

# **Blackmail from A to Z: A Reply to Joseph Isenbergh's "Blackmail from A to C"**

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**and**  
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The long and the short of blackmail is that it consists of two acts, each of which, were they to occur alone, would be considered legal by *everyone*. Yet somehow, when these elements occur together, virtually all commentators who have ever written on the subject consider the complex act consisting of both elements to be unlawful.<sup>1</sup> There is only

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The authors wish to thank the staff and board of the Earhart Foundation—in particular David Kennedy and Antony Sullivan—for the funding necessary to write this Article. All errors are of course ours alone.

1. *See generally* Peter Alldridge, *Attempted Murder of the Soul: Privacy and Secrets*, 13 OXFORD J. L. STUD. 368; Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639 (1993); Gary Becker, *The Case Against Blackmail*, Jan. 1985 (unpublished); James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 CAL. L. REV. 1413 (1992); Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935 (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 LEGAL Q. REV. 382 (1939); Ronald Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655 (1988); George Daly & J. Fred Giertz, *Externalities, Extortion, and Efficiency: Reply*, 68 (65) AM. ECON. REV. 736 (1978) (1975); Sidney W. DeLong, *Blackmailers, Bribe Takers and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993); Daniel Ellsberg, *The Theory and Practice of Blackmail*, in *BARGAINING: FORMAL THEORIES OF NEGOTIATION* (Oran R. Young ed., 1975); Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); Hugh Evans, *Why Blackmail Should Be Banned*, 65 PHIL. 89 (1990); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW*:

a corporal's guard that demurs.<sup>2</sup> Is the mainstream view due perhaps

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HARMLESS WRONGDOING (1988); Joel Feinberg, *The Paradox of Blackmail*, 1 RATIO JURIS 83 (1988); Joel Feinberg, *Why Blackmail Should Be Banned*, 65 PHIL. 89 (1990); George P. Fletcher, *Blackmail: The Paradigmatic Case*, 141 U. PA. L. REV. 1617 (1993); CHARLES FRIED, CONTRACT AS PROMISE (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 LEGAL Q. REV. 436 (1928), reprinted in ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 175 (Arthur L. Goodhart ed., 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 (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, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787 (1993); MICHAEL HEPWORTH, BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE (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); William Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); 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, *Secret Rights: A Comment on Campbell's Theory of Blackmail*, 21 CONN. L. REV. 407 (1989); James Lindgren, *Kept in the Dark: Owen's View of Blackmail*, 21 CONN. L. REV. 749 (1989); James Lindgren, *Blackmail: On Waste, Morals and Ronald Coase*, 36 UCLA L. REV. 597 (1989); James Lindgren, *Blackmail: An Afterward*, 141 U. PA. L. REV. 1975 (1993); Daniel Lyons, *Welcome Threats and Coercive Offers*, PHIL. 425 (Oct. 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. 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*, Nov. 1992 (unpublished); Glanville Williams, *Blackmail*, CRIM. L. REV. (1954); W.H.D. Winder, *The Development of Blackmail*, 5 MOD. L. REV. 21, 36-41 (1941).

2. See generally Walter Block, *The Blackmailer as Hero*, LIBERTARIAN FORUM 1 (Dec. 1972); WALTER BLOCK, DEFENDING THE UNDEFENDABLE (1991); Walter Block, *Trading Money for Silence*, 8 U. HAWAII L. REV. 57 (1986); Walter Block, *The Case for Decriminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997); Walter Block, *A Libertarian Theory of Blackmail: Reply to Leo Katz*, 33 IRISH JURIST 280 (1998); Walter Block, *Toward a Libertarian Theory of Blackmail: Reply to George Fletcher*, J. LIBERTARIAN STUD. (forthcoming); Walter Block, *The Second Paradox of Blackmail: A Reply to DeLong* (forthcoming); Walter Block, *Blackmailing for Mutual Good: A Reply to Russell Hardin* (forthcoming); 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 & Robert W. McGee, *Blackmail as a Victimless Crime*:

to some sort of alchemy? How else can two legal "rights" be rendered a "wrong" when they take place in tandem?

Let us consider the specifics. Which two acts together constitute blackmail? First, there is a threat or an offer, depending upon your point of view.<sup>3</sup> Whatever it is called, it states that some act, which in and of itself is perfectly legal, will be done.<sup>4</sup> The proposition typically is to engage in free speech rights and gossip about the secrets of the blackmailee or target.<sup>5</sup> However, the topic could be almost anything. The proposition could be to build a fence on my own land that blocks your view. It could be to write a negative review of your recently published book. It could even be to withhold selling you a piece of my property.

Second, there is a demand or a request. This again depends upon your point of view. Characteristically in the case of blackmail, the proposal concerns money or other valuable considerations.

Now put the two acts together. For example, the proposition is that unless you give me money, I will tell the newspapers that you patronize prostitutes. Unless you grant me special privileges, I will build a tall fence. Unless you do some service for me, I will give your book a negative review. Unless you pay me my price, I will not sell you my motorcycle.

What each of these scenarios has in common is that it is legal to ask for money, services, or privileges. Also, it is not a crime to gossip about one's sexual practices, erect a structure on my own land, cast aspersions on your literary skills, or keep my motorcycle for myself.

Blackmail must be sharply distinguished from extortion. Extortion also combines a request for money with a threat. Only here the threat is to do something clearly unlawful, such as kill someone, burn down a house, or kidnap children. Blackmail and extortion are commonly confused, perhaps because they both combine a threat and a demand.

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*Reply to Altman*, BRACKTON L.J. (forthcoming); Walter Block & Robert W. McGee, *Blackmail and Economic Analysis: Reply to Ginsberg and Shechtman* (forthcoming); Walter Block & Robert W. McGee, *Let's Legalize Blackmail: A Libertarian Reply to "Truth and Consequences: The Force of Blackmail's Central Case"* by Wendy J. Gordon (forthcoming); 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* (1993).

3. Walter Block & David Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick, and Lindgren*, 19 LOY. L.A. L. REV. 37, 38 (1985).

4. *Id.*

5. *Id.*

However, these two acts resemble each other only superficially. They are as distinct as rape and seduction<sup>6</sup> or trade and robbery.

Isenbergh attempts to rationalize the present outlawry of blackmail.<sup>7</sup> His "concern . . . is limited to 'pure' or 'informational' blackmail: the sale of silence by someone who is otherwise free to disclose what he knows."<sup>8</sup> He proposes a nomenclature to deal with this issue.<sup>9</sup> *A* is the blackmailee or target; *B* is the blackmailer, the man who solicits money or other valuable consideration in order to keep silent; and *C* is the person to whom *B* threatens to make available this information.<sup>10</sup>

Isenbergh fully accepts our characterization of blackmail as the amalgamation of two otherwise licit acts and correctly distinguishes it from extortion: "Blackmail, as addressed here, does not include threats of disclosure barred by statute or contract, such as a doctor's threat to reveal a patient's loathsome disease, which belong to the broader class of 'extortion.'"<sup>11</sup>

Nevertheless, Isenbergh distinguishes between some threats coupled with a demand for money from other seemingly identical threats.<sup>12</sup> One he labels "permissible threats."<sup>13</sup> The other he labels "blackmail."<sup>14</sup> He states:

"Pay me higher wages or I will go on strike or quit," "pay me the price I am asking for this good or I will sell it to someone else," and "marry me or I will shave my head and join the Foreign Legion" are, I think, *permissible threats* almost anywhere, while "paint my house or I will tell your boyfriend about your sex change operation" and "if you fire me I'll tell the IRS about your secret Swiss bank account" are *blackmail*.<sup>15</sup>

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6. See Walter E. Williams, *The Legitimate Role of Government in a Free Society*, THE FRANK M. ENGEL LECTURES 1978-1997, 633, 640 (Roger C. Bird ed., American College, 1998).

7. Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905 (1993).

8. *Id.* at 1905.

9. *Id.*

10. *Id.*

11. *Id.* at 1905-06. This is just a first approximation. In our view, contrary to Isenbergh's legal positivism, some statutes (e.g., the prohibition of victimless crimes, such as prostitution or drugs) are themselves improper. Therefore, his statement, in order to be correct, implicitly assumes legitimacy of the statute barring disclosure.

12. *Id.* at 1906.

13. *Id.*

14. *Id.*

15. *Id.* (emphasis added). One small caveat. To quit a job, assuming no labor contract is in effect, must be legitimate. To not be allowed to quit is slavery. Going on strike is another matter. Despite being legal, a strike—just like extortion—actually consists of two acts, one of which should be legal, the other not. The first, and licit one, is to quit the job.

Our author continues, “[t]hreats of the latter type often elicit a strong aesthetic reaction,” while, presumably, those of the former type do not.<sup>16</sup> But aesthetic tastes surely cannot be the bedrock of the law. They are far too subjective. On what legal principle can we justify making “permissible threats” legal while outlawing blackmail?<sup>17</sup>

Isenbergh answers that “[t]he justification for the prohibition of blackmail, if there is one, must therefore lie in the particular nature of information.”<sup>18</sup> Why is this? It is because

[i]n a frictionless world (one in which it were costless to bargain over the value of information), prohibition of blackmail would surely not be correct. For most rights in property *other* than information, even in our world of significant transactional costs, prohibition of bargaining is likely to impede the appropriate allocation of those rights.<sup>19</sup>

Isenbergh’s theory can thus be seen as an instance of the fallacious argument of “market failure.”<sup>20</sup> If markets were perfect, i.e., there were

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The second, and illicit one, is to prevent others (e.g., “scabs”) from taking these positions. For this distinction, see Walter Block, *Labor Relations, Unions and Collective Bargaining: A Political Economic Analysis*, 16 SOC. POL. & ECON. STUD. 477 (1991); Bill Kauffman, *The Child Labor Amendment Debate of the 1920s; or, Catholics and Mugwumps and Farmers*, 10 J. LIBERTARIAN STUD. 139 (1992); SYLVESTER PETRO, *THE LABOR POLICY OF THE FREE SOCIETY* (1957); Barry W. Poulson, *Substantive Due Process and Labor Law*, 6 J. LIBERTARIAN STUD. 267 (1982); MORGAN O. REYNOLDS, *POWER AND PRIVILEGE: LABOR UNIONS IN AMERICA* (1984); MORGAN O. REYNOLDS, *MAKING AMERICA POORER: THE COST OF LABOR LAW* (1987); Morgan O. Reynolds, *An Economic Analysis of the Norris-LaGuardia Act, the Wagner Act and the Labor Representation Industry*, 6 J. LIBERTARIAN STUD. 227 (1982).

16. Isenbergh, *supra* note 7, at 1906.

17. It is precisely our contention that there *is* no justification for the prohibition of blackmail.

18. Isenbergh, *supra* note 7, at 1907.

19. *Id.* Isenbergh, as it shall later become apparent, is a devotee of the “economics” approach to law and economics. In his view, the sole desideratum of the law is to maximize wealth. *Id.* at 1912. Thus, when Isenbergh uses the word “correct” in the present context, he does not mean what ordinary mortals do—that it is in accord with principles of justice. He denotes simply that, in his opinion, a given law will or will not maximize wealth.

20. Though popular, this is an invalid line of reasoning. It is certainly possible, even if “imperfections” (e.g., the real world, compared to the artificial one of “perfect competition”) exist, for markets to outperform bureaucrats, no matter what the criterion of success. For critiques of this market failure argument, see THE THEORY OF MARKET FAILURE (Tyler Cowen ed., 1988); HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993); MURRAY N. ROTHBARD, *MAN, ECONOMY AND STATE* (1993); Walter Block, *The Justification for Taxation in the Public Finance Literature: An Unorthodox View*, 3 J. PUB. FIN. & PUB. CHOICE 141 (1989); and Walter Block, *Public Finance Texts Cannot Justify Government Taxation: A*

no transactional costs, then we could have laissez faire capitalism. Unfortunately, however, they are not. On the contrary, there are "frictions." Therefore, we must have government intervention, regulation, and prohibition.

Isenbergh, however, does not fit neatly into either the total prohibitionist or the total legalization model. Instead, he wants to

retain the prohibition of blackmail for: 1) information, however acquired, held by *B* concerning a prosecutable crime or tort committed by *A* against *C*; and 2) information acquired by *B* outside a prior course of dealing with *A* . . . [and] make *B*'s agreement with *A* not to disclose information unenforceable and to treat *B*'s receipt of compensation for silence as a form of complicity in whatever is kept silent.<sup>21</sup>

At the outset one can see that none of this follows any precept of justice. Instead it is an attempt to tailor the law to reach certain specific economic goals. This is akin to "fine tuning," or centrally planning, the economy.

### I. BLACKMAIL AS PROHIBITED BARGAINING

According to Isenbergh:

What is prohibited under the law of blackmail is a certain type of *bargaining* over the disclosure of information, rather than the bare result, which is some sort of compensation given for silence. It is *B*'s *threat* of disclosure that is barred, not any and all reward from *A* for *B*'s discretion. Thus if *A* spontaneously offers to reward *B*'s discretion regarding private information, or simply does so without bargaining, there is no prohibited blackmail, even if it is likely that *B*'s discretion would end with the withdrawal of the reward. The law of blackmail is in this respect like that of prostitution, which usually bars specific bargaining over the sale of sex rather than all transfers of wealth in consideration of sex.<sup>22</sup>

This is a pivotal statement because it uncovers several difficulties. Why should *bargaining* be singled out for special concern in blackmail? There is nothing intrinsically invasive about negotiating. If we are to be logically consistent and ban discussions over contracts in blackmail, why not prohibit all occupations and professions whose main function is to arrange the details of commerce? This includes, for example, lawyers, auctioneers, real estate agents, stockbrokers, middlemen, and intermediaries of all types and varieties functioning in the business world. And

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*Critique*, 36 CAN. PUB. ADMIN. 225 (1993).

21. Isenbergh, *supra* note 7, at 1908.

22. *Id.* at 1908-09.

what about people and groups who reduce transactional costs in the social world—personal columns in newspapers, matchmakers, organizers of singles dances, church clubs for the unmarried?

There is far more bargaining in a modern society than just these examples. In order to be inclusive, why not ban bargaining entirely and insist upon sales at retail or sticker prices? That is, if I advertise to sell my car for five thousand dollars and someone were to offer me four thousand dollars, he should be incarcerated for that crime. We should be dealt with in a similar summary manner if we were to accept his offer. Thus, Isenbergh's view of the law can be interpreted as racist and discriminatory because certain nations and ethnic groups make more of a virtue out of bargaining than others.<sup>23</sup>

Isenberg might object that he is limiting his crusade against bargaining to commercial interactions concerning information. However, two objections immediately arise. First, if bargaining is so bad, why limit its prohibition to just information? Why not broaden the prohibition as outlined above? Second, Isenbergh hones in on the informational aspects of blackmail. But many of the cases he mentions focus at least partially, and often almost completely, on information availability, or the lack thereof.<sup>24</sup> Surely, most middlemen and intermediaries function as information providers. Bargaining between the retailer and customer of consumer durables, houses, cars, and similar goods also serves as an information-creating institution.

Another problem is if the blackmail contract is initiated by the blackmailee, then Isenbergh will give him a free ride, legally speaking. But if inaugurated by the blackmailer, Isenberg will throw the book at him. Why? Is it not the same identical contract in either case? It seems unreasonable for its legality to turn on so superficial a fact.

In the view of Murray Rothbard:

Suppose that, in the above case, instead of Smith [the blackmailer] going to Jones [the blackmailee] with an offer of silence, Jones had heard of Smith's knowledge and his intent to print it, and went to Smith to offer to purchase the latter's silence? Should *that* contract be illegal? And if so, why? But if Jones' offer should be legal while Smith's is illegal, should it be illegal for Smith to turn down Jones' offer, and then ask for *more* money as the price of his silence? And, furthermore, should it be illegal for Smith to subtly let Jones know that Smith has the information and intends to publish, and then allow Jones to make the actual offer? But how could this simple letting

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23. In certain cultures, it is almost an insult to offer to pay the sticker price. It is a mark of good breeding for buyers and sellers to haggle with one another.

24. See Isenbergh, *supra* note 7, at 1906.

Jones know in advance be considered as illegal? Could it not be rather construed as a simple act of courtesy to Jones? The shoals get muddier and muddier, and the support for outlawry of blackmail contracts—especially by libertarians who believe in property rights—becomes ever more flimsy.<sup>25</sup>

Then there is the gratuitous and unwarranted attack on the practice of issuing warnings. Isenbergh characterizes the blackmailer's initial statement to the blackmailee as a threat, but he might as well have called it a warning (or even an offer).<sup>26</sup> If I may legally do *X* to you, why should it be illegal to warn you that I may or will do *X* should you see fit not to accede to my demands? Warnings themselves are not, per se, an invasion of person or property. On that ground alone they should be allowed. To resort to mere pragmatism, surely it will be a better world when people are allowed to warn each other of intended actions, than one when they are legally constrained to launch (legal) attacks on one another totally without warning.<sup>27</sup>

And what are we to say of Isenbergh's contention that laws prohibiting prostitution should be allowed to serve as the model for those on blackmail? At the very least, this is unacceptable, barring reasons adduced in its defense. Why should "capitalist acts between consenting adults" be banned?<sup>28</sup> Are these not quintessentially victimless crimes, as even Isenbergh himself acknowledges?<sup>29</sup> This applies also to "gambling" and "trade in narcotics," both of which he also mentions.<sup>30</sup>

Moreover, Isenbergh is factually incorrect when he maintains that it is illegal to engage only in "specific bargaining over the sale of sex rather than all transfers of wealth in consideration of sex."<sup>31</sup> Marriage is legal in our society. And what is the prenuptial agreement, part and parcel of many marital relationships, but a bargain over at least some transfers of wealth in consideration, to some degree, for sexual favors?

In any case, it is the height of hypocrisy to "legalize" prostitution but to arrest people for bargaining over the price of sexual services. This restricts entry into the "oldest profession" by poor women who are led by

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25. MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 125 (1982).

26. Isenbergh, *supra* note 7, at 1905.

27. Epstein states of the inability to give warnings: "This . . . will work to the disadvantage of the other party, who is now deprived of the choice that the threat would have otherwise given him." Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 558 (1983).

28. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

29. See Isenbergh, *supra* note 7, at 1908.

30. *Id.* at 1909.

31. *Id.* at 1908-09.

their poverty to become "street walkers."<sup>32</sup> The reason this law should serve as the model for any other, including blackmail, is never clearly articulated by Isenbergh.

## II. THE EXTENT OF BLACKMAIL

Isenbergh states that while the incidence of blackmail in popular fiction, television, and movies is very high, it must be less in real life.<sup>33</sup> But he then gives examples that are everyday occurrences: "A parent's threat to tell a child's playmates that he sleeps with a nightlight unless he cleans his room;" the threat of a disgruntled worker to snitch to the IRS about an employer's tax evasion unless promoted; and divorce settlements enlarged by the implicit threat to reveal concealed income to the IRS.<sup>34</sup>

Then there is emotional blackmail: "You'll break your mother's heart if you . . ." Given that the installation of this guilt practically comes with mother's milk, it must be very frequent. Similarly, the threat, "If you don't do your homework, your father will hear of it when he gets home" is an everyday occurrence.

Another difficulty is that Isenbergh considers "determining the point at which [such] ubiquitous minor threats molt into prohibited blackmail"<sup>35</sup> at the same time he admits that just this sort of thing "falls literally within the Model Penal Code's definition of criminal coercion."<sup>36</sup> How can it be a "minor threat" if it is a criminal matter? To swoop down on all parents who violate this code would render any jurisdiction that did so far more totalitarian than anything the Soviet Union's Stalin or China's Mao ever dreamed. If we are not to descend to this level of barbarism and make a dead letter out of blackmail law, we must legalize the practice. It would be hard to manufacture better *reductios ad absurdum* of blackmail law than the scenarios offered by Isenbergh. The puzzle is that he is not convinced by them, certainly not to the point of total decriminalization.

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32. For arguments in favor of legalizing victimless crimes, see WALTER BLOCK, DEFENDING THE UNDEFENDABLE (1991); THE CRISIS IN DRUG PROHIBITION (David Boaz ed., 1991); JOEL FEINBERG, HARMLESS WRONGDOING: THE MORAL LIMITS OF THE CRIMINAL LAW (1990); DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL (Ronald Hamowy ed., 1987); THOMAS SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS AND PUSHERS (red. ed., 1985); and MARK THORNTON, THE ECONOMICS OF PROHIBITION (1991).

33. See Isenbergh, *supra* note 7, at 1909.

34. *Id.* at 1909-10.

35. *Id.* at 1910.

36. *Id.*

### III. BLACKMAIL AND PROPERTY RIGHTS

There are two ways to establish property rights: intrinsically and instrumentally. In the former case, a man owns himself and his justly acquired property as a matter of right, regardless of any other consideration.<sup>37</sup> It is a matter of logic<sup>38</sup> or natural law.<sup>39</sup> In the latter case, we prohibit slavery, theft, assault, and battery to serve a higher purpose, not because these actions are necessarily illicit.

Isenbergh is an instrumentalist, and his higher purpose is to enhance wealth or economic value, or reduce costs, most notably transactional costs. That is: “[t]he assignment of property rights to those who value them most reduces the necessity of exchanges or other transactions to bring them to higher valued uses. An important function of a legal regime is, therefore, to maintain property rights in the hands of owners who value them most.”<sup>40</sup>

Isenbergh never examines why this goal is worthy of being the basic premise of law, its very foundation. Nor does he face the question whether Law X is just, even though it will maximize value, or increase wealth the most, or reduce transactional costs to their lowest possible level. By the very fact that Law X does indeed have these properties, it is thereby known to be just. For him, to say that a law is just, appropriate, or proper is to say no more than that it most efficiently promotes affluence. There is no more to just law than that. This is the basis upon which Isenbergh analyzes blackmail.

That being the case, it behooves him to show that laws against murder, theft, rape, and assault actually have these effects. He proceeds:

The prohibition of murder accords an individual the property right in his own life; the prohibition of battery frames an individual's rights in his body; the prohibition of theft sets the contours of other property rights. That life is worth more a priori to its owner than to any other person is revealed by the rarity of exchanges in which someone consents to being killed for a payment from another who would enjoy doing it. That people value their bodies more than batterers can

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37. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 14-26 (J.W. Gough ed., Basil Blackwell 1946) (1690).

38. HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993).

39. MURRAY N. ROTHBARD, FOR A NEW LIBERTY (1978); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982).

40. See Isenbergh, *supra* note 7, at 1910.

similarly be inferred from the infrequency of their consenting to being beaten for a fee.<sup>41</sup>

This will not do. Isenbergh has given the game away before he even really gets going. He admits at the outset that upon occasion a man indeed "consents to being killed for a payment."<sup>42</sup> Men sometimes, albeit rarely, *do* "consent[] to being beaten for a fee."<sup>43</sup> If so, then logic implies that, in the majority of cases when people will not voluntarily undergo this treatment, we *should* have laws against murder and battery. But in the *minority* of cases when they will undergo this treatment, we should not. It is hard to see any way around this difficulty.

Further, it is presently illegal to consent to being "killed for a payment from another who would enjoy doing it."<sup>44</sup> Why do we have to prohibit these contracts with the force of law if the goal is to maximize wealth, and virtually no one would do this act anyway? On the other hand, what else can we conclude from the few times this occurs, other than that it maximizes value in these cases?

Another difficulty is that the number of people who "consent[] to being beaten for a fee" is not really as rare as Isenbergh seems to think.<sup>45</sup> Certainly, this describes every athlete who ever stepped into the ring to compete for prizes. This includes professional boxers, kick boxers, wrestlers, and sumo wrestlers. All of these athletes, even world champions with perfect records of victories get pummelled, pushed, and punched. In a word, these athletes are treated approximately how we would describe assault and battery if it were to have occurred outside the ring. This is only the tip of the iceberg. There are many others who voluntarily submit to being, in effect, beaten, and are paid for their pains. This includes all contact sports such as football, hockey, soccer, rugby, and basketball, when crashing into other men often results in bruises and injuries.

Isenbergh also errs when he states: "If homicide . . . [was] legal, . . . [r]elations between people in such a world would have the character of blackmail."<sup>46</sup> On the contrary, they would have the character of extortion. For in the latter case, there is a threat of an intrinsically illegal act: murder; in the former, the threat must be one that is legal.

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41. *Id.* at 1910-11.

42. *Id.* at 1911.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

These are just the beginnings of the problems. On a practical level, Isenbergh's legal advice would open up a whole can of worms in criminal law. For example, murderers would have a defense hitherto not available to them: my victim *would* have been willing to have me murder him because he knew I valued his death more than he valued his life. Similarly for rapists: my victim would have consented to my attack, given that she had low self-esteem and my need for her body was so great. They could even use Isenbergh as an expert witness. According to him, there are some cases, admittedly rare, when the murder victim *would* value the money he is paid for being killed more than his own life.<sup>47</sup>

Who knows if confessed murderers and rapists would be able to utilize this defense successfully. Perhaps not, given that the burden of proof is still on them. How could they ever prove these allegations? But thanks to Isenbergh, they now have one more defense than they had before. If they cannot prove their allegations, how can Isenbergh or anyone else demonstrate them? This legal philosophy hopelessly enmeshes us in logically impermissible interpersonal comparisons of utility.<sup>48</sup>

Isenbergh utilizes his philosophy of property rights to shed light on blackmail outlawry. True to his premises he asserts:

If we could determine the flow of information costlessly from some sort of meta-vantage point, we would want the information held by *B* to be disclosed to *C* when its value to *C* was greater than its value to *A*, but to be kept private when it was worth more to *A*. There being no omniscient traffic controller, we generally leave it to private bargaining to steer property rights to owners who value them most.<sup>49</sup>

This is where Isenbergh's focus on "market failure" plays a role. Ordinarily, this is precisely what markets, competition, and economic freedom accomplish; buying and selling, "bartering and trucking," in Adam Smith's famous phraseology, are organized in order to attain expressly that. I buy a newspaper from you for one dollar. I value the item more than that amount; you value it less. Therefore, when the money and the paper exchange hands, each of them migrates from a man who values it less to one who values it more. Total wealth is thus enhanced.

Presumably, this would work as well in the market for secrets and information, e.g., blackmail. *B* has the choice to tell *A*'s story to *C* or to

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47. For an elaboration of these arguments, see Walter Block, *O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Coase and Posner*, 3 EUR. J. L. & ECON. 265 (1996).

48. See MURRAY N. ROTHBARD, TOWARD A RECONSTRUCTION OF UTILITY AND WELFARE ECONOMICS (Center for Libertarian Studies, Occasional Paper No. 3, 1977).

49. Isenbergh, *supra* note 7, at 1912.

be paid off by *A* to desist. Supposedly, *B* will go in whichever direction that will earn him the greatest returns. This will maximize overall wealth in that *B* will cooperate with the one who values the information most. In contrast, the usual "market failure" argument is that *C* cannot place full value on this information when he does not yet know what it is. If *B* starts to tell *C* about it, then and to the degree he succeeds, *B* will have lowered the payment he could otherwise have obtained. Why? Because *C* already *has* some of the information; why should he pay what he otherwise would have?

One answer to this is that it relies on the vantage point of the "omniscient traffic controller," one which Isenbergh has explicitly eschewed.<sup>50</sup> There is no way for any of us mere mortals to know, in any specific case, that information which *C* would have considered more valuable went to *A* (he purchased silence from *B* for a fee and thus preserved his privacy) instead. But it is the same in the ordinary case of a newspaper sale. The presumption, again, is that this increased wealth, at least in the *ex ante* sense, because I valued the newspaper more highly than the one dollar, and you valued the money more than the periodical. However, did this *maximize* wealth? No one, apart from the "omniscient traffic controller," or a socialistic central planner with the temerity to think he knows our interests better than we do ourselves, and thus, can overturn our freely contracted choices for our own good, could make such a statement.<sup>51</sup> There is always the possibility that there is a third person who values this particular newspaper more than I do, or values this particular dollar bill more than you.<sup>52</sup> Our point is that if there is a "market failure" in blackmail that justifies outlawry on economic grounds, this applies to every trade in the market without exception. The "market failure" argument, then, proves far too much.<sup>53</sup>

Isenbergh ends this section with a query of blackmail: "1) whether the prohibition thereby prevents the flow of information to those who value it most; and 2) if it does, what is gained."<sup>54</sup> Instead of directly answering it, he turns to an examination of five theories of blackmail for answers.

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50. *Id.*

51. *Id.*

52. There never has been a successful demonstration of "market failure." For further elaboration, see *supra* note 34; ROTHBARD, MAN, ECONOMY AND STATE, *supra* note 20; and HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY, *supra* note 20.

53. This tacitly assumes that the purpose of the law is to maximize wealth, as opposed to promoting justice. Isenbergh shows no evidence of having recognized this as a challenge to be addressed.

54. Isenbergh, *supra* note 7, at 1912.

## IV. ESTABLISHED THEORIES OF BLACKMAIL

A. *Prohibition of Blackmail as Protection of Privacy*

As indicated by the subheading, Isenbergh considers under this rubric theories of blackmail outlawry that rely upon the protection of privacy as their goal. One problem with Isenbergh's treatment is that he accepts, without quibble, that people do indeed have a right to privacy.<sup>55</sup> In the libertarian view, however, there is no such thing as a right to privacy, apart from that afforded by private property rights.<sup>56</sup> If there were, such things as investigative reporting, detective agencies, and gossip would all have to be banned.

For the sake of argument, let us accept Isenbergh's approach on this matter. Given the legitimacy of protecting privacy, Isenbergh asks which will better safeguard this "right": blackmail outlawry, which hurts *A* now, but lowers the probability that future *Bs* will act "predatorily" with regard to future *As*; or blackmail legalization, which has the exact opposite effect? It will help the *As* of the world at present, but will put more of them at risk in the future because it increases incentives to ferret out secrets with which still other people can be blackmailed.

This conundrum is similar to that regarding the legal prohibition of paying off the kidnapper. Such a law would hurt *A* now, the parent of a kidnapped child who is willing to compensate the kidnapper for a release, but is prevented from so doing. However, it would help future *As*, who are less likely to be victimized by future kidnappers who, at the margin, will turn to other pursuits.

For Isenbergh, this is strictly a cost benefit economic analysis. It is doomed to failure, given the intellectual illegitimacy of interpersonal comparisons of utility. Unless we have a rate of transformation with which to compare the present misery of the parent of a kidnapped child with the future happiness of other parents who, thanks to this law, will not suffer the same consequences, we can make no rational determination of this question. It is clear that there exists no yardstick based on which these feelings can be scientifically compared. To presume there is one, as is implicitly done by Isenbergh, is thus, to remove our analysis from the realm of rationality.<sup>57</sup>

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55. *Id.* at 1912-15.

56. ROTHBARD, *THE ETHICS OF LIBERTY*, *supra* note 25, at 121-22.

57. This question is reminiscent of the one concerning the well-being of cows. Are they better off because human beings eat them? The answer is obvious. No cow victimized by Wendy's, Burger King, or McDonald's can be considered to have had its welfare enhanced. But there is also a pro side. Were we as a race not enamored by beef, we would not care

How would a principled philosophy address this issue? It would ask, does paying off a kidnapper constitute a *per se* invasive act; does asking for a fee to keep silent constitute a *per se* invasive act? The latter, at least, is clear. Even Isenbergh admits, as long as the blackmailee initiates the contract, blackmail is legally unobjectionable. “[I]f *A* spontaneously offers to reward *B*’s discretion regarding private information, or simply does so without bargaining, there is no prohibited blackmail . . . .”<sup>58</sup> If there is a case for either of these prohibitions, it does not apply to blackmail; rather, it pertains to the victim paying off the kidnapper. For at least there is the claim that in making such a payment, the victim is aiding and abetting the criminal. Isenbergh wishes “to treat *B*’s receipt of compensation for silence as a form of complicity in whatever is kept silent.”<sup>59</sup> This is a gratuitous and contrived attack. In contrast, a reasonable case can be made that the parents of the kidnapped child are really complicit with the criminal gang when they make a payment for safe release. For this only encourages them to continue their nefarious behavior; to add insult to injury, the payment gives the kidnappers the means through which they can rent a safe house, buy a car, and engage in the investment of other kidnapping capital.

Ultimately, however, this argument fails. The victim of kidnapping, unlike the blackmailee, has endured an uninvited border crossing, or a violation of the libertarian axiom of nonaggression.<sup>60</sup> In making the

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for, or bring into existence, quite so many cows.

How can this query possibly be answered? Any rational response would have to assume some rate of exchange (utility comparison) between being killed and eaten on a massive scale and more of the species being born and raised. There is no such rate of exchange. This question cannot be answered in any meaningful nonequivocal way.

58. See Isenbergh, *supra* note 7, at 1908.

59. *Id.*

60. Rothbard states:

The libertarian creed rests upon one central axiom: that no man or group of men may aggress against the person or property of anyone else. This may be called the “nonaggression axiom.” “Aggression” is defined as the initiation of the use or threat of physical violence against the person or property of anyone else. Aggression is therefore synonymous with invasion.

ROTHBARD, FOR A NEW LIBERTY, *supra* note 39, at 23; see also Tibor Machan, *Law, Justice and Natural Rights*, 14 W. ONTARIO L. REV. 119 (1975); TIBOR MACHAN, INDIVIDUALS AND THEIR RIGHTS (1989); HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY, *supra* note 20; and MURRAY N. ROTHBARD, POWER AND MARKET: GOVERNMENT AND THE ECONOMY (1970).

disbursement, he is acting defensively, trying merely to secure what is really his: the right to raise his child.<sup>61</sup>

Other difficulties in this section concern the fact that Isenbergh allows to pass without objection the characterization of blackmailers as "predatory" and "predators."<sup>62</sup> From the point of view of a blackmailee with a desire for privacy, any sniffing around for compromising secrets will be resented.<sup>63</sup> We all sometimes resent the perfectly legal activities of others. For example, I might be indignant if you make overtures to an attractive woman I desire for myself; yet, this is certainly your right in a free society. On the other hand, from the perspective of a blackmailee whose secret is already known, the blackmailer is hardly guilty of predation, at least compared to the situation where the gossip has the requisite information. In this case, all is lost. In comparison, at least the blackmailer has the *decency* to allow you to purchase his silence.

Then, too, why should we heavily weigh, or even weigh at all, the welfare of those with embarrassing pasts? Did they not do something immoral, shameful, or criminal? Why encourage this immoral behavior in the future by reducing the incentive of blackmailers to ferret out this information, and thereby *decrease* the incidence of blackmail in the future?

#### *B. Prohibition of Blackmail as an Instrument of Disclosure*

In these theories, *A*, the holder of the secret, and *B*, the blackmailer, are in cahoots, and the victim is *C*, the real victim, the person who would gain if the information was publicized. Outlawry is interpreted as an impetus toward disclosure. But "not . . . a very powerful one,"<sup>64</sup> according to Isenbergh, because no law "prohibits *B* from bargaining with *C*,"<sup>65</sup> and "it is often difficult for *B* to communicate to *C* the value of the information without communicating the information itself."<sup>66</sup>

None of this can be denied. However, Isenbergh's discussion continues to be marred by a spurious comparative weighing of interpersonal utilities. Consider the following: "The pecuniary value to the public of information on *A*'s tax evasion is at least equal to *A*'s pecuniary benefit from concealment. Knowledge of *A*'s tax fraud would gain the Treasury

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61. Spooner makes a similar point with regard to defensive voting. LYSANDER SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY (Ralph Myles ed., 1966).

62. See Isenbergh, *supra* note 7, at 1914.

63. *Id.*

64. *Id.* at 1916.

65. *Id.* at 1916 n.29.

66. *Id.* at 1916.

*A*'s delinquent taxes, plus penalties, along with the value of future deterrence of *A* and others.<sup>67</sup>

If "pecuniary" means that one simply adds up the dollars concerned, then of course Isenbergh is correct, but only tautologically so. This, in any case, is insufficient to establish his goal of maximizing wealth unless we may directly infer economic well-being from severity of taxation. But there is no warrant to do any such thing.

This statement implicitly assumes that the government can spend the money as wisely on behalf of the citizens as they can on their own account. Particularly in this epoch when the taxpayers are forced to work for their government a greater proportion of the year than applied to the Medieval serfs on behalf of their masters, it takes great courage to assert that a dollar spent by the state will create as much value as that allowed to remain in the private sector.<sup>68</sup>

### C. *The Blackmailer as a Rogue Agent*

Here, Isenbergh takes James Lindgren to task and does so incisively. In the view of the latter, the wrongness of blackmail is that *B* bargains with "leverage" or "chips" which properly belong to *C*.<sup>69</sup> Prohibition,

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67. *Id.* at 1915 n.28.

68. It would remain unproven, and unprovable, in any case. Suppose, for example, that taxes were only one percent of the G.D.P., but that they were compulsory. How can it be shown then, that even a dollar forcibly taken from a man will garner more for him than had he been able to spend it himself? And if this somehow could be shown, then we would furnish all robbers with a new and startling defense: "I would have spent this money I stole from my victim on wine, women and song. This would have benefitted the previous owner of these funds to a greater degree than had he been allowed to spend it himself." How could we say nay to the criminal, once we allow into court Isenbergh's perspective? There is, of course, the vast literature of "market failure" in support of this. For critiques, see *supra* note 34; ROTHBARD, MAN, ECONOMY AND STATE, *supra* note 20; and HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY, *supra* note 20.

69. 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, *Secret Rights: A Comment on Campbell's Theory of Blackmail*, 21 CONN. L. REV. 407 (1989); James Lindgren, *Kept in the Dark: Owens's View of Blackmail*, 21 CONN. L. REV. 749 (1989); James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597 (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).

For criticism of Lindgren, see Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997); 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); Sidney W. Delong, *Blackmailers, Bribe Takers*,

then, is merely a special case of the law against theft. But if this were so, then Isenbergh asks, "isn't it also at least wrongish [sic] to deny to *C* (by total silence) the leverage that more properly belongs to him?"<sup>70</sup> Isenbergh trenchantly maintains that Lindgren's "theory of blackmail starts by finding existing leverage in *C*, but does not account for how or why it is there. What, beyond the prohibition of blackmail itself, gives *C* leverage that *C* would not otherwise have with respect to information concerning *A*?"<sup>71</sup>

The only problem with this insightful critique of Lindgren is that Isenbergh, based on his own theory, is logically precluded from making it. Or, at the very least, Isenbergh's views open up to Lindgren a defense he would not otherwise have (one from which the libertarian theory, for example, would be immune). The reason *C* properly owns these "chips" is because allowing him to do so maximizes wealth. This response even safeguards Lindgren from Isenbergh's otherwise scathing "practical aspect" *reductio*s of his perspective:

Suppose *B* recognizes *A* as a fellow death camp guard and seeks money to keep it quiet. Is the *C* to whom that leverage properly belongs an immigration official or prosecutor? What if *A* no longer has any exposure to legal sanction and faces only loss of reputation? Does the leverage belong to no one? To Jews and Gypsies because they have some strands of DNA in common with *A*'s victims? Or perhaps to historians?<sup>72</sup>

The answer available to Lindgren, thanks to the opening afforded him by Isenbergh, is that the leverage properly belongs to whichever of these people whose ownership would maximize wealth. The beauty of this response is that Lindgren is not even compelled to pick out one of these alternatives himself. He can always demand that of Isenbergh, the holder of this curious theory.

#### *D. Blackmail as Private Enforcement of Criminal and Moral Rules*

Isenbergh opens this section with: "The only theory of blackmail surfacing in academic writing that would not prohibit the transaction finds in the blackmail bargain a mechanism of private enforcement—through the agency of *B*—of criminal laws or moral stan-

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*and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849 (1993); and Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905 (1993).

70. Isenbergh, *supra* note 7, at 1917 n.35.

71. *Id.* at 1917.

72. *Id.* at 1918.

dards."<sup>73</sup> This is false. While the libertarian theory of blackmail in support of legalization certainly *includes* this point in its arsenal of arguments, it is by no means *limited* to this contention.

Even worse is Isenbergh's declaration: "No published writing that I know of embraces this view . . ."<sup>74</sup> It is not bizarre that Isenbergh has failed to do his homework. Perhaps he can use as an excuse that some of this literature (but certainly not all!) was published in obscure journals. But this seems to be the only accurate description of Lindgren's reason to allow this statement into print. For Lindgren is Isenbergh's (co)editor, and one of the articles adumbrating this line of thought, and said not to exist, has singled Lindgren out (among others) for special critique.<sup>75</sup> To add insult to injury, Lindgren himself even replied to this article.<sup>76</sup> Most of this took place, needless to say, long before the publication of Isenbergh.<sup>77</sup>

Why does Isenbergh reject this eminently reasonable thesis? Unfortunately, he devotes but a single paragraph to criticism. His main objection would appear to be that "[a]ny benefit from blackmail in the form of an incentive for good conduct by A, however, is likely to be marginal."<sup>78</sup> The reply to this is straightforward: every bit helps. With crime as rampant as it is, if the legalization of blackmail can help reduce its incidence even a tiny bit, this is all to the good. In any case, crime and immorality reduction is hardly the main reason for legalization. Isenbergh objects that "the most that can be expected from exposing private conduct to blackmail may only be somewhat greater discretion in people's private conduct."<sup>79</sup> Well, what is wrong with that? Surely discretion, rather than blatancy, better oils the social wheels of civilization.

Isenbergh's second objection is that "*B* is not going to get rich tracking down bank robbers and shaking them down for blackmail. *B* is far more

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73. *Id.*

74. *Id.* at 1918 n.38.

75. The article in question is Walter Block & David Gordon, *Blackmail, Extortion and Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37 (1985).

76. James Lindgren, *In Defense of Keeping Blackmail a Crime: Responding to Block and Gordon*, 20 LOY. L.A. L. REV. 35 (1986).

77. See Isenbergh, *supra* note 7. Perhaps we are being too harsh on Isenbergh. He did, after all, have the decency to at least mention the *possibility* that blackmail may be worthy of legalization, and indeed, argues partially on behalf of this contention. The same cannot be said for virtually any other scholar who has written on the side of prohibition. With regard to these other writers, it is as if they were to argue for prohibition of alcohol, cigarettes, and addictive drugs without even considering that there is another side to the issue.

78. *Id.* at 1919.

79. *Id.*

likely to get *dead* in this line of work.<sup>80</sup> True enough, perhaps, but totally irrelevant. Just because an occupation is dangerous is no reason to legally proscribe or even denigrate it. The jobs of policeman, fireman, and test pilot are all hazardous, yet they each contribute in their own way to human well-being. The blackmailer, too, could add his mite to the pot. Would Isenbergh ban these other professions on this ground? Hardly.

#### *E. Blackmail as Deadweight Loss*

Although wedded to a version of the "economic approach" to blackmail,<sup>81</sup> Isenbergh casts a critical eye on other versions of this theory.<sup>82</sup> The view under attack is that blackmail wastes resources and should be banned on that basis because it would "leave the same distribution of information as before [A and B had] bargained. *B* and *A* would therefore have invested time and effort in a transaction that brought nothing new. It would be as though they had dug a hole and filled it up again."<sup>83</sup>

Isenbergh rejects this on the grounds that it "proves too much," is overinclusive, and would prohibit the purchase of a "scenic easement."<sup>84</sup> He might have also objected that if people wish to dig holes and fill them up again, that should be their own business and should be beyond the scope of the law. In any case, only a very superficial perspective on

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80. *Id.*

81. This misnomer implies that all economists would subscribe to the view that law should be the handmaiden of enhancing a very narrow and erroneous understanding of economic well-being. For more on this "economic" approach, see Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935 (1993); Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849 (1993); William Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998); Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817; and Steven Shavell, *An Economic Analysis of Threats and Their Legality: Blackmail, Extortion and Robbery*, 141 U. PA. L. REV. 1877 (1993).

82. For a critique, see Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639 (1993); Walter Block, *O.J.'s Defense: A Reductio ad Absurdum of the Economics of Coase and Posner*, 3 EUR. J.L. & ECON. 265 (1996); Walter Block & Robert W. McGee, *Blackmail and Economic Analysis: Reply to Ginsburg and Shechtman* (forthcoming); Walter Block & David Gordon, *Blackmail, Extortion and Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37 (1985); Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993); and Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787 (1993).

83. See Isenbergh, *supra* note 7, at 1919-20.

84. *Id.* at 1919.

84. *Id.* at 1920.

human well-being would reject the possibility that there might be joy in such activities for some people.<sup>85</sup>

And it is the same with his view that “[t]o be sure, one ought not to encourage pointless bargaining . . .”<sup>86</sup> But some people like “pointless bargaining.” Others, in contrast, like Chicago economics. We say, pay your money and take your choice. *Non gustibus disputandum*. It is unclear why either of the above pair should be banned by law, but not the other. This suggests that Isenbergh has ignored the economics of leisure: it is not productive in the sense of wealth creation, but it certainly, at least for those who are not totally driven workaholics, is conducive to the good life.

Nor am I convinced by Isenbergh’s citation of “Ronald Coase, the acknowledged godfather of legal analysis based on transaction costs”<sup>87</sup> in order to reject Nozick’s doctrine<sup>88</sup> of “unproductive exchanges.”<sup>89</sup> Yes, “Nozick’s landowner is better off than if the neighbor had sold his lot to someone else who wanted to build on it, a possibility that is now permanently foreclosed,” but he would have been better off in the *ex ante* sense even apart from this consideration.<sup>90</sup> We can deduce that a person is better off whenever he makes a trade, merely by the fact that

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85. In our subjective evaluation of human action, there are things from which people derive great joy which seem to us to be even sillier than digging holes and filling them up again. At least that act constitutes physical exercise, and we are big fans of athletic endeavors. But what are we to make of watching soap operas, playing checkers, gardening, and mowing the grass? Surely these are far more wasteful! Were we advocates of the “economic approach,” and if we had a taste for dictatorship, we would recommend forthwith that all these be rendered unlawful. If Isenbergh can do this for digging holes and filling them up again, why cannot we call for a ban on everything we deem worthless?

86. Isenbergh, *supra* note 7, at 1920.

87. *Id.* at 1921. For critiques of the “godfather,” see Walter Block, *Coase and Demsetz on Private Property Rights*, 1 J. LIBERTARIAN STUD. 111 (1977); Walter Block, *Ethics, Efficiency, Coasian Property Rights, and Psychic Income: A Reply to Demsetz*, 8 REV. AUS. ECON. 61 (1995); Block, *supra* note 44; Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12 HAMLINE L. REV. 229 (1989); Roy E. Cordato, *Knowledge Problems and the Problem of Social Cost*, 14 J. HIST. ECON. THOUGHT (1992); ROY E. CORDATO, *WELFARE ECONOMICS AND EXTERNALITIES IN AN OPEN ENDED UNIVERSE: A MODERN AUSTRIAN PERSPECTIVE* (1992); Elisabeth Krecke, *Law and the Market Order: An Austrian Critique of the Economic Analysis of Law*, paper presented at the Ludwig von Mises Institute’s Austrian Scholars’ Conference, New York City, Oct. 9-11, 1992, *reprinted in* *COMMENTARIES ON LAW & ECONOMICS: 1997 YEARBOOK*; GARY NORTH, *THE COASE THEOREM* (1992); GARY NORTH, *TOOLS OF DOMINION: THE CASE LAWS OF EXODUS* (1997); and MURRAY N. ROTHBARD, *(LAW, PROPERTY RIGHTS AND AIR POLLUTION) ECONOMICS & THE ENVIRONMENT: A RECONCILIATION* (Walter Block ed., Vancouver, The Fraser Institute, 1990).

88. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

89. For another, earlier, critique, see Block & Gordon, *supra* note 2.

90. Isenbergh, *supra* note 7, at 1921 n.43.

he made it.<sup>91</sup> This includes digging holes and filling them up, soap operas, "pointless" bargaining, and all the rest. Rothbard states:

actual choice reveals, or demonstrates, a man's preferences; i.e., . . . his preferences are deducible from what he has chosen in action. Thus, if a man chooses to spend an hour at a concert rather than a movie, we deduce that the former was preferred, or ranked higher on his value scale.<sup>92</sup>

#### V. BARGAINING OVER BUILDING ON CONTIGUOUS LOTS

Isenbergh advocates blackmail legalization except for actions pertaining to information. To establish his credentials in this regard, he states:

If *B* has the right to build on his lot in a way that would impair *A*'s view, *B* might seek compensation from *A* for not building. This transaction falls into the formal pattern of blackmail. Indeed, if *B* has no interest in building for its own sake and wants only to profit from selling an easement to *A*, *B*'s announced intention to build is blackmail as defined in the Model Penal Code. *B*'s bargaining with *A* ought, nonetheless, not be prohibited, no matter what the intrinsic value *B* attaches to building.<sup>93</sup>

I welcome Isenbergh to the ranks of blackmail legalizers, even though his adherence to this position is limited to noninformational cases. There are so few of us, it would be impracticable to turn away even partial adherents. However, even his limited agreement is problematic.

First, it is improper for the law to even take cognizance of motivations in determining what is legal. Acts, not intentions, are the *sine qua non* of rational law. This does not mean that purposes may not perhaps decide the severity of an offense, but to have guilt or innocence turn solely on motive is entirely another matter.

Isenbergh reports without criticism, that in the eyes of the law, the same *act* can either be a violation or not, depending only on intention. We do this for no other law, and we ought not for blackmail either. For example, killing someone by accident (e.g., in a highway fatality) and on purpose (e.g., first degree murder) are both still violations of the law, even though we may deal with the perpetrators in vastly different ways. In contrast, if *B*, the builder of the fence that will spoil *A*'s view, intends to do this solely because of the benefits to him of this edifice, then he is

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91. This is always limited to the *ex ante* sense.

92. ROTHBARD, *supra* note 48, at 2.

93. Isenbergh, *supra* note 7, at 1921-22.

innocent of blackmail. However, if he undertakes the same action, only this time he builds the fence not because he gains from it directly, but solely in the hope that *A* will pay him to rip it down, he is guilty of this offense.

Second, it is always possible for *B* to plead in his defense that he really enjoys the fence for its own sake (e.g., privacy) and had not even realized that his neighbor, *A*, would lose scenic value. How can we say to him nay in the absence of firm evidence (e.g., a diary to which he committed his innermost thoughts)?<sup>94</sup>

Third, Isenbergh reveals himself as an agnostic with regard to the initial assignment of property rights.<sup>95</sup> For him, this is a moot point. He contents himself with noting that “[a]s long as the opportunity and difficulty of bargaining are symmetrical, the transactional burden in cases where *B* sells *A* an easement under one regime is no greater than the burden under the other regime of sales by *A* to *B* of the right to build.”<sup>96</sup>

But this will not do at all. The “transactional burden” is far from the only consideration of the matter. What Isenbergh is doing, in following Coase, is maintaining that it really does not matter whether owners or nonowners of property determine what shall be built there.<sup>97</sup> Instead, the alternative “property rights” scheme would be a recipe for disaster. If nonowners can make such determinations, this would place a premium on nonownership. This would spell the doom of property rights as an economic institution. On a practical level, there are *many* nonowners of each piece of property; *which of them* would have the privilege of determining building patterns on their neighbor’s holdings?

## VI. BARGAINING OVER INFORMATION

If Isenbergh’s views were at least in weak conformity with libertarianism on noninformational blackmail, the same, alas, cannot be said for blackmail with regard to information. According to Isenbergh:

*B*’s information should be controlled by *A* or disclosed to *C* according to whether *A* or *C* values the information more. Unlike the case of contiguous lots, however, the regime of free bargaining between *B* and

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94. That we as a society do precisely that in thousands of other cases is of no moment. The question is, should we perpetrate such injustice?

95. See Isenbergh, *supra* note 7, at 1922.

96. *Id.* at 1923.

97. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). This new right of nonowners to determine building patterns need not be limited to neighbors. Destruction of scenic views is hardly limited to contiguous plots of land.

*A* does not clearly tend toward that result . . . . Information is less susceptible to exclusive ownership than other property . . . .

. . . Regardless of who ultimately values the information the most, at the time of a potential blackmail bargain, *B* stands to gain more from the effort of bargaining with *A*, who already knows the value of the information. *B* cannot bargain with *C* over the value of the information without revealing some part of it, thereby reducing the amount still undisclosed.<sup>98</sup>

There are difficulties here. Why should information go to those who value it more, as opposed to those who *own* it? Suppose you, a millionaire, value my dog *Lil* more than I do. That is, you would be willing to pay far more for this animal than I can afford. Should you be allowed to seize him against my will? That would seem to be the implication of Isenbergh's view. But it is difficult to reconcile this with his avowed desire to maximize wealth. If you, the millionaire can seize my dog on this ground, what about me, should you take a liking to having me as a slave?<sup>99</sup> Down this garden path lay reductios galore, but not a bit of wealth maximization.

How can we even know that anyone values anything more than anyone else other than by an act of purchase? I know that you value this newspaper more than I do because I just sold it to you for one dollar. I infer that you place a greater value on it than this amount, and you can deduce that I rank the newspaper at a lower level than that. In the absence of a voluntary sale, however, no such conclusion can be drawn. Rothbard speaks of the fallacy of "treatment of preference-scales as if they existed as separate entities apart from real action."<sup>100</sup> The only way that Isenbergh can make *any* claim about *C*'s preferences is to use his own imagination. By stipulation, there is no way in which *C* can register his evaluation of the information which he does not (yet) have, apart from the artificial efforts taken on his supposed behalf by Isenbergh.<sup>101</sup>

From whence do we derive the conclusion that when a seller reveals some part of the information to be departed, he *reduces* the value of the remainder? This will come as shocking news to all those in the advertising business. Book flyers and movie previews give part of the

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98. Isenbergh, *supra* note 7, at 1923.

99. *See supra* note 47.

100. ROTHBARD, *supra* note 48, at 7.

101. This applies as well to Isenbergh's claim that "it is difficult in any event for *B* to get *full value* for information in dealings with *C*." Isenberg, *supra* note 7, at 1925 (emphasis added). There can be no value, let alone "full value" that *C* places on anything, in the absence of a demonstrated preference on his part. And this, even Isenbergh would presumably agree, is ruled out by the nature of the situation.

plot away, but this is in an effort to *increase* sales, not decrease them. Auto retailers commonly invite prospective purchasers to test drive their vehicles; taking them up on this offer constitutes the "revealing [of] some part of . . . [the] information," but this is part and parcel of a *sales ploy*.<sup>102</sup> True, these efforts are sometimes unsuccessful; sometimes they boomerang. But if the advertising industry makes a positive contribution to the G.D.P., the presumption is that more often than not they are successful.

Were the Isenberghs of the world to accept this interpretation of advertising, they would presumably want to make blackmail compulsory, instead of illegal. Then the "market failure" would be the other way around; instead of having too much blackmail in the free, unregulated market, we would have too little. But this is merely part of the interventionistic mind set, which finds it difficult to rest easy because nothing is neither prohibited nor mandatory.

## VII. AN ALTERNATIVE REGIME FOR BARGAINING OVER PRIVATE INFORMATION

Isenbergh proposes three underpinnings for blackmail legislation. It should: "enhance the likelihood that [private information] will be controlled by the one who values it most;" reduce "the incentives to invest resources in discovering information and bargaining over it;" and reduce "the incentives for those whom the information concerns (A . . .) to leave it exposed to discovery by B in the first place."<sup>103</sup>

Based on these three considerations, Isenbergh proposes, in effect, a utilitarian calculus, where the benefits of one of these is compared to the others when there is any conflict between them. For example, "Any gains from A's greater control over private information must therefore be *weighed against* the possible cost of B's increased efforts to unearth information and A's own cost of preserving privacy."<sup>104</sup> An important objection is that there are no measures of utility (e.g., "utils"), and that even if there were, it would still be illegitimate to compare them across people. If, somehow, this were possible, it would, in any case, leave utilitarians such as Isenbergh open to the objection of the "utility monster," a person or a creature who just happens to enjoy eating warm human flesh but who derives more pleasure from this than the negative utility suffered from the tortures of being eaten alive. Would Isenbergh advocate a law giving full rein (or reign) to such an individual? And if

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102. Isenbergh, *supra* note 7, at 1923.

103. *Id.* at 1925.

104. *Id.* at 1926 (emphasis added).

not, what reasons can he offer for employing utility, "social cost," happiness calculations, and all the rest to our relatively more pedestrian concerns?

As part of his "weighing" of costs, Isenbergh states: "Journalists, for example, might be somewhat more inclined to uncover stories for the sole purpose of covering them up again, while it would be better for them to pursue stories that can be more profitably sold to the public."<sup>105</sup> "[W]ould be better for them" according to what criteria?<sup>106</sup>

What seems to rankle Isenbergh is that blackmail should lead to a withholding of information from the public. This suggests a kinship between his views on blackmail and those of the neoclassical economists on monopoly. In the latter case, advocates of antitrust incessantly complain of the fact that the "imperfect competitor" is withholding, not information, but goods or resources that would better be utilized by consumers. In our view, these critics of the market share with Isenbergh a remarkable faith, again, in interpersonal comparisons of utility.<sup>107</sup>

It is at this point in his essay that Isenbergh reveals himself as an outlier on blackmail law. The overwhelming majority of commentators on this issue favor a complete ban. There is a corporal's guard that endorses total legalization.<sup>108</sup> Isenbergh, in sharp contrast to both camps, maintains uniquely that "[i]t is not necessary . . . to take free bargaining absolutely or not at all."<sup>109</sup> Instead, he advocates outlawry in certain circumstances and decriminalization in others. Which is which?

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105. *Id.* at 1926 n.49.

106. *Id.*

107. For works critical of antitrust on these grounds, see DOMINICK T. ARMENTANO, *THE MYTHS OF ANTITRUST* (1972); DOMINICK T. ARMENTANO, *ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE* (1990); DOMINICK T. ARMENTANO, *ANTITRUST POLICY: THE CASE FOR REPEAL* (1991); DONALD ARMSTRONG, *COMPETITION VERSUS MONOPOLY: COMBINES POLICY IN PERSPECTIVE* (1982); Walter Block, *Austrian Monopoly Theory—A Critique*, 1 J. LIBERTARIAN STUD. 271 (1977); WALTER BLOCK, *AMENDING THE COMBINES INVESTIGATION ACT* (1982); Walter Block, *Total Repeal of Anti-trust Legislation: A Critique of Bork, Brozen and Posner*, 8 REV. AUS. ECON. 31 (1994); Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 REV. AUS. ECON. 43 (1996); Donald J. Boudreaux & Thomas J. DiLorenzo, *The Protectionist Roots of Antitrust*, 6 REV. AUS. ECON. 81 (1993); Jack High, *Bork's Paradox: Static vs. Dynamic Efficiency in Antitrust Analysis*, CONTEMP. POL'Y ISSUES, Winter 1984-85, at 21; Fred S. McChesney, *Antitrust and Regulation: Chicago's Contradictory Views*, 10 CATO J. 775 (1991); ROTHBARD, *POWER AND MARKET*, *supra* note 57; William F. Shugart III, *Don't Revise the Clayton Act: Scrap It*, 6 CATO J. 925 (1987); and Fred L. Smith, Jr., *Why Not Abolish Antitrust?* REGULATION 23 (Jan./Feb. 1983).

108. See *supra* note 2.

109. Isenbergh, *supra* note 7, at 1926.

His first candidate for outlawry is blackmail over “prosecutable crimes.” This is because “[i]f the public benefits from the prohibition of a crime—and generally it does—it follows that the public gains more from the discovery of the crime than the criminal gains from concealing it.”<sup>110</sup>

One problem with this is that it is simply impermissible to make such interpersonal comparisons of utility. Isenbergh, paradoxically, furnishes us with yet another reason for rejecting this claim:

It is true that if a given criminal prohibition is inefficient, to prohibit blackmail against those who have committed the underlying crime makes things worse. A *devoué* of freedom who thinks, for example, that gambling and prostitution ought not to be illegal would be likely also to think that gamblers and prostitutes ought to be able to buy their privacy.<sup>111</sup>

But this is only a small sample of illegitimate laws, for the libertarian. In this era when lawbooks come not in the hundreds or even thousands, but tens of thousands of pages, the presumption is that virtually all law is illegitimate. It is concerned with improperly transferring wealth from its rightful owners to, in effect, recipients of stolen property; or with inappropriately regulating business; or with tariffs; or with stultifying taxes.<sup>112</sup>

But we need not resort to such peripheral matters. We can do so, also, with regard to legislation that even libertarians favor; for example, laws against murder or rape.

Consider the following. *B* knows that *A* committed such a crime. Is *B* guilty of complicity yet? No. This knowledge is merely information that *B* has attained, either inadvertently or through purposeful research. It matters not which. As long as there are no obligations to turn in criminals to law enforcement authorities, *B* is so far an innocent man.<sup>113</sup> Again there are two legal whites, which, even when combined, do not constitute a legal black. There is knowledge of *A*’s crime and *B*’s silence. Neither of them alone, nor together, establish *B*’s guilt for any crime, including complicity.

We now introduce blackmail into the analytic framework. Here, *B* agrees to continue his silence about *A*’s crime for a fee, and this deal is initiated either by *A* or *B*. According to Isenbergh, *B* is now guilty of

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110. *Id.* at 1927.

111. *Id.* at 1927 n.50.

112. It is also concerned with protecting person and property.

113. There can be no such duty in a free society. If there were, we would all be drafted, in effect, into the police department. Under libertarianism, the only obligations are to not aggress against person or property and to uphold contractual commitments.

complicity, whereas before (with no blackmail, just knowledge of A's crime), B was innocent. But B did no more in this second scenario than he did before. That is, B kept silent in both cases, in the first instance for no compensation, and in the second for a monetary reward. Why should the mere exchange of money (with no other act occurring except the agreement to keep silent for money), coupled, of course, with the threat to tell all if not paid, render B, an innocent man, complicit in A's crime? B, conceivably, may be guilty of making threats of exposure or issuing warnings thereof, but it is a reach to consider him complicit in A's original crime because he was not so complicit based on his mere silence before the blackmail contract was consummated.

Why should he now be considered complicit? It is difficult to avoid the explanation that this conclusion is solely a function of Isenbergh's central planning notions about the economic efficiency of knowledge dispersal. But to accept this would be to agree to the triumph of "economics" over justice.<sup>114</sup>

These convolutions in law seem contrived for the sole purpose of preventing (or reducing incentives toward) B's deliberate search for information about A's secrets. This is already done by thousands of journalists for periodicals of the *National Enquirer* stripe. As a practical matter, therefore, it is unlikely to have much of an effect.

Isenbergh defends his position as follows: "The idea would be to impose on blackmailers part of the social cost of the concealment of information in cases where the information was more valuable disclosed."<sup>115</sup>

We have already called into question how any such determination could be made. But suppose, somehow, that it could. That is, we now posit that the information on a (real, not victimless) criminal occurrence is more valuable disclosed than concealed. Why single out the poor, misunderstood *blackmailer* for special (negative) attention? If we stipulate that disclosure is more utilitarian than concealment, and further that the name of the game is to attain the most utils, then why is it not incumbent on *everyone*, not just the blackmailer, to ferret out this information? Why not, that is, commandeer the labor of *all* citizens to this end? And if not, what did the inoffensive blackmailer ever do to deserve being singled out?<sup>116</sup>

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114. Isenbergh's contentions about social cost are no more restricted by economics than the polar opposite. That is, one need not be an economist to buy into Isenbergh's legal conclusions, nor are all economists, because they are economists, logically required to agree.

115. Isenbergh, *supra* note 7, at 1929.

116. One of the arguments against rent control is that it singles out a small minority of people, landlords, for special responsibilities regarding the poor. Leaving aside the issue

Isenbergh next attempts to subvert justice in order to promote his pet economic scheme of wealth maximization concerns by making blackmail contracts not illegal, but unenforceable.<sup>117</sup> However, the presumption underlying democratic rule is that we all pay taxes to the government, preeminently, for two services: protection of person and property and *enforcement* of contracts. If the state refuses to uphold its basic obligations, why should it be paid taxes? Further, once we let this cloven hoof into the door, there is no logical stopping point. If we can increase utility by abrogating these contracts, how about in all other cases when people waste valuable resources, as in the case of soap operas, digging holes for the sheer pleasure of filling them up again, checkers, etc? We might well conclude that contracts concerning all these matters should be rendered unenforceable.

Hardin states: "Richard Posner says blackmail . . . has no social product and should therefore be criminalized. This is a very odd conclusion. Much of what I do has no social product (for instance, I consume, I waste time), but surely it should not be criminalized."<sup>118</sup>

Isenbergh's answer to Hardin, it would appear, would be, "No, we won't put you in jail. But any contracts concerning your time wastage will now be considered unenforceable." How, then, will poor Hardin be able to purchase the resources that help him waste time enjoyably? The answer is that he would not. Assume that Hardin likes to waste time by lollygagging around in his swimming pool. No contractor would have built this amenity for him, had he known that the Isenbergh forces would have rendered unenforceable any such contract with Hardin. The latter, presumably, could still waste time to his heart's content, but would be unable to do so by combining his time with resources. Surely, this would take much of the fun out of it.

Isenbergh goes so far as to "want to distinguish, if possible, between information already held by *B* (or obtained fortuitously) and information generated by *B*'s special efforts for the purpose of blackmail."<sup>119</sup> As a practical legal matter, this would appear doomed to failure.<sup>120</sup> As a

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of whether these laws succeed in their announced aims, they do so in a way that does not apply to clothing, food, medical services, and other goods and services used by the poor. For example, the entire community is called upon to help clothe, feed, and cure the poor, but only the landlord is expected to shelter them. There seems to be a similar bias operating in the present case vis-à-vis the blackmailer.

117. See Isenbergh, *supra* note 7, at 1928.

118. Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787, 1806 (1993).

119. Isenbergh, *supra* note 7, at 1929.

120. In the course of explicating this view, Isenbergh states: "If, for example, *A* has written *B* a compromising letter, *A* can offer to buy it back, while *B* cannot offer to sell it."

matter of justice, there would appear to be no distinction worth making in this regard. Why should "special efforts" to obtain information attract the attention of a law whose aim is to promote justice, given that it is legal to gossip about it, and that it is legal to *accept* a blackmail contract to keep silent about it? True, it is presently illegal to *initiate* such a contract, but this is a mistake in the law as now constituted.

Consider Isenbergh's analysis of Judge Posner's support of *United States v. Lallemand*<sup>121</sup> in the light of his own

new legal regime for bargaining over private information. . . .

1. Contracts not to disclose knowledge of prosecutable crimes and torts would be invalid and unenforceable. To enter into such a contract would in addition imply a measure of complicity in the underlying crime or tort.

2. Contracts not to disclose private information entered into between persons with no prior course of dealing would also be invalid and unenforceable.

3. Other contracts not to disclose private information would be valid.<sup>122</sup>

In this case, *B*, a male homosexual, blackmailed *A*, a married male homosexual, with a videotape of the two of them, *A* and *B*, having sex. *B* was convicted and jailed when *A*'s wife accidentally found the tape.

Isenbergh states:

*Lallemand* is not a case of blackmail for an involuntary condition (homosexuality). *A*'s exposure to blackmail did not flow simply from his homosexuality. *A* chose to marry someone from whom he concealed his sexual orientation, and to seek out other sexual partners . . . . It is not immediately obvious why the law should have protected *A* from an ill-considered, or even unlucky, choice of extramarital lover.

Because *A* and *B* had a voluntary course of dealing (even though *B* in fact deliberately set out to acquire compromising information about *B* [sic]).<sup>123</sup> *B*'s demands on *A* here would be permissible under the regime proposed in this Article . . . . [T]o permit the blackmail in *Lallemand* would quite possibly be the right result on balance, measured by social cost. *B*'s acquisition of information entailed little

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*Id.* at 1929 n.55. There are undoubtedly "economic" considerations underlying this assertion, but certainly not ones pertaining to justice. This claim resembles Ellen Fein's advice to the effect that boys may ask girls for dates, but never the other way around. *See* ELLEN FEIN, THE RULES: TIME TESTED SECRETS FOR CAPTURING THE HEART OF MR. RIGHT (1995). One can perhaps see sound (sociobiological) reasons for the latter; not so, unfortunately, for the former. *See* EDWARD O. WILSON, SOCIOBIOLOGY (1980).

121. 989 F.2d 936 (5th Cir. 1993).

122. *See* Isenbergh, *supra* note 7, at 1930.

123. Presumably, Isenbergh meant "A" here.

more cost or effort than the activity that *A* might otherwise have carried on with a different companion not bent on blackmail . . . . *B*'s opportunism hardly inspires admiration, to be sure, but it entailed little net social cost.<sup>124</sup>

In Isenbergh's reply we have an indication of all that is wrong in his approach. Most basically, to make the law of blackmail (or anything else, for that matter) turn on such an irrelevant issue as cost suggests a perversion of justice.

DeLong dismisses all "economic" justifications of prohibition as follows:

Why does blackmail strike us as so wrongful? So wrongful that even in the midst of a transaction cost analysis, the economist Ronald Coase would refer to it as "moral murder?"<sup>125</sup> None of the foregoing [economic] theories seems to touch the nerve that the blackmailer rubs; none explains the societal abhorrence of the blackmailer's craft. *Purely economic explanations of the criminal law often produce bizarre conclusions, such as that blackmail rules are intended to reduce expenditures by blackmailers.* Such provocations are part of the charm of economic analysis. We all know that blackmail laws are meant to do more than prevent waste.<sup>126</sup>

Our only objection is that we do not at all regard this as "charming." If the law is to be predicated on cost, that is bad enough; but to base it on "social" cost, a term fatally compromised by interpersonal comparisons of utility, is far worse.

Then there is the issue of the involuntariness of homosexuality. Why is this even relevant? If murder were one day found to be caused by inner compulsion, we would scarcely allow murderers to roam free. Surely the defense of homosexuality as a legal act has to do with the fact that it is a victimless "crime," a matter of consent between two adults. Even if homosexuality was attributable to an inner compulsion, as possibly it is in the case of addictive drugs, as long as the sexual act is not the result of an "outer" compulsion, namely rape, it should be legal.

Nor need we accept Isenbergh's contention that "*B*'s opportunism hardly inspires admiration . . . ."<sup>127</sup> It did, after all, help *A*'s wife learn of her predicament in this specific case and, in general, serves as an impediment to such acts of infidelity.

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124. Isenbergh, *supra* note 7, at 1931-32 n.57.

125. The article DeLong is referring to is Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655 (1988).

126. Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, 1689 (1993) (emphasis added).

127. Isenbergh, *supra* note 7, at 1932 n.57.

But the most problematic matter in this case is that Isenbergh, by his own admission, is precluded from criticizing Posner in this manner. If he is to be consistent with his own analysis, he must take one more fact into account: the legality of homosexuality. In certain epochs, and in certain jurisdictions (e.g., Massachusetts in 1997), it has been legal. Here, Isenbergh may logically take the view he does. But in other eras and other geographical locations (e.g., Saudi Arabia in 1997 or Alabama in 1902), homosexuality has been a "prosecutable crime." Isenbergh must then, upon pain of self-contradiction, subscribe to Posner's view of the matter. For Isenbergh is on record as maintaining that under such circumstances, blackmail contracts should be "invalid and unenforceable."<sup>128</sup> Moreover, blackmailers would be complicit in the "underlying crime."<sup>129</sup> This is not exactly Posner's position, to be sure, but it is consistent in that both would punish the blackmailer, albeit for different reasons.

### VIII. CONCLUSION

Let us consider one last argument against basing legal regimes on narrowly construed economic considerations. Relative prices change. That is their very nature. They do so incessantly, continuously. If law is based on calculations of cost, let alone social cost, it too will vary, along with the underlying prices from which it is derived. This fact applies to information as well. Does anyone doubt that the fax, telephone, e-mail, computers, videotape, VCRs, and camcorders have radically shifted, and shifted yet again, the costs of information gathering? And, although any predictions on the matter are fraught with danger, the burgeoning computer field, with new innovations and discoveries piling up every month, indicates more of the same in the future.

If we tie the tail of law onto the dog of economics, our legal system will be in a continual state of flux. It will not even approach the rule of law, which is a necessary condition of reasonable legal institutions.<sup>130</sup>

Isenbergh speaks of "information" being "worth more to A . . . than to C" and therefore blackmail being "productive."<sup>131</sup> He discusses "A, B, and C in the aggregate [being better or] worse off," depending upon the legal status of blackmail.<sup>132</sup> He even concedes that "[t]he balance of

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128. *Id.* at 1930.

129. *Id.* at 1927 n.50.

130. FRIEDRICH A. HAYEK, CONSTITUTION OF LIBERTY 397-411 (1971); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998).

131. Isenbergh, *supra* note 7, at 1932.

132. *Id.*

advantage between these two regimes is not self-evident."<sup>133</sup> He shows no evidence of realizing that continual price changes will render all of these calculations obsolete. Isenbergh reaches his "conclusion even though it may well be that the gains from improved allocation of rights in information would be roughly balanced by a possible increase in costly transacting."<sup>134</sup> He even discusses "[w]hat tips the scales in [his] mind" in his evaluation of the two systems.<sup>135</sup> But if the social costs on each side are roughly equal,<sup>136</sup> such that even Isenbergh can be tipped in one direction or the other, then once price changes are incorporated into the analysis, even the appearance of legal rigor will be converted into shifting sands and, ultimately, quicksand.<sup>137</sup>

Even worse, this affliction occurs at a point in time, not merely over time. Suppose, for example, that information-intensive relative prices in Hawaii and Vermont are different. Courts in these two places, both faithfully following Isenbergh's "principles," can and will reach opposite judicial findings.

We conclude, very much contrary to Isenbergh, that if justice is to be served, blackmail should be legalized totally, with no exceptions whatsoever.

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133. *Id.*

134. *Id.* at 1933.

135. *Id.*

136. We persevere in maintaining that this is equivalent to betting on which of two pins more angels can dance.

137. For contrasting points of view, see Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877 (1983). On adherence to the "economic" underpinning of law concerning the relevant cost calculations, see James Lindgren, *Blackmail: An Afterward*, 141 U. PA. L. REV. 1975, 1983 (1993).

# MERCER LAW REVIEW

Walter F. George School of Law



## Blackmail from A to Z: A Reply to Joseph Isenbergh's "Blackmail from A to C"

*Walter Block  
Robert W. McGee*

# MERCER LAW REVIEW

*Member of the National Conference of Law Reviews, Inc.*

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Volume 50

Winter 1999

Number 2

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