BERMAN ON BLACKMAIL: TAKING MOTIVES FERVENTLY

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Table of Contents

I. INTRODUCTION

Should blackmail be legalized? In the view of most people, this is a no-brainer. Of course blackmail should not be made licit. It is a vicious crime. Berman has his finger on the pulse of the man in the street when he says: "It is a safe bet that blackmail's criminalization does not appear puzzling to the casual observer. Not only does it resemble other varieties of theft, the criminalization of which rarely raises eyebrows, but blackmail just smells likes [sic] a nasty practice."[1] And if there were any question about this, we can call upon the support of a very popular novelist. In the view of Arthur Conan Doyle:

> 'But who is he?'
>
> 'I'll tell you, Watson. He is the king of all the blackmailers. Heaven help the man, and still more

1. Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 876-77 (1998).

> 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' imprisonment if her own ruin must immediately follow? His victims dare not hit back.'[2]

One last bit of evidence on this matter, not that any is needed. While Nobel Prize winning economist Ronald Coase cannot by any stretch of the imagination be considered an intellectual common man, he shows his affinity for the popular abhorrence of blackmail by castigating it as "moral murder."[3] Nor is it the case that this view is shared only by non-learned people. As it happens, virtually all legal theorists who have written about this subject have agreed that blackmail ought to maintain its present status as a prohibited act.[4]

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2. A. CONAN DOYLE, *The Adventures of Charles Augustus Milverton*, in *The Return of Sherlock Holmes, reprinted in* THE COMPLETE SHERLOCK HOLMES 667, 668 (1938).

3. Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655 (1988), *cited in* Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, 1689 (1993). For a critique of this article, see Walter Block et. al., *The Second Paradox of Blackmail*, 10 BUS. ETHICS Q. 593 (2000).

4. Peter Alldridge, *'Attempted Murder of the Soul': Blackmail, Privacy and Secrets*, 13 OXFORD J. LEGAL STUD. 368 (1993); Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639 (1993); Gary Becker, *The Case Against Blackmail* (Jan. 1985) (unpublished) (on file with author); Berman, *supra* note 1, at 877; James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1470 (1992); Jennifer Gerarda Brown, *Blackmail As Private Justice*, 141 U. PA. L. REV. 1935, 1935-73 (1993); Debra J. Campbell, *Why Blackmail Should be Criminalized: A Reply to Walter Block and David Gordon*, 21 LOY. L.A. L. REV. 883 (1988); A.H. Campbell, *The Anomalies of Blackmail*, 55 LAW Q. REV. 382 (1939); Coase, *supra* note 3; George Daly & J. Fred Giertz,

There are some commentators, however, who have taken the opposite point of view, and, in my own view, show that the case for

Externalities, Extortion, and Efficiency: Reply, 68 AM. ECON. REV 736 (1978); DeLong, *supra* note 3; Daniel Ellsberg, *The Theory and Practice of Blackmail*, in BARGAINING: FORMAL THEORIES OF NEGOTIATION 343 (Oran R. Young ed., 1975); Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); Hugh Evans, *Why Blackmail Should be Banned*, 65 PHIL. 89 (1990); Joel Feinberg, *The Paradox of Blackmail*, 1 RATIO JURIS 83 (1988); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988); George P. Fletcher, *Blackmail: The Paradigmatic Case*, 141 U. PA. L. REV. 1617 (1993); CHARLES FRIED, CONTRACT AS PROMISE 102 (1981); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849 (1993); Arthur L. Goodhart, *Blackmail and Consideration in Contracts*, 44 LAW Q. REV. 436 (1928), *reprinted in* ARTHUR L. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 175 (Cambridge Univ. Press 1931); Wendy, J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741 (1993); Michael Gorr, *Nozick's Argument Against Blackmail*, 58 PERSONALIST 187, 190 (1977); Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFF. 43 (1992); Vinit Haksar, *Coercive Proposals*, 4 POL. THEORY 65 (1976); Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787 (1993); MICHAEL HEPWORTH, BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE 29 (1975); Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905 (1993); R.S. Jandoo & W. Arthur Harland, *Legally Aided Blackmail*, 27 NEW L. J. 402 (1984); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567 (1993); D. Kipnis, *Blackmail as a Career Choice: A Liberal Assessment*, 18 CRIM. JUST. ETHICS 19 (1999); William Landes and Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 43 (1975); Michael Levin, *Blockmail*, 18 CRIM. JUST. ETHICS 11 (1999); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984); James Lindgren, *More Blackmail Ink: A Critique of* Blackmail, Inc., *Epstein's Theory of Blackmail*, 16 CONN. L. REV. 909 (1984); James Lindgren, *In Defense of Keeping Blackmail A Crime: Responding to Block and Gordon*, 20 LOY. L.A. L. REV. 35 (1986); James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597 (1989); James Lindgren, *Kept in the Dark: Owens's View of Blackmail*, 21 CONN. L. REV. 749 (1989); James Lindgren, *Secret Rights: A Comment on Campbell's Theory of Blackmail*, 21 CONN. L. REV. 407 (1989); James Lindgren, *Blackmail: An Afterward*, 141 U. PA. L. REV. 1975 (1993); James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993); Daniel Lyons, *Welcome Threats and Coercive Offers*, 50 PHIL. 425 (1975); Jeffrie, G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156 (1980); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974); David Owens, *Should Blackmail be Banned?*, 63 PHIL. 501 (1979); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. Little Brown 1992); Richard Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817 (1993); Steven Shavell, *An Economic Analysis of Threats and Their Legality: Blackmail, Extortion and Robbery*, 141 U. PA. L. REV. 1877 (1993); L. G. Tooher, *Developments in the Law of Blackmail in England and Australia*, 27 INT'L & COMP. L.Q. 337 (1978); JEREMY WALDRON, BLACKMAIL AS COMPLICITY 4 (Nov. 1992) (unpublished manuscript) (on file with author); Glanville Williams, *Blackmail*, THE CRIM. L. REV. (1954); W.H. D. Winder, *The Development of Blackmail*, 5 MOD. L. REV. 21, 36-41 (1941).

prohibition of blackmail is weak or non-existent.[5] Howcan the view that blackmail ought to be legalized possibly be defended?

We start off, first, with the distinction between blackmail and extortion. In both cases, there is a threat, coupled with a demand for money.[6] But in the former case, the threat consists of doing no more than one has a legal right to do in any case. For example, to blab the secret, or to gossip about the adultery. In the latter case, the threat consists of doing something that is patently illegal, and ought to be considered in this light. For instance, initiating violence against the victim, such as is involved in murder, arson, or rape.

By no stretch of the imagination can it ever be said that the extortionist does his victim a favor. If I come to you, gun in hand, and demand your money with the threat of killing you if you resist, to think that I am your benefactor would be a cruel joke. However, precisely this claim can indeed be made with regard to blackmail. After all, if you are an adulterer, desperate to keep your secret hidden, in whose hands would you rather your secret be? A gossip, in which case the jig is up, or a blackmailer, who at least has the decency to offer you a monetary way out of your predicament? Obviously, the latter is vastly preferable.[7] Were it not, you would

5. Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 274 (1982); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982); MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE 443 (1993); Ronald Joseph Scalise, Jr., *Blackmail, Legality, and Liberalism*, 74 TUL. L. REV. 1483 (2000); Walter Block, *The Blackmailer as Hero*, THE LIBERTARIAN F. 1 (1972); WALTER BLOCK, DEFENDING THE UNDEFENDABLE, 44-49 (1976); Walter Block & David Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37 (1985); Walter Block, *Trading Money for Silence*, 8 U. HAW. L. REV. 57 (1986); Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997); Walter Block, *A Libertarian Theory of Blackmail*, 33 IRISH JURIST 280 (1998); Walter Block & Robert W. McGee, *Blackmail from A to Z: A Reply to Joseph Isenbergh's* Blackmail from A to C, 50 MERCER L. REV. 569 (1999); Walter Block & Robert W. McGee, *Blackmail As A Victimless Crime*, 31 BRACTON L. J. 24 (1999); Walter Block & Christopher E. Kent, *Blackmail, in* MAGILL'S LEGAL GUIDE 109 (1999); Walter Block, *Blackmailing for Mutual Good: A Reply to Russell Hardin*, 24 VT. L. REV. 121 (1999); Walter Block, *Blackmail and Economic Analysis*, 21 T. JEFFERSON L. REV. 165 (1999); Walter Block, *The Crime of Blackmail: A Libertarian Critique*, 18 CRIM. JUST. ETHICS 3 (1999); Walter Block, *Replies to Levin and Kipnis on Blackmail*, 18 CRIM. JUST. ETHICS 23 (1999); Block, *supra* note 3; Walter Block, *The Legalization of Blackmail: A Reply to Professor Gordon*, 30 SETON HALL L. REV. 1182 (2000); Walter Block, *Threats, Blackmail, Extortion and Robbery And Other Bad Things*, 35 TULSA L. J. 333 (2000); Walter Block & Gary Anderson, *Blackmail, Extortion and Exchange*, 44 N.Y.L. SCH. L. REV. 541 (2001); Walter Block, *Blackmail Is Private Justice — A Reply to Brown*, 34 U. BRIT. COLUM. L. REV. 11 (2000); Walter Block, *A Reply to Wexler: Libertarianism and Decency*, 34 U. BRIT. COLUM. L. REV. 49 (2000); Walter Block, Book Review, 14 J. LIBERTARIAN STUD. 247 (2000). I wish to single out the aforementioned article written by Scalise. In its criticism of Berman, it has numerous parallels with my own treatment. I did not heavily cite it, as it deserved, since it came across my desk only after I had written the present article. Nevertheless, I acknowledge its precedence, in many ways, in my critique of Berman.

6. It may include a demand for other valuable consideration, such as sexual favors.

7. Can it reasonably be objected that the extortionist, too, does you a favor by not shooting you, and instead taking your money? This is of course true. However, there is a contrast

always be free to utter, in reply to a demand for money from a blackmailer, "Publish and be damned."[8]

One would think, then, that the discussion on this matter in the law reviews and scholarly academic journals would largely consist of a debate between these two schools of thought: the first, the mainstream perspective, holds that blackmail is properly criminalized and ought to remain so, and second, the critic's, or libertarian,[9] takes the position that as blackmail threatens only that

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between the two cases. The blackmailer has every right to spill the beans (we assume he came by his information about you in a legal manner too abstract from that problem) while the extortionist has no right whatever to do to you what he threatens.

8. Richard A. Posner, *Blackmail, Privacy & Freedom of Contract*, 141 U. PA. L. REV. 1817, 1839 (1993) (quoting the Duke of Wellington in 1 ELIZABETH LONGFORD, WELLINGTON: THE YEARS OF THE SWORD 1661-67 (1969)).

9. Libertarianism is a theory of the proper use of physical force. Its basis is private property rights based on homesteading, and the non-aggression axiom: it is improper to threaten or use violence against a person or his legitimately owned property. *See* Terry L. Anderson & P. J. Hill, *An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West*, 3 J. LIBERTARIAN STUD. 9 (1979); William L. Anderson et al., *Government Spending and Taxation: What Causes What*, 52 S. ECON. J. 630 (1986); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998); Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law without Government*, 9 J. LIBERTARIAN STUD. 1 (1989); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990); Alfred G. Cuzán, *Do We Ever Really Get Out of Anarchy?*, 3 J. LIBERTARIAN STUD. 151 (1979); ANTHONY DE JASAY, THE STATE (1985); DAVID FRIEDMAN, THE MACHINERY OF FREEDOM: GUIDE TO A RADICAL CAPITALISM (1973); David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399 (1979); HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS (1989); HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993); Hans-Hermann Hoppe, *The Private Production of Defense*, 14 J. LIBERTARIAN STUD. 27 (1998); Jeffrey Rogers Hummel, *National Goods Versus Public Goods: Defense, Disarmament, and Free Riders*, 4 REV. AUSTRIAN ECON. 88 (1990); N. Stephan Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, 12 J. LIBERTARIAN STUD. 313 (1996); N. Stephan Kinsella, *Legislation and the Discovery of Law in a Free Society*, 11 J. LIBERTARIAN STUD. 132 (1995), *available at* http://www.mises.org/journals/jls/11_2/11_2_5.pdf; N. Stephan Kinsella, *The Undeniable Morality of Capitalism*, 25 ST. MARY'S L. J. 1419 (1994) (reviewing HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY (1993)); N. Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, 17 REASON PAPERS 61 (1992); Andrew P. Morriss, *Miners, Vigilantes & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581 (1998); Joseph R. Peden, *Property Rights in Celtic Irish Law*, 1 J. LIBERTARIAN STUD. 81 (1977); MURRAY N. ROTHBARD, FOR A NEW LIBERTY (1978); THE ETHICS OF LIBERTY, *supra* note 5; Murray N. Rothbard, *Society Without a State*, *in* ANARCHISM: NOMOS XIX (J. R. Pennock & J. W. Chapman eds., 1978); MAN, ECONOMY AND STATE, *supra* note 5; AEON J. SKOBLE, *The Anarchism Controversy*, *in* LIBERTY FOR THE 21ST CENTURY: ESSAYS IN CONTEMPORARY LIBERTARIAN THOUGHT 77 (Tibor Machan & Douglas Rasmussen eds., 1995); Larry J. Sechrest, *Rand, Anarchy, and Taxes*, 1 J. AYN RAND STUD. 87 (1999); LYSANDER SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY AND A LETTER TO THOMAS F. BAYARD (1966); Edward Stringham, *Market Chosen Law*, 14 J. LIBERTARIAN STUD. 53 (1998); Patrick Tinsley, *Private Police: A Note*, 14 J. LIBERTARIAN STUD. 95 (1998); MORRIS TANNEHILL & LINDA TANNEHILL, THE MARKET FOR LIBERTY (1984); WILLIAM C. WOOLRIDGE, UNCLE SAM THE MONOPOLY MAN (1970).

which the blackmailer has a right to do, it should be legalized. If one thought this, however, one would be almost entirely mistaken.

In actual point of fact, with but only a few exceptions, there has been no debate at all between these two views. While the libertarians have indeed criticized the mainstream view,[10] there have been only four rejoinders in the other direction.[11] More typically, the response of those who counsel continued blackmail prohibition is to ignore them entirely or to dismiss them without any serious discussion.[12]

Virtually all of the publications on this topic have been devoted not to the debate between these two schools of thought, but rather have occurred within the mainstream consensus. Namely, the range of opinion has been for the most part limited to the view that blackmail must indeed remain criminalized but the various participants diverge as to their reasons for this contention. Some take a consequentialist, or utilitarian stance, and others take a principled, or deontological, perspective.[13]

To characterize this intra-mainstream debate from the perspective of one who disagrees with both, it would be that each of these views is extremely effective in criticizing the other, but totally unable to withstand the denunciations offered by the other against its own stance. It is as if there were some sort of intellectual schizophrenia going on: when on the attack, the mainstream commentators on blackmail legalization speak in a very sharp and

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10. *See supra* note 5.

11. The four mainstream articles are James Lindgren, *In Defense of Keeping Blackmail A Crime: Responding to Block and Gordon*, 20 LOY. L.A. L. REV. 35 (1986); Debra J. Campbell, *Why Blackmail Should be Criminalized: A Reply to Walter Block and David Gordon*, 21 LOY. L.A. L. REV. 883 (1988); D. Kipnis, *Blackmail as a Career Choice: A Liberal Assessment*, 18 CRIM. JUST. ETHICS 19 (1999); and, Michael Levin, *Blockmail*, 18 CRIM. JUST. ETHICS 11 (1999). For a rejoinder to the first pair of articles, see Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997); for a response to the second pair, see Walter Block, *Replies to Levin and Kipnis on Blackmail*, 18 CRIM. JUST. ETHICS 23 (1999).

12. One very fragmentary "response" is by Richard A. Posner, who dismisses the case for legalized blackmail very succinctly indeed, in but one word, as "remarkable." Posner, *supra* note 8. For a rejoinder to Posner, see Block & Anderson, *supra* note 5. Another occurs in the present paper under discussion, where Berman notes that Rothbard is "one exception" in that he disputes the claim that "blackmail is properly made criminal." Berman, *supra* note 1, at 799-800. It is more than passing curiosity that in a paper devoted to a detailed examination of the views of dozens of theorists, all of whom maintain that "blackmail is properly made criminal," Berman would dismiss these views to the contrary as follows: "Because Rothbard's conclusion stands or falls upon familiar libertarian premises, however, it need not be addressed here." *Id.* Further, Berman characterizes as "radical" but does not criticize Isenbergh's proposal to decriminalize some but not all types of blackmail. *Id.* at 814. Evidently, this is as far as Berman can go in his treatment of heterodox views. The case for complete decriminalization of this practice presumably goes too far to be even considered.

13. The University of Pennsylvania Law Review Symposium, for example, contained twelve articles which all agreed with the conclusion that blackmail is properly illegal, and only differed as to the underlying justifications. 141 U. PA. L. REV. (1993).

incisive voice; when they give their own views on the subject, the very opposite occurs: they open themselves to the equally devastating responses of their fellows.[14] Several years ago there was a National Basketball Association player by the name of Ernie DiGregorio. His reputation as an offensive player was a good one. But his defensive skills were greatly wanting, so much so that he earned the nickname, "Ernie No-D."[15] In my view, the mainstream commentators are all offense (against the theories of their fellows), and no defense (of their own analyses).

How does Berman's[16] contribution fit in with the blackmail literature? This author can be found within the mainstream analysis of blackmail, in that he favors its status quo legal prohibition. He begins by "arguing that no current theory adequately unravels the paradox"[17] of blackmail.[18] By paradox, he means, uncontroversially, how can two acts, when engaged in together be illegal, given that when they are undertaken in isolation, they are both legal? He states, "I am legally free to reveal embarrassing information about you. Generally speaking, I am also free to negotiate payment to refrain from exercising a legal right. But if I combine the two — offering to remain silent for a fee — I am guilty of a felony: blackmail."[19]

He notes that the advocates of the present law prohibiting blackmail contracts fall into two camps: those who justify the status quo on utilitarian or consequentialist grounds, and those who defend it for deontological or principled reasons.[20] And where does he fit in, in terms of this distinction, in his own view? He rejects both stating, "both [will] always prove unable to distinguish blackmail from much behavior that is, and should remain, free from criminal sanction."[21] In this, I am in entire accord with Berman. In what he sees as sharp contrast to the mainstream position, Berman announces that his own view is "the evidentiary theory of blackmail."[22] He interprets this theory as free of the criticisms he will level against the mainstream view, both the consequentialist

14. As well, the criticisms of the libertarians who favor legalization have in my opinion been crushing (see *supra* note 5), albeit for the most part ignored (see *supra* note 11).

15. For those who are uninitiated in the niceties of the world of the NBA, "No-D" indicates a lack of defensive abilities.

16. Berman, *supra* note 1.

17. *Id.* at 797.

18. By this argument, he announces that he is rejecting both sides of the mainstream perspective that, for him, is the only game in town. That is, although he mentions that Rothbard rejects both sides of the mainstream view, Berman does not condescend to criticize this libertarian position.

19. *Id.* at 796.

20. *Id.* at 797.

21. *Id.*

22. *Id.*

and deontological versions. To anticipate my criticism of Berman, I shall claim that far from his theory being distinct from these others, it is part and parcel of both of them, that his own theory is subject to the same objections he so well levels at consequentialist and deontological defenses of blackmail prohibition, plus additional ones, to be mentioned.

II CRITIQUE

With this introduction, we are now ready to consider Berman's critique of mainstream views on blackmail, [23] other than his own. He begins with a critique of those I consider to be his fellow travelers in this regard, and, as is typical of this genre, his "offense" is for the most part no less than devastating,[24] as shall be seen. First, Berman sets up the barrier over which any theory of blackmail must pass:

> Any satisfactory theory must account for both parts of the blackmail puzzle. First, it must explain whether and why blackmail should be made criminal. Second, if it supports criminalization of blackmail, it must explain whether and why unconditional performance of the acts a blackmailer might threaten should remain lawful . . . . By and large, the theories in the first group [adverse social consequences] passably perform the second task of distinguishing the threat from the act. But they fail to accomplish the first task — showing why blackmail should be criminal. In contrast, several theories in the second group [blackmail is wrong in and of itself] provide seemingly persuasive explanations for blackmail's criminalization, but fail to account adequately for the difference between the threat and the act. No prior theory performs both jobs satisfactorily.[25]

This is a reasonable enough criterion. The question remains as to whether Berman's own theory will survive such a test; and also, how

23. *Id.*

24. *Id.* Berman mentions in passing, "Professor James Lindgren [is] the most intensely committed contributor to the debate" over blackmail. *Id.* at 797. If the degree of intense commitment to this debate can be measured by numbers of pages published on the topic, Berman was correct in his assessment at the time he published in 1998. The total number of pages published by Lindgren up until and including 1997 was 152.5; by Block, as of that date, 58 pages (corrections were made in this calculation for number of co-authors, but not for size of page). As of 2001, these positions had been reversed; Block had published 252 pages, Lindgren remained at 152.5.

25. *Id.* at 799-800. I entirely agree with Berman's last statement.

well does the libertarian legalization thesis do in this regard (in showing why there is no such thing as a blackmail puzzle, or paradox)?

A. Consequentialists

Berman begins his analysis with theories that defend blackmail prohibition on grounds of reducing harm or negative social consequences.[26] He considers the views of economists who believe that blackmail contracts are economically inefficient, and should be prohibited on that basis.[27] We shall consider his views in some detail, not because he refutes them well,[28] nor because the theories he deals with are not in any great need of refutation,[29] but mainly as a means of using his refutations of other mainstream legal philosophers against his own views.
Berman distinguishes:[30]

> four types of blackmail based on the manner in which the damaging information is obtained: in 'opportunistic blackmail,' the blackmailer innocently stumbles upon information he subsequently realizes will serve as useful blackmail fodder; in 'participant blackmail,' he was a participant in the conduct about which he later blackmails the victim; in 'commercial research blackmail,' the blackmailer consciously seeks information in order to blackmail his victim; and in 'entrepreneurial blackmail,' the blackmailer entices a victim into a compromising situation for the specific purpose of producing the material with which he can blackmail.[31]

Berman quite correctly points out, against the claims of Ginsberg and Schectman,[32] that at least insofar as the first two types of blackmail are concerned, there can be no question of any economic costs, since there are none. Hence, these, at least, even in

26. *Id.* at 801.
27. *Id.* at 802.
28. He does refute them well for the most part.
29. This has been done not only by the libertarian literature on blackmail (*supra* note 5), but also by the mainstream writings on this subject (*supra* note 4) which is self-refutational, taken as a whole, in that no attempt to explain the so called paradox survives without fatal objections. However, you can never have too much of the truth, and thus even more piling on is always welcome.
30. Berman, *supra* note 1, at 803.
31. *Id.* (citing Hepworth, *supra* note 4, at 73-77).
32. Ginsberg & Schectman, *supra* note 4.

the view of Ginsberg and Schectman, ought to be legalized.[33] Since these two authors advocate no such thing, this is a flaw in their view, sees Berman, to his credit. We might add that even *if* it can somehow be shown that blackmail does involve costs, it still does not follow that it ought to be prohibited. For surely there are numerous inefficient activities we pursue, all of which waste resources. For example, lying around in a hammock on a lazy summer's day; watching soap operas; goofing off; day dreaming; floating mindlessly in a swimming pool. Yet, it would be a very courageous legal philosopher who would acquiesce in the notion that since these acts are all improvident, they ought to be outlawed, the basic premise of the so called economic point of view on blackmail.[34]

Consider now Berman's criticism of Shavell.[35] The latter argues that "'potential *victims* will exercise excessive precautions or reduce their level of innocent, yet embarrassing, activities' to prevent being blackmailed by persons who chance upon damaging information."[36] Berman points out, "[s]uch an assumption is an economic reason for making blackmail illegal only if the costs of these consequences outweigh their social benefits."[37] But Berman overlooks the insight that *even if* the cost benefit analysis could somehow be made to indicate this,[38] that the normative positive distinction would still vitiate against any such conclusion.

Then, too, this omission on Berman's part mars his otherwise splendid rejection of Posner's argument for the status quo on blackmail legislation. In the words of the former, the latter, "concedes that the social welfare arguments against . . . blackmail — threats to reveal that a victim has engaged either in a criminal act for which he was not caught and punished or in disreputable or immoral acts that do not violate any commonly enforced law— are

33. *Id.*

34. Economics is a positive, not a normative, science. Therefore, there cannot *be* any such thing as an economic point of view on whether or not blackmail should be legalized.

35. Berman, *supra* note 1, at 806.

36. *Id.* (citing Shavell, *supra* note 4, at 1903).

37. *Id.*

38. It cannot be. The problem run in to by all such attempts to measure benefits and costs between one person and another is known in economics as the "insoluble problem of interpersonal comparisons of utility," and the "impossibility of cardinal utility." All we can know is that one person, for example, prefers an apple to an orange. This is the valid notion of ordinal utility. Cardinal utility would imply that the person in question derives, say, 10 "utils" (measures of happiness) from the apple, and only 5 from the orange. In addition to this illicit concept, cost-benefit analysis requires the additional step of interpersonal comparisons: John obtains 20 utils from an apple, Bill only 10; therefore the former likes apples twice as much as the latter. For more on the necessarily subjectiveness of all such "calculations," see JAMES M. BUCHANAN & G.F. THIRLBY, L.S.E. ESSAYS ON COST (1981); JAMES M. BUCHANAN, COST AND CHOICE: AN INQUIRY INTO ECONOMIC THEORY (1969); LUDWIG VON MISES, HUMAN ACTION (1949); MAN, ECONOMY AND STATE, *supra* note 5.

inconclusive."[39] And what artillery does Berman launch at Posner's refusal to embrace blackmail legalization, even though, by his own admission, he cannot make the case that all such acts are wealth reducing, the be-all and end-all of his philosophy? Berman states,

> the economic case against blackmail cannot survive without more rigorous empirical work and predictive modelling [sic]. Unless and until the law and economics scholars can demonstrate more persuasively that blackmail reduces social wealth, it will remain difficult to reconcile their defense of blackmail's criminalization with their methodology's scientific and positivist aspirations.[40]

But all the "empirical work" in the world cannot demonstrate that one party disvalues an act more or less than another party values it.[41]

Here is how Berman dismisses the utilitarian argument for blackmail prohibition:

> The foregoing analysis supports three conclusions about the law and economics argument on blackmail. First, the economic approach fails to justify prohibitions against adventitious blackmail. Second, whether other major forms of blackmail are truly disadvantageous on law and economics principles is far from certain once one takes externalities into proper account. Third, it is unlikely that the economic argument warrants resort to the criminal law.[42]

In the view of the Epstein,[43] decriminalization will lead to "Blackmail, Inc.," a firm specializing in this practice on a commercial basis. For Epstein, quoted by Berman, "blackmail is criminal because it has a necessary tendency to induce *other* acts of theft and deception, the criminalization of which is wholly

39. Berman, supra note 1, at 809 (referring to Posner, *supra* note 4, at 1835).

40. *Id.* at 809-10.

41. A puzzle in nomenclature. Berman discusses, "why blackmail is not merely discouraged or even prohibited, but criminalized." *Id.* at 810. He states, "assuming that the blackmail deal is unproductive, the question remains why it should be illegal, let alone criminal." *Id.* at 829. Both of these statements appear to maintain a distinction between that which is prohibited, or illegal, on the one hand, and criminal, on the other. But surely each implies the other. That is, if an act is illegal, then to undertake it is criminal. Alternatively, if something is criminal, then to do it is to engage in a prohibited, or illegal, act.

42. *Id.* at 813.

43. Epstein, *supra* note 4, at 562.

*un*puzzling."[44] Berman has three reasons for rejecting this contention of Epstein's. His first is as follows:

> Consider, for example, a blackmail proposal in which the blackmailer demands sexual favors for the nondisclosure of embarrassing information that the victim has no moral obligation to divulge (such as her own illegitimate birth). This form of blackmail would neither induce the victim to engage in theft or fraud nor encourage any 'deception' that society has a legitimate interest in deterring. Under Epstein's reasoning, it should not be criminalized.[45]

Although a clever attempt to undermine Epstein, this example cannot withstand scrutiny. First of all, if Blackmail, Inc. got wind of the illegitimate birth of this woman, and she were so ashamed of it that she would rather dispense sexual favors than be exposed, then her own economic condition would be reduced from what it would have been had this whole episode not arisen.[46] But if we believe that crime arises due to poverty, and she is poorer in a very meaningful manner, then she is more apt to engage in criminal behavior than otherwise. Not only does this premise follow based on a reduction in her general wealth level, it also may be derived, more specifically, from the fact that she now has less time available to earn an honest living. The dispensing of sexual favors, after all, takes time. Time is money, according to the old aphorism. With more of her daily routine taken up in satisfying her blackmailer, there is just that much less time available to her to earn an honest living. This might well, further, incline her to a life of crime.

Let me elaborate. Whether or not it is true that the blackmailed woman will more likely turn to crime as a result of the "ravages" of Blackmail, Inc., Berman, at least, is in no position to object to this contention. This is because Berman is attempting *a reductio* on Epstein; that is, Berman is implicitly accepting, for the sake of argument, Epstein's premise that *if* the girl were to turn to a life of crime due to her becoming a blackmailee,[47] then Epstein would be

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44. Berman, *supra* note 1, at 814 (quoting Epstein, *supra* note 4, at 553).

45. *Id*. at 815-16.

46. Of course, it is always better, from her point of view, that her secret be in the hands of Blackmail, Inc., rather than in the hands of a gossip, but that is another matter. Right now, we are attempting to establish that her wealth position would be worsened once her secret gets out; it matters not to whom.

47. I refuse to characterize this woman as a "victim" of blackmail for several reasons. First, "victim" implies the presence of a perpetrator, or a victimizer; this is akin to conceding that the blackmailer is a criminal. Second, it is not even a matter of contention that gossip should be proscribed by law. But gossip worsens the position of a person with a secret to keep

correct. The power of Berman's example, I take it, is that he has seemingly found a bona fide case of blackmail with no impetus for the blackmailee to turn to crime, as Epstein avers. Berman has not unearthed such a case.

Berman then maintains that,

> [a] second problem with Epstein's theory is that the claim upon which it rests — that force and fraud demarcate the criminal law's proper reach — is extremely dubious. Even aside from 'victimless' offenses such as gambling, prostitution, and drug use, criminalization of which is notoriously suspect on liberal principles, the state makes numerous activities criminal that appear not to involve either force or fraud. These offenses cover a wide range of conduct from statutory rape to indecent exposure to larceny by stealth.[48]

But this, too, is problematic. First of all, Berman treads dangerously close to legal positivism, the doctrine that all laws are necessarily just.[49] He does this in implying that just because "gambling, prostitution, and drug use"[50] are illegal, they somehow serve as a counter weight to Epstein's libertarian claim that force and fraud are necessary and sufficient for outlawry.[51] He does crawl back from this position by conceding that these laws are "notoriously suspect on liberal principles,"[52] but this is not the half of it. These laws are a moral monstrosity in the free society, precisely because of Epstein's well-founded concern with force and fraud. And why the quotation marks around the word "victimless?" These acts are indubitably victimless, not of course in the sense that the dependents of the gambler, or drug user, will not be worse off from these practices,[53] but because they are volitional on the part of the prostitute or addict.

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far more than does blackmail. If we as a society are not going to incarcerate the gossip, the issue of doing so for the blackmailer should not even arise.

48. *Id.* at 816.

49. The mention of Nazi law, or, for that matter, Communist law, ought to put paid to that notion.

50. *Id.*

51. See *supra* note 9, for libertarian literature in support of this contention. As it happens, although Epstein does indeed take the libertarian position on this one issue, his own views are not totally compatible with that philosophy. David Gordon, *Book Review*, MISES REV. (1995) (reviewing RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995)).

52. Berman, *supra* note 1, at 816.

53. Which would occur, in any case, with regard to the dependents of real victims of real crimes, such as murder, theft, or rape.

More serious is Berman's claim that statutory rape, indecent exposure or larceny by stealth are all both properly criminal and do not violate Epstein's strictures against force and fraud. Let us consider each in turn. Laws prohibiting statutory rape, provided that they deal with underage children, are certainly compatible with Epsteinian notions. Children, in the absence of appropriate adult supervision, are in effect defined as people upon whom fraud is necessarily perpetrated. One simply cannot treat youngsters as adults, and the refusal to do so hardly counts as a violation of the libertarian axiom proscribing violence against adult non-aggressors or their property.

Indecent exposure, contrary to Berman, should not be a crime at all. True, it does not at all involve initiatory aggression, but, as there are no "victims," it should not be legally prohibited. Nudism cannot be a *per se* violation of law, lest there would be no nude paintings. Were going about *sans* cloths necessarily invasive, it could not be allowed, period.[54] But what of the rendering of the social fabric, if naked people are able to cavort entirely upon their own recognizance, with no consideration given to others who might be offended, even outraged, by such goings on? The solution to this problem does not lie in the criminalization of nudity; rather, it may be found in the institution of private property. How would this work? How, without a law to the contrary, could people be prevented from, say, fornicating on their front porches, in plain view of sundry passers-by? This could be accomplished via private street ownership.[55] The road owner, for much the same reasons as the

54. Compare nudity, or exposure of the unclothed human body (there is nothing "indecent" about this), with murder, rape, or kidnapping, which are intrinsically unlawful, at least under the libertarian legal code.

55. For discussion of the practicality, nay, the viability, of private street, road and highway ownership and management, see Walter Block, *Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock*, 8 J. DES ECONOMISTES ET DES ETUDES HUMAINES 315 (1998); Walter Block, *Compromising the Uncompromisable: Speed, Parades, Cigarettes*, 40 ASIAN ECON. REV. 15 (1998); Walter Block, *Private Roads, Competition, Automobile Insurance and Price Controls*, 8 COMPETITIVENESS REVIEW 55 (1998); Walter Block, *Road Socialism*, 9 INT'L J. VALUE-BASED MGMT. 195 (1996); Walter Block et. al., *Roads, Bridges, Sunlight and Private Property Rights*, 7 J. DES ECONOMISTES ET DES ETUDES HUMAINES 351 (1996); Walter Block, *Public Goods and Externalities: The Case of Roads*, 7 J. LIBERTARIAN STUD. 1 (1983); Walter Block, *Theories of Highway Safety*, TRANSP. RES. REC. 7 (1983); Walter Block, *Congestion and Road Pricing*, 4 J. LIBERTARIAN STUD. 299 (1980); Walter Block, *Free Market Transportation: Denationalizing the Roads*, 3 J. LIBERTARIAN STUD. 209 (1979); Michelle Cadin & Walter Block, *Privatize the Public Highway System*, 47 THE FREEMAN 96 (1997); Dan Klein, *The Voluntary Provision of Public Goods? The Turnpike Companies of Early America*, 28 ECON. INQUIRY 788 (1990); Dan Klein et al, *Economy, Community and the Law: The Turnpike Movement in New York, 1797-1845*, LAW & SOCIETY REV. (1993); Dan Klein et al., *From Trunk to Branch: Toll Roads in New York, 1800-1860*, ESSAYS IN ECON. & BUS. HIST. 191 (1993); Dan Klein & G.J. Fielding, *Private Toll Roads: Learning from the Nineteenth Century*, TRANSP. Q. 321 (1992); Dan Klein & G.J. Fielding, *How to Franchise Highways*, J. TRANSP. ECON. & POL'Y 113 (1993); Dan Klein & G.J. Fielding, *High Occupancy/Toll Lanes: Phasing*

condominium developer, would find it in his best interests to preclude public nudity. If he did not, the value of his lands would suffer and he would become a candidate for bankruptcy. Conceivably, there might be some few streets in the nation where nakedness would not be obviated through contractual arrangements; there are, after all, some plots of land devoted to nudist colonies. But virtually all road owners would substitute contract for legal prohibition. And this is just as it should be, for, while no one wants rampant nudity, everywhere, it simply is not a crime, akin to murder or rape, Berman to the contrary notwithstanding.

Third, there is "larceny by stealth." Presumably, by this Berman alludes to pick-pocketing, bad check writing, mislabeling products, selling underweight, counterfeiting credit cards,[56] or the like. Now it must be admitted at the outset that these are crimes; however these are not crimes of violence. Superficially, then, Berman seems to have Epstein over a barrel. Here are acts that clearly ought to be proscribed by law, and yet they do not utilize "force." But Epstein mentions both force *and* fraud, and surely the latter four crimes mentioned above are fraudulent. What about pick-pocketing? If it is done well, it can hardly be done "forcefully." And say what you will about it, but it is not fraud. Has Berman finally come up with an example that embarrasses Epstein's libertarian insight? Not a bit of it. Berman's mistake is that he interprets force, or violence, far too narrowly. He sees it almost as a term in physics, not law. That is, for him, the criterion is implicitly in terms of foot pounds of energy expended, or "work" in the sense of force multiplied by distance. But for Epstein, and all libertarians, this is not at all the meaning of the term. Rather, for him, it is understood strictly in legal terminology: as doing "violence," that is, violating the rights of person or property.[57] And while pick-pocketing certainly contains no violence known to the student of physics,[58] it cannot be denied that it is in violation of private property rights to wallets.

Having refuted Berman's critique of Epstein on blackmail is certainly not to say that the views of the latter are warranted. Just

in Congestion Pricing a Lane at a Time, POL'Y STUDY 170 (1993); GABRIEL ROTH, THE PRIVATE PROVISION OF PUBLIC SERVICES IN DEVELOPING COUNTRIES (1987); GABRIEL ROTH, PAYING FOR ROADS: THE ECONOMICS OF TRAFFIC CONGESTION (1967); GABRIEL ROTH, A SELF-FINANCING ROAD SYSTEM (1966); FOR A NEW LIBERTY, *supra* note 9; WOOLRIDGE, *supra* note 9.

56. Notice, I do not say "counterfeiting fiat currency." This is because dollars, lira, pounds, marks, yen, etc., are already counterfeited (of gold), and far from counterfeiting counterfeit money being a crime, it should be seen as a legal act. DEFENDING THE UNDEFENDABLE, *supra* note 5, at 109-20.

57. We sometimes speak in terms of "doing violence to the facts." We hardly mean bashing the facts on the head with a baseball bat, whatever that would mean. This elocution is rather a somewhat poetic synonym for lying, or at least being mistaken.

58. Delicacy is all it contains.

because Berman fails to lay a glove on Epstein does not ensure the validity of his scare model of Blackmail, Inc.[59] This is not the time or the place for a full scale critique of Epstein on blackmail.[60] Suffice it to say that many actions lead to crime. But there is many a slip between cup and lip. "Leading" to crime, a tendency for crime to occur in the wake of something or other, is not the same as crime *per se*. Only the latter should be prohibited by law. Which entirely innocent acts, for example, are correlated with criminal behavior? Soccer games, for one thing; the "soccer hoodlums" of Europe seem almost brought to a frenzy by the advent of this game. Nor are such occurrences by any means a monopoly of under-developed civilizations in other parts of the world. When the Chicago Bulls won their last NBA championship, their fans celebrated by rioting and looting. Movies depicting gang violence are often followed up by such acts in real life. Were we to take Epstein seriously, the soccer and basketball athletes, and the movie actors, producers and writers who "lead to" these crimes would all be incarcerated, a manifest injustice.[61] Let blackmail be ever so much strongly associated with crime, real crime; that is, it does not follow in the slightest that the act of offering to keep silent for a fee should be criminalized.

B. Deontologists

So much for the consequentialists. What of the deontologists? The first commentator considered by Berman who dismisses blackmail legalization not for its supposed bad effects but for its presumed intrinsically evil nature is Gorr.[62] Berman introduces this author as a corrective for the views of Feinberg.[63] The latter commentator arouses Berman's *ire* since he actually has the audacity to maintain that at least one kind of blackmail, exposing adultery, should be legalized.[64] Instead of directly confronting Feinberg on this apostasy, he dismisses him on the ground that his "conclusion is startling."[65]

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59. Epstein, *supra* note 4, at 562.

60. Block & Gordon, *supra* note 5, at 37-38.

61. Berman offers a magnificent example of the sneaker manufacturers who justifiably persist in providing these products to the public despite their knowledge that inner city youth are target-wearers of them. Berman, *supra* note 1, at 816 n.67.

62. Gorr, *supra* note 4.

63. Feinberg, *supra* note 4.

64. I do not list Feinberg's work in note 5, since this note is reserved for authors who favor the legalization of blackmail *per se* and in principle; rather, his work is listed in note 4, with those who favor the criminalization of blackmail, in either all or part.

65. Berman, *supra* note 1, at 821. For further examples of this and other authors' refusal to come to grips with those who propound the view that blackmail should be legalized, see *supra* note 12.

It is here that Berman indicates the glimmerings of a philosophy that will undermine his own perspective.[66] He states, "[b]ecause it is clearly wrongful not to report the identity of someone who has committed a felony, there would be nothing puzzling or problematic about criminalizing the conditional offer not to report a crime."[67] The difficulty here is with "clearly wrongful." By use of this phrase, without any supporting documentation whatsoever, Berman reveals himself as a scholar who is willing to use imprecise language as the premise of his conclusions. What is clearly wrongful? Is it immoral?[68] Should it be punished by law? Does it merely mean that the speaker opposes such action? Is it "clearly wrongful" to smoke cigarettes, or for a fat person to eat chocolate, and is there "nothing puzzling or problematic about criminalizing" these activities also?[69]

The problem, here, apart from lack of clarity concerning crucial terminology, is that Berman is implicitly extolling a "Good Samaritan" concept of the law. Not satisfied with prohibiting the invasion of other people's persons or property, here this author is calling for criminalization for *failure* to perform deeds that are essentially supererogatory. To turn in a criminal to the authorities, or to give charity to the poor, is *over and above the call* of legal duty. It simply *cannot* be a requirement of law, since if it were, we would *all* be in jail. For if it is a legal obligation to "report the identity of someone who has committed a felony,"[70] then it is a requirement that one go out and *look* for felons to inform on. This is essentially an open-ended requirement, or a positive obligation in philosophical parlance, which, by its very nature, can have no limit. Even sleep, apart from that amount required to maximize the turning in of criminals to the authorities, would be proscribed. It will do no good to contend that the obligation is satisfied by merely notifying the police of crimes that one happens to witness by accident.[71] For if it is *really* an obligation, then it is a positive one — one must devote one's entire life to this process. Similar to charity. If it, too, is a positive commitment, then one must give away all of one's worldly possessions,[72] until one's wealth level has reached that of the poorest members of society.

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66. *Id.* at 834.

67. *Id.* at 820.

68. *See id.* On numerous occasions, Berman uses the concepts of "immorality," "unnecessary misery," and "harm causing" as a stick with which to beat his opponents, without condescending to define these terms.

69. *Id.*

70. *Id.*

71. If this were all there were to the obligation, then people would go around with blinders on, lest they witness anything untoward.

72. And if we take this to its logical conclusion, and why should we not, then to also enslave oneself to the poor.

Another philosophical difficulty arises when Berman states, in his refutation of Gorr, "if we do not believe that an actor knows where her moral duty lies, it makes no sense to hold her morally culpable for risking violation of that duty."[73] If this were all there were to it, it would be unobjectionable. After all, it would appear to logically follow that we cannot hold anyone morally blameworthy[74] if he does not know his moral duty. However, Berman means to imply more than this; specifically, that if a person is not morally blameworthy, he should not be punished by law for committing a crime; and this is indeed a difficulty.

Take the following case: a person who clearly cannot be blameworthy (i.e., a baby,[75] a sleeping person, or an insane person) somehow fires a pistol and kills an innocent passerby. Traditional law, of the sort advocated by Berman, would hold the perpetrator of this crime morally blameless, and therefore not indictable for the crime of murder.

But suppose there were available a machine[76] that could switch the life from the live murderer into the body of his dead victim. In other words, we could forcibly place the baby,[77] sleeping person, or insane person who discharged the pistol into one compartment of this machine; and into the other compartment we could place the body of the victim of this shooting. Then, we could pull the switch, and out would emerge a newly enlivened ex-dead victim, along with a now newly dead baby,[78] sleeping person, or insane person. The question is should we pull that switch? That is, will justice be served if we do, and not be served if we as a society decline to do so? Clearly, the interests of justice would be served if we undertook this transfer operation, for of all the people in our little tableau, the dead victim is the most innocent. It will not do to merely look at the shooter and ask if he is morally culpable or not; this is the practice of most legal theorists, including Berman. This is very much beside the point. The real issue is that there is only one life available, and there are two competitors for that life — the murdered man, on the one hand, and the baby, sleeping person, or insane person on the other hand. Whatever the moral merits or demerits of the perpetrator of this crime, the *best* that can be said about him is that there were extenuating or ameliorating circumstances involved. What can be said in behalf of the victim, in contrast, is that he is

73. Berman, *supra* note 1, at 822.

74. Whatever that means, and Berman vouchsafes us no answer.

75. I owe this example to Matthew Block.

76. Inspired by NOZICK, *supra* note 4.

77. I owe this example to Matthew Block.

78. If the idea of taking the baby's life away from it is hard to contemplate, substitute the baby's parent for the baby, or whoever left the gun in its grasp.

totally, completely and fully innocent of *any* wrongdoing whatsoever, and if anyone deserves this one life available, it is he.[79] Motives, culpability, blameworthiness, immorality are all very much beside the point.

But Berman is having none of this. In his view, "[w]hereas victims are concerned solely with harm, the law is concerned with the defendant's culpability, of which harm is but a minor ingredient."[80] It doesn't seem to be able to permeate Berman's view that there is another competing theory of punishment available for consideration. In this libertarian view,[81] the victim, not the perpetrator, takes center stage. It is the plight of the latter, not the situation of the former, that is of immense concern. In Berman's opinion, in contrast, can we but find the criminal blameless, or come up with an excuse for him, then all attempts to render the victim whole again -- surely the essence of punishment theory -- will have to go by the boards.

Let us look at Katz's case of *Smithy vs. Louie*[82] through the eyes of Berman. Both of these worthies break into Bartleby's home on successive nights, to steal his valuables.[83] Smithy beats him up and does not take his treasure, while Louie does the latter not the former.[84] Bartleby prefers his treatment at Smithy's hands to Louie's, since he values his property more than his physical integrity.[85] Berman sums up as follows:

> The law, of course, would punish Smithy the batterer more severely than Louie the thief, and Katz approves. The criminal law, he argues, should not take account of a victim's idiosyncratic preferences.

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79. Unfortunately for Berman, his theory, to be discussed below, depends intimately upon moral blameworthiness.

80. Berman, *supra* note 1, at 827.

81. ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS (Randy Barnett & John Hagel III eds., 1977); Walter Block, *Toward a Libertarian Theory of Guilt and Punishment for the Crime of Statism: The Rise and Fall of the State* (forthcoming) (manuscript on file with author); Walter Block, *National Defense and the Theory of Externalities, Public Goods and Club*, *in* EXPLORATIONS IN THE THEORY AND HISTORY OF SECURITY PRODUCTION 332 (Hans-Hermann Hoppe et al. eds., 2002); J. Charles King, *A Rationale for Punishment*, 4 J. LIBERTARIAN STUD. 151, 154 (1980); N. Stephan Kinsella, *A Libertarian Theory of Punishment and Rights*, 30 LOY. L.A. L. REV. 607 (1997); *New Rationalist Directions in Libertarian Rights Theory*, *supra* note 9; N. Stephan Kinsella, *Punishment and Proportionality: The Estoppel Approach*, 12 J. LIBERTARIAN STUDIES 51 (1996); *Estoppel: A New Justification for Individual Rights*, *supra* note 9; N. Stephan Kinsella, *Inalienability and Punishment: A Reply to George Smith*, 14 J. LIBERTARIAN STUD. 79 (1998-99); THE ETHICS OF LIBERTY, *supra* note 5.

82. Katz, *supra* note 4, at 1582-83.

83. *Id.*

84. *Id.*

85. *Id.*

> Whereas victims are concerned solely with harm, the law is concerned with the defendant's culpability . . . . Smithy is punished more severely than Louie because battery is morally worse than theft. For the same reason, the law rightly views blackmail in light of what the blackmailer intends to do — take money from one who does not want to part with it.[86]

Although it is Berman citing Katz in this paragraph, the former does not disagree with the latter in any of these contentions. Berman confines his criticism to Katz's mere assertion, without discussion or argument, as to which acts are immoral, and why.[87]

This refusal of Berman's to elucidate his own concept of immorality — a lynchpin of his perspective on blackmail, and on much else in criminal law — comes with particular ill grace given his castigation of Katz that he "simply asserts that the act the blackmailer threatens is immoral."[88] And again: "whether the act threatened is a moral right or a moral wrong (or something else) cannot be simply assumed without argument."[89]

As well, it is patently false that the blackmailer takes "money from one who does not want to part with it."[90] Very much to the contrary, the holder of a secret will give his eye teeth to the blackmailer to ensure he does not spill the beans. The blackmailee is deliriously happy to fall into the clutches of someone who will keep silent, for a fee, rather than someone who will blab no matter what he does.

Further, what are we to make of the claim that "battery is morally worse than theft"?[91] How can Katz make such a statement, and Berman acquiesce in it, without a shred of discussion of what morality is? The trouble with mainstream punishment theory is that there is no deontological connection between what the perpetrator does, and what he suffers in return. In contrast, libertarian punishment theory[92] is predicated on the notion that the punishment should be proportionate to the crime. Specifically, this translates into the formula that whatever the miscreant does to his victim is done to him, only twice over. Sometimes called "two teeth for a tooth" theory,[93] this mandates that whatever the perpetrator does to the victim, he be repaid two fold, with cognizance taken of

86. Berman, *supra* note 1, at 827.
87. *Id.* This criticism, in my view, applies to Berman as well.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *See supra* note 11; Berman, *supra* note 1, at 828.
93. ETHICS OF LIBERTY, *supra* note 5, at 88.

the costs of capturing him, and with a premium for endangering the latter.

How would this work with the pedestrian theft of a television set? First off, the criminal must be made to disgorge the television he stole, giving it back to the victim. Second, what the burglar tried to do to the victim must be done to him; that is, in this case, a second tv must be seized from the brigand, and given over the to the robbery victim.[94] Assuming that the crook turns himself over to the police immediately after the dastardly act, there is no further penalty for the costs of searching for him, convicting him, etc.[95] However, if the miscreant came to the victim's domicile with a gun, while the occupant was at home, this is far worse, in terms of endangerment, than if he came unarmed, to an empty house. He will be in any case forced to play Russian roulette, but in the latter case there will be many more chambers, and many fewer bullets, than in the former. Monetary payment may be negotiated between victim and perpetrator at any stage in the negotiations.[96] For example, if the crime is sexual battery, and the punishment includes the use of a broomstick on the rapist,[97] the latter with the permission of the former, may be able to come to an agreement as to the monetary payment in lieu of this punishment.

Contrast this type of punishment with the mainstream view on the matter. Under present law, the victim is an afterthought. The main emphasis is on rehabilitating and re-educating the criminal. Naturally, all of this is done at the taxpayer's (i.e., the victim's) expense. This is to add insult to injury. First, the citizen is mulcted by the criminal stealing his television set. Then he is made to cough up a second time, to keep the criminal in a nice cozy jail, with air conditioning, a color television,[98] a gymnasium/weight-lifting room, hot and cold running water, social workers, and public defenders.

To return to the case in point. In the libertarian perspective, there is no need to make any essentially arbitrary assessments of which is "worse," battery or theft. In each case, what was done to the victim is carried out twice fold upon the person and or property

94. If the wrongdoer does not have a television set of his own with which to make recompense, its value will be in effect taken out of his hide. That is, he will be forcibly enslaved until he earns the requisite funds. In the libertarian society, only slavery and the kidnapping of innocent people, not criminals, are proscribed by law.

95. This would be the "transactions costs" so beloved in the University of Chicago Law and Economics tradition. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

96. The victim may before the criminal is even caught, contractually give over these rights to an agent (a private police force - insurance company) so as to forestall any retaliation.

97. This would be done twice, according to our formula.

98. A poetic injustice in the case of television theft, for the bad guy might benefit from viewing the idiot box while the previous owner is forced to do without.

of the evil doer, with due allowances for peripheral punishments as outlined above.[99]

In contrast to the libertarian theory, Berman asks, stipulating for argument's sake that compensation to the victim of crime is justified: "[H]ow does one set the proper compensation level? Ideally, the state should replicate the market price for the boundary crossing — that is, the price upon which the persons threatened by the conduct and the person who wishes to engage in it would agree in a voluntary transaction."[100]

This, however, seems tongue in cheek, for no sooner does Berman raise this issue but he discards it:

> [T]he likely existence of a transactional surplus (where the minimum price acceptable to the seller is less than the maximum price acceptable to the buyer) makes it impossible to ascertain the hypothetical market price. And it would be unfair to allow the boundary crosser to appropriate all the benefits of the exchange by compensating the "seller" of the right in an amount (less than the market price) necessary to keep him on the same indifference curve.[101]

True, setting up quasi-market shadow prices is not a rational way to go about compensating the victim, but this leaves untouched the libertarian approach.[102]

In his treatment of Nozick, Berman seems to buy into the notion that the rights of two different people can clash.[103] He describes Nozick's position as follows: "when the state does prohibit conduct

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99. The main competitor with libertarian punishment theory is put forth by the University of Chicago School of Legal Theory. Based on utilitarianism, this perspective posits that punishment be set so as to minimize the costs of crime, or to maximize some measure of social welfare, such as GDP. The difficulty here can be seen by assuming that the "best," i.e., most "economical" or "efficient," punishment for petty theft was the death penalty. Even if this would indeed maximize GDP, it would still be unjust, i.e., disproportionate to the crime. For the utilitarian viewpoint on crime and punishment, see FRIEDMAN, *supra* note 9; Isaac Ehrlich, *Participation in Illegitimate Activities — An Economic Analysis*, *in* THE ECONOMICS OF CRIME AND PUNISHMENT (Gary S. Becker & William Landes eds., 1974); Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 2 J. LEGAL STUDIES 259 (1972); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUDIES 257 (1974); Isaac Ehrlich, *The Economic Approach to Crime — A Preliminary Assessment*, *in* CRIMINOLOGY REVIEW YEARBOOK 1 (Sheldon L. Messinger & Egon Bittner eds., 1979).

100. Berman, *supra* note 1, at 829-30.

101. *Id.* at 830.

102. For a critique of indifference curves on the ground that all human action consists of preference and ranking, see Murray N. Rothbard, *Toward a Reconstruction of Utility and Welfare Economics*, *in* I THE LOGIC OF ACTION: METHOD, MONEY AND THE AUSTRIAN SCHOOL (Edward Elgar ed., 1997).

103. Berman, *supra* note 1, at 828-32. I infer this from the fact that Berman scathingly dismisses all the other of Nozick's contentions he deals with, except for this one.

that risks crossing the moral boundary of another, it should usually compensate the party whose liberty is thus infringed."[104] But if rights are properly specified, they can never be incompatible with one another. To say that I have a right to do X, and that you have a right to prevent me from doing X is to support internally inconsistent law. To support the infringement of liberty, in a book dedicated to articulating the implications of liberty, is rather problematic. It is even possible to describe this line of reasoning as descending to the depths of self-contradiction.[105]

Berman's treatment of Nozick's theory of unproductive exchange also leaves something to be desired. Berman approvingly cites Nozick to the effect that,

> 'If your next-door neighbor plans to erect a certain structure on his land, which he has a right to do, you might be better off if he didn't exist at all . . . . Yet purchasing his abstention from proceeding with his plans will be a productive exchange. Suppose, however, that the neighbor has no desire to erect the structure on the land; he formulates his plan and informs you of it solely in order to sell you his abstention from it. Such an exchange would not be a productive one; it merely gives you relief from something that would not threaten if not for the possibility of an exchange to get relief from it.'[106]

Berman states, "[a]s Nozick's last sentence suggests, the proposal leading up to the hypothesized unproductive exchange is a threat — because it is coercive — not an offer."[107]

But this is a particularly perverse way of distinguishing between a threat and an offer. The point is, the neighbor has every right to erect this structure on his land, as even Nozick, and thus Berman, acknowledge. But if he has a right[108] to do this, he also has a right

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104. *Id.* at 830.

105. For a thorough going, indeed, blistering critique of ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974) from a libertarian perspective, see Randy E. Barnett, *Whither Anarchy? Has Robert Nozick Justified the State?*, 1 J. LIBERTARIAN STUD. 15 (1977); Roy A. Childs, Jr., *The Invisible Hand Strikes Back*, 1 J. LIBERTARIAN STUD. 23 (1977); Williamson M. Evers, *Toward a Reformulation of the Law of Contracts*, 1 J. LIBERTARIAN STUD. 3 (1977); Murray N. Rothbard, *Robert Nozick and the Immaculate Conception of the State*, 1 J. LIBERTARIAN STUD. 45 (1977); John T. Sanders, *The Free Market Model Versus Government: A Reply to Nozick*, 1 J. LIBERTARIAN STUD. 35 (1977).

106. Berman, *supra* note 1, at 831 n.127 (quoting NOZICK, *supra* note 4, at 84-85 n.2).

107. *Id.*

108. We implicitly assume there is an absence of any zoning restriction to the contrary. But even if such a law were in effect, it would still be unjust. For criticism of zoning legislation, see Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970); BERNARD SIEGAN,

to refrain. And if he has a right to refrain, he has a right to be paid for so doing, if he can find a willing customer. And he can! You, his neighbor, have agreed to pay him to refrain from that which he has every right to do — to "threaten" to erect this structure, but not to carry through with it.

Rothbard provides the definitive critique to Nozick, explicitly, and by extension, to Berman:

> For his criterion of a 'productive' exchange is one where each party is better off than if the other did not exist at all; whereas a 'non-productive' exchange is one where one party would be better off if the other dropped dead.[ ] Thus: 'if I pay you for not harming me, I gain nothing from you that I wouldn't possess if either you didn't exist at all or existed without having anything to do with me.'
>
> . . .
>
> Let us then see how Nozick applies his 'non-productive' . . . criteria to the problem of blackmail.[ ] Nozick tries to rehabilitate the outlawry of blackmail by asserting that 'non-productive' contracts should be illegal, and that a blackmail contract is non-productive because a blackmailee is worse off because of the blackmailer's very existence [ ]In short, if blackmailer Smith dropped dead, Jones (the blackmailee) would be better off. Or, to put it another way, Jones is paying not for Smith's making him better off, but for *not* making him *worse off*. But surely the latter is *also* a productive contract, because Jones is still better off making the exchange than he *would have been* if the exchange were not made.
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> But this theory gets Nozick into very muddy waters indeed; some (though by no means all) of which he recognizes. He concedes, for example, that his reason for outlawing blackmail would force him also to

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LAND USE WITHOUT ZONING (1972); Walter Block, *Zoning: A Tragic Public Policy*, *in* THE FREEMAN 470 (1981); Walter Block, *Is Zoning Obsolete?*, *in* VITAL SPEECHES OF THE DAY (1980).

> outlaw the following contract: Brown comes to Green, his next-door neighbor, with the following proposition: I intend to build such-and-such a pink building on my property (which he knows that Green will detest). I *won't* build this building, however, if you pay me X amount of money. Nozick concedes that this, too, would have to be illegal in his schema, because Green would be paying Brown for not being worse off, and hence the contract would be 'non-productive'. [sic] In essence, Green would be better off if Brown dropped dead. It is difficult, however, for a libertarian to square such outlawry with any plausible theory of property rights . . . . In analogy with the blackmail example above, furthermore, Nozick concedes that it *would* be legal, in his schema, for Green, on finding out about Brown's projected pink building, to come to Brown and offer to pay him not to go ahead. But why would such an exchange *be* 'productive' just because Green made the offer? [ ] What difference does it make *who* makes the offer in this situation? Wouldn't Green *still* be better off if Brown dropped dead? And again, following the analogy, *would* Nozick make it illegal for Brown to refuse Green's offer and *then* ask for more money? Why? Or, again, would Nozick make it illegal for Brown to subtly let Green know about the projected pink building and then let nature take its course: say, by advertising in the paper about the building and sending Green the clipping?[109] Couldn't this be taken as an act of courtesy? And why should merely *advertising* something be illegal? Clearly, Nozick's case becomes ever more flimsy as we consider the implications.

> Furthermore, Nozick has not at all considered the manifold implications of his 'drop dead' principle. If he is saying, as he seems to, that A is illegitimately 'coercing' B if B is better off should A drop dead, then consider the following case: Brown and Green are competing at auction for the same painting which they desire. They are the last two customers left.

109. Shades of Katz's Mildred and Abigail "warning" case. Katz, *supra* note 4, at 1569-70.

> Wouldn't Green be better off if Brown dropped dead? Isn't Brown therefore illegally coercing Green in some way, and therefore shouldn't Brown's participation in the auction be outlawed? Or, *per contra*, isn't Green coercing Brown in the same manner and shouldn't *Green's* participation in the auction be outlawed? If not, why not? Or, suppose that Brown and Green are competing for the hand of the same girl; wouldn't each be better off if the other dropped dead, and shouldn't either or both's participation in the courtship therefore be outlawed? The ramifications are virtually endless.

> Nozick, furthermore, gets himself into a deeper quagmire when he adds that a blackmail exchange is not 'productive' because outlawing the exchange makes one party (the blackmailee) no worse off. But that of course is not true: as Professor Block has pointed out, outlawing a blackmail contract means that the blackmailer has no further incentive *not* to disseminate the unwelcome, hitherto secret information about the blackmailed party.[110]

Berman also errs in his own critique of Nozick's "drop dead" theory. He states:

> But the equivalence between coercion and unproductive exchanges does not always hold. Imagine that your coworker announces that his daughter is selling Girl Scout cookies and that he will be taking orders. You subscribe for four boxes of Thin Mints at $2.50 per box. Although you'd prefer the $10 to the cookies, you estimate that to decline the offer might cause you some reputational harm, and you value the cookies and the preservation of your reputation more highly than $10 plus a possible slight diminution of your office status. This is plainly an unproductive exchange — you would have preferred that your coworker had never mentioned his daughter and the cookies. But the offer to sell you Girl Scout cookies is not a threat (because it doesn't

110. THE ETHICS OF LIBERTY, *supra* note 5, at 240-42.

> put you worse off than your expected or morally deserved baselines).[111]

To be sure, as Berman observes, your co-worker's suggestion is an offer, not a threat. But this is *not* "because it doesn't put you worse off than your expected or morally deserved baselines."[112] In the absence of a definition of morality, it ill behooves this author to rely on any such justification for his position: we simply have no independent criterion to determine what your deserved baseline is. Even if we blindly accept that this exchange *would* put you below this level, it is *still* not a threat, because there are numerous ways in which this could occur and yet no threat take place. For example, a bakery could open its doors right next to yours, and attract your customers away from you; your girlfriend could take up a new religion, and leave you on this basis; you could be fired from your job for any number of reasons having nothing to do with a threat. All of these occurrences would leave you "worse off." No, the reason Berman is correct in maintaining that your co-worker's announcement is not a threat is because he has every *right*[113] to make such an offer.

III. BERMAN'S THEORY

A. Preliminary

After having pretty well demolished virtually all of the arguments of both consequentialists and deontologists in their attempt to solve the paradox of blackmail, Berman now weighs in with his own positive theory to this end. How does he attempt to clear up the mystery? He characterizes his own view as "evidentiary theory,"[114] and makes some pretty ambitious claims in its behalf: "It explains why blackmail is an exception to two general rules: that it should be legal to threaten what it is legal to do, and that voluntary transactions should be lawful."[115]

Specifically, Berman presents his theory in the form of three principles. Behavior should be prohibited by law if:

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111. Berman, *supra* note 1, at 831 n.127.

112. *Id.*

113. For the libertarian, this means, merely, that his daughter has good title to the cookies, and that no physical violence is in the offering.

114. *Id.* at 834.

115. *Id.*

> (1) it is likely in the aggregate to yield net adverse social consequences (taking into account the costs imposed by the criminal ban itself);
>
> (2) it (a) tends to cause or threaten identifiable harm and (b) is morally wrongful in itself; or
>
> (3) it tends both (a) to cause or threaten identifiable harm, and (b) to be undertaken by a morally blameworthy actor.[116]

Principle (1) is the (familiar by now) utilitarian or consequentialist criterion, according to which anything reducing wealth, or GDP, or some such measure of well being, ought to be banned by law. It is more than puzzling that after expending so much ink utterly demolishing such theories Berman adopts it for himself.

Principle (2) is an amalgamation of the consequentialist and deontological theories. The first part, "identifiable harm"[117] focuses attention of the former of these two. In the second, "wrongful in itself"[118] is aimed in the direction of the latter of these two, in that it looks at the act in principle, apart from its effects. Both sections of principle (2), then, are subject to the criticism just made, namely that it is logically inconsistent for Berman to criticize these views, and then to incorporate them into his own explanation.

In addition, Berman nowhere defines, explains, expounds upon or in any way satisfies our curiosity about what he means by "morally wrongful in itself."[119] That this undefined phrase appears in not one, but two of his bedrock principles [120] is such a serious lacunae that it well might deserve to be characterized as a philosophical "howler."

Principle (3) is suspect in that it introduces yet another phrase, "morally blameworthy,"[121] again without benefit of explanation. How are those who wish to evaluate his three-principled theories to do so fairly and fully if we are given no independent criterion of these phrases? Without an explication of words like "moral," "immoral," "blameworthy," the author is free to make things up as

116. *Id.* at 836.
117. *Id.*
118. *Id.*
119. *Id.*
120. It is apparent in principle (3) as well.
121. *Id.*

he goes along, to create entirely new concepts out of the whole cloth, as a means of precluding reproach.

Then, too, there is no distinction offered as to the difference between "morally wrongful in itself" and "morally blameworthy." If there is no difference between then, then principles (2) and (3) overlap, and one of them may be jettisoned, without loss to the argument. If there is a difference, it is the duty of the author to specify what it is, and he does not. It would appear, at least at the outset, there is no difference between these two concepts. For how else can a morally blameworthy actor be defined other than as a person who, from time to time, or often, or more often than most people,[122] does things that are intrinsically wrongful, and of a degree far surpassing the evil deeds of the average person? Another consideration which mitigates against there being two separate principles (2) and (3) is that if an act is not morally wrongful in and of itself, why is it that if X does it, he is morally blameworthy? Alternatively, if the act is indeed morally blameworthy, how can it reasonably be denied that the act is wrong in and of itself? Berman offers two arguments in behalf of there being a valid distinction between (2) and (3). Let us consider each in turn. First, in his opinion:

> The distinction between the second and third criteria turns on the claim that an actor is not blameworthy for engaging in a wrongful action if, for example, he lacks information critical to determining its wrongfulness or acts out of a bona fide and reasonable judgment (albeit one a majority of society deems mistaken) that his act is morally justified. For example, a legislator who concludes that euthanasia is morally wrong but also believes that, in practice, the euthanizer rarely acts in a morally blameworthy fashion could vote to criminalize the conduct in accord with the second criterion but not the third.[123]

The difficulty here is that if euthanasia is really morally wrong, it is a downright contradiction to assert that "the euthanizer rarely acts in a morally blameworthy fashion."[124] Very much to the contrary, *given* that euthanasia is morally forbidden, akin indeed to murder, then it is *impossible* for the euthanasia-murderer to act in a moral manner. It is very much beside the point what the actor

122. Even Stalin and Hitler did not *always* act improperly.
123. *Id.* at 837.
124. *Id.*

believes. He may believe, for example, that murder is justified. This will by not one whit save his act from being immoral.[125] Berman's example sounds more reasonable than it is because of the disputed status of euthanasia, which does not at all apply to murder. But in his premise Berman *stipulates* that this practice is indeed morally wrong. Well if it is, then it is not possible for anyone, ever, to engage in it without being morally blameworthy.

Secondly, he states:

> Conversely, an actor who causes harm for reasons that are not justified is deserving of blame regardless of whether the act is deemed wrongful in itself. To use a familiar example, if someone kills an assailant in a situation where the use of deadly force is justified because necessary for self-defense, but the killer is unaware of the necessity, the killing is justifiably made criminal under the third criterion but not the second.[126]

There are justifications, too, for being dubious about this claim regarding the distinctiveness between (2) and (3). Yes, if Berman is correct in maintaining that such an "unaware" killing is properly criminal, then (2) and (3) yield the results as per Berman. But suppose this author is incorrect in his assessment that "the killing is justifiably made criminal."[127] Then it is *not* the case that (2) and (3) diverge in their implications. For then the act would be neither morally wrong in itself (2), nor would the actor be morally blameworthy (3). Of course, it is possible that Berman and I are on different wavelengths with regard to these concepts, given that they have not been clarified.

I have criticized Berman for being stingy with his definitions.[128] This, in spite of the fact that a section of his paper to which we now turn our attention is entitled "[t]he third criterion: defining terms."[129] The main burden of this section, despite its title, is to "endeavor [] to show that blackmail is properly criminal because it satisfies the third criterion."[130] And what of its title? Here, Berman states, "[b]ecause the argument to follow will necessarily depend on

125. If it is immoral, remember we have not once been vouchsafed a definition of morality by Berman.

126. *Id.*

127. *Id*. It would not be a crime under libertarian law, since the justification for this act exists, whether or not the killer knew about it at the time. But this is, strictly speaking, irrelevant to our attempt to determine whether (2) and (3) are independent or not.

128. I have done so more than once, since this is so integral to his theory.

129. *Id.* at 837-41.

130. *Id.* at 837.

the particular content ascribed to 'harm' and 'moral blameworthiness,' some explication of these notoriously ambiguous terms is in order."[131]

One would wish that he had followed through on this. Instead, rather than defining harm, he resorts to legal positivism, noting that,

> the law does recognize as 'harm' injuries to, among other things, bodily integrity (homicide, rape, battery), psychic or emotional well-being (assault, stalking, hate speech, child pornography), property interests (theft, vandalism, trespass), public institutions and processes (treason, bribery of public officials, insider trading), and public morals (prostitution, obscenity, drug use, gambling).[132]

In response to this is that the law is an ass. Just because it is indeed the law that people be thrown in jail for the "harm" of victimless crimes such as hate speech,[133] insider trading,[134] prostitution, obscenity, drug use, and gambling, does not make it right.[135] Another is that Berman himself is already on record as casting aspersions on liberal societies that enact such legislation. How, then, can Berman come to rely upon such institutions in this context? He states that criminalization of, "victimless offenses such as gambling, prostitution, and drug use, . . . is notoriously suspect on liberal principles . . . ."[136] As for bribery of public officials, it all depends upon what they are doing. If they are concentration camp guards, it is perfectly within the libertarian law, if not the law of the land, to bribe them.[137]

"Harm," happily, does not suffer from lack of definition. But it does not follow from this that it is reasonable to embed this concept in the very bowels of society, the law. Very much to the contrary, if mere harm can suffice for criminalization, then we shall have to ban the following activities — these include, in alphabetical order — to affront, annoy, antagonize, bad mouth, banter, belittle, betray,

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131. *Id.* at 837-38.

132. *Id.* at 838.

133. Hate crimes and the outlawry of hate speech are the quintessential thought crimes. *See generally* GEORGE ORWELL, ANIMAL FARM (1946).

134. For the libertarian argument in favor of the legalization of such practices, see Robert W. McGee & Walter Block, *Information, Privilege, Opportunity and Insider Trading*, 10 N. ILL. U.L. REV. 1 (1989); HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET (1966); Henry G. Manne, *In Defense of Insider Trading*, HARV. BUS. REV. 113 (1966).

135. *See supra* note 49 and accompanying text.

136. Berman, *supra* note 1, at 816; s*ee supra* note 45 and accompanying text.

137. DEFENDING THE UNDEFENDABLE, *supra* note 5, at 101-06.

blame, bother, castigate, challenge, cold shoulder, compete against, condemn, criticize, curse, decry, deprecate, disapprove of, discriminate against, disparage, doubt, embarrass, enrage, flirt with, frown at, frustrate, give the silent treatment to, goad, gossip about, heckle, humiliate, hurt someone's feelings, impugn, insult, inveigh against, irk, irritate, jeer at, laugh at, make jokes at the expense of, be malicious, malign, manipulate, mock, mortify, needle, nettle, pout, provoke, refuse to play with, refuse to befriend, reproach, revile, run up the score against, scoff, sneer at, spite, sulk at, talk behind a friends back, tantalize, tattletale against, taunt, tease, torment, traduce, trash talk at, treat with contempt, undermine, upbraid, vex, vilify, vituperate against, wear the same dress as, and withhold a blessing from.[138]

Of course, principle (3) is a double-edged test. It requires not one, but two elements. In addition to being nasty, one must do this with bad motivations.[139] But surely the human condition is such that this is not an insuperable barrier for most people.

A critic might well remark that if a person cannot get into a snit and be mean to everyone around him out of bad motives, then life is certainly not worth living. Or, better yet, if the law prohibits by threat of a jail sentence, flying off into a passion[140] and exhibiting a nasty temper, then such a law is hopelessly out of touch with human nature.

At the risk of overkill, let us elaborate upon a few of these cases. "Trash talk" has become so disruptive an occurrence in the National Basketball Association that the rules were changed so as to incorporate a prohibition of this behavior. (This is similar to the National Football League player who scores a touchdown, and then does a goal line dance aimed to humiliate the other team; it, too, has been proscribed). Similarly, if a rich woman were to employ spies to find out what kind a dress her "victim" intended to wear, and then hired a dress maker to copy her wardrobe, she could humiliate the latter.

Then, too, harm is totally subjective and very much in the eyes of the beholder. A deadly insult to one person is something another person sloughs off in apathy or non-recognition. If mere harm is to be elevated in law, and included in the criterion for lawlessness, our legal codes will look very different, and far more arbitrary than at present.

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138. This is but the tip of the iceberg. Surely there are numerous other legal ways we can make a pain in the neck of ourselves to others.

139. Whatever "bad motivations" are.

140. Without, of course, violating the rights of person or property of anyone else through force, fraud, or the threat thereof.

But this does not even begin to cover the difficulties posed in the text. For in addition to failing to define "morality" and to aggrandizing harm eradication into a basic legal principle, Berman also introduces[141] a new concept —"liberal" — also without benefit of any definition or explication, and places this, too, at the core of his legal philosophy. He states, "[t]he important question, however, is normative: what types of harms *may* a liberal society rely on to justify limiting individual liberty?"[142] We shall see, below, just what other liberties — besides the right to engage in blackmail — this author thinks is justified for the state to violate, but the contrasting answer from the libertarian perspective should be clear —none.

Does Berman entirely avoid the question of defining what he means by morality? No. He does state the following:

> 'Moral blameworthiness' is also a nebulous concept. Although all the factors of which it is a function cannot be fully elucidated in this space, a few guideposts can be marked. In the easiest case, an individual's conduct is morally blameworthy when his objective is to inflict harm — such as when he acts out of malice (in the lay sense) or spite. But this does not exhaust the subject. The average thief, after all, steals not *in order* to impose a loss on his victim, but for the purpose of obtaining a gain for himself. Yet this conduct, too, appears blameworthy — even absent a law prohibiting it. The category of 'morally blameworthy' conduct, therefore, must be broad enough to include the conscious willingness to cause harm without adequate moral justification, where the amount and quality of justification required is commensurate with the magnitude of harm caused. Similarly, it should include the conscious willingness to risk harm to others without adequate moral justification.[143]

This, however, creates more problems than it solves. The most serious flaw is that it is a circular definition — it defines "morally blameworthy" in terms of inadequate "moral justification," and thus is of little help to would-be critics who are still mystified by the concept. Berman also concedes that the concept is "nebulous."[144]

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141. More accurately, he uses this concept all throughout his paper, without ever once defining it, or justifying it as the lodestar of law. Berman, *supra* note 1.

142. *Id.*

143. Berman, *supra* note 1, at 839.

144. *Id.*

But not nebulous enough to preclude it from being made the guiding light of his legal philosophy in general and his case against blackmail legalization in particular. Further, not only is harm an integral and presumably independent part of his principle three, but here we learn it also plays a role in defining morality. But if harm (eradication) is a poor bedrock upon which to build a legal system, the same goes for a morality based on this criterion. As well, if morality is defined in terms of harm (abolition), then why does principle (3) require two separate premises: (a) mentioning harm, and (b) articulating moral blameworthiness?

Here is a second attempt at a definition:

> [W]e can articulate moral blameworthiness in terms of the actor's motivations for acting. Thus (as a first and rough pass), an actor has 'morally bad motives' — and is therefore morally blameworthy — when he acts with the knowledge that his conduct will cause, threaten, or risk harm to others, unless: (1) he *actually* believes that his action will produce more good than evil; (2) that belief is a but-for cause of his action; and (3) the standards the actor employs for measuring and evaluating 'evil' and 'good' in this case are defensible under common moral standards.[145]

This may not be the first pass at the issue, but it certainly is a "rough" one. It is also circular,[146] defining one concept of morality in terms of another. As well, it underlies yet another difficulty with this entire Berman enterprise: it is very heavy, indeed, on motives, and very light on actual criminal actions. This is wrong for several reasons. First, it is notoriously difficult to ascertain what motivates people, particularly if they attempt to disguise their true feelings. Second, motives are no more than thoughts; if we could be incarcerated for our mere cognitions, there probably is not one of us who would remain free under such a legal regime.

B. Harm and Bad Motive

Berman starts off this section on the interrogatory: "[W]e have reached the critical questions: (a) does blackmail (ordinarily) cause

145. *Id.* at 839-40. I would hate to put this to the test under the "common moral standards" prevalent in Nazi Germany or in the U.S.S.R.

146. *Id.* at 836 n.142. Berman offers yet another circular definition of morality when he says that "commission of the proscribed conduct is ordinarily morally blameworthy insofar as it reflects the knowing violation of a valid criminal law." *Id.* But what is a valid law? It is presumably one in which morally blameworthy acts are punished.

cognizable harm? and (b) does the blackmailer (ordinarily) harbor bad motives?"[147]

The easy answer, at least from this quarter, is yes, blackmail most certainly does cause harm,[148] if compared with the situation in which the secret has not been uncovered. However, assuming that the information has been revealed, blackmail does *not* cause harm, when compared to gossip. And yet, even if blackmail *did* cause harm, there would be no warrant for prohibiting it, unless we also criminalized the other nasty practices mentioned above.[149] As to bad or immoral motives, we stipulate that this is so, but wonder why this should be either necessary or sufficient for criminal behavior.[150] Berman continues his analysis:

> Regardless of whether the third criterion for criminalization rests on consequentialist or retributive justifications, . . . it cannot require that the conduct examined *always* cause (or threaten) harm and be undertaken with bad motives. Such a requirement would make ex ante line drawing impossible. Although one or another more precise qualifiers might appear more apt on further scrutiny, 'ordinarily' serves as a satisfactory placeholder — with the important qualification that it not be understood to require that harm or bad motives occur 'more often than not.' There is no a priori reason why making certain conduct criminal must be improper when 'only,' say, 40 percent of given conduct is undertaken with bad motives.[151]

But this is almost purposeful obfuscation. Mentioning that an act is motivated by only a certain percentage of bad motivation constitutes *a reductio ad absurdum* of the system better mentioned by a critic than a proponent.[152] "Ordinarily," and "more often than not," in other contexts might full well suffice. At present, however, we are discussing jail sentences for criminals. It seems almost irresponsible to consent to such inexactitude in such a situation.

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147. *Id.* at 840.

148. It causes harm to the blackmailee, but perhaps its good to the persons who hear the secret (e.g., the cuckolded husband).

149. *Id.* at 817.

150. If we stipulate that Hitler and Stalin were well-motivated, intending to do good (i.e., eliminate vermin), would this save them from criminal charges? Hardly.

151. *Id.* at 840 n.152.

152. An economics joke (a contradiction in terms?) has it that economists give exact predictions to show they have a sense of humor. But at least economic predictions are in terms of quantities that admit of exact measurement, unlike "bad motives."

I am willing to stipulate, if only for the sake of argument, that blackmail is harmful. It appears, though, that Berman is unwilling to do so. In his criticism of Gordon,[153] Berman criticizes her assertion that "'the blackmailer's end is harm.' What does this mean?"[154] Berman continues, "[s]urely not that his *motive* is to cause harm, for presumably the average blackmailer's motive, like that of the garden variety thief, is merely to obtain a personal benefit."[155] But doesn't even the "garden variety thief" cause harm? And isn't this why Berman wants to criminalize his acts? One is tempted to ask, whether immoral mean not being nice? And whatever the defenders of legalized blackmail have said in its favor,[156] it being nice has never been one of them.

Although hypercritical of Gordon on this point, Berman passes without demur her statement that "the blackmailer violates deontological constraints if he threatens disclosure in order to obtain money or other advantage because his intent is directed to the money, not to the [lawfulness of] disclosure or beneficial side-effects that might be produced."[157] But why should a desire to earn money be construed as criminal? Surely, this is done only on the other side of what used to be considered the Iron Curtain?

Suppose my motive in an athletic competition is not the beauty of the enterprise, nor the thrill of physical exertion, nor yet an attempt to engage in sportsmanlike conduct, and not even the joy of participating. Rather, it is to beat the living stuffing out of the opponent and to humiliate him by running up the score. Presumably, I am guilty of bad motives. If I whip him, especially if I am a "bad winner," I will succeed in my nefarious goal. This will certainly harm my opponent. Should I go to jail for this harmful and immoral behavior? This seems to be Berman's view.

Berman next considers the release of negative information, and how it can harm reputations:

> Plainly, the simple disclosure of information likely to injure another's reputation satisfies the harm requirement (at least when the claimed injury is of a sufficiently substantial degree as to warrant society's protection[]). Injury to reputation is clearly other-regarding harm. Moreover, it is a harm that has long been legally cognizable — civilly and

153. Gordon, *supra* note 4, at 1766.
154. Berman, *supra* note 1, at 841.
155. *Id.*
156. *See generally supra* note 5.
157. Gordon, *supra* note 4, at 1765.

> criminally — under both common and statutory law.[158]

But this will not work and on many levels. A minor point is legal positivism — just because it is indeed the law to punish people who indulge their free speech rights as libelers and slanderers, does not make it right.

The major point is that reputations are simply not the sorts of things that can be owned in the very nature of things. This is why extant law on this matter is simply wrongheaded. Reputations consist of the thoughts of other people about a given person. His own views about himself do not count. For example, the reputation of A, consists of the thoughts of other people, B - Z, about A. A's opinion of himself counts not one whit in making up A's reputation. Similarly, the reputation of B consists of the thoughts of other people, A, C - Z, about B. B's opinion of himself counts not one whit in making up his, B's, reputation. But it is *impossible* to own the thoughts of other people.[159] That being the case, it is also quite inconceivable that C could *steal* D's reputation from him, for to do so would be to change the minds of A, B, E - Z about D. If this were the case, then libel is a victimless crime; it is not at all like stealing someone's wrist watch.[160]

Somewhat paradoxically, people work hard to establish their reputations. They can even sell them as "good will," i.e., when they are attached to a business. Nevertheless, since we each own only ourselves, and no one else,[161] we can only own our own thoughts. But our own thoughts, paradoxically, are the only ones that do not enter into our own reputations; only the thoughts of others, owned by them, not us, make up our reputations.

If it were really true that people could have a property right in their reputations, then all sorts of acts that are now legal, and properly so, would become outlawed. For example, negative movie reviews reduce the reputations of their producers and actors; negative book reviews have the same effect on their authors; critical

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158. Berman, *supra* note 1, at 842.

159. We are having enough trouble owning our *own* thoughts, i.e., not being punished for them, thanks to hate crimes and hate speech legislation.

160. THE ETHICS OF LIBERTY, *supra* note 9, at 126-28; DEFENDING THE UNDEFENDABLE, *supra* note 5, at 59-62.

161. On the libertarian voluntary slavery issue, an entirely different matter, *see* Walter Block, *Market Inalienability Once Again: Reply to Radin*, 22 T. JEFFERSON L. REV. 37 (1999); Walter Block, *Alienability, Inalienability, Paternalism and the Law: Reply to Kronman*, 28 AM. J. CRIM. L. 35 (2001); Walter Block, *Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Kinsella and Epstein*, J. LIBERTARIAN STUD. (forthcoming) (manuscript on file with author); WALTER BLOCK, KUFLIK ON INALIENABILITY: A REJOINDER (forthcoming) (manuscript on file with author); WALTER BLOCK, EPSTEIN ON ALIENATION: A REPLY (forthcoming) (manuscript on file with author).

commentary from a radio or television sportscaster can ruin the bankability of a professional athlete. This present article is critical of that written by Berman; if it succeeds in convincing the legal philosophical fraternity of the errors of his ways, Berman's reputation as a legal philosopher shall suffer. According to the theory now under discussion, all of the "victims" of these critiques would have the right to sue, and to collect, from their detractors.[162] Berman on libel:

> This is not to say that such conduct *should* be criminal. Each of the three criteria provides only prima facie justification for criminalizing conduct; none demands it. A legislature could choose not to criminalize reputation-threatening disclosures undertaken with morally bad motives if it concludes that such disclosures advance social welfare. Moreover, other legal norms, including a constitutional guarantee, might mandate noncriminalization. As noted earlier, the Supreme Court has already construed the First Amendment to prohibit criminal punishment of true speech regarding matters of public interest.[163]

Several reactions. First, either these three criteria offered by Berman imply that certain laws are justified, or they do not. If, in his opinion, they merely "provide [] . . . only prima facie justification for criminalizing conduct"[164] then they are incomplete, even considering all three together. That is, his criteria are underspecified. Second, the goal of "advanc[ing] social welfare"[165] is the last refuge of the legal philosopher at sea without a rudder. There is no dictator, however totalitarian, who does not hide behind it. Third, while Berman has taken legal positivist positions all throughout his essay, he curiously declines to take this step with regard to libel law. That is, for the legal positivist, the fact that the Supreme Court has made a *pronunciamento* about an issue should

162. If the critique in this article of Berman does not succeed, my reputation will suffer. Would I then have the right to sue and collect from Berman? That would appear to be an implication of his thesis. True, if I fail, it will be no one's fault but my own. On the other hand, assuming this eventuality, Berman will share part of the blame (take it all on?), since if his article were not so brilliant, I might well have succeeded. In any case, my reputation will be tarnished and, according to his theory, he will at least be a causal element in my downfall. Given that we are a litigious society, I think I'll sue him, in that eventuality.

163. Berman, *supra* note 1, at 847 n.180 (referring to Cox Broadcasting Corp. v. Cohen, 420 U.S. 469, 491 (1975)).

164. *Id.*

165. *Id.*

be definitive. Why not in this case? Could it be because that whenever the extant law suits his purpose, he is happy to clothe himself in it, and when it does not suit his purpose, he does not?

How does all of this relate to blackmail? Berman notes that it is "profoundly difficult to obtain direct evidence of an actor's mental state,"[166] such as malice, and that a "disclosure made anonymously"[167] would do just fine in this regard. So too, would blackmail. In Berman's words:

> Surely it is probative. Consider, for example, a criminal libel prosecution (in a jurisdiction where blackmail is legal) involving defendants (*D's*) disclosure of a husband's (*H's*) infidelities to his wife (*W*). Here, *D's* prior (unaccepted) offer to refrain, for a payment of $1,000, from disclosing the adultery is circumstantial evidence that, when he proceeded to reveal *H's* secrets, *D* was not motivated by loyalty to *W*, or by an interest in achieving some measure of corrective justice, or by devotion to The Truth. A reasonable factfinder could suspect that, had any of these interests motivated *D*, he would not have offered to sell *H* his silence. This is *not* just a covert way of giving effect to the factfinder's own ethical belief that *D should* not have offered to remain silent for individual gain. It is empirically true that people value goods and interests in diverse and incommensurable ways and, relatedly, that most people have internalized a norm against commodifying certain types of nonmaterial interests and obligations. It is therefore reasonable to assume that most people who recognize morally persuasive

166. *Id.* at 844.

167. *Id.* at 844 n.172, reporting on *Pennsylvania v. Foley*, 141 A. 50, 51-52 (Pa. 1928) ("affirming conviction under statute prohibiting 'the sending of anonymous communications of a . . . defamatory . . . nature,' and explaining that anonymous publications of defamatory material 'show such a malignity of heart and a desire to do personal injury that the Legislature or the courts may properly hold that such publications are so far malicious or negligent as to be unjustifiable.'"). I am not so sure about this. My children, now in their early twenties, simply will not listen to me, despite my good intentions with regard to them and my greater life's experiences, and have not done so for at least the last five years. This citation gives me an idea. I will from now on, instead of directly telling them of their faults and how to correct them — which I have often done, but to no avail — will do so henceforth on an anonymous basis. If I do so, I will be sending anonymous communications of a defamatory nature. Their peccadillos are certainly defamatory, if anything is. But will this "show such a malignity of heart and a desire to do personal injury that the Legislature or the courts may properly hold that such publications are so far malicious or negligent as to be unjustifiable?" *Id.* Hardly. Remember, I am their loving dad. I mean only what is best for them.

> grounds for undertaking a given course of action would not offer to sell abstention from it for personal gain.[168]

We can say of Berman that human motivation is more complex than he incorporates into his analysis. Yes, it is entirely possible that D acted from purely financial motives. But why is this necessarily an indicia of bad faith, or malevolence? Berman, himself, accepts a salary in return for his efforts. Are we to impugn his motivations on this ground? Further, cannot motivation be over-determined? That is, could not D have been acting out of *several* motives, some of them good, others bad,[169] like most people on earth? For example, D (the blackmailer) might have intended to punish H for his adultery. And not only that: he might have hoped to double cross the husband and, out of concern for the wife, or for The Truth, tell about the secret in any case.[170]

It is also somewhat disquieting to learn that Berman relies heavily on the fact that "most people who recognize morally persuasive grounds for undertaking a given course of action would not offer to sell abstention from it for personal gain."[171] What "most people" do, or do not do,[172] should surely not be recognized by the criminal law.[173]

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168. *Id.* at 845.

169. We continue to stipulate, in the absence of any definition of these terms by our author, that we are somehow in any case on the same wavelength with regard to them.

170. Berman is correct in asserting that, "most people have internalized a norm against commodifying certain types of nonmaterial interests and obligations." *Id.* For a critique of these views, see THE ETHICS OF LIBERTY, *supra* note 9, at 126-28; *see also* DEFENDING THE UNDEFENDABLE, *supra* note 5, at 59-62.

171. Berman, *supra* note 1, at 845.

172. It is contended by Goldhagen, for example, that most Germans in the pre-World War period supported the acts of the Nazi regime. Surely no implications follow from this according to which we must support the views on law of "most people." *See generally* DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (1996).

173. Berman also states, "the probability that a morally bad disclosure of adultery occurred after the discloser had offered to remain silent for a fee is greater than the probability that a morally good adultery disclosure occurred subsequent to such an offer," and "the conditional threat probably makes it *significantly* more likely that the disclosure was morally blameworthy." Berman, *supra* note 1, at 845-46. The problem, here, is that criminal guilt is supposed to be established by proof beyond a reasonable doubt, not based on a balance of the probabilities. Berman is, however, advocating criminalization based on the latter, not the former. Courts are supposed to get at the truth. Maybe not with a capital "T," but truth nonetheless. A defendant is supposed to be *proven* guilty, beyond a reasonable doubt. But here, by the author's own stipulation, there is no proof. If there is none, there can be no guilt. If there is no guilt, if there *can be* no guilt, this is tantamount to saying that blackmail ought to be legalized. We are here assuming that *if* there is harm and an indication of, not proof of, malice, a crime has been committed. But if I open up a store to compete against yours, or to seduce your girlfriend, out of bad motives, then there is harm and malice. Berman's implication seems to be jail. If so, it is unwarranted. In another context Berman does

All of this, of course, is a bit beside the point. For even if we admit that the blackmailer *was* motivated by selfish pecuniary gains, not devotion to the Truth, nor the wife's interest in knowing of the infidelity, Berman still cannot justify jailing the blackmailer, for he was threatening to do no more than he had every right to do. The fact that he caused "harm" and did this "maliciously" should be of exactly zero moment as far as the law is concerned. For we are all guilty of engaging in malicious harm almost every day.[174]

Berman's analysis of the Milverton case is nothing short of superb. This alludes to a fictional character of Arthur Conan Doyle,[175] an arch blackmailer, who is considered by Sherlock Holmes to be the "worst man" in London. But Berman sees right through this:

> Maybe so, but Milverton could be worse still. Imagine that he is as cunning and ruthless as Conan Doyle represents, but that he is motivated by something other than money. Already rich as Croesus, Milverton acquires information not to blackmail but merely to reveal, for he takes greater pleasure in causing pain and suffering than in aggregating further wealth. This Milverton would never consider offering his victim a choice of harms; he will disclose every bit of embarrassing and discrediting information he obtains — at the moment most damaging to its subject.[176]

However, Berman does not draw the obvious and logical conclusion — that if the blabbing Milverton is even worse than the blackmailing Milverton, and the first amendment precludes outlawing the gossip,[177] then *certainly* the blackmailer must be above the law. Instead, he turns things around and opines that, "[a]ll this suggests [is] that, First Amendment considerations aside, the morally blameworthy disclosure of harmful information *could* be made criminal."[178]

Berman now moves on to what he calls the solution of the secondary puzzle — showing that blackmail is not really a voluntary

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mention the concept of reasonable doubt. *Id.* at 854 n.201. But he does not apply this to *behavior*. Rather, he confines this concern to determining whether or not "the actor would have lacked morally justifying motives for engaging in" an act. *Id.*

174. DEFENDING THE UNDEFENDABLE, *supra* note 5, at 101-06. I agree there are a few saints out there, but this doesn't apply to everyone.

175. DOYLE, *supra* note 2. Milverton is also discussed in HEPWORTH, *supra* note 4, at 46-47, and in Block, *supra* note 3.

176. Berman, *supra* note 1, at 850.

177. *Id.* at 851.

178. *Id.*

trade between money and silence, but rather a coercive act. He starts off by approvingly citing Sullivan to the effect that "coercion 'is inevitably normative . . . . It necessarily embodies a conclusion about the wrongfulness of a proposal.'"[179] Berman continues:

> Surely, then, if a proposed course of action is wrong in itself, the conditional proposal is coercive (at least where the recipient of the proposal views the proposed action as detrimental to her own interests). But normative concerns are not limited to whether a proposal is inherently wrongful in either an objective or conventional sense; they extend as well to considerations of the moral character of an actor's motives for advancing a proposal that is itself morally ambiguous. Although clarity may sometimes be enhanced by terming an immoral proposal 'wrongful' and an immorally motivated one 'bad,'[] we should not insist on the distinction at all costs. To the contrary, inasmuch as the conditional offer tends to reveal that the actor would lack morally adequate reasons for engaging in his threatened course of conduct, a refusal to recognize this *particular* proposal made by this particular actor on this particular occasion — as 'wrongful' beclouds more than it illuminates. Put otherwise, perhaps we should not rigidly insist that the moral character of acts be judged independently of the motives behind them.[] It follows that the blackmail victim is just as coerced as the holdup victim.[180]

The last sentence is surely a *non sequitur.* It simply does not follow from the premises. The holdup victim is in a very different position than the blackmailee. It cannot possibly be overemphasized how stark is this difference. Yes, both are demanded of money[181] and each is offered an alternative. But the option offered to the holdup victim is a bullet in the chest, something the gunman has no right to "offer," or rather, threaten. In very sharp contrast, the blackmailee's alternative is to be subjected to the blackmailer broadcasting from the rooftops information that he would like kept secret. However, the blackmailer *has every right* to engage in such an exercise of free speech! That is, if this needs further elaboration,

179. *Id.* (*quoting* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1443 (1989)).

180. *Id.* at 851-52.

181. Or other valuable considerations.

the holdup man has no right to do what he threatens, while the blackmailer has every right to put into effect the quite different threat he makes. But Berman is not without a reply. In his view:

> Put otherwise, theorists who deny that blackmail is coercive or that the blackmail victim acts under duress fail to understand or validate the victim's perspective as participant in a particular human drama. Were she to articulate her sense of being coerced, the victim would be more likely to emphasize the particular complaint that her blackmailer ought not to do as he threatens, not the more abstract objection that what the blackmailer threatens ought not be done.[182]

Berman's blackmail victim can complain all she wants that "her blackmailer ought not to do as he threatens,"[183] but her complaint would lack validity each time. What is it, after all, that the blackmailer is threatening? No more than to exercise his rights of free speech to engage in gossip, to put a word in the ear of the people who the blackmailee fears the most. But this right is not contested by anyone, least of all Berman. How, then, can Berman take the side of the blackmailee in this case, and support her complaint?[184]

If we are to sympathetically "understand or validate the victim's perspective as participant in [this] particular human drama,"[185] why not in other cases? For example, consider people who pay high rents, receive low wages, and do not win the lottery, even though they regularly purchase tickets. It takes no stretch of the imagination to think of them as aggrieved. They, too, like Berman's blackmailee, can "complain." Does this mean we are justified in enacting rent control, a minimum-wage law, and a rule mandating that all regular ticket buyers must win the lottery? Hardly. Yet this seems to be implied by Berman's remarks.

Where did Berman go wrong? Although this can only be speculative,[186] it seems to stem from the Sullivan claim that coercion is inevitably wrongful in the moral sense of the word that Berman

182. *Id.* at 852 n.197.

183. *Id.*

184. There is an explanation not yet examined by Berman or any other legal theorist who favors the status quo on blackmail prohibition as to why blackmailees feel so aggrieved, and filled with outraged and righteous indignation at their treatment. Could this phenomenon be due to their own support for present law in this regard?

185. *Id.*

186. I am much more modest about the possibility of seeing into another person's thought processes or motivations than is Berman.

seems to employ. Take a case in point. I see a man about to jump off a bridge in a suicide attempt. I am bigger and stronger than him, and I use my power to stop him. I do so by use of physical force, or coercion. Yet, normatively, most people, certainly including self-styled "liberals" such as Berman, would undoubtedly approve of my act. Here, then, is a case where coercion is not at all normative, at least in the negative sense.[187]

IV. TESTING THE EVIDENTIARY THEORY

We now arrive at the last section of Berman's article, where he tests his evidentiary theory against other mainstream views of blackmail.[188] He analyzes seven different types of cases, and we will comment on each.

A. "Hard" Bargains

The hard bargain is a case where the seller jacks up the price when he knows the buyer is desperate. Is this blackmail? One would think that on the basis of "evidentiary theory," it would be. After all, the buyer is harmed by such opportunistic behavior, and the seller certainly can do this out of mean, nasty or immoral motives. But Berman resists this notion. He gives the following example:

> Consider an antique dealer possessed of a cheap and ugly vase that, despite her best efforts, she has been unable to unload for years. One day she receives a visit from an eccentric multimillionaire who announces that the vase is precisely what he needs to complete his collection and cap a lifelong search. When he asks the price, the dealer answers that she will not part with it for a penny less than $10 million. The collector, not a complete fool, is flabbergasted. 'But it's not worth anywhere near that much!' he argues. 'Very true,' the dealer responds. 'Indeed, just before you walked in, I was considering throwing it out to make space for other merchandise. But I know both that you want it and that you can afford my new price. Take it or leave it.'[189]

187. That is, according to what I am able to discern of "liberal" morality. For the libertarian, of course, mine would be a coercive act and therefore unjustified.

188. Nowhere does he confront the libertarian claim that blackmail should be legalized.

189. *Id.* at 856.

> Whatever we might think of the dealer's behavior, we could not plausibly condemn it as criminal so long as we (rightly) refrain from imposing price controls or a ban on price discrimination in all its forms. Any satisfactory theory of blackmail must, therefore, coherently explain why the hard bargain is not blackmail. The evidentiary theory provides just such an explanation. It begins by considering the act threatened — in this case, to retain ownership of the vase. Very simply, this action could not be criminalized — no matter what an observer might infer about the motives of the actor — because it would not satisfy the harm requirement. Plainly, the collector has no legally protected interest in the vase; neither does the public at large (though we can imagine systems of property law under which it would). By withholding from the collector a benefit in which he has no legal interest, the dealer cannot inflict legally cognizable harm. Because the dealer's reasons for keeping the vase — or even for destroying it, were that her choice — are legally immaterial, a conditional threat to do either unless paid off cannot provide any *legally* relevant information. Therefore, the conditional threat should be as legal as the unconditional performance of the act. In terms of the evidentiary blackmail test, a 'hard bargain' is not criminal blackmail because, under the second step from Section III.A, the acts threatened (to keep the vase or even to destroy it) would not inflict legal harm.[190]

This argument is fundamentally flawed in several different respects. First, "Vase, schmase" — Berman gives us an example of an aggrieved millionaire, about whom it is difficult for anyone to tug at the heartstrings. As a "liberal" he could have better utilized the example offered by Murphy, which Berman himself cites.[191] Here, it is not a disappointed millionaire and a vase, but rather a little boy, dying of a dread disease, who wants to have a baseball autographed by Babe Ruth, but the owner, unconscionably raises the price almost beyond reach.[192] Here, surely, we can see real

190. *Id.*
191. *Id.* at 855 n.204 (referring to Murphy's hypothetical owner of the Babe Ruth-autographed baseball in Murphy, *supra* note 4).
192. Murphy, *supra* note 4.

harm, can we not?[193] And just as certainly, anyone who would tease, abuse, beset and harass a young boy in this condition could not do so out of bad motives?

Second, what is this with not "imposing price controls or a ban on price discrimination"?[194] How is this derived from "evidentiary theory"? Nor is this consistent with Berman's allegiance to "liberalism," at least if this word is understood in its North American twentieth and twenty-first century, not its European and nineteenth century meaning. Why *shouldn't* a liberal society impose such laws, to protect the weak and downtrodden from "harm" and "malice"?[195]

Third, a minor point. The value of the vase is whatever its owner says it is. Technically, it is equal to the value of the next best opportunity for it, or alternative cost. The value might well have been zero before the advent of the millionaire, but afterward, its value to the owner evidently rose. Berman's view to the contrary bespeaks an objectivist or Marxist orientation,[196] where the value of items inheres in them, and is not determined by human actor evaluators.

Fourth, coercion. In ordinary parlance we would give short shrift to the argument that the vase or baseball owner "coerced" the buyer, by raising the price of these items. But these are not ordinary items. Berman, himself, is on record as using coercion in an incompatible manner. He supported Sullivan's claim that coercion is inevitably wrongful in the moral sense of the word. [197] If it is not immoral to jack up the price of a baseball that can make more enjoyable the last days of a dying boy's life, then it is hard to know what is. Berman has one more arrow in his quiver, however:

> It is telling that the hard bargain 'fails' the blackmail test at the second step, rather than the fourth. The hard bargainer may (at least in certain cases) act with motives we might wish to condemn as immoral, though we do not believe her conduct should be made criminal. Put another way, there is a reasonable sense in which our hypothetical millionaire collector might sputter with outrage, 'But that's blackmail!'

193. Small dying boys can feel real harm about baseballs, but presumably millionaires cannot about vases.

194. Berman, *supra* note 1, at 856.

195. Needless to say, such denigrations of private property rights would not be countenanced under libertarianism.

196. Here, the value is based on the number of "labor hours" which have gone into its manufacture.

197. *Id.* at 851 n.193.

> even though he knows that the dealer's proposition is lawful and believes that it should remain so.[198]

And what, in turn, is "the second step"? It is:

> [I]f the act, *y*, is not itself criminal, ask whether it causes or threatens legally cognizable harm. If it does not, then it cannot be made criminal (or at least not on the strength of the third criterion of criminalization). Certainly, one might be tempted to call at least some propositions that fall out at this stage "blackmail," and the designation could be appropriate so long as we are speaking of moral rather than legal offenses. However, the purpose of this inquiry is to determine the proper scope of a criminal prohibition. Accordingly, when performing the act threatened would impose a 'disutility' that society would not deem a legal harm, this step of the test concludes that the proposition is not blackmail.[199]

This, of course, opens up another inquiry[200] — what is "legally cognizable" harm? Once again, Berman rides to the rescue: "[S]ociety could (and often does) recognize injury to reputation as legally cognizable harm, a legislature could unproblematically[] criminalize all disclosures of embarrassing information so long as we could reasonably believe that most persons who make such disclosures do so with morally unacceptable motives."[201]

Thus, the case against Berman is straightforward. He says that hard bargaining is not blackmail because of the "second step." This maintains that something should be illegal if it creates "legally cognizable" harm, that is, "done with morally unacceptable motives." But what could be more "morally unacceptable" than commiserating a young boy on his very death bed?

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198. *Id.* at 856-57 n.205. But the same could be said for any other blackmailee, once he was convinced that to gossip is not a crime, and to threaten that which is not a crime is also not a crime. Berman has appreciated so little of the libertarian case for blackmail legalization that he takes it as a given that if an act is legal, it *cannot* be blackmail. But this argument is odd. Why cannot the millionaire vase collector *both* be a blackmailee *and* concede that the dealer's proposition is lawful?

199. *Id.* at 853-54.

200. *Id.* at 858-61.

201. Berman, *supra* note 1, at 797-98.

B. Market Price Blackmail

What is market price blackmail? It is the demand for no more money from the blackmailee than would be obtainable elsewhere, say from a tabloid newspaper, for keeping a secret. Since Berman comes down on the correct (libertarian) side of this issue — it should be legalized — I have no trouble with his conclusion. But his reasoning leaves something to be desired.

First and foremost, the only difference between this type of blackmail and any other is that the blackmailer forbears to ask for as much money as might otherwise be available. He is willing to accept from the blackmailee only the lesser amount he could garner from a tabloid, and forbears to demand the presumably greater amount that might be forthcoming from the blackmailee, were he pushed to the limit. However, this is inconsistent with Berman's view that "we (rightly) refrain from imposing price controls."[202] If price controls are illegitimate, it seems farfetched to call legal an otherwise (even for him) licit act the only difference from which is that it occurs at a higher price. Why this prejudice against maximizing profits? Yes, "the seller's purpose is to make a buck,"[203] but why is this "not a motivation that makes the harm-causing sale morally justifiable"?[204] What is so wrong with making a buck? Is there no such thing as an *honest* buck?

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202. *Id.* at 856. Berman blatantly contradicts himself when he says "The state can regulate the price *B* may charge *A* for non publication — capping it at the market price — for the same reason the state engages in price regulation elsewhere. Price regulation is a common way of limiting the monopolist's price to a hypothetical competitive price. And the blackmailer (market price, supra-market price, or otherwise) must be a monopolist (or, at least, an oligopolist) of the information he threatens to reveal, else his offer of secrecy would have little value." *Id.* at 856 n.213. At this level of generalization, monopoly abounds. For example, marriage is an example of bilateral monopoly, for each spouse, by law, is the *only* one who can serve certain needs of the other; on this basis, there is no keeping the government out of the bedroom. For the libertarian case against price control in all so called cases of "monopoly," see D. T. ARMENTANO, THE MYTHS OF ANTITRUST: ECONOMIC THEORY AND LEGAL CASES (1972); D. T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (1982); D. T. ARMENTANO, ANTITRUST POLICY: THE CASE FOR REPEAL (1991); DONALD ARMSTRONG, COMPETITION VERSUS MONOPOLY: COMBINES POLICY IN PERSPECTIVE (1982); WALTER BLOCK, AMENDING THE COMBINES INVESTIGATION ACT (1982); Walter Block, *Austrian Monopoly Theory — A Critique*, 1 J. LIBERTARIAN STUD. 271 (1977); Walter Block, *Total Repeal of Antitrust Legislation: A Critique of Bork, Brozen and Posner*, 8 REV. AUS. ECON. 35 (1994); Thomas J. Dilorenzo, *The Myth of Natural Monopoly*, 9 REV. AUS. ECON. 43 (1997); Donald J. Boudreaux & Thomas J. DiLorenzo, *The Protectionist Roots of Antitrust*, 6 REV. AUS. ECON. 81 (1992); Jack High, *Bork's Paradox: Static vs. Dynamic Efficiency in Antitrust Analysis*, 3 CONTEMP. POL'Y ISSUES 21 (1984-85); Fred McChesney, *Antitrust and Regulation: Chicago's Contradictory Views*, 10 CATO J. 775 (1991); Robert W. McGee, *Mergers and Acquisitions: An Economic and Legal Analysis*, 22 CREIGHTON L. REV. 665 (1998); MAN, ECONOMY AND STATE, *supra* note 5; William F. Shughart II, *Don't Revise the Clayton Act, Scrap It!*, 6 CATO J. 925 (1987); Fred L. Smith, Jr., *Why Not Abolish Antitrust?*, REG. 23 (1983).

203. Berman, *supra* note 1, at 858.

204. *Id.*

Second, Berman opines: "*B* [the blackmailer] *should* be permitted to sell *T* [the tabloid] reputationally harmful information about public figure *A*, even though the class of persons who make the unconditional sale to *T* are probably *not* less morally blameworthy than those who make a conditional offer to *A*."[205] This might well be acceptable coming from almost any other commentator, but from Berman, who makes such a strong case about morality, almost a fetish, it is invalid. Why does his concern vanish in this one case?

Third, in his reasoning on this topic, Berman exhibits some strange views of rights enjoyed by public figures vis-a-vis the rest of us. In his view:

> Insofar as public figures have elicited public interest — thus creating the market necessary to produce a market price — by voluntarily entering the realm of public attention, they have made their private lives, to some extent and in some indistinct sense, public commodities. It could be argued, therefore, that by seeking and achieving celebrity, public figures have assumed the risk of widespread invasions of their privacy. Arguably, then, any harm such invasions may cause should not be legally cognizable.[206]

The objections to this thesis are telling. For one thing, this sets up two castes of people, with different rights: public figures, with lesser recourse to law; and non-public figures, with more recourse to the law.[207] This alone should suffice to sink any such legal doctrine, since all people have the same natural rights. For another, it is by no means true that all public figures have elicited public interest. Some of the now famous may have achieved that exalted status from having been brutalized, or raped, or victimized in any number of other ways. As another example, it is difficult to see how Elian Gonzalez, or his mother for him, sought any public notoriety.[208].

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205. *Id.* at 858-59.

206. *Id.* at 858 n.208.

207. This pernicious doctrine, of course, emanates from libel case law. But as we have seen (see *supra* note 169), in the free society there would be no interferences with free speech of this variety; hence, there is reason for such a distinction to even arise.

208. In the 2000 Olympics, Nancy Johnson won the gold medal in the 10-meter air rifle competition. NEWSWEEK, at 58, *available at* 2000 WL 21083869 (Sept. 25, 2000). She finished 36th in the Atlanta Olympics of 1996 in this same event. Presumably, however, she tried equally hard on both occasions. Thus, she can hardly be said to have sought out her status as a public figure in a way that she had not, before. On the other hand, outside of the target shooting community, there is probably not one person in a thousand who will recognize her name. Is she a public figure? Numerous teachers, doctors, lawyers, researchers, and academics work in obscurity all their lives, whereupon some medal or accolade is bestowed

To treat public figures differently in law from non-public figures is arbitrary and capricious. Such a doctrine would imply that different people have different rights, depending upon their status or class. This is not an aspect of the free society, but rather earmarked by the caste system. If a commoner punches the nose of a public figure, or the reverse occurs, it makes not the slightest bit of difference as a matter of law, at least under libertarianism; both are treated exactly alike. There is simply not one rule for the rich (or public figures) and another for the poor (those not in the limelight). And this holds true, at least ideally,[209] not only for a punch in the nose, but for murder, rape, theft, trespass, fraud, fender benders, indeed for virtually *all* laws. How, then, can there be one and only one exception: regarding libel and slander?

C. Crime Exposure Blackmail

Here the threat is not to reveal an embarrassing secret about the blackmailee, but rather to expose his criminal behavior to the authorities. As can be expected, Berman maintains it "should be both a crime and a . . . serious offense . . . ."[210]

But why? Again, we have a jeremiad against "pure selfishness."[211] And, also, a focus on good intentions for the person who refuses to come forward with information of this sort: "Her silence may be motivated largely by fear of retaliation, by friendship and loyalty toward the criminal, and by fear of the police. Our sympathy for these motivations provides an explanation for the lenient treatment."[212] But it seems artificial that what could easily be construed as cowardice, or radically misplaced[213] allegiance, is considered morally good, while attempting to earn an honest dollar is denigrated on ethical grounds.

However, let the person who refuses to notify the police of a crime try to blackmail the criminal, and his motives take a sharp turn for the worse; then, Berman can throw the book at him. The problem with this analysis is that there are no positive obligations. Good Samaritan laws are a violation of individual freedom. This being the case, the person with knowledge of a crime is not obliged to share that information with the police. As the owner of this data,

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upon them. It cannot be said that any of them have "elicited" their subsequent public figure-hood in a way that millions of others, just like them apart from the recognition, have not.

209. Yes, the rich public figures can afford better lawyers, but that is an entirely separate matter. Juries and judges are supposed to treat them in an identical manner, despite their very different backgrounds. But with the doctrine of the "public figure," this is not the case.

210. Berman, *supra* note 1, at 862.

211. *Id.*

212. *Id.* at 861.

213. We assume, now, that the crime in question is a real one (i.e., murder, rape, assault) and not a victimless one (i.e., drug trafficking, or prostitution or pornography).

he may do with it as he wishes, as long as he does not threaten or initiate violence against person or property. If he blackmails the criminal with what he has legally unearthed, he is not guilty of extortion. It matters not one whit who this harms or hurts. It should be legal to do this to anyone, except through physical violence, threat, fraud or theft. Nor are motives of any consequence. At best, intentions and thoughts can provide a modicum leniency (or not); they cannot, by themselves, or even in tandem with harms, determine whether an act is criminal or not.

D. Victim Blackmail

What if the person who knows of the crime was the victim of it? Would this change matters? For once, Berman and I are in agreement — this will not make any difference whatsoever. From the libertarian perspective, blackmail should be legal in either case; for the "evidentiary theory," neither.

According to Berman: "Consequently, if we believe that all members of the community have a civic duty to report crime, then it cannot be morally acceptable for a victim to offer to ignore her obligation for personal gain — even if that gain is in some sense compensatory."[214]

But this rings hollow. Berman, as we have seen, was willing to mitigate such a duty in cases of fear or misplaced loyalty. How can he then rely upon with civic duty in his analysis? Further, Berman approvingly cites Justice Marshall to the effect that, "'[i]t may be the duty of a citizen to accuse every offender, and to proclaim every offence [sic] which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man.'"[215] No truer words could ever be said. For if it really were a positive obligation it would be unending.[216]

Berman and I do agree, however, that the fact that victim blackmail "is in some sense compensatory" is of no moment. He, because he maintains it is not exculpatory; me, because I take the position that anyone, victim or not, has a right to blackmail the criminal. Thus, compensation does not arise as a defense for either view.

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214. *Id.* at 863.

215. *Id.* at 861-62 n.220 (*quoting* Chief Justice Marshall in *Marbury v. Brooks*, 20 U.S. 556, 557-76 (1822)). True, Berman qualifies this for a father-in-law concealing a forgery of a son-in-law and for a case of treason where a father does not turn in a son, but this does not appear to be relevant to the present case.

216. Berman, *supra* note 1, at 816.

E. Public Interest Blackmail

Berman starts off this section with the observation that, "[t]he typical blackmailer demands from his victim a cash payment to which he has no legitimate claim."[217] This sounds ominous, but it is not. It applies to *each and every* market transaction that has, or ever will, take place. For example, I buy a newspaper for $1. I have "no legitimate claim" to the newspaper, yet I "demand" it, in return for my $1. The vendor is in the same position — he has no legitimate claim to my dollar, yet he too demands it, as payment for his newspaper. No, I as blackmailer have "no legitimate claim" to your $1000, and yet I "demand" it, if you want me to keep secret the fact that you take a bath with a rubber duckie. On the other hand, you, too, have no legitimate claim to the information in my head[218] (about you and the duckie); snd yet you demand that I keep quiet about it, in return for the $1000 you give me.

Berman's main concern in this section is to analyze the situation when the object of desire of the blackmailer is not private gain, but public good. Will this impinge upon its legality?

For the libertarian view, it matters not what the goal is; blackmail is blackmail is blackmail, and it should be legal in any and all of its varieties. For the evidentiary theory, legal status depends upon the specifics of the case. The key, though, is whether the motives are moral:

> We can solve the puzzle of 'public interest blackmail' by examining what is presumed to be one of the most common blackmail threats, 'homosexual blackmail.'[ ] Assume *B* threatens to expose *A's* homosexuality (or homosexual acts) unless *A* pays *B* $1,000. This is an unproblematic case of criminal blackmail. And quick application of the evidentiary test explains why. The key (step 3) is to identify the morally justifying reasons *B* might have for exposing *A*. Different observers will have widely differing intuitions regarding which reasons do in fact supply moral justification for outing *A*. Most persons, I suspect, would recognize few if any motives as morally legitimate beyond protecting a benighted spouse or suitor. Others might endorse a more general interest in exposing homosexuals, perhaps as a means to discourage homosexual activity. [ ]*B's* conditional

217. Berman, *supra* note 1, at 864.

218. We obviate an objection here by assuming I came to this knowledge legitimately, i.e., no trespass.

> offer of silence (step 4) should have evidentiary significance to individuals who fall near either pole, however, *B's* willingness to remain silent for personal gain suggests that his motives for exposing *A* would satisfy neither the social liberal nor the cultural conservative.[219]

This seems a bit too narrow. Why consider only the moral sensibilities of the "social liberal" and "the cultural conservative"? There can be no doubt that neither would find "morally justifying reasons" in sheer naked greed, or the quest for the unholy buck. However, there are other perspectives from which these motives would be interpreted as fully acceptable.[220] Berman is willing to consider "widely differing intuitions" stretching all the way from the "social liberal" to the "cultural conservative," but no further. Pity. More generally, the fact that he consults only *some* systems of morality, but eschews others, without giving any reasons why the former should be ranked higher than the latter, is an additional difficulty with his system

Another problem is that his theory seems almost infinitely malleable, and inclusive. If one view doesn't fit, try another. He states:

> Some people might conclude that outing is categorically unjustifiable. This view does not, however, undermine the evidentiary theory. One who believes there are no morally acceptable reasons for exposing an individual's homosexuality should, I submit, favor making outing illegal (on the second or third criteria of criminalization). They can then approve criminalizing homosexual blackmail on the grounds that it is (or should be) simple extortion.[221]

There would appear to be a one size fits all mentality, here. The theory can satisfy pretty much *any* view of morality. If so, it is "too good," in that it makes no distinctions between correct and incorrect perspectives. It is only saved from this fate by Berman's incomprehensible refusal to consider systems of morality such as ethical egoism.[222]

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219. *Id.*

220. Such as libertarianism, and objectivism. For the former, see *supra* note 9. For the latter, read any of the works of Ayn Rand.

221. *Id.* at 864 n.225.

222. For example, Randianism, see *id.* at 865.

F. Non-Informational Blackmail

Sometimes, what the blackmailer offers[223] to refrain from is not the disbursement of information which he has every right to disburse, but rather to engage in other acts which would be perfectly legal, but for the fact he is asking for money or other valuable consideration to refrain from undertaking them. Katz offers a few examples of this variety of blackmail, which are cited by Berman:

> 'Pay me $10,000, or I will seduce your fiance'; 'Pay me $10,000, or I will persuade your son that it is his patriotic duty to volunteer for combat in Vietnam'; 'Pay me $10,000, or I will give your high-spirited, risk-addicted 19-year-old daughter a motorcycle for Christmas'; 'Pay me $10,000, or I will hasten our ailing father's death by leaving the Catholic Church.'[224]

Although Berman acknowledges that all these acts are "perfectly legal,"[225] he nevertheless persists in calling for their prohibition when coupled with offers to refrain, if paid off to do so. (As a good politically correct[226] "liberal,"[227] Berman would presumably also object to the request for sexual services of a woman by a man in lieu of refraining from the act that would otherwise be undertaken by the blackmailer. It is unclear as to what his position would be were the sexes reversed.) Why? Because "they also cause (or risk) cognizable harm,"[228] and are undertaken with bad motives. But Berman never calls for the abolition of hang gliding, chocolate, cigarettes, or other dangerous activities. As well, his analysis continues to be marred by the fact that he will accept practically anything under the sun as a good motive, with the exception of asking for (or demanding)[229] money. For example, if the thought of

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223. Instead of "offers," I could say "threatens." But it would amount to the same thing. For a "threat" to do something I have every right to do should be as legal as an "offer" to undertake the same act. On the other hand, suppose I "offer" to punch you in the nose. (We are not in a boxing ring, in which context this "offer" would be unexceptionable.) This, too, is illicit, despite being couched in the language of "offer" rather than "threat" since I do not have a right to carry through on this physically invasive act.

224. *Id.* at 866 (quoting Katz, *supra* note 4, at 1567-68).

225. *Id.*

226. There is no sexist language in his article. Berman does not adopt the traditional convention that "he" actually stands for "he or she."

227. In the twentieth century, not the nineteenth century sense.

228. *Id.* at 866.

229. The distinction between "asking for" and "demanding" is pretty much the same as between an "offer" and a "threat."

the blackmailer is that it is the son's "duty" to enlist, or that he will "profit from the experience,"[230] that is all well and good.

Berman even goes so far as to accuse the blackmailer who threatens to leave the Catholic Church a "murder[er] by religious conversion."[231] This would be so if the threat was motivated by a desire to inherit from the father. But in this case the blackmail was not even the precipitating factor. Rather, the proximate cause of the father's death was the departure of the son from the church.

The difficulty with this, from my critic's point of view, is that it is not easy to come up with as telling a *reductio ad absurdum* as this one, furnished by Berman. But I'll try: I seduce your fiancé, and marry her myself. You commit suicide. I am guilty of murder. All I can say to this one is, "c'mon, give me a break." Here is another try. I marry someone I know my parents will hate. They will die of grief. I will inherit. Thus we have murder by marriage.

No, no, no. It pains me to have to say this, and I would never have thought to do so but for Berman, but no one should be found guilty of murder by merely leaving the church, buying a Christmas present, convincing someone to enter the army, marrying an "unsuitable" spouse in the eyes of one's parents, or seducing an adult woman.

G. Bribery

A bribery contract, in this context, is exactly the same as one for blackmail, only it is initiated by the blackmailee, not the blackmailer. Berman and I are in accord on this — when the blackmailee approaches a potential gossip and pays him off not to tell the secret, this should be legal. As per usual, however, our respective reasoning is different. For me, this should be legal because it does not violate the libertarian axiom proscribing aggression. For Berman, this conclusion is justified because it does not involve "blameworthy, harm-causing conduct."[232]

But suppose a married woman commits adultery. I innocently witness it. She approaches me with an offer of $1000 if I will keep my lips sealed about this event. Berman considers her innocent of any crime. However, this is a false analysis, inconsistent with his own evidentiary theory. For the woman did do something that, at least according to one moral code acknowledged by Berman, would be considered blameworthy. Namely, for the "cultural conservative,"[233] adultery is indeed blameworthy. And so would be

230. *Id.*
231. *Id.* at 867.
232. *Id.* at 868.
233. *Id.* at 864.

her attempt to cover up this sin by bribing me to keep quiet about the event. As well, at least a prima facie case can be made that this attempted bribery on the part of the woman would be "harm-causing." For if I spill the beans to her husband, he may be able to take steps to improve his own situation. If he is kept in the dark on this, he will not. True, we might also interpret this as non-harm causing. Perhaps ignorance is bliss, and the husband will be better off not knowing of his wife's infidelity. But Berman is very "liberal" in his interpretations; pretty much any "reasonable" interpretation[234] will do for him.[235] It is difficult, then, to see why he interprets his own evidentiary theory as unambiguously supportive of legalization for the unfaithful wife's attempt at bribery.

So much for the woman-adulterer briber. What of the bribee-blackmailer? For Berman, this all depends upon: "(1) does the bribe taker cause legally cognizable harm? and (2) if so, does he have morally blameworthy motives?"[236] This is more than passing curious in that although they are the essence of his evidentiary theory, Berman has just eschewed them in the case of the briber. Here, he once again resorts to them. However, they will avail him little, in that they can be interpreted, as we have seen, in numerous ways, and can be tailored to fit just about any perspective. Yes, Berman will not apply these criteria in a way that incorporates moral perspectives with which he is not in sympathy, but this need not stop the rest of us. The briber and the bribee are equally likely to create "harm." Indeed, the one is the opposite side of the same coin as the other. The fact that Berman interprets them 180 degrees apart only indicates the arbitrary way he wields his own principles. And not only capricious. Berman's own language, "[t]his is probably not legally cognizable harm," "not likely enough to have [ ] acted with morally blameworthy motives as to justify criminal punishment . . ."[237] leaves something to be desired. If even the proponent of the theory cannot use it to answer questions of guilt, of what value is it to others?

Berman also is guilty of an elementary mistake in economic theory. He states that "*B* . . . [can] profit at *A*'*s* expense,"[238] where *B* is the bribee and possible blackmailer, and *A* is the adulterer briber. But trade, of whatever variety, shape or manner, including barter and those intermediated with money, must necessarily be

234. Berman states: "Different observers will have widely differing intuitions regarding which reasons do in fact supply moral justification for outing *A*." *Id.*

235. Anything but ethical egoism, selfishness, "making a buck," objectivism, Randianism or libertarianism.

236. Berman, *supra* note 1, at 868.

237. *Id.* at 869.

238. *Id.*

mutually beneficial in the ex ante sense of anticipations, otherwise it would scarcely take place. That is, in the market, no one can ever "profit" at anyone else's "expense," in the sense that denies that such acts necessarily benefit both parties. If I purchase a newspaper for $1, then at the time of purchase I *must* rate the periodical itself, or at least something about having it, [239] more highly than the coin; as a mirror image, the vendor *cannot but* make the opposite ranking, namely for him, the money is worth more than the newspaper. It is the same with A and B and bribery blackmail. If *both* parties did not value what they were to receive more than what they were to give up, the deal would never have been agreed to.

V. CONCLUSION

Berman's thesis can be neatly summarized by use of his principle (3), which stipulates that any act should be criminalized if "it tends both (a) to cause or threaten identifiable harm, and (b) to be undertaken by a morally blameworthy actor."[240]

To this I say two things. First, "Harm, schmarm" — just because something is harmful does not mean it should be illegal. We do altogether too many things to each other that hurt one another, i.e., to engage in competition with our fellow creatures. We have a *right* to do these things, since not a one of them violates the libertarian nonaggression axiom; e.g., initiates violence or the threat thereof to person or property, nor constitutes an unwarranted border crossing. Second, it is much the same thing with being morally blameworthy. To the extent this phrase has any meaning whatsoever, we are all guilty of it — we all forget to tell our loved ones how much we love them, we are all boorish from time to time, we omit birthday cards, and do many of the other acts mentioned above.[241]

Borrowing a leaf from Berman's book, I could with as much sense set up principle (4), which states that any act should be criminalized it if tends both (a) to begin with the letter "B," and (b) to be undertaken by a person sporting a pair of shoes. This would capture blackmail, alright, but it would also place in the net baseball, eating beans, and being boring. I suggest that Berman's principle (3) has much the same effect.

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239. In another context, that having to do with Girl Scout cookies, Berman correctly notes that it need not be this dessert itself that is of definitive value. It could be, in the case he mentions, an attempt to curry favor with the girl scout's father. *Id.* at 831 n.127.

240. *Id.* at 836.

241. DEFENDING THE UNDEFENDABLE, *supra* note 5, at 101-06.

None of the acts such as publicly revealing embarrassing secrets, which are threatened by blackmailers, would earn a jail sentence from Berman, in and of themselves. But when they are "threatened" unless the "victim" pays off the initiator not to undertake them, and to add insult to injury, it could be somehow proven that they were enacted with malice aforethought, then, these become criminal acts for Berman. But this would be wildly over-inclusive in any rational system of law. In fact, it would not be an exaggeration to say that under such a legal system, there would be no one left to condemn or imprison anyone, since we would all long since have been incarcerated. Which of us, apart from a Mother Teresa, could be innocent of any of these acts for an entire lifetime?

How many of us have said things like the following hurtful (in a nasty mood, to cover malice) things that constitute blackmail: "If you don't clean up your room, you can't get the car keys!" "If you are not nice to me, there will be no sex tonight!" "If you don't give me that $1, I won't give you this newspaper!" "If you don't give me that newspaper, I won't give you this $1!"

Blackmail is not a paradox for the libertarian perspective; only for mainstream commentators, who have not yet, any of them, nor will they, solve it. This is because it is not a paradox at all, rather, there is the fallacy of blackmail: twist and turn as they might, there is no way to turn two legal whites into a legal black.

If there is any paradox, it is this: how can so many otherwise smart people contort themselves into so many different fallacious positions in order to solve the nonexistent paradox of blackmail?