained and the lower value attached ot the sacrifices made for its attainment; it is, in other words, yield minus costs. To make profit is invariably the aim sought by any action If an action fails to attain the ends sought, yield either does not exceed costs or lags behind costs. In the latter case the outcome means a loss, a decrease in satisfaction."

[47]This calls to mind Fletcher's (1993, p. 1626) view that blackmail establishes a "relationship of dominance and subordination," discussed above.

[48]See on this Boaz 1990; Block 1993, 1996a; Hamowy 1987; Szasz 1985; Thornton 1991.

[49]By this we assume DeLong means the blackmail and bribery stories

[50]Rothbard 1978, 1998; Hoppe 1989, chap. 7; Hoppe 1993, chaps. 8–11; Kinsella 1997

[51]See Rothbard 1993, p. 443, n.49; 1998, pp 124–126, 245–246

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MANAGEMENT ETHICS WITHOUT THE PAST: RATIONALISM AND INDIVIDUALISM IN CRITICAL ORGANIZATION THEORY

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Abstract. Since the Enlightenment our attachment to the past has been greatly weakened, in some areas of social life it has almost ceased to exist. This characteristic of the modern mind is seen as an overreaction The modern mind has lost the capacity to appreciate the positive contribution the maintenance of the past in the present achieves in social life, especially in the sphere of moral conduct.

In the field of organization theory, nowhere is the past as explicitly distrusted as in critical organization theory. The maintenance of the past in the present is seen as a potential carrier of oppressive and unjust social relationships Perpetual critique is advocated as a means to uncover these oppressive and unjust relations and prevent any new undemocratic relations from becoming established

I present an historical and cultural analysis of the modern attitude toward the past and develop a concept of *moral tradition* to analyze critical organization theory's ethical assumptions and implications. In so doing, an effort is made to rectify the exaggerated confidence critical organization theory places in rationalism and individualism and to recognize the ineluctable role traditions play not only in organizational life, but also in the way we theorize about organizations.

I. Introduction

It is worth remembering Karl Marx's dictum that all criticism begins in the criticism of repetition (Marx 1850). It shows not only the dependence of criticism on what it criticizes, but also the dependence of criticism on the past. The part of organization theory that most centrally relies on criticism—critical organization theory (e.g., Alvesson and Willmot 1992a)—has developed without the benefit of this part of Marx's teaching. In critical organization theory, the dependence of criticism on the past has been forgotten. This is important because maintaining part of the past in the present is required to provide continuity and stability in moral conduct (Arendt 1968, MacIntyre 1988, Rieff 1985, Shils 1981).

In this essay, I will develop a conceptual framework to analyze the role of the past in the establishment and maintenance of moral conduct, with special attention to the relationship between moral commitment and criticism. This involves

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