

## ARTICLES

### BLACKMAIL IS PRIVATE JUSTICE — A REPLY TO BROWN\*

WALTER BLOCK†

*Blackmail is often confused with extortion. Yet, the former is the threat to do something licit unless paid off, while the latter is the threat to do something illicit unless compensated. For example, blackmail is the threat to gossip, or tell the truth about someone's extramarital affair (being a blabbermouth is properly not against the law), while extortion is the threat to burn someone's house down, or kill their children, unless he gives you money (arson and murder most certainly are and ought to be illegal). Professor Brown maintains, nevertheless, that all and any forms of blackmail are properly unlawful, and it is the contention of this paper that her conclusion is mistaken and is the line of reasoning she employs to reach it.*

#### I. INTRODUCTION

Libertarianism is a political theory that asks only one question: under what conditions is the use of force justified? It responds with only one answer: in retaliation against the prior use or threat of force or fraud against persons and justly owned property. Property may be legitimately acquired through the process of homesteading virgin territory, trade, gifts, inheritance, and any other peaceful and voluntary means. Initiatory force against innocent people or their rightfully owned property is strictly prohibited by law. The libertarian axiom is "thou shalt not aggress against non-aggressors."<sup>1</sup>

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† Professor, Department of Economics, University of Central Arkansas.

<sup>1</sup> For elaboration on this, see M.N. Rothbard, "Law, Property Rights, and Air Pollution" in W. Block, ed., *Economics and the Environment: A Reconciliation* (Vancouver: The Fraser Institute, 1990) [hereinafter *Pollution*]; M.N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998) [hereinafter *Ethics*]; B.L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990) [hereinafter *Enterprise*]; B.L. Benson, "Enforcement of Private

What is the libertarian perspective on blackmail? The key issue for this political philosophy is whether or not the blackmailer threatens or initiates violence against people who are innocent of violations of the libertarian code. If blackmail necessarily involves such uninvited border crossings, it should be prohibited; if not, it should be legalized.

Superficially, it would appear that blackmail should be illegal under the libertarian code of law. It sounds like the initiation of aggression when the blackmailer threatens to do something that is not in the interests of the threatened party. However, upon further consideration it is apparent that this is not the case. The blackmailer does not threaten to violate the rights of the person or property of the blackmailee, but only to engage in his own free speech right to gossip about the latter's secret. If it is licit to actually reveal another person's hidden information, it can neither be regarded as a violation of rights to threaten to do so unless paid a fee, nor to refrain from so doing on this basis.

Brown focuses on "incriminating information"<sup>2</sup> blackmail, a special case where the secret consists of knowledge concerning the commission of a crime.<sup>3</sup> She considers the argument that this kind of blackmail can "confer social benefits"<sup>4</sup> in terms of crime reduction. How? If

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Property. Rights in Primitive Societies: Law Without Government" (1989) 9 J. Libertarian Stud. 1 [hereinafter *Enforcement*]; B.L. Benson, "The Spontaneous Evolution of Commercial Law" (1989) 55 S. Econ. J. 644 [hereinafter *Spontaneous*]; C. Murray, *What it means to be a Libertarian* (New York: Broadway, 1997); J. Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988); R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) [hereinafter *Utopia*]; T. Machan, *Individuals and their Rights* (LaSalle: Open Court, 1989); T. Machan, "Law, Justice, and Natural Rights" (1975) 14 West. Ont. L. Rev. 119; H.H. Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Boston: Kluwer, 1993) [hereinafter *Economics*]; D. Friedman, "Private Creation and Enforcement of Law: A Historical Case" (1979) 8 J. Leg. Stud. 399 [hereinafter *Creation*]; J.D. Gwartney & R.L. Stroup, *What everyone should know about economics and prosperity* (Vancouver: The Fraser Institute, 1993); D. Boaz, *Libertarianism: A Primer* (New York: Free Press, 1997); L. Spooner, *No Treason* (Larkspur, Colo.: Pine Tree Press, 1966), [hereinafter *Spooner*]; W. Block, *Defending the Undefendable* (New York: Fox and Wilkes, 1991), [hereinafter *Defending*]; W. Block, "Libertarianism vs. Libertinism" (1994) 11 J. Libertarian Stud. 117.

<sup>2</sup> J.G. Brown, "Blackmail as Private Justice" (1993) 141 U. Pa. L. Rev. 1935 at 1936.

<sup>3</sup> For the sake of argument, I shall assume we are talking about real crime, that is, the kind that constitutes a physical invasion. The libertarian analysis of blackmail with regard to other kinds of "crime," victimless crimes, would be somewhat different. Considering such activities as homosexuality, gambling, prostitution, pornography, and addictive drug use, the libertarian would advocate legalization; he would certainly not support turning people in to the police who engage in them on a consenting adult basis. This is to be distinguished from blackmailing such people, which would still be legitimate, since engaging in it is not a violation of rights.

<sup>4</sup> Brown, *supra* note 2.

incriminating blackmail were legalized, people would have more incentive to seek out information about outlaw activity. This would reduce crime since the culprits would now have to share their booty with blackmailers.<sup>5</sup> If the blackmailee refused to knuckle under to these demands, the blackmailer would have a greater incentive to "report crimes to the police, if only to make blackmail threats credible in the future."<sup>6</sup>

While this appears to be an honest attempt to portray the argument for the legalization of blackmail, Brown's presentation is marred in several ways.

First, playing the devil's advocate, she favours only "incriminating blackmail,"<sup>7</sup> but not any other kinds. It would take us too far afield to defend the libertarian case on behalf of legalization for cases other than incriminating blackmail.<sup>8</sup> All that can be said at this point is that *no* type of blackmail violates the libertarian axiom against non-aggression. But blackmail, of whatever stripe, must be sharply distinguished from extortion, where the threat is not the licit one of gossip but is rather violence, such as murder, rape, arson, and kidnapping.

<sup>5</sup> For a similar proposition, see *Defending*, *supra* note 1 at 47-48.

<sup>6</sup> Brown, *supra* note 2.

<sup>7</sup> *Ibid.*

<sup>8</sup> See E. Mack, "In Defense of Blackmail" (1982) 41 *Phil. Stud.* 274; *Ethics*, *supra* note 1; M.N. Rothbard, *Man, Economy and State* (Auburn, Ala.: Mises Institute, 1993) [hereinafter *State*]; W. Block, "The Blackmailer as Hero" (1972) *The Libertarian Forum* (December) 1; *Defending*, *supra* note 1 at 44-9; W. Block & D. Gordon, "Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren" (1985) 19 *Loy. L.A. L. Rev.* 37 [hereinafter *Extortion*]; W. Block, "Trading Money for Silence" (1986) 8 *U. Haw. L. Rev.* 57; W. Block, "The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell" (1997) *West.State.U.L.Rev.* 225 [hereinafter *De-Criminalizing*]; W. Block, "A Libertarian Theory of Blackmail: Reply to Leo Katz" (1998) 33 *Ir. Jur.* 280 [hereinafter *Libertarian*]; W. Block, "Toward a Libertarian Theory of Blackmail," (2001) 15:2 *Journal of Libertarian Studies* [forthcoming]; W. Block & R.W. McGee, "Blackmail as a Victimless Crime," (1999) 31 *Bracton L. J.* 24; W. Block, N. Stephan Kinsella and Hans-Hermann Hoppe, "The Second Paradox of Blackmail," (2000) 10:3 *Business Ethics Q.* 593; W. Block, "The Legalization of Blackmail: A Reply to Professor Gordon" (2000) 30:4 *Seton Hall L. Rev.* 1223; W. Block, "Blackmailing for Mutual Good: A Reply to Russell Hardin" (1999) 24:1 *Vermont L. Rev.* 121; W. Block & G.M. Anderson, "Blackmail, Extortion and Exchange" *New York Law School Law Review* [forthcoming]; W. Block, "Blackmail and Economic Analysis" (1999) 21:2 *Thomas Jefferson L. Rev.* 165; W. Block, "Threats, Blackmail, Extortion and Robbery and Other Bad Things" (2000) 35:2 *U.Tulsa L. Rev.* 333; W. Block & R.W. McGee, "Blackmail from A to Z" (1999) 50:2 *Mercer L. Rev.* 569; W. Block, "The Crime of Blackmail: A Libertarian Critique" (1999) 18:2 *Criminal Justice Ethics* 3; and W. Block, "Replies to Levin and Kipnis on Blackmail" (1999) 18:2 *Criminal Justice Ethics* 23.

Second, Brown concedes too much to the other side of the debate. According to her, "Granted, blackmail might also benefit criminals by allowing them to postpone detection by public officials."<sup>9</sup> Yes, of course, this applies to a blackmailee-criminal who pays off the blackmailer, where the blackmailer then keeps his part of the bargain. But where is the justification for Brown's implicit assumption that in the absence of legalization of blackmail the blackmailer would have spilled the beans to the police? This appears unwarranted.

Third, Brown couches her tongue-in-cheek support not on the basis of principle, but rather on a cost-benefit analysis: "But this potential benefit to some criminals would not necessarily exceed the additional costs imposed by blackmail ... even if blackmail caused the probability of *public* detection to fall in some cases, this loss could be more than compensated by increased use of both casually and deliberately acquired information by private blackmailers."<sup>10</sup>

Another difficulty with her presentation is that she does not seem to be aware that she is treading on already occupied ground. Brown states: "...the literature about blackmail has given short shrift to the ways blackmail might generally deter crime."<sup>11</sup> No truer words could be said. However, the weak implication is that no other commentators have made similar points on behalf of blackmail legalization, which suggests that she has overlooked the work of the critics.<sup>12</sup>

But if Brown's implicit assumption is incorrect, there is no need for any balancing, or cost-benefit analysis, or empirical study thereof. The legalization of blackmail unambiguously leads to less crime, on the assumption that offenders think rationally,<sup>13</sup> and will reduce their participation in illegal acts as they become less profitable, *ceteris paribus*.

Despite these shortcomings, I appreciate Brown's attempt to "set out the *best* case for blackmail before concluding that it should be illegal."<sup>14</sup>

<sup>9</sup> Brown, *supra* note 2.

<sup>10</sup> *Ibid.* at 1936-37.

<sup>11</sup> *Ibid.* at 1937, n. 6.

<sup>12</sup> See *supra* note 8 at 280; see also L. Katz, "Blackmail and Other Forms of Arm-Twisting," (1993) 141 U. Pa. L. Rev. 1567. For a critique of Katz on other grounds, see Libertarian, *supra* note 8 at 280.

<sup>13</sup> J.R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (Chicago: University of Chicago Press, 1998); G.S. Becker, *The Economic Approach to Human Behavior* (Chicago: University of Chicago Press, 1976). Becker, however, does not carry through on this in the case of blackmail. See G.S. Becker, "The Case Against Blackmail" (January 1985) [unpublished].

<sup>14</sup> Brown, *supra* note 2 at 1937 [emphasis added].

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One accomplishes little by knocking down straw men, after all. She continues: "Even in the 'best case' scenario, this arguably productive form of blackmail remains unappealing." There are several reasons for this, according to the author. First, it is part and parcel of the deterrence theory of punishment, and this, in addition to being too limited (*e.g.*, it ignores "retribution, incapacitation and rehabilitation"<sup>15</sup>), has flaws of its own. Second, "blackmail might achieve deterrence at the expense of other goals of the criminal justice system," such as "education of the public."<sup>16</sup> However, these reasons fail to the extent that criminal justice is kept secret rather than privatized, as Brown would have it.

But as far as libertarianism is concerned, all this is much beside the point. For scholars in this tradition, it matters not whether blackmail is or is not inconsistent with other goals, such as deterrence or public education. The only question is, does blackmail consist of a *per se* rights violation? Since it clearly does not, these other issues are at best irrelevant, and at worst sow the seeds of confusion.

As it happens, Brown seems unduly pessimistic about these practical (albeit irrelevant) issues. Were blackmail legalized (even if only for incriminating information), while "all law enforcement activity" by definition could no longer remain "in the light of public scrutiny and involvement,"<sup>17</sup> a goodly bit would still be widely known. To the extent that the public needs to be educated, this could be achieved via the remaining non-secret elements. For example, there will be at least some cases where the blackmail contract will not be made, and the blackmailee's secrets will be revealed to the public. Probably, the blackmailer will let it be known that the secret is being revealed precisely because the blackmailee refused to purchase his service of keeping his lips sealed. Why? Because such occasional lapses will help convince future clients of the blackmailer's seriousness. This, of course, is not Brown's paradigm central case of blackmail, in which, by definition, secrecy is maintained. But this certainly serves the role of public education.<sup>18</sup>

Further, not all of these additional goals are worth pursuing. For example, Brown's own nomination, educating the public, would itself

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<sup>15</sup> *Ibid.* at 1938.

<sup>16</sup> *Ibid.* at 1937-38.

<sup>17</sup> *Ibid.* at 1938.

<sup>18</sup> *Ibid.* at 1946. Brown states that "future blackmail threats will be more credible if blackmailers report crimes when blackmailee[s] refuse to pay. Blackmailers might also turn in the criminals they unsuccessfully blackmail more readily if they have no fear of facing criminal charges themselves."

appear to be incompatible with the democratic philosophy she presumably embraces. According to this doctrine, the voters are supreme. In Brown's opinion, however, they are much in need of "education." If the latter is correct, how can we justify allowing the great unwashed the right to vote in elections?

## II. THE BEST CASE FOR INCRIMINATING BLACKMAIL

In this section Brown continues to avoid legal principle on behalf of expediency in order to adumbrate the best case she can for decriminalizing blackmail. It suggests that she is skirting dangerously close to employing a straw man strategy. She goes so far as to intimate that blackmail might be legalized in certain neighbourhoods, but not others, depending on how co-operative the local people are towards the authorities. This author states:

For example, the legislature might determine that in some neighbourhoods or communities, people readily and frequently tip off the police about certain crimes, while in other communities, people try to minimize interaction with law enforcement officials and might require additional economic incentives to use incriminating information they might have. Thus, empirical data about the culture and reporting behaviours of an identified community could help guide a legislature in defining the range of crimes covered by the statute.<sup>19</sup>

Brown is willing, moreover, to tailor the law to conform to the likely responses of the blackmailees. She reasonably assumes<sup>20</sup> that drug dealers, but not embezzlers, are likely to react with great violence to blackmail offers. Therefore, the law should allow the blackmailing of the latter, but not the former.

The difficulty here, at least for the libertarian, is that while embezzlement is a real crime, drug trafficking is not. The embezzler engages in fraud, which amounts to the theft of property. According to Rothbard:

Fraud as implicit theft stems from the right of free contract, derived in turn from the rights of private property. Thus, suppose that Smith and Jones agree on a contractual exchange of property titles: Smith will pay \$1000 in return for Jones' car. If Smith appropriates the car and then refuses to turn over \$1000 to Jones, then Smith has in effect stolen the \$1000; Smith is an aggressor against \$1000 now properly belonging to Jones. Thus, failure to keep a contract of this type is tantamount to theft, and therefore to a physical

<sup>19</sup> *Ibid.* at 1939, n. 12.

<sup>20</sup> *Ibid.* at 1940.

appropriation of another's property fully as "violent" as trespass or simple burglary without armed assault.<sup>21</sup>

In sharp contrast, the purchase and sale of addictive drugs is or at least can be a "capitalist act between consenting adults."<sup>22</sup> Here, no violence, *per se*, takes place at all. That there is brutality and ferocity associated with drug trafficking is solely a function of its present tragic legal prohibition.<sup>23</sup> When there is a dispute over commercial arrangements in this industry the parties may not avail themselves of the police or courts. Instead, they are left with no option but to fight it out amongst themselves. But it is (and was) the same with alcohol. Nowadays, if I have a conflict with my wine merchant, I peacefully sue him in a small claims court. During alcohol prohibition in the early part of this century, this alternative was not available to me. Had I gone to seek justice then, I would have been imprisoned.

If anything, then, the legal prescription on blackmail as private law enforcement would be the very opposite: crime-fighting resources, whether public or private, ought be aimed at the embezzler, not the drug dealer.

### III. THE DETERRENCE VALUE OF BLACKMAIL

#### A. AN ECONOMIC MODEL OF DETERRENCE

Having set the stage with a rather weak case for blackmail legalization in the case of incriminating information, Brown is now ready to show that it is not a productive activity. In this section she sensibly notes that crime tends to be reduced through the increase of both the penalties associated with being caught, and the probability of its occurrence; and that an increase of the former is typically more economical in terms of crime-fighting expenditures than an increase of the latter.

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<sup>21</sup> *Ethics, supra*, note 1 at 78.

<sup>22</sup> *Utopia, supra*, note 1 at 163.

<sup>23</sup> See R. Hamowy, ed., *Dealing With Drugs Consequences of Government Control* (Lexington, Mass.: Lexington Institute, 1987); M. Friedman, "An Open Letter to Bill Bennett" *The Wall Street Journal* (7 September 1989); T. Szasz, ed., *Ceremonial Chemistry: The Ritual Persecution of Drugs, Addicts and Pushers* (Holmes Beach, Fla.: Learning Publications, 1985); M. Thornton, *The Economics of Prohibition* (Salt Lake City: The University of Utah Press, 1991); W. Block, "Drug Prohibition, Individual Virtue and Positive Economics" (1996) 8 *Rev. Pol. Econ.* 433; W. Block, "Drug Prohibition: A Legal and Economic Analysis" (1993) 12 *J. Bus. Ethics* 107; D. Boaz, ed., *The Crisis in Drug Prohibition* (Washington, D.C.: The Cato Institute, 1990).

As is her wont, however, her discussion ignores issues of justice.<sup>24</sup> Suppose, for example, it were possible to reduce crime greatly by imposing the death penalty for stealing one stick of bubble gum, a sort of super Singapore punishment regime. This might well be "efficient" from the perspective of at least some version of this term, but it would scarcely make the punishment commensurate with the crime.

B. BLACKMAIL AS A MECHANISM OF CRIMINAL LAW ENFORCEMENT

Brown offers four different types of jurisdictions for our consideration, according to whether or not blackmail is legal, and if the government imposes the obligation on the citizenry to report crimes.<sup>25</sup>

		Blackmail	
		Legal	Illegal
Is there a duty to	yes	A	B
report crimes?	no	C	D

That is, under A, the government imposes a duty to report criminal activities, and blackmail is allowed; under B, the government imposes a duty to report criminal activities, and blackmail is prohibited; under C, the government imposes no duty to report criminal activities, and blackmail is allowed; and under D, the government imposes no duty to report criminal activities, and blackmail is prohibited. The last case, D, describes the actual legal situation in the U.S., while C is the only one consistent with libertarianism.

Libertarians must reject selections A and B because of the positive obligations imposed therein. The difficulty with positive obligations is that they are inherently a theft of services. 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.<sup>26</sup>

<sup>24</sup> M.N. Rothbard, *For a New Liberty* (New York: Collier Books, 1978); *Ethics, supra*, note 1; R. Barnett & J. Hagel, eds., *Assessing the Criminal* (Cambridge, Mass.: Ballinger, 1977); R.E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998) [hereinafter Barnett].

<sup>25</sup> See Brown, *supra* note 2 at 1947-48, n. 28, fig. 1.

<sup>26</sup> Some might argue that this obligation is a part of citizenship: that the person who lives in a certain jurisdiction in effect agrees to take on this responsibility. However, the "in effect" or implicit contract argument is a very dangerous one. Almost anything can be proven in this way. (E.g., you have an implicit contract to give me money, since you are now reading this article.) The fallacy can clearly be seen in two ways. First, empirically: there never has been, in all the history of the world, a constitution signed by all, or even virtually all of the inhabitants at any time; at most, such agreements are signed by a

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While still upholding what she considers the "best case"<sup>27</sup> for blackmail, Brown rejects the argument that bounties for tips on criminals would be even more efficient than blackmail, due to the additional "transaction costs when the state serves as a middle person—paying a bounty to the informant and collecting a fine from the criminal once convicted." Brown could strengthen this point by noting that the government, in virtually all cases, runs its prisons at a loss. Therefore, there is no possibility of collecting any fines net of its costs.

#### IV. THE DANGERS OF BLACKMAIL

Now, at long last, Brown attempts to show that, despite all the good efforts she has made as the devil's advocate, blackmail of any kind should not be legalized after all. She organizes her reasons into two categories: questions of efficiency and moral principles.

##### A. ECONOMIC INEFFICIENCY OF BLACKMAIL

Our author is to be congratulated for rejecting the argument that "[b]lackmail ... involves coercion of the blackmailee."<sup>28</sup> She repudiates this claim, arguing that the fact 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."<sup>29</sup> As an example she might have used Fletcher's<sup>30</sup> case

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mere handful of people, as in the case of the United States' own Declaration of Independence. Second, rationality: let us assume that there were people who owned land *before* the advent of this supposed contract, and passed it down, through the years, to their descendants who are now alive. Certainly, there can be no contract, implicit or otherwise, binding these people to any such obligation, since they can trace their land ownership to a time before its existence. And if not for them, then not for anyone who bought or rented land from them. For further elaboration on this point, see Spooner, *supra* note 1; *Economics, supra* note 1; *Ethics, supra* note 1.

<sup>27</sup> Brown, *supra* note 2 at 1948.

<sup>28</sup> *Ibid.* at 1950, n. 32.

<sup>29</sup> Her insight is slightly marred, however, by her citation of J. Lindgren, "Unraveling the Paradox of Blackmail" (1984) 84 Colum. L. Rev. 670 at 701, n. 162, to the effect that "[e]ven highly coercive threats are present in many types of legitimate economic bargaining." This is almost self contradictory in that Brown is presumably engaged in urging that blackmail does *not* involve coercion. How can it help her to cite the diametrically opposite stance in support of this contention? Another difficulty is that it is hard to imagine a legitimate economic interaction that involves coercion. One would have thought that if an act, economic or otherwise, is coercive, it is to that extent illegitimate.

<sup>30</sup> G.P. Fletcher, "Blackmail: The Paradigmatic Case" (1993) 141 U. Pa. L. Rev. 1618.

where the blackmailer offers to sell to the supposed victim a baseball autographed by Babe Ruth with the knowledge that the "victim's" child, who is dying, would receive great solace from having the ball. The blackmailer demands an inordinately high price for this sports equipment memorabilia, based on his knowledge of the "victim's" special need. This is as apt an example of "hard bargaining" as one is likely to confront, but it hardly involves coercion, since the baseball is the legitimate property of the seller, and he can surely place any value on it that he wishes, and for whatever reason.

Let us now consider Brown's<sup>31</sup> views on the debate between Coase and Lindgren.<sup>32</sup> Coase had argued that blackmail was economically inefficient in that resources were being devoted to a solely redistributive task where no new net wealth was being created. That is, the blackmailer spent time and effort to uncover the secrets of the blackmailee, and then more of the same in order to negotiate with him over the terms of the contract. If successful, the agreement would then suppress the information; the only thing that would have been accomplished would be a transfer of funds from the blackmailee to the blackmailer. Lindgren<sup>33</sup> had agreed with this as regards information purposefully sought, at a cost; but he disagreed with Coase when it came to knowledge accidentally attained with no resource investment involved. Coase's reply is that even for casually acquired information there would still be bargaining costs.

The proper answer to this debate, from my point of view, is "a pox on both your houses." Coase and Lindgren agree that, in effect, digging up dirt and then burying it again serves no socially useful purpose. In this they are both wrong. Why would anyone do it if there were no benefit to be derived therefrom? According to "folk wisdom" the question was

<sup>31</sup> Brown, *supra* note 2 at 1951-53.

<sup>32</sup> R. Coase, "The 1987 McCorkle Lecture: Blackmail" (1988) 74 Va. L. Rev. 655; J. Lindgren, "Blackmail: On Waste, Morals and Ronald Coase" (1989) 36 U.C.L.A. L. Rev. 597. See also J. Lindgren, "In Defense of Keeping Blackmail A Crime: Responding to Block and Gordon" (1986) 20 Loy. L.A. L. Rev. 35; J. Lindgren, "More Blackmail Ink: a Critique of 'Blackmail, Inc.,' Epstein's Theory of Blackmail" (1984) 16 Conn. L. Rev. 909; J. Lindgren, "Kept in the Dark: Owen's view of Blackmail" (1989) 21 Conn. L. Rev. 749 [hereinafter *Dark*]; J. Lindgren, "Secret Rights: A Comment on Campbell's Theory of Blackmail," (1989) 21 Conn. L. Rev. 407; J. Lindgren, "Blackmail: An Afterward" (1993) 141 U. Pa. L. Rev. 1975; J. Lindgren, "The Theory, History and Practice of the Bribery-Extortion Distinction" (1993) 141 U. Pa. L. Rev. 1695. For criticisms of Lindgren, see De-Criminalizing, *supra* note 8; Extortion, *supra* note 8; J. Isenbergh, "Blackmail from A to C" (1993) 141 U. Pa. L. Rev. 1905; D.H. Ginsburg & P. Shechtman, "Blackmail: An Economic Analysis of the Law" (1993) 141 U. Pa. L. Rev. 1849; S.W. DeLong, "Blackmailers, Bribe Takers, and the Second Paradox" (1993) 141 U. Pa. L. Rev. 1663.

<sup>33</sup> Dark, *supra* note 32.

asked: "Why climb Mount Everest?" And the answer given was: "Because it is there." The translation into economic jargon of this reply is as follows: even apart from the fame and adulation given to those who have successfully reached its peak, the psychic benefits are greater than the costs. How else to explain that people would want to engage in such acts of derring-do, even in private?

But precisely the same insight applies to the present context. Why dig up a dirty bit of information that people would rather keep secret, whether or not it has to do with criminal behaviour? Although there are surely other possible explanations, one reason is because it is there! Now tastes are of course such that adulation is heaped upon those who can scale mountains, and we tend to sneer at people who delve into others' secrets, and morality may well incline us in the same direction. But for all that, the economic analysis is exactly the same. It simply will not do for Coase and Lindgren, and now Brown as well, to denigrate as non-productive, at least in the *ex ante* sense, the voluntary acts of other people. The gambling industry has as its main result the (not so) arbitrary transfer of funds from one person to another. Would any of these three authors contend that it is therefore non-productive? Hardly.

They are each arguing, in effect, over how many angels can dance at the head of a pin. What determines economic efficiency is not whether resources are used, and new wealth is created in some objective sense; but rather whether, in the minds of the actors themselves, who are involved in the situation, their efforts are more than repaid by the results attained, at least in the *ex ante* sense. The only time we as outsiders can determine if an act is economically efficient in this sense is if there are two willing partners to the exchange. (Or, as in the case of climbing the mountain, the man involved undertakes it on a voluntary basis.) The point is that costs are essentially subjective.<sup>34</sup> They consist of alternatives foregone, or, strictly speaking, the second best option not undertaken whenever a choice is made. But this next best opportunity is hypothetical. No other person can witness it. By its very nature it can only be known to the economic actor himself. Specifically, there is simply no way to determine whether or not the costs of bargaining alone are greater, smaller, or equal to the expenditures.

Brown insists that deterrence must be included in any such calculations, and that this must be entered on the side of blackmail legalization. After all, "When the blackmail is based on incriminating

<sup>34</sup> J.M. Buchanan, *Cost and Choice: An Inquiry into Economic Theory* (Chicago: Markham, 1969); J.M. Buchanan & G.F. Thirlby, *L.S.E. Essays on Cost* (New York: New York University Press, 1981); L. von Mises, *Human Action*, 3d ed. (Chicago: Regnery, 1966); W. Block, "On Robert Nozick's 'On Austrian Methodology'" (1980) 23 *Inquiry* 397 [hereinafter *Austrian*].

information, it may augment the potential costs of criminal activity and deter crime, thereby increasing social welfare."<sup>35</sup>

There are problems here as well. The concept of "social welfare" is fatally flawed by invalid interpersonal comparisons of utility.<sup>36</sup> Nor is it even necessary: surely, criminal activity not only harms but also violates the rights of each victim. Is that not enough of a reason to oppose it? Her insight is further impaired by an exception she offers to this general rule: "Some crime may benefit the criminal more than it harms anyone else. Reduction of such crime would not necessarily increase social welfare."<sup>37</sup> If by this she means victimless crimes (prostitution or drug trafficking or homosexuality or pornography, all limited to consenting adults), this is well and good. But then, from her own perspective, she ought to oppose incriminating blackmail, not favour it. On the other hand, her other remarks about drug prohibition<sup>38</sup> lend little credence to this interpretation. But if this is not the explanation for Brown's remarkable comment, then she opens herself up to the rejoinder concerning the "utility monster." This is a person who derives a gigantic amount of joy, *ergo* utility, from cannibalism—much more, we calculate, than the negative amount suffered by those being eaten. Brown's remarks suggest that she would have to defend this creature's right to murder people since this would enhance "social welfare."<sup>39</sup> If she refuses to do so, then she may not logically make the point that "some crime may benefit the criminal more than it harms anyone else."

<sup>35</sup> Brown, *supra* note 2 at 1952.

<sup>36</sup> M.N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics" Occasional Paper #3 (San Francisco: Center for Libertarian Studies, 1977); L. Robbins, *An Essay on the Nature and Significance of Economic Science*, 2nd ed. (London: MacMillan & Co., 1935); L. Robbins, "Interpersonal Comparisons of Utility" (1938) *Econ. J.* 635.

<sup>37</sup> Brown, *supra* note 2 at 1952, n. 40.

<sup>38</sup> *Ibid.* at 1940, 1956, n. 47.

<sup>39</sup> *Ibid.* at 1953, n. 41. Brown believes that privacy invasions also impose "social costs." An alternative view, which I believe is the more correct way of looking at this matter, is that some people strive to promote privacy (locksmiths, guards, the purveyors of gated communities) while others attempt to reduce it (detectives, investigators, reporters, photographers). *Each* of them promotes social welfare in the sense of increasing *ex ante* utility. For example, when I buy a 12-foot-high fence for \$1000, I value it at more than that amount, while the seller values it at less; therefore, we both gain. Similarly, when you hire a detective for \$500 you place a greater value on his time than that, while he places a lesser value. This may well pose insuperable problems for GDP calculations, given that both of these expenditures are to some extent at cross purposes, but not for social welfare theory.

Another difficulty is that deterrence itself is less important, philosophically, than it is cracked up to be. Rothbard states that

this criterion of deterrence implies schemas of punishment which almost everyone would consider grossly unjust. For example: if there were no punishment for crime at all, a great number of people would commit petty theft, such as stealing fruit from a fruit stand. On the other hand, most people have a far greater built-in inner objection to themselves committing murder than they have to petty shoplifting, and would be far less apt to commit the grosser crime. Therefore, if the object of punishment is to deter crime, then a far greater punishment would be required for preventing shoplifting than for precluding murder, a system that goes against most people's ethical standards. As a result, with deterrence as the criterion there would have to be stringent capital punishment for petty thievery—for the theft of bubblegum—while murderers might only incur the penalty of a few months in jail.

Similarly, a classic critique of the deterrence principle is that, if deterrence were our sole criterion, it would be perfectly proper for the police or courts to execute publicly for a crime someone whom they know to be innocent, but whom they had convinced the public was guilty. The knowing execution of an innocent man—provided, of course, that the knowledge can be kept secret—would exert a deterrence effect just as fully as the execution of the guilty. And yet, of course, such a policy, too, goes violently against almost everyone's standards of justice.... In short, the deterrence principle implies a gross violation of the intuitive sense that justice connotes some form of fitting and proportionate punishment of the guilty party and to him alone.<sup>40</sup>

Brown next considers the Landes-Posner<sup>41</sup> critique of private law enforcement, based on the claim that this would lead to both under-investment and over-investment in crime fighting. The argument of these two authors for the first of these positions is that the private police officer, e.g., the blackmailer, would lower the penalties imposed on the criminal, since they would now be limited to money, not jail time. However, as Brown trenchantly notes, such private acts would "simply supplement public enforcement. The state can still incarcerate the offender if he is apprehended."<sup>42</sup>

As well, the Landes-Posner critique maintains that only public prosecutors, not private blackmailers, could be expected to engage in discretionary non-enforcement of bad laws.<sup>43</sup> But there is an obvious

<sup>40</sup> *Ethics*, *supra* note 1 at 91.

<sup>41</sup> W. Landes & R.A. Posner, "The Private Enforcement of Law" (1975) 4 J. Leg. Stud. 1.

<sup>42</sup> Brown, *supra* note 2 at 1954.

<sup>43</sup> What are "bad laws"? For the libertarian, this is an easy question. Bad laws include those which punish victimless "criminals." But Brown eschews this answer, at least with regard to drug laws. What, then, is her definition of a "bad law?" The fear is that

answer here, for Brown as well as these two authors, and for all other scholars who rely on the apparatus of the state to achieve justice: let them repeal the unjust laws for which the government is itself responsible. Why blame the poor innocent blackmailer who is merely acting in a way that, in effect, supports the law as written?

Then there is the Landes-Posner claim that blackmail will also lead to excessive crime reduction. This is difficult to understand on the face of it, even apart from the fact that if blackmail leads to *both* over-optimal and under-optimal allocation of resources, there is a distinct possibility that the two will balance one another, leading to no misallocation at all. The main error is that, again assuming real crimes against person and property such as rape and murder, and not victimless "crimes," there cannot possibly *be* extraneous crime prevention. Yes, it would be silly to spend the entire GDP, or any amount approaching that, on protection against murder, for then we would all die of starvation.<sup>44</sup> But consider this from a marginal perspective, not a total one. X percent of the GDP is now spent on crime prevention. Mr. Smith, based on his own utility maximization considerations, now wishes to spend an additional \$1 on this goal. On what basis can Landes and Posner possibly object? Certainly not because welfare will thereby be reduced; not, that is, if they take Smith's preferences into account.

Next, Brown takes issue<sup>45</sup> with Epstein.<sup>46</sup> The latter sees in legalization the debauchery of the blackmailee, who would be forced to engage in (real) crimes in order to make his payments to the blackmailer. Brown, with a little help from her friend Lindgren,<sup>47</sup> points out, unobjectionably, that "we do not generally criminalize activities simply because they are paid for with illegal gains. People often commit crimes to pay for legitimate goods and services, but that is not a rationale for criminalizing the production of those items."<sup>48</sup> The point here being

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prosecutors of the Brown variety would be free to indulge their arbitrary opinions as to what makes good and bad law.

<sup>44</sup> On the other hand, if this were the freely chosen decision of all the people, then there is nothing in economic analysis that can say them nay. I characterize this as "silly" in that such a decision is likely to come only from the political process, not the economic.

<sup>45</sup> Brown, *supra* note 2 at 1958-62.

<sup>46</sup> R. Epstein, "Blackmail, Inc." (1983) 50 U. Chi. L. Rev. 553. For an alternative critique of Epstein, see Extortion, *supra* note 8.

<sup>47</sup> Paradox, *supra* note 29 at 920.

<sup>48</sup> Brown, *supra* note 2 at 1960-61.

presumably the libertarian one, that we should monomaniacally focus on the propriety of blackmail itself, and ignore all irrelevant considerations.

If this practice passes muster under the non-aggression axiom, then it should be legalized no matter what are its ancillary or external effects. If blackmail is legitimate, and the blackmailee goes out and commits a crime<sup>49</sup> to finance his payments, so be it; blackmail stays legal, and we strive mightily to quell these other villainies. The alternative, that we prohibit blackmail, would force us to do the same with regard to gambling and luxury autos, *etc.*, because people upon occasion commit crimes in their pursuit. Too bad, then, that Brown does not follow through with this magnificent insight of hers when it comes to the dangers of blackmail:

In our zeal to deter one set of crimes, we might create incentives to commit others. The blackmailer could turn out to be as dangerous as the criminal with whom he transacts business. Because actual or potential physical force is part of many crimes, many blackmailers will have to be prepared to deal with violent blackmailees. It might prove difficult to know when blackmailers are merely prepared for violence and when they initiate it.

Monitoring blackmailers' activities would be difficult, and they might use criminal methods to operate an otherwise legitimate business. For example, a blackmailer might approach a criminal and threaten not only to disclose incriminating information to the authorities unless paid, but also to harm the criminal's person or property. The criminal is unlikely to report the illegal threat, because she will fear detection of her criminal activity if she goes to the authorities.<sup>50</sup>

Had Brown kept faith with her earlier vision, she would have said something very different. For example: "Too bad that blackmail might become associated with the initiation of violence, or with real crime. But that is no reason to ban it. Butchers, bakers and candlestick-makers also, sometimes, murder and rape, but no rational person ever advocated the banning of these professions. If the blackmailer commits crimes, well and good, we will stop him. But we will respect his law-abiding [purely blackmail] activities." Instead, she contents herself with the quite sound but far less satisfying claim that "[t]he possibility that the blackmailer will commit crimes may not be as great a problem as initially appears...."<sup>51</sup>

<sup>49</sup> A real one, that is, not a victimless one like blackmail.

<sup>50</sup> Brown, *supra* note 2 at 1961.

<sup>51</sup> *Ibid.*

### B. LINDGREN'S STRUCTURAL THEORY OF BLACKMAIL: EQUITY AND EXTERNALITIES

In this section Brown<sup>52</sup> distinguishes her views from those of Lindgren.<sup>53</sup> Of all the scholars she criticizes, Brown is perhaps most sympathetic to Lindgren, but there is no perfect congruity between their perspectives. Brown attributes to this author the opinion that blackmail should be outlawed "because it harms third parties by compromising their rights."<sup>54</sup> She does not appear to realize that these are two very different reasons: one of them valid, the other not. If we were to ban all acts which merely *harmed* others, there would be no one left outside of prison. You date a woman in whom I was interested, and you have harmed me. You open a store in competition with mine, and again you have harmed me. You buy a loaf of bread, thus raising its price by a minuscule amount; when I later make a similar purchase, you are once again exposed as having harmed me.

Compromising my rights is, of course, at least for the libertarian, an entirely different matter. If Brown had looked into this charge, she might have come to grips with the real fallacy underlying Lindgren's theory. Instead, she focuses on the irrelevant charge of harm. And her response to this? Yes, blackmail harms other people (negative externalities) but it also helps them<sup>55</sup> (positive externalities).<sup>56</sup> Thus, the legal status of blackmail should turn on the issue of whether the positive or negative harm predominates.

Even on the face of it, assuming for the moment that these entities *could* be meaningfully compared, the whole idea seems preposterous. We do not apply such an empirical externalities test to any other act to determine its legality. Consider broccoli, for example. Its benefits in terms of vitamins, roughage, good health, etc., are undoubted. This alone has both positive and negative externalities, as some people benefit from

<sup>52</sup> *Ibid.* at 1963-66.

<sup>53</sup> Paradox, *supra* note 29.

<sup>54</sup> Brown, *supra* note 2 at 1963.

<sup>55</sup> *Ibid.*

<sup>56</sup> For a critique of externalities, see W. Block, "The Justification of Taxation in the Public Finance Literature: An Unorthodox View" (1989) 3 *Journal of Public Finance and Public Choice* 141; W. Block, "Canadian Public Finance Texts Cannot Justify Government Taxation: A Critique of Auld & Miller, Musgrave, Musgrave & Bird, McCready, and Wolf" (1993) 2 *Can. Pub. Adm.* 225; *Economics*, *supra* note 1; J. Hummel, "National Goods vs. Public Goods: Defense, Disarmament and Free Riders" (1990) 9 *Rev. Austrian Econ.* 88.

the good health of the broccoli eaters, and others thereby lose out, (e.g., misanthropes).

On the other hand, this vegetable has proved to be an implement of torture for generations of youngsters, although a few weird kids take to it like ducks to water. Is the reason broccoli is still legal because its positive effects outweigh the negatives? Hardly. Were this utilitarian calculation<sup>57</sup> to be reversed, and broccoli found to be harmful on balance (it is still healthy, say, but the hatred of it on the part of the young people of the country comes to more than offsetting this factor), would the law automatically be changed? *Should* it be, under such circumstances? Merely to ask these nonsensical questions is to answer them. We *can't* compare the joy and displeasure associated with broccoli (or with anything else, for that matter, such as blackmail). Even if we could, somehow, this still would be beside the point. For acts should be outlawed if and only if they violate the libertarian strictures against uninvited border crossings, not because of any alleged preponderance of incomparable external costs over external benefits.

What of Part II of the Lindgren case, the claim that the blackmailer has in effect stolen the leverage or "chips" of third parties (information which properly belongs to them) and thus necessarily engages in "unjust enrichment"?<sup>58</sup> The proper way to refute this claim is to show that it is the blackmailer, not any third party, who is the legitimate owner of the knowledge in question. But Brown does not take this tack. On the contrary, she again resorts to "externalities [that] can be both negative and positive. If the activity is otherwise beneficial, we should not assume that its costs—including effect on third parties—necessarily outweigh these benefits."<sup>59</sup> This is all well and good, insofar as it goes. It is, after all, a criticism of Lindgren, and his is a theory much in need of correction. And it does wound Lindgren's thesis, based upon his own premises that negative and positive externalities can be compared. They cannot be compared, and thus Brown's criticism of Lindgren is ultimately unsatisfying.

Consider in this regard Brown's<sup>60</sup> analysis of Lindgren's "hypothetical case of blackmail in which a woman threatens to disclose that a company is criminally violating pollution standards by using a smokestack without pollution control equipment. She may live near the smokestack and suffer some damage from the pollution, for which she can seek some

<sup>57</sup> Again, assuming that interpersonal comparisons do not render it totally meaningless.

<sup>58</sup> Brown, *supra* note 2 at 1963.

<sup>59</sup> *Ibid.* at 1964.

<sup>60</sup> *Ibid.* at 1965.

compensation. But if she asks for \$1,000,000 to keep quiet about the pollution and 'seeks nothing for the public's benefit,'" Lindgren says, "she has 'clearly' committed blackmail. This is because there is an almost total disjunction between the advantage sought and the leverage used."<sup>61</sup>

There are several difficulties here. First, pollution, contrary to the practically universally received opinion,<sup>62</sup> is not an external diseconomy, akin, for example, to competition. On the contrary, at least under libertarian law, it is an invasion, similar to trespass.<sup>63</sup> It is the encroachment of soot particles into the bodies (stomachs, lungs) and the property of other people. Pollution is (falsely) considered a negative externality because for more than one hundred years (roughly, 1835-1960) it was allowed, even protected, by the law of the land.<sup>64</sup> Secondly, the information that this crime (now that, at long last, the state correctly looks at it in this manner) has occurred properly belongs to the woman in Lindgren's hypothetical. Who else could appropriately be the owner of that knowledge, apart from the person who saw it with her own eyes? Does this woman have a right to disclose information about this occurrence to other people? Of this we can be sure, given the right to free speech. No one, not even Lindgren, would object were she to make the authorities aware of the pollution. Does she, in contrast, have an obligation to do so? Not even Brown maintains this. If one may legally do something, may one refrain (given no obligation to do so) for a fee? This seems to follow from the very logic of the case. This, then, is the proper answer to Lindgren: the woman owns this knowledge "chip." She may do whatever she wishes with it, as long as her action does not constitute a physical invasion. As the offer to keep silent for a fee (the amount is immaterial) does not constitute aggression against non-aggressors, the woman is totally within her rights to blackmail the polluting firm.

Brown will have none of this. In lieu, she claims that:

Lindgren's mistake is to see "public benefit" only in the short term. By failing to recognize that this woman's blackmail imposes costs on a wrongdoer that,

<sup>61</sup> Paradox, *supra* note 29 at 714; Brown, *supra* note 2 at 1965.

<sup>62</sup> Shared in, obviously, by Brown.

<sup>63</sup> *Pollution*, *supra* note 1; R. McGee & W. Block, "Pollution Trading Permits as a Form of Market Socialism, and the Search for a Real Market Solution to Environmental Pollution" (1994) 6 *Fordham Env'tl. L.J.* 517 [hereinafter *Permits*]; W. Block, "Environmental Problems, Private Property Rights Solutions" in Walter Block, ed., *Economics and the Environment: A Reconciliation* (Vancouver: The Fraser Institute, 1990) at 281-332 [hereinafter *Problems*].

<sup>64</sup> M.J. Horwitz, *The Transformation of American Law: 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977); Rothbard, *ibid.*; *Permits*, *supra* note 63; *Problems*, *supra* note 63 at 281-332.

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if allowed, might deter other polluters because they fear similar treatment, Lindgren creates a greater "disjunction" between the interests of the blackmailer and the public than may actually exist. Particularly when the blackmail may confer some social benefits of deterrence, the exchange seems fair: the blackmailer "appropriates" the state's leverage but also creates some deterrence value that inures to the benefit of the general public.<sup>65</sup>

To this I say, "benefits, schmenefits." It matters for legal analysis not one whit whether we look at matters in the short or long run.<sup>66</sup> Brown's, in other words, is a superficial analysis. She agrees with Lindgren on theoretical or basic grounds, and only quarrels with him on the most cursory of issues. If I have to choose between them, I would side with Lindgren. For Brown concedes to him that the state really owns the knowledge of the pollution (which, so far, only this woman—and of course the polluter—possesses). Brown maintains that the woman is using this "chip" for the public good. But that is not for Brown or this woman to determine. If the government really owns the information, it is for *it* to determine how best it is to be used. Suppose I stole Brown's pen from her, and then used it to edit her next article. The point is not whether or not my actions actually help Brown or not; the issue is that I have no right to this pen *even if* I use it to help Brown. In like manner, once Brown concedes to Lindgren that the state is the proper owner of the information inside this woman's head, it is entirely irrelevant if she uses it for what Brown sees as the state's purpose. It is for the *state* to make any such determination.<sup>67</sup>

What of the issue that, but for the blackmailer, the blackmailee (who is, in this case, a criminal polluter-trespasser) would have more money with which to make restitution to the victim? Yes, if we wish to indulge in a bit of interpersonal comparing of utilities, we should indeed, along with Brown, "consider the possibility that those benefits will outweigh the losses to individual victims who are unable to collect restitution from a criminal defendant who, but for the blackmail payments, would have been able to make restitution."<sup>68</sup> On the other hand, we should also do so for

<sup>65</sup> Brown, *supra* note 2 at 1965.

<sup>66</sup> In any case, there is no "social rate" of time discount which can be used to compute a discounted present value for the "public good." Without a time preference rate, there is no way in which short-run and long-run values can be compared. There is no doubt that in the make-believe world occupied by Lindgren (and most commentators) the long run scores heavily against the short run. Brown's mistake is to buy into Lindgren's scenario in the first place.

<sup>67</sup> Here I assume, only for the sake of argument, that the state has a right to make such a determination.

<sup>68</sup> Brown, *supra* note 2 at 1966.

everyone from whom the blackmailee-criminal purchased *anything*. If we followed Brown's advice on this, we should have to punish the polluter's grocer or shoe-shine boy, not only the blackmailer, for reducing the amount of money this polluter would have with which to compensate his victims. This, however, would be on behalf of the victim of the real crime (not of blackmail), for, in justice, such a victim is due compensation. But we should no more properly incarcerate the grocer or the shoe-shine boy for selling goods or services to the blackmailee-criminal than we should the blackmailer himself, for providing yet another service to the blackmailee-criminal (in this case silence). The point is, the blackmailer occupies exactly the same legal position as do the grocer and shoe-shine boy. Since no one, not even Brown or Lindgren, advocates incarcerating the latter, they should leave off holding this position with regard to the former.

#### V. MORALITY ON A SYSTEMIC SCALE: AGAINST BLACKMAIL

Here, Brown for the first time gives her own views, having left off playing the role of either devil's advocate or critic.<sup>69</sup> She grounds her own defence of the illegality of blackmail in "the community's collective interest in the administration of justice as a public event that binds and defines us. We are intuitively suspicious of private justice, and private justice is the essence of incriminating blackmail."<sup>70</sup>

Before we go any further, here are a few more critical remarks. There is no such thing as a "community," apart from the individuals who comprise it.<sup>71</sup> Thus, there can be no "collective interest" in the administration of justice or of anything else for that matter. There are only the individual interests of many people. For there to be a "community" or a "collective interest" over and above that which applies to individual

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<sup>69</sup> *Ibid.* at 1966-73.

<sup>70</sup> *Ibid.* at 1967.

<sup>71</sup> For more on the methodological individualism which underlies this statement, see State, *supra* note (Auburn, Ala.: Mises Institute, Auburn University, 1993); H.H. Hoppe, "On Praxeology and the Praxeological Foundation of Epistemology and Ethics" in J. Herbener, ed., *The Meaning of Ludwig von Mises* (Boston: Dordrecht, 1992); H.H. Hoppe, *Praxeology and Economic Science* (Auburn, Ala.: Mises Institute, Auburn University, 1988); G. Fox, "The Pricing of Environmental Goods: A Praxeological Critique of Contingent Valuation" (1992) 5 *Cultural Dynamics* 245; G.A. Selgin, "Praxeology and Understanding: An Analysis of the Controversy in Austrian Economics" (1988) 2 *Rev. Austrian Econ.* 19; M. Rizzo, "Praxeology and Econometrics: A Critique of Positivist Economics" in L. Spadaro, ed., *New Directions in Austrian Economics* (Kansas City: Sheed Andrews and McMeel, 1979) at 40-56; Austrian, *supra* note 34.

human beings, there must be such thing as a "group mind," or a "collective conscience," or "mass consciousness." Needless to say, no such entity has ever been captured or held in captivity.

While we are indeed "defined" by many things, and a search for justice may well be one of them, we are only bound by the libertarian axiom of non-aggression, and by any obligations over and above that which we voluntarily take upon ourselves. If there is something else that should be (not morally but) legally binding on us, it has never been justified.<sup>72</sup>

Yes, there is indeed great revulsion against blackmail;<sup>73</sup> however, we are not at all commonly "suspicious of private justice." The American Arbitration Association, the Hague, the International Court of World Settlements, the administrators of Canon Law, the rabbis who execute Talmudic Law, the World Court, the punishment circles of many Indigenous tribes, while not as well known or revered as government courts, are certainly highly respected amongst people aware of them. They are certainly institutions of non-governmental justice. If "The Godfather" movies are to be believed, even the Mafia employs private courts.

A case can be made that the same applies to the United Nations. It, too, is not itself a government, although its membership is of course composed of such entities. That is, the UN has no power to tax, or to preclude other governments (that is, other worldwide treaty organizations such as the ITO) from competing with it. There are two criteria for government: ability to use legitimate force, and a monopoly power thereof. As the UN has neither,<sup>74</sup> it cannot be considered a government. That being the case, all of its adjudication, mediation, and arbitration services might conceivably be considered instances of "private justice."

Brown doesn't seem to appreciate that her theory implies nothing less than that the UN be turned into a world government, where Americans will of necessity be outvoted by Chinese, Indians, and others. For if there is something untoward about a non-public authority, say, justice as determined by a contract between Smith and Jones, then there must be

<sup>72</sup> Attempts have been made by J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), for example. For a devastating critique, however, see *Utopia*, *supra* note 1.

<sup>73</sup> Much but not all of it is in reaction to extortion, with which blackmail is commonly confused.

<sup>74</sup> It certainly has no monopoly power. Nor does it have the ability to compel its member nations, certainly not the stronger ones, to do its bidding. It does have soldiers under its ostensible command, but these serve mainly as "human fences" and cannot be demanded of member nations, only requested.

something equally improper about a contract (e.g., treaty) between any two UN member countries, such as Finland and Bolivia.

Brown continues her screed against privatization: "To say that a public authority enforces the criminal law is to state a near tautology. Many define criminal prohibitions not just by the severity of their associated penalty, but also by the state's exclusive entitlement to enforce them."<sup>75</sup> She buttresses the latter by citing Blackstone as follows: "Whatever power, therefore, individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone, who bears the sword of justice by the consent of the whole community."<sup>76</sup>

The German government under the Nazis was a legitimate one, at least in terms of the niceties of democracy.<sup>77</sup> Although Hitler won the election that brought him to power by a plurality, not a majority, this was in much the same way as Clinton came to office for his first term. Would Brown go so far as to assert as a "near tautology" that criminal prohibitions are defined by the Nazi "state's exclusive entitlement to enforce them?" Hardly. Therefore, she needs to revise her statement. What are the options? Certainly, we cannot say that government involvement is *sufficient* for criminal justice. Is it, then, *necessary*? This, too, is difficult to accept, given the splendid records of the private justice associations mentioned above, which in the minds of at least some commentators, compare favourably with government institutions.<sup>78</sup>

Then there is the issue of "consent of the whole community." German Jews, Ibos, and Soviet kulaks by no stretch of the imagination can be said to have consented to anything at all, much less to the judicial power, of those who abused them. But even in the United States this concept is not exactly in conformity with the facts. Yes, "consent" is celebrated on stage and screen and in popular songs and jingles, but where is the evidence for it? How many people signed the United States' Constitution, the Declaration of Independence or the Articles of Confederation? How many people signed the constitutions of the thirteen states which together began the United States of America? Let it not be objected that signatures are

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<sup>75</sup> Brown, *supra* note 2 at 1967.

<sup>76</sup> *Ibid.* at 1967, n. 93.

<sup>77</sup> As much cannot be said for the Russia of Lenin or Stalin, the China of Mao, the Cambodia of Pol Pot, the Uganda of Idi Amin, etc. These were dictatorships, not democracies.

<sup>78</sup> For further discussion of this phenomenon, see Enterprise, *supra* note 1; Enforcement, *supra* note 1; Spontaneous, *supra* note 1; 44; Creation, *supra* note 1; T. & P.J. Hill, "An American Experiment in Anarcho-Capitalism: The *Not So Wild, Wild West*" (1979) 3 J. Libertarian Stud. 9; J.R. Peden, "Property rights in Celtic Irish law" (1979) 1 J. Libertarian Stud. 81.

not needed. They are needed, at law, for even the most unimportant of commercial contracts. Should anything less be required for the momentous justification of the state upon which all else, at least for Brown, rests? Can we infer consent from voting in elections? From payment of taxes? From failure to leave the country in protest? None of these arguments will suffice.<sup>79</sup>

Yes, "[t]he criminal action belongs not to the victim, but to the state,"<sup>80</sup> but only if the former has first *relinquished* this basic human right to the latter. In the absence of any evidence for this contention, it is far from a "truism about the nature of criminal law [that it] seem[s] to lead inexorably to the conclusion that it should be enforced publicly rather than privately;"<sup>81</sup> in fact, the very opposite seems to be nearer to the truth. Namely, that if (criminal) justice is to be done, it cannot be done by a government independent of the consent of the governed, no matter how much scholars such as Brown would like to believe so.

Happily, our author recognizes at least some small vestigial traces of private rights that have somehow withstood the onslaught of the modern state. She mentions<sup>82</sup> in this context the victim's rights movement, restorative justice, reconciliation,<sup>83</sup> victim-offender mediation and alternative dispute resolution; she might also have included under this rubric the move to force criminals to compensate victims, and the move to privatize jails. But she only acknowledges such phenomena the better to give the back of her hand to them.<sup>84</sup> To this end<sup>85</sup> she cites Mnookin and Kornhauser<sup>86</sup> to the effect that governmental law really underlies all such findings, which are, in any case, merely (less expensive) attempts to forecast those of the state. She also cites the socialist Fiss,<sup>87</sup> who is hostile to the private sector because it does not stamp out all wealth disparities.<sup>88</sup>

<sup>79</sup> Spooner, *supra* note 1; Barnett, *supra* note 24.

<sup>80</sup> Brown, *supra* note 2 at 1967-68.

<sup>81</sup> *Ibid.* at 1968.

<sup>82</sup> *Ibid.* at 1968-69.

<sup>83</sup> But why does she mention them in quotation marks? Perhaps her further comments below reflect her doubts of their very legitimacy.

<sup>84</sup> Brown, *supra* note 2 at 1969, n. 98-99.

<sup>85</sup> *Ibid.* at 1958, n. 54.

<sup>86</sup> R.H. Mnookin & L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.

<sup>87</sup> O.M. Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073.

<sup>88</sup> Fiss unwittingly gives the "consent by the governed" game away when he says, "These (government) officials ... possess a power that has been defined and conferred by public

At last we arrive at the very source of Brown's hostility to blackmail's legalization, even for what she is pleased to believe is the only rational case for it, when used with regard to the criminal-blackmailee. She states that "[r]esource disparities will affect outcomes in blackmail powerfully. Legalized blackmail allows wealthy criminals to prevent (or at least postpone) disclosure of their crime by purchasing the blackmailer's silence. Poorer criminals lack this purchasing power, and are thus more likely to be reported, apprehended, and imprisoned."<sup>89</sup>

In other words, but for unfair income disparity Brown would presumably favour blackmail legalization, at least with regard to incriminating facts. But given that not all people have the same amount of money, all bets are off.

This is highly problematic. First of all, if Brown is correct in maintaining that inequality in wealth logically implies changing the law of blackmail from what it would otherwise be (legalized, that is, in the case of incriminating information), much more follows as well. If she is willing to pervert what even she considers as justice in this one case, why not elsewhere? For example, suppose a poor man rapes a rich woman. Ordinarily, the wealth status of neither of them would be at all relevant. But we live and we learn. Under the Brown dispensation, perhaps he shouldn't be imprisoned. Perhaps he should even get a medal, if he is poor enough to warrant one. Who knows? Brown's egalitarian principles do not indicate any specific conclusion, only that we tip the scales of justice in favour of the poor and against the rich to some degree or other. Perhaps there should be a sort of Handicapper General<sup>90</sup> for the administration of justice, who would right the imbalance imposed on the law by income inequality by precisely the right amount. All these things seem to be in keeping with Brown's legal philosophy. It is impossible to further specify, since she only vouchsafes us with the view that things are unfair as they are, but provides us with no numerical program to right these wrongs.

Further, Brown's quarrel is really not so much with blackmail legislation, but with all of jurisprudence. Were she writing about divorce,

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law, *not by private agreement...*" *Ibid.* at 1085 [emphasis added]. Undoubtedly, what Fiss meant was not that the public law could not trace itself back, if we went far enough into the past, to private agreement, *e.g.*, that the governed indeed had once consented to being ruled under democratic procedures. Rather, he intended to denote that *this particular* private settlement owed its genesis to private, not public agreement. But for all of that his original statement, taken quite literally, is precisely correct: There never was any original agreement under which public sector law operates.

<sup>89</sup> Brown, *supra* note 2 at 1970.

<sup>90</sup> K. Vonnegut, "Harrison Bergeron" in *Welcome to the Monkey House* (New York: Delacorte Press, 1971).

or contracts, or constitutional law, or any other aspect of the criminal code, and did so in a manner logically consistent with her remarkable egalitarian complaint as set out here, she would have to favour a wholesale revamping of them as well, in favour of the poverty-stricken and against the wealthy.

In justification of her position on educating the public, Brown cites a host of authorities attesting to the benefits of the spotlight of publicity being placed on the doings of the courts, whether in "accusation, trial, vindication through acquittal, or condemnation through conviction and punishment."<sup>91</sup> But this is entirely irrelevant to the main point at issue: whether or not there is room for private justice. Surely the American Arbitration Association, or any of the other private court institutions mentioned above, need not close its doors to outsiders or to the press. And on the other hand, closed-door trials in government courts are not exactly unknown. To be sure, blackmailers and blackmailees are not at all publicity hounds. But our author is here discussing matters of relevance to *all* of private justice, not just to blackmail; thus, she cannot make use of any such objection.

Brown argues that "[p]ublic enforcement of the criminal law also helps to insure that criminals receive the protection of constitutional limitations on law enforcement."<sup>92</sup> But this is by no means necessarily a benefit. The spectre of obviously guilty felons let loose under technicalities is nowhere mentioned in the United States' Constitution,<sup>93</sup> while victims and their families look on helplessly, is not one which inspires much confidence.<sup>94</sup> Even if it were stipulated to be a benefit, it scarcely follows that private courts are, in effect, lawless. Brown is of course worried that "[b]lackmailers would not feel these [constitutional] constraints, for criminals might pay blackmail to conceal their crimes even when the blackmailer gains evidence in a manner which would be

<sup>91</sup> Brown, *supra* note 2 at 1971.

<sup>92</sup> *Ibid.* at 1972.

<sup>93</sup> Perhaps found in one of its many "penumbras."

<sup>94</sup> The interpretation of these "protections" seems almost purposefully perverse. If the police commit some technical violation of the Miranda precedent, or of search and seizure laws, why is it necessary to throw out evidence derived thereby, and thus free the obviously guilty criminal? Cannot the guilty parties, the cops, be made to pay for their transgressions, perhaps with the loss of pay? To allow the perpetrator to escape justice due to procedural error is to subscribe to the view that two wrongs make a right. This is particularly infuriating in that in the blackmail case, as we have seen, opponents of legalization, such as Brown, claim on one side of their mouths that two rights can make a wrong, and on the other side that two wrongs can make a right.

unconstitutional if the government were the actor."<sup>95</sup> But here our author is really objecting to how the information was attained, not to the actual blackmail. If this is so, there is no need to outlaw blackmail *per se*. All the law need to do is to set out how such knowledge may be acquired. Specifically, it should stipulate that information may be gained in any way at all, as long as it does not violate the libertarian prohibition against aggression towards non-aggressors.

Another Brown criticism of legalization concerns the fact that the blackmailee need not be guilty of a crime, and may be in need of procedural protections against the blackmailer.<sup>96</sup> But there is a simple answer: if you are accused by a blackmailer of a crime you did not commit, simply refuse the services of the blackmailer, even if you have no iron-clad alibi. Tell the blackmailer to "[p]ublish and be damned."<sup>97</sup> A mere unsubstantiated accusation will not suffice even to discomfort you, if the blackmailer carries through on his threat to "expose" you as a criminal. If it would; every criminal would send anonymous letters accusing hundreds of innocent people of the crime he himself has committed, in order to lay down a smokescreen to reduce the probability of his own apprehension.

## VI. CONCLUSION

I entirely agree with Brown that "[e]ven if the crime were very rare, the basis for blackmail's illegality would not be a trivial matter. Blackmail captures the imagination of many legal scholars because more than most crimes, it treads so closely to legitimate, even encouraged, economic activity."<sup>98</sup> Certainly, lawyers themselves are practically every day guilty of blackmail, at the very least whenever they threaten to sue unless their client is given certain monies.

<sup>95</sup> Brown, *supra* note 2 at 1972, n. 111, cites the opposition of *Utopia*, *supra* note 1 to private courts competing with governmental ones on procedural grounds. She seems unaware that this view has been subjected to withering criticism. See R. Barnett, "Whither anarchy? Has Robert Nozick justified the state?" (1977) 1 J. Libertarian Stud. 15; R.A. Childs, "The invisible hand strikes back" 1 J. Libertarian Stud. 23; W.M. Evers, "Toward a reformulation of the law of contracts," (1977) 1 J. Libertarian Stud. 3; M.N. Rothbard, "Robert Nozick and the immaculate conception of the state" (1977) 1 J. Libertarian Stud. 45; J.T. Sanders, "The free market model versus Government: a reply to Nozick" (1977) 1 J. Libertarian Stud. 35.

<sup>96</sup> Brown, *supra* note 2 at 1972.

<sup>97</sup> Statement of the Duke of Wellington, cited in R. Posner, "Blackmail, Privacy and Freedom of Contract" (1993) 141 U. Pa. L. Rev. 1839 at note 43.

<sup>98</sup> Brown, *supra* note 2 at 1973.

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It is all the more important, then, not to lose sight of the libertarian axiom of non-aggression, and the fact that the basis of law is and must always remain the protection of persons and of legitimately held property rights. Since blackmail of whatever stripe or variety is not in conflict with this dictum, *e.g.*, does not constitute an uninvited border crossing, it should be legalized.

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