The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell

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INTRODUCTION

The argument for legalizing blackmail is simple and straightforward.[1] Blackmail consists of a threat or menace, coupled with a demand for money or other valuable consideration.' The threat. however. consists of something the blackmailer has every right to do. For example, it is entirely legal to engage in malicious gossip, or write a negative movie review, expose past criminal behavior. or refuse to befriend a person.' How, then? can it be illegal' to threaten to do something, when to actually engage in the activity would be legal? In other words, if I can licitly write a negative review of a movie, book or play, what would justify incarcerating me for offering to refrain from doing so, for a sum of money? Alternatively, if it is lawful to jail me for threatening to write this critique unless I am paid off not to do so, how can it be properly lawful to write the critique in the first place?

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1. Walter Block & David Gordon. *Blackmail, Extortion and Free Speech: A Reply io Posner, Epstein, Nozick and Lindgren.* 19 LOY. L.A. L. REV. 37 (1985); Walter Block. *Trading Money for Silence,* 8 U. HAW. L. REV. 57-73 (1986): MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE (1962): MURRAY N. ROTHBARD. THE ETHICS OF LIBERTY (1982); Eric Mack. *In Defense of Blackmail.* 41 PHIL. STUD. 274 (1982).

2. W.H.D. Winder. *The Development of Blackmail.* 5 MOD. L. REV. **21,** 23-24 (1941): Richard Epstein, *Blackmail, Inc.,* 50 U. CHI. L. REV. 553 (1983).

3. This practice is IO be sharply contrasted with extortion, which also consists of a threat, or menace, coupled **with** a demand for money or other valuable considerations. But here the threat consists of something the extomonist has no nght at all to do: engage in murder, arson, kidnaping, rape, etc.

4. **As** opposed to immoral, which is a very different issue.

The two — acting: and offering not to act for a fee — naturally "go together." In *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren* (hereinafter *"Blackmail, Extol·riot? and Free Speech"):'* David Gordon and I contended that it should be legal to gossip about a person's adulterous affairs, *and* to offer to refrain from such gossip for consideration.[6] Blackmail may not be very nice, it may not be pleasant. it may be immoral, but as long as the law confines itself to violation of person and legitimate property rights: as it should in the libertarian philosophy (the basis of this reply),' there is no case for prohibition.

Why, then: the virtual unanimous rejection of this elementary and uncomplicated analysis?[8] There are several possible explanations: First: there is a failure by those who have expressed an opinion on the subject to even consider the legal merits of blackmail. Instead, they focus entirely on the deleterious effects of rhe activity: the lives ruined, the unhappiness created, etc.[9] The implicit argument is that all harmful things ought to be prohibited by law.[10] The flaw in this reasoning is

5. Block & Gordon. *supra* note 1.

6. On moral grounds. neither would be justified. But here we are discussing what the law should be and not the requirements of moral action. which is a very different issue.

7. *See* HANS-HERMANN HOPPE. THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993); HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS AND ETHICS (1989): MURRAY N. ROTHBARD. FOR A NEW LIBERTY 85 (1978); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY 227 (1982).

8. It is virtually unanimous in two senses. First, blackmail is against the law in virtually all "civilized" countries. Second, the range of opinion on the part of "mainstream" legal scholars and philosophers brooks no disagreement on this issue. *See* Leo Katz and James Lindgren, *Instead of a Preface.* 141 U. PA. L. REV. 1565 (1993) (introducing a compilation on blackmail of no fewer than 14 different contributions. with not a single solitary dissent from this opinion). Interestingly. no two authors agree as to preciseiy why blackmail should be legally proscribed.

9. *See, e.g.,* MIKE HEPWORTH, BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE (1975).

10. For a critique of this view see Stephan Kinsella, *Rarionalism, Legislation and Law.* 11 J. LIBERTARIAN STUD. 132 (1995); Bruce L. Benson, *Customary Law With Private Means of Resolving Disputes and Dispensing Jusrice: A Descriprion of a Modern System of Law and Order Without State Coercion,* 9 J. LIBERTARIAN STUD. 25 (1990); Bruce Benson, *Enforcement of Private Propery Rights in Primitive Socieries: Law Without Government,* 9 J. LIBERTARIAN STUD. 1 (1989); Barry Poulson, *Substantive Due Process and Labor Law: 6*

that there are many ways to harm people which patently ought to be legal. For example, if A opens a grocery store directly across the street from B's grocery store, A will harm B.[11] B might, as a result of his frustration and anger at the competition, engage in wife beating, child abuse, or even commit suicide. Would the injurious results of **A's** conduct justify the legal proscription of any and all commercial competition? Of course not. Alternatively, C might ask D out for a date, and D refuses him. The effects on C in such a case may be disturbing. but in most of the free world D has every right to refuse C's offer. Suppose. on the other hand, that D agrees to date C. D's acceptance might harm E, who is insanely jealous of D. For all of that, mere harm is not sufficient to warrant prohibition. Violation of person or property right is necessary to justify judicial intenention.

Second, there are ths purported claims that the uniqueness of blackmail itself should render it illegal. despite the foregoing considerations. It is into this latter category that the views of my detractors. James Lindgren[12] and Debra Campbell." may be placed. Notwithstanding my disagreement with their views. it is apparent that they have carefully considered the ramifications of this law. Their analyses, however, are found wanting. In the next two sections, I consider the criticisms leveled at David Gordon and myself in response to *Blackmail. Extortion and Free Speech.*[14]

J. LIBERTARIAN STUD. 267 (1982);'Roger A. Arnold. *Efficiency vs. Ethics: Which Is the Proper Decision Criterion in Law Cases?.* 6 J. LIBERTARIAN STUD. 49 (1982); Williamson M. Evers. *Toward a Reformulation of the Law of Contracts,* 1 J. LIBERTARIAN STUD. 3 (1977).

11. Robert W. McGee. *If Dwarf Tossing is Outlawed. Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?,* 38 AM. J. JURIS. 335, 346 n.61, 356 n.89 (1993); Robert W. McGee & Yeomin Yoon, *Trade Policy in the Computer Industry: Time for a Change.* 8 TEMP. INT'L & COMP. L. J., 219, 253 n.293 (1994).

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

13. Debra J. Campbell. *Why Blackmail Should be Criminalized: A Reply to Walter Block and David Gordon.* 21 LOY. L.A. L. REV. 883 (1988).

14. Block & Gordon. *supra* note 1

I. LINDGREN

Lindgren begins by inaccurately characterizing *Blackmail, Extortion and Free Speech"* as maintaining that "blackmail or extortion threats should no longer be criminal."[16] This statement is erroneous. First of all, Gordon and I sharply distinguished between blackmail (a rightful threat, such as to tell a secret obtained legitimately) and extortion (a wrongful threat, such as to murder or maim), holding the latter properly illegal, and the former improperly so.[17] Second, we did not maintain that blackmail should "no longer" be criminal. This implies that at one time we believed blackmail to be properly criminal, and now we do not: or that in our view blackmail was once appropriately prohibited say, until 1953. but then, more recently, because of something that occurred in that year, we no longer hold such a view. Neither implication is true. Throughout our professional careers, Gordon and I have maintained that blackmail should be lawful.

Lindgren next mentions that he "looked at blackmail and tried to explain what is particularly immoral, inefficient or harmful about the behavior."[18] In contrast, he states that in *Blackmail, Extortion aiid Free Speech,* we ask: "What rights does blackmail violate?" and "conclude that informational blackmail violates no right of the victim and thus should be legal.""[19] This approach is problematic for several reasons. First, Lindgren appears to have placed blinders on his eyes before he even began his critique. He *assumes* that the explanation for the prohibition of blackmail is a rational one. He fails to even consider that the legal proscription of blackmail could be mistaken and incomprehensible on rational grounds. Lindgren appears to rule out such a finding before he even begins, surely not a methodology in keeping with scholarly thought.

15. *Id*
16. Lindgren, *supra* note 12. at 35.
17. Block & Gordon, *supra* note 1
18. Lindgren, *supra* note 12. at 36.
19. *Id*

Second, Lindgren spends a great deal of time discussing the *victim,* all the while adumbrating the position espoused in *Blackmail, Extortion aiid Free Speech.* Lindgren would attribute to us the view that "blackmail violates no right of the victim."[20] This is, of course, not the case. Mors importantly, however, there is no "victim" involved at all. Lindgren attempts to characterize our view as including a victim, and to further mention that none of his rights are violated. But if the "victim's" rights are not violated. in what sense can he be seen as a "victim"? On the contrary. our view was that the person who pays money to the blackmailer is a *beneficia??.* of his. which implies, of course. that the blackmailer is not an exploiter, but rather a *benefactor.* The word "victim" is thus inaccurate. More exact. and certainly more neutral and less pejorative a term. would be "blackmailee."[21]

A. Empty Search

We now arrive at what Lindgren calls our "empty search for violations of rights.'" What were we supposedly looking for? His first stab at this is at the self-described "trivial level," where he posits that "every crime involves a violation of rights — if only a citizen's right to be free of the behavior prohibited by the crime. **A** homicide is criminal since it violates the right not to be killed."

Although he is kind enough not to tax us with this interpretation, I cannot accept the view that this characterization is true even in the trivial sense he thinks it is. On the contrary. this is a bit of thinly disguised legal positivism." according to which, whatever the legislature. court. or law prohibits not only is illegal. but *ought* to be so

20. *Id*
21. The dictionary lists no such word. Evidently, at least in common parlance, "victim ofblackmail" is a redundancy. At least to this extent. then, Lindgren, not Gordon and myself. is correct.
22. Lindgren. *supra* note 12, at 36.
23. *Id.*
24. Legal positivism is the doctrine that all man-made or legislative-made law is just. Thus. it is a logical contradiction to say. "This law was passed by the duly elected legislature, but is unjust." The Nazis and Communists, needless to say, could take great comfort from this doctrine

considered. Suppose, for example, that the law mandates that all Jews are to be summarily put to death. If Lindgren were correct, this law would imply that non-Jewish citizens have "a right to be free of the behavior committed by the crime," namely the crime of other people being Jewish. Similarly, a rent control law would imply that people have "a right to be free" of free market rents, as would the draft imply that people have "a right to be free" of what?[25] Freedom? But all this is nonsense, not a serious piece of legal analysis. It is simply not true that people have a right to be free of other people being Jewish, or from free market rents. or from freedom itself. no matter what the law of the land. On the contrary, it is always possible to ask of a law enacted by a legislature: Is it a just law? Is it a proper law? Is it a legitimate law? With Lindgren's interpretation it would be impossible (or at least meaningless) to ask such questions.

It is thus entirely beside the point that "most states treat blackmail as a species of theft" and see the practice as a "threat typically violat[ing] the victim's civil right to keep his property and be free of duress."[26] The question is whether state legislatures are *correct* in their assessment of blackmail. a point Lindgren ignores.

As Lindgren sees our position. something can be criminal "only if it violates some other law. only if there is a source of illegality independent of the law against the particular behavior.'" How he arrives at this juncture is a bit of a mystery. unassisted by his failure to cite anything from *Blackmail, Extortion and Free Speech* which would support this idiosyncratic interpretation. After this start, it cannot be denied that our author utterly devastates the idea; the only drawback to

25. It might be argued that neither laws pertaining to rent control nor those pertaining to the draft are criminal matters. As a matter of legal positivism, this is undoubtedly true, at least in many jurisdictions. But this is merely one way of categorizing legal enactments. Surely people who violate either of these laws can be subject to criminal penalties. Consider the landlord who insists upon charging whatever he wishes for his property. He is hauled into court and fined. If he refuses. as he would have every libertarian (not legal) right to do. he will certainly be incarcerated (I owe this objection to an anonymous referee).

26. Lindgren, *supra* note 12. at 37.

27. *Id.* at 36.

demolishing this "straw man" is that it has nothing at all to do with our views of blackmail.

It is difficult, if not impossible. to justify prohibiting murder or any other crime on these grounds. but these are not our grounds. In my view, criminal codes are justified only to the extent they are limited to protecting persons and property against invasions by other people. This. indeed. is the basic axiom of the libertarian political philosophy. In this view. a major cause of injustice in the world is created by governments which go beyond these limitations.[28] It is improper. for example, for the state to compel citizens to aid one another, whether directly (forcing someone to save a drowning person) or indirectly (e.g., the welfare state)." But this applies not only to injustice. but also to pragmatic failures such as economic inefficiency. Murder is an attack on an individual's most important piece of private property, his own person. Similarly, rape, assault. battery and kidnaping are all interferences with bodily property rights. and as such are clearly illegitimate. Theft. arson and fraud are all border crossings, uninvited incursions: it is entirely proper to extend to victims of these practices. too, the protection of the criminal law.

If this is only "common sense." it applies equally to blackmail. the subject under discussion. I maintain that it is improper to proscribe blackmail precisely because blackmail does not amount to initiation of violence against innocent persons or their property, *not* "if it violates some other law," as Lindgren contends.:" Yes. "the search for violated rights leads nowhere."[31] but not because such a search implies that for an action to be criminal "it must be subsumed in another crime.'" Nor can I see my way clear to agreeing with our critic that outlawry is justified on the ground that "civil law provides . . . [this] remed[y] for

28 For an elaboration, see *supra* note 8

29 For a critique of the latter. on the ground that it hurts even its intended beneficiaries. to say nothing of society as a whole see CHARLES MURRAY. LOSING GROUND AMERICAN SOCIAL POLICY FROM 1950 TO 1980 (1984)

30. Lindgren. *supra* note 12, at 36

31 *Id* at 37

32 *Id*

blackmail."[33] The law does indeed provide this remedy. but the law is *mistaken* in doing so.

B. Consent

A linchpin of our defense of blackmail is that the blackmailee *consents* to this practice. Indeed. the blackmailee may even initiate the blackmail arrangement. as would be the case where he finds that someone is about to "spill the beans," and he approaches that person. and offers him money to agree to cease and desist.

Lindgren attempts to disparage the importance of the consent of the so-called victim of criminal behavior. He states: "Consent is not a universal bar to criminality. If I buy a product from a price-fixer. the contract is consensual. Yet I may have been the victim of a criminal violation of the antitrust laws."[34]

Unfortunately. this weak analysis will not suffice. For here legal positivism once again raises its ugly head. Lindgren's analysis is logically predicated upon the *legitimacy* of anti-trust laws. yet he remains content with merely mentioning the fact that price fixing and other such practices are indeed against the present law of the United States. Just because price fixing *is* illegal. however. is no reason to believe that it *should* be illegal. Why should all vendors not agree to sell their product at a certain fixed price? If each one alone has a right to set his own terms of trade. then presumably, they all have a right to agree to do this in concert. People do not lose their rights just because

33. *Id.*
34. *Id.* at 38

others are similarly exercising theirs." Here, there is indeed consent between a seller and buyer, but there is no proper illegality.

Secondly, take Lindgren's case of the professor who threatens to fail a passing student unless he is paid $50.[36] Lindgren correctly asserts that "a student who gives in to such a threat is consenting to the contract. The student must think that he can benefit from the contract or he would not go along."[37] The professor has no right to make this threat because. presumably, it is contrary *to* the contract he signed with his employer. the university. Here there is consent between the professor and the student, but not between the university and the professor. Far from being analogous to the blackmail situation, this is a case of extortion because the professor has no right to fail the student. To do so would be a violation of his contract with his employer, as well as between him and the student. The student, in other words: when he agreed to attend the university. had an implicit, if not explicit, understanding that he would not be treated in this manner. No such understanding exists between the blackmailer and the blackmailee.

There is a sharp division which must be drawn between the professor and student. on the one hand. and the blackmailer and blackmailee, on the other. In the former case there is a contract between the hvo of them. courtesy of the administration of the college. It stipulates the grounds upon which the professor may evaluate the student's work. Typically, these are confined to quality of term papers and exams, etc. They most certainly do not include monetary or other payments from the student to the professor. On the other hand, there

35. For the moral and economic case for legalizing price fixing and other so-called monopolistic practices see DOMINICK T. ARMENTANO, THE MYTHS OF ANTITRUST (1972); DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (1982): DONALD ARMSTRONG. COMPETITION VS. MONOPOLY (1982); Walter Block, *Austrian Monopoly Theory — A Critique*, 1 J. LIBERTARIAN STUD., 271 (1977); WALTER BLOCK, AMENDING THE COMBINES INVESTIGATION ACT (1982): Walter Block, *The Total Repeal of Antitrust: A Critique of Bork, Brozen and Posner, 8* REV. AUSTRIAN ECON. 31 (1994); MURRAY N. ROTHBARD, MAN ECONOMY AND STATE (1962): HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1 993).
36. Lindgren, *supra* note 12, at 38.
37. *Id.*

is no existing contract behveen the blackmailer and blackmailee. They meet as total strangers, unconnected to each other n-hether by contract or by a third party intermediary (such as the college).

But suppose that this were not the case. Presume, that there *is* a prior contract between the blackmailer and blackmailee. Namely, the blackmailee had paid the blackmailer not to engage in this practice with regard to him. *Then*, the act of blackmail should be illegal. But this would not be because there is anything intrinsically illicit about blackmail: it would stem from the fact that there was a prior contract between them banning such activity. In like manner: there is nothing untoward about my selling your son a motorcycle. But if I had previously agreed not to do so and was paid by you for this purpose, and I did so anyway, then my sale of a motorcycle to your son would be rendered illegitimate.

Lastly, Lindgren offers the case of the robber's threat: "Your money or your life" and contends that this. too: is "a bargain where a victim usually stands to gain by consenting."" Once again, however, the analogy with blackmail fails. In the latter case. if the blackmailer has a right to carry out the threat. he has a right to make the threat. The obvious question is, does a robber have the right to carry out the theft of his victim's hard-earned money? To **ask** this question is to answer it. The reply must surely be that the robber has no such right. If not, from whence does the right to make this threat arise? Answer: it does not. The victim consents to the extent that given the choices offered him he "freely" chooses one of them, say, his life instead of his money (and his life). But the robber had no right to impose this on him in the first place! In contrast: the blackmailer had every right to speak out freely about the blackmailee's secret.

C. *Immorality*

Lindgren then focuses on the relationship behveen blackmail, illegality and immorality." He claims that the first should fit in the

38. *Id.*
39. *Id.* at 38-30.

second category because it is an aspect of the third. To an extent he is correct. There is indeed a complex, but close. inter-relationship between the illegal and the immoral: given that blackmail is immoral,[40] it is reasonable to ask if it should be illegal as well.

Our position is that only those immoralities which constitute "border crossings'' of person or property should be prohibited by law; those that do not. should not be prohibited. For example. murder. rape. arson and kidnaping are undoubtedly immoral; however. they should be proscribed by law not for that reason but because they constitute an infringement of the person and property rights of other people.

It also might be contended that the blackmailer takes another's property. and this practice therefore ought io be illegal. if I am to be consistent nith my own views. But such a stance cannot logically be maintained. Blackmail no more "takes"'! property from another than the baker "takes" money from his customer in return for bread. In both the bakery and blackmail cases: there is not a "taking" but rather a voluntary trade which was mutually agreed upon at the time of sale. The baker takes money, but he gives bread. The customer takes bread, but he gives money. Both the baker and the customer are satisfied with this deal at the time of sale; otherwise they would not agree to it. True, the baker might have wished for a higher price and the customer for a lower one, but despite their misgivings. they agreed to engage in the transaction.

40. Lindgren states that "Block and Gordcn . . . grant[] . . . the immorality of blackmail." *Id.* at 38. This is not exactly true. In *Blackmail, Extortion and Free* ***Speech,*** our wish was merely to *distinguish* between that which is immoral and that which should be illegal. maintaining all rhe time that while there is indeed some ov erlap. there is by no means a one to one correlation. For the purposes of our analysis. we wished merely to grant this for argument's sake. not to make an independent claim to this effect. Indeed. our statement. cited in Lindgren was that "[b]lackmail *may well be* underhwded. evil. vicious. reprehensible and immoral. But that is entirely beside the point. Our concern here is solely with the question of the criminal. not moral: status of blackmail." Block & Gordon. *supra* note 1, at 47, (emphasis added) cited in Lindgren. *supra* note 12, ar 39. This hardly amounts to a "grant . . . [of] the immorality of blackmail," **as** per Lindgren. Lindgren, *supra* note 12. at 39.

41. ***See*** *generally* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

It is precisely the same with the blackmailer and blackmailer. The former agrees to keep his silence for a fee. and the latter agrees to pay money for this service of forebearance. It cannot be denied the blackmailee wishes that the blackmailer would take less money for this service. or that he had never ferreted out the blackmailee's secret in the first place, but the blackmailer has similar misgivings: for his part, he wishes the blackmailee were richer. or more worried about the secret being bruited about, so that he, like the baker. could charge more.

Sow consider the list of things that are nidely considered immoral, but which patently do *not* constitute initiatory violence or theft: "illicit" drug use. pornography, atheism, gambling, homosexuality. smoking." fornication. sodomy, adultery. masturbation, overeating, laziness. divorce: the list goes on and on.[43] Would Lindgren advocate a legal ban on all of these actions? If so, then he is at least logically consistent. If not. how can he favor the outlawry of blackmail. For gossiping, which surely deserves inclusion on this list of Immoralities, is the only thing threatened by the blackmailer.

Lindgren's treatment of lying. something that is "seriously immoral but not illegal,"[44] is far more reasonable. He maintains that lying per se, no matter how immoral. should not be legally forbidden. Insofar as lying amounts to fraud, or theft. however. then it should be outlawed. This is exactly our position. Similarly, he states, "At common law. one type of blackmail. a threat to [improperly] accuse of sodomy, was punished under the crime of robbery.""

Again. there is no dispute between us — with the exception that Gordon and I called this act extortion, *not* blackmail, since no one has a right to falsely accuse someone of a crime."

42 The inhalation of cigarette fumes which affects only the smoker himself, mahing no reference to "secondhand smoke." which may infringe on the rights of others

43 The Mormon religion proscribes drinking tea and coffee on moral grounds

44 Lindgren, *supra* note 12, at 40

45 *Id*

46 The same analysis applies to Lindgren's example of the unionist who "threatens to call a strike unless he is given a personal payoff." *Id* at 41 (*quoting* James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM L REV 670, 672 (1984)) Again. even assuming the legitimacy of unions (for an alternative view see Walter Block, *Labor Relations, Unions and Collective Bargaining A Political Economic Analysis*, 16J SOC POL AND ECON. STUD. 477 (1991)) the labor leader still has no right to do this. If he has no right to do it. he has no right to threaten it. Such an act ought to be criminalized. because it is illicit extortion, not legitimate blackmail.

Lindgren sees minimization of "harm, disutility or inefficiency"" as the main legal desiderata. In contrast, I maintain that justice is the essence of law and that justice. in tum. consists mainly of protecting persons and property against violent incursions. But this he characterizes as a "novel approach of requiring violations of independent rights."" If our approach was indeed "novel," so be it. But this is far too complimentary to Gordon and myself. Lindgren seems unaware of any legal philosophical tradition other than the utilitarian, but actually there is one, and n e are but humble followers in this libertarian or natural rights vineyard." To the extent that our contribution was "novel," it is not with regard to this perspective itself. only with applying it to blackmail.

D. Using Other People's "Chips"

Lindgren now reiterates his own positive theory of blackmail and criticizes our rejection of it. His view is that the blackmailer, in effect. steals information (bsnefits from information that is not his) and is, hence. a thief. To put this thought into our terminology. Lindgren in effect asserts there is thus no such thing as mere blackmail: all blackmail is extortion.

What information is it that the blackmailer illicitly utilizes? It is the information that would have gone to a third party. such as the blackmailee's "spouse. or employer, the authorities. or even the public

47. Lindgren. *supra* note 12. at 39.

48. *Id.*

49. This refers to natural rights. For more information on this topic see HOPPE, *supra* note 7; MURRAY N. ROTHBARD, FOR A NEW LIBERTY (1973); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982). *See also* Tibor R. Machan, *Law, Jusrice and Natural Rights,* 14 W. ONTARIO L. REV. 119 (1975); Tibor R. Machan, *Prima Facie versus Natural (Human) Rights,* 10 J. VALUE INQUIRY 119 (1976); Tibor R. Machan, *A Reconsideration of Natural Rights Theory* 19 **AM.** PHIL. Q. 61 (1982); Tibor R. Machan, *Justice, Self and Natural Rights, in* MORALITY & SOCIAL INJUSTICE: POINT/COUNTERPOINT (James Sterba ed., 1995).

at large."[50] This "involves the . . . misuse of a third party's leverage for the blackmailer's own benefit."" The blackmailer is suppressing the wife's right to learn of her husband's philandering or the police force's right to discover the blackmailee's crime.

The mistake here is not hard to see. Neither the wife nor the police have any right to force the blackmailer to notify *them* of the secret behavior in question. Given that they do not: the blackmailer cannot logically be guilty of stealing anything from them. Because there is no one else from whom the blackmailer could steal. he *cannot* be guilty of theft. Lindgren characrsrizes the foregoing as the blackmailer "bargaining with the state's (or the wife's) chip."" Strictly speaking, this assertion is not true. The blackmailer. to use Lindgren's somewhat misleading metaphor." is dealing with *his own chip*, that is, *his* knowledge of the husband's philandering or the blackmailee's crime. not with the knowledge of the wife or the police: because so far they lack such knowledge. These people might be better off if they were notified of the actions of the husband (criminal), but because they have no right against the blackmailer to this information, all such conjecture is beside the point.

Lindgren asserts that the "threatener does not have a sufficient personal stake in the potential dispute between the tortfeasor and the tort victim so that he may effectively settle that dispute through blackmail."[54]

But who can determine n-ho has enough of a "stake" in any given case to be able to legitimately act'? Lindgren certainly fails to offer any criterion upon the basis of which that question could be

50. Lindgren, *supra* note 12. at 41
51. *Id.*
52. *Id.* at **42.**
53. There is nothing wrong with rhe use of analogy, metaphor, examples, per se, a view Lindgren mistakenly taxes us with. *Id.* If there were somerhing intrinsically problematic about this mode of argumentation, we too are guilty of violating the stricture. But argument in this form is only of help in clarifying ideas; it canno: substitute for the required reasoning. This is precisely where Lindgren fails: he allows his talk of "chips" to obscure the real issue: that these third parties (the wife, the police) have no right apainsr the blackmailer such that he must tell them the secret.
54. *Id.*

answered. All this talk of stake holding is beside the point in any case. The issue. the *only* issue, is whether the would-be blackmailer came by his information in a legitimate manner, that is. without the use of initiatory violence against person or property. If he did, then he has the right to use it in any manner deemed suitable by him.

Lindgren now *takes* Gordon and me to task for our failure to distinguish more fully between "suppressing information and releasing it."[55] He waxes eloquent about the greater importance of the latter, noting that the first amendment to ths Constitution focuses on it. However. the former is also important on Constitutional grounds,[56] and even has its own amendment — theFifth — dedicated to it.

Another difficulty is that the blackmailer by no means suppresses a crime. He merely *refrains* from telling the police about it, an entirely different matter. True suppression would consist of the blackmailer *forcibly silencing* a would-be "stool pigeon" who was about to tell all to the police. Needless to say, nothing like this is done by the blackmailer, or is even claimed by Lindgren. or anyone else.

There is no doubt a diffsrence between suppressing information and releasing it. But is it a *relevant* difference'? I think not. The essence of our defense of the blackmailer is that he threatens no more than he has a right to actually do. And what. precisely, does this consist of? In my view he can legitimately *either* tell the secret of the blackmailee (should he refuse to pay up) or keep the secret if a payment is mads. *Either one* is entirely legitimate. So why *should* a distinction be made between these two acts. *both* of which fall under the rubric of legitimacy for blackmail?

II. CAMPBELL

If Lindgren started off on the wrong foot. the same. happily. cannot be said for Campbell. On the contrary, she begins by specifically disavowing any intimate connection betw een immorality

55 *Id* at 41-43
56 Not that this is particularly germane *to* our inquiry

and disutility on the one hand, and criminalization on the other."[57] Sharply distinguishing herself from Lindgren, she instead follows Eric Mack,[58] who argues that if immorality and disutility are not sufficient for the criminalization of boycotts: they should fail with regard to blackmail as well.[59]

Further, she correctly repudiates Robert Nozick's[60] notion that blackmail is "unproductive."[61] In addition, she properly maintains that even if a commercial agreement is indeed "non productive," it should still not be outlawed.[62] This concept is entirely in keeping with the view expressed in *Blackmail, Extortion and Free Speech,* that the only things that should be prohibited by law are uninvited border crossings, whether against a person or his private property.[63] Since lack of "productiveness"[64] is an entirely separate matter, it should not be sanctioned by the law.

But then, unfortunately, when she turns her attention to ths efforts on blackmail under consideration,[65] she loses her way.

She begins by putting our argument in the form of a syllogism:

> 1. If one threatens to do what one has a right to do, then the threat is permissible and should be legal.
> 2. If something is only a permissible threat, then it also should be legal.
> 3. Blackmail is only threatening to do what one has a right to do. Therefore,
> 4. Blackmail should be legal.[66]

57. Campbell, *supra* note 13, at 885.
58. Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 274 (1982).
59. Campbell, *supra* note 13, at 885.
60. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).
61. Campbell, *supra* note 13, at 885.
62. *Id.*
63. *See generally* Block & Gordon, *supra* note 1.
64. An awful lot of lazy people would be incarcerated under such a legal code, surely an injustice, even though sloth may be immoral,
65. *Id.*
66. Campbell, *supra* note 13, at 886.

This appears reasonable enough. However, on the basis of this characterization, her criticism is that Gordon and I merely assumed the first premise, but offered no arguments in its behalf, and that "the third premise is false."[67]

She is drawn to this conclusion on the basis of her distinction between an offer and a threat: "[T]o distinguish legitimate economic exchanges from cases of blackmail one must disregard the threat involved and look carefully at the offer."[68]

Her point is that blackmail passes muster on the basis of the former consideration — one point in our favor — but fails on the latter — a point against us. Unfortunately, previous discussions have focused on the threat issue, which, she agrees with us, cannot illegitimate blackmail: they have, however, ignored the offer question the supposed Achilles' heel of our case. She will now rectify this imbalance and thereby indicate our error.[69]

As she sees things, blackmail *offers* not a legitimate choice, but rather a coerced choice:

> For the purposes of my argument, an offer is 'coercive' if the offeror creates a coerced choice for the offeree. Someone is the victim of a coerced choice if he has to choose between two things, both of which he had a right to before the offeror came on the scene. For example, some person V[ictim] has a right to both X (his money) and *Y* (his secret). The person making the offer, call him B[lackmailer], has a concurrent right to Y (in the case of blackmail, the blackmailer has the right to publish true information about the victim). B is attempting to force V to *choose* between relinquishing his (V's) right to either X or Y. The important thing to notice is that an offer is coercive only in the case that it creates a *coerced choice*, and

67. *Id.*
68. *Id.* at 887.
69. *Id.*

regardless of whether or not that choice in linked with a permissible or impermissible threat.[70]

There are problems here.

First, there is an over-determination, or a conflict, in rights. It would appear that both B and V own the secret. This cannot be, given that each one's use is incompatible with that of the other. If V maintains his secret (along nith his money) he will preclude B from using it. By stipulation. however, B is (also) an ouner of Y. That is, B has a right to speak freely about V's secret. Alternatively, this can be stated using an internal self-contradiction in Campbell's model. B both has. and has not: the right to use this secret for his own benefit. He may do so because the "B[lackmailer], has a concurrent right to *Y* (in the case of blackmail. the blackmailer has the right to publish true information about the victim)."[71] But it is also true that he may not, since to do so would be to "create a coerced choice," a legal impermissibility for Campbell.

States Campbell:

> In the case of blackmail. the victim has two rights but the blackmailer also has a right to one of the things the victim has a right to. i.e.. the information. Since one of the victim's rights happens to be something to which the blackmailer slso has a right. the blackmailer asks (forces) the victim to choose between his rights [his money or his secret] . . . or suffer the consequences of non-compliance."

I submit that this is confusing. How can two different people both have a right to the same thing?"[72] And if they, somehow, both do,

70. *Id* at 888.
71. *Id*
72. *Id.* at 889-90.
73. Two people can no more haie an incompatible right to the same thing than two people can occupy the same space at :he same time. The latter is a contradiction of physics (and of the laws of language — if two people are both in Boston, for example, proper speakers of the English language would haie to deny that this city constitutes just one "space"), the former is the denial of a coherent legal system. The function of law is to determine which of

how can it be determined nhich one is wrong in exercising his right? Why in any case pick on the poor blackmailer, given that his claim is as valid as any other?

Second, this is a distinction without a difference. It is all well to *say* that a threat and an offer are unequal, but operationally they come down to precisely the same thing. Campbell's notion to the effect that blackmail is innocent of a coercive *threat*. but guilty of a coercive *offer*, thus cannot be maintained.

Third, this legal analysis falls prey to the reductio ad absurdum. Suppose that Mr. C has 5500 in his pocket and is taking part in an auction. where he has just offered a high bid of S400 for a painting. The auctioneer has brought the gavel down twice and is about to bring it down a third time indicating a final sale. when along comes Mr. D, with a bid of S500. Assuming that D had not come along and that no other person would make a bid. then as soon as the gavel came down for the third time C had a right to the painting plus the S100 still in his pocket. However, when D comes along and bids. say. S499, then C must give up either the painting, or the extra 5100: he cannot keep both, even though absent D he would have been so entitled. According to the logic of Campbell's presentation. D has created a coerced choice for C. C now "has to choose between two things. both of which he hac a right to before the offeror (D) came on the scene."[74] only one o which he can now have. Therefore. D's activities are equivalent tc blackmail, and should be proscribed. forthwith. I submit that this would be a highly problematical finding for any rational court.

Yet another contradiction arises in Campbell's analysis. She asserts that the third premise she attributes to us ("Blackmail is only threatening to do what one has a right to do") is false." The clea implication, here, is that the threat uttered by the blackmailer is ai *impermissible* one. Later she appears to contradict this, asserting: "Th

two (or more) people has a right to something. To say that they both do is to give up on th task. The task of Solomon, the judge, was to determine which of two women had the right t rear the baby. Suppose he had concluded that both did. and not on a half time basis eithe We would conclude that he had not discharged his judicial responsibility.

74. Campbell, ***supra*** note 13, at 888.
75. *Id.* at 886.

offer in the case of blackmail joins a *coerced* choice and a permissible *threat* . . . . Permissible threat: you have a right to threaten to tell my secret."[76] Here, the clear implication, nay, the explicit statement, is that the uttered threat by the blackmailer is a permissible one. Further on she once again reverses field and returns to her first point: "[I]t should now be obvious that Block and Gordon's premise, that blackmail is just a permissible threat, is false."[77] Well, if it is false that the threat is permissible, then it must be true that it is impermissible. So we travel from the impermissible to the permissible and back once again to the impermissible. All of this, to say the least, is rather confusing.

But the difficulties have by no means come to an end.[78] Campbell now attempts to smuggle in "unfair trade practices, such as private monopolies and usurious interest rates" under the rubric she has so painstakingly created for blackmail." It would appear that those who sell goods or services in the absence of enough competitors to satisfy Campbell, and/or who charge interest rates deemed to be excessive by her, are also guilty of offering "a coerced choice," and thus limiting "our ability to contract freely."[80] Because members of a capitalist society are interested in protecting their ability to "contract freely," we are justified in declaring illegal those contracts duly entered into with fewer than the required number of competitors or at too high interest rates.[81]

But where, in these two cases, are the two things that the victim has the right over, under circumstances where the monopolist or usurer is demanding one of them? That is to say, Campbell has not shown that a buyer has any rights against a single seller that he would not have against this person had there been more competitors. Right now, Wendy's is but one of many sellers of fast food burgers. They sell a meal at, say, $5. Were they to raise their price to $10, they might lose

76. *Id.* at 889.

77. *Id.*

78. For a critique of Campbell's exegesis of the Rawlsian position applied to blackmail see NOZICK, *supra* note 60.

79. Campbell, *supra* note 13, at 892.

80. *Id.*

81. *Id.*

customers to their competition. but no one could have a legitimate case against them for "overpricing." since each person can. in a free society, set whatever price they wish on their own goods or sen-ices.

Now suppose that all other purveyors of fast food decide to leave the industry and that no one else enters. Wendy's is now the only seller. They continue to market their meals for $10. Campbell now would claim they are violating customers' rights, when before, at the same $10 price, she would not have made this claim. And it is the same with usury. In a free society. people have a right to place whatever value they wish on their loanable funds. When they do so, they do not steal anything from their willing borrowers. In the absence of any specific theft from a customer for charging high prices or interest rates. these examples do not fit at all with the modality created by Campbell for blackmail. Worse. there is another logical contradiction lurking in the undergrowth. If capitalism implies the right to freely contract, how can private monopolistic, or usurious contracts be incompatible with that right'? How can contracts be broken. or not permitted in the first place. in the name of the right to contract freely?

CONCLUSION

Squirm and twist and turn as they may, the critics of legalizing the blackmailer's actions[82] cannot ignore the fact that he threatens merely what he has a right to do.[83] If he should not be incarcerated for doing it. it is scarcely logical that he be penalized in this way for merely threatening it, or offering to stop it for a fee, or agreeing to cease and desist at the request of the blackmailee. Nevertheless, the

82. *See* Campbell, *supra* note 13; Lindgren. *supra* note 12; NOZICK, *supra* note 60, Richard A. Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817 (1993); Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983) and James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984).

33. If you object to this. you must think Michael Jordan. Bill Gates, Mike Tyson. Madonna and Woody Allen should all be incarcerated for the crime of selling their services at very high prices.

logic of the foregoing is precisely what is ignored by those who advocate legal proscription.

It may be of interest to speculate why our detractors would overlook this point. One theory is that the prohibition of blackmail is hoary with tradition. Blackmail has been against the law for so long that commentator's first instinct is to attempt to find explanations for this state of affairs. and by the very nature of all such efforts, they soon enough come to resemble attempted justifications. There is perhaps something to be said for this hypothesis, but one must have reservations about it. The analysts involved in this controversy are hardly noted for slavish devotion to tradition. On the contrary, they are keen and insightful and have blazed far too many new paths to get caught in this sort of historical rut.

Another possibility is that their dedication to economic freedom and to private property and contracts,[84] although notable in several cases, does not stretch all the way down to the core of their philosophical systems. At least in the case of blackmail, they are no longer willing or able to apply the same principles of individual rights which earmarks so much of their intellectual contributions. If so. they are at sea without a rudder, at least in this case. Once one loses sight of the proper basis of criminality — a violation of person or property right through initiatory force — anything goes.

84. For an interpretation of law as contract see Bruce L. Benson, *Customary Law as a Social Contract: International Commercial Law*, CONST. POL. ECON. 2, 1-27 (1992).