

BLACKMAIL AS A VICTIMLESS CRIME¹

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The legal theory of blackmail is the veritable puzzle surrounded by a mystery wrapped in an enigma. Consider. Blackmail consists of two things, each indisputably legal on their own; yet, when combined in a single act, the result is considered a crime. What are the two things? First, there is either a threat or an offer. In the former case, it is, typically, to publicise an embarrassing secret; in the latter, it is to remain silent about this information. Second, there is a demand or a request for funds or other valuable considerations. When put together, there is a threat that, unless paid off, the secret will be told.

Either of these things, standing alone, is perfectly legal. To tell an embarrassing secret is to do no more than gossip. To ask for money is likewise a legitimate activity, as everyone from Bill Clinton to the beggar to the fundraiser for the local charity can attest. Yet when combined, the result is called blackmail and it is widely seen as a crime.

But that is just the puzzle. The mystery is that over a dozen attempts to account for this puzzle have been written, and not one of them agrees to any great extent with any other². It is as if there are a plethora of witnesses to a motor vehicle accident, each not only disagreeing with all the others but each telling a completely different story. The enigma is that with the exception of a corporal's guard of commentators³, no one

¹ The authors wish to thank the officers and trustees of the Earhart Foundation for financial support in the writing of this article. Only the former, not the latter, are responsible for the opinions expressed herein.

² Although all the following agree that blackmail should remain criminalised, there is virtually no overlap in the reasoning of any of them. See Scott Altman: *A Patchwork Theory of Blackmail* (1993) 141 U.Pa.L.Rev. 1639; Jennifer Gerarda Brown: *Blackmail as Private Justice* (1993) 141 U.Pa.L.Rev. 1935; Debra J. Campbell: *Why Blackmail Should be Criminalised: A Reply to Walter Block and David Gordon* (1988) 21 Loy.L.A.L.Rev. 883; Sidney W. DeLong: *Blackmailers, Bribe Takers, and the Second Paradox* (1993) 141 U.Pa.L.Rev. 1663; Richard Epstein: *Blackmail, Inc.* (1983) 50 U.Chi.L.Rev. 553; George P. Fletcher: *Blackmail: The Paradigmatic Case* (1993) 141 U.Pa.L.Rev. 1617; Douglas H. Ginsburg and Paul Shechtman: *Blackmail: An Economic Analysis of the Law* (1993) 141 U.Pa.L.Rev. 1849; Wendy J. Gordon: *Truth and Consequences: The Force of Blackmail's Central Case* (1993) 141 U.Pa.L.Rev. 1741.

³ Eric Mack: *In Defense of Blackmail* (1982) 41 Philosophical Studies 274; Walter Block: *The Blackmailer as Hero* (The Libertarian Forum, December 1972)- pp.1-4; Walter Block: *Trading Money for Silence* University of Hawaii Law Review, Volume 8, No.1, Spring 1986- pp.57-73; Walter Block: *The Case for Decriminalising Blackmail: A Reply to Lindgren and Campbell* Western State University Law Review, Vol. 24, No. 2, Spring, 1997- pp.225-246; Walter Block: *A Libertarian Theory of Blackmail* Irish Jurist Vol.XXXIII, 1998, pp.280-310; Walter Block: *Toward a Libertarian Theory of Blackmail*, forthcoming Journal of Libertarian Studies; Walter Block and Stephan Kinsella: *The Second Paradox of Blackmail*, forthcoming; Walter Block and Robert W. McGee: *Lets Legalise Blackmail*, forthcoming; Walter Block and

has seen fit to assert the contrary: that two legal “whites” cannot make an illegal “black”.

This is precisely the point of the present paper. Here, there will be no attempt to account for this puzzle-mystery-enigma. On the contrary, we shall maintain that since it is legal to gossip, it should therefore not be against the law to threaten to gossip, unless paid off not to do so. In a word, blackmail is a victimless crime, and must be legalised if justice is to be attained.

What is the relevance of a paper of this sort? If it is limited to arguing the case for blackmail, its appeal will be somewhat circumscribed. For the political realities are such that blackmail prohibitionism is not likely to be overturned any time soon. Such an essay might still have some value, but mainly as an exercise in logic or perhaps to promote antiquarian interest in the history of legal philosophy. Fortunately, however, there are in addition many practical implications of the views to be explored in this paper.

Exhibit A in this contention is the entire preface to University of Pennsylvania Law Review’s symposium on blackmail. It reads as follows:

“A whole symposium about an exotic crime like blackmail? Why? Only because it has come to seem to us that one cannot think about coercion, contracts, consent, robbery, rape, unconstitutional conditions, nuclear deterrence, assumption of risk, the greater includes the lesser arguments, plea bargains, settlements, sexual harassment’s, insider trading, bribery, domination, secrecy, privacy, law enforcement, utilitarianism and deontology without being tripped up repeatedly by the paradox of blackmail. How so? And what paradox? Read on...⁴”

Consider sexual harassment in this regard. In the view of those that would prohibit behaviour a quid pro quo is illegitimate; e.g. it is improper to hire an employee on the condition that she go to bed with you.

But what is this if not blackmail? That is, there is no difference in blackmail between “go to bed with me or I reveal your secret” on the one hand, and “go to bed with me or I won’t hire you (or will fire you)” on the other. Take the case of Nevada where prostitution is legal. There, presumably, I may make a woman the following offer: come and work for me as a secretary, and there will be “sexual services” that you must provide for me in this contract.

If this sort of quid pro quo is harassment, and you believe that prostitution ought to be legal, and you oppose the legalisation of blackmail, have you not committed a

Gary Anderson: *Posner on Blackmail: A Critique*, forthcoming; Walter Block and Robert W. McGee: *Blackmail and “Economic” Analysis*, forthcoming *Thomas Jefferson Law Review*.

⁴ Leo Katz and James Lindgren: *Symposium: Instead of a Preface* (1993) 141 *U. Pa. L. Rev.* 1565.

logical contradiction? Whether or not this is true, such a consideration at least shows that the debate over blackmail has ramifications and implications for a much wider realm of activity than and that of Katz and Lindgren⁵ are eminently correct in linking the two.

Consider but one more case mentioned by these two scholars: insider trading⁶. Here, too, there is a kinship with blackmail. For what is insider trading but a sort of quid pro quo: you sell me your share of stock for an agreed upon price, but I have some hidden secret knowledge unbeknownst to you that I obtained in a totally legal manner (I am, for example, the geologist who first spotted the new copper deposit).

This is neither the time or the place for a full exploration of the parallels between blackmail and the activities mentioned by Katz and Lindgren⁷. Suffice it to show that there is more riding on the debate over blackmail per se, to which we now turn, than first meets the eye.

In order to put flesh on these bare bones, we will consider in detail, the views of Altman, as a foil. This author starts off with an interesting observation: "*people who disagree about many legal and moral questions usually favour punishing blackmailers...*"⁸ This cannot be denied, as we have seen. But Altman's inference from this fact, that it "*suggests room for overlapping consensus on this issue*" is only one plausible conclusion. The other is that all of these people are mistaken; e.g., the reason they cannot agree as to why blackmail should be outlawed is that this is an unreasonable position.

Let us try to make this point in another way. Elsewhere Altman⁹ states:

*"We might more easily solve the legal and moral puzzles if we stop insisting that one principle must explain every aspect of blackmail. I recommend abandoning the search for a unified explanation. Probably no single flaw justifies condemning and prohibiting all and only blackmail transactions... Because blackmail is varied, different reasons might support condemning and prohibiting different forms"*¹⁰.

Yes, blackmail does have several different variations. Typically what is threatened is the release of information embarrassing to the blackmailee. But other threats are possible too. For example, Katz¹¹ offers the following:

⁵ *Supra* note 4, p.1565.

⁶ See Robert W. McGee and Walter Block: *Information, Privilege, Opportunity and Insider Trading* (1989) 10 N. Ill. U. L. Rev. 1.

⁷ Katz and Lindgren: *supra* note 4- p.1565.

⁸ Altman, *supra* note 3- p.1639.

⁹ Altman: *supra* note 3- p.1640.

¹⁰ This is eerily reminiscent of the philosophical analysis of Ludwig Wittgenstein. See Ludwig Wittgenstein: *Philosophical Investigations*, translated G.E.M. Anscombe (Macmillan, 1953).

¹¹ Katz: *supra* note 2- pp.1567-8.

“Pay me £10,000 – or I will: cause some really bad blood at the next faculty meeting, ... seduce your fiancée, Persuade your son that it is his patriotic duty to volunteer for combat in Vietnam, Give your high-spirited, risk addicted 19-year-old daughter a motorcycle for Christmas, ... hasten our father’s death by leaving the Catholic Church¹².”

If the threats are varied, so too is the demand; usually, it is for money, but it could also be sexual favours, or any other valuable consideration. Moreover, blackmail typically consists of a threat, (“Pay me £x or else...”) but it could also constitute an offer (“I’ll perform the service for you of keeping quiet about your secret for £y”). That is, the blackmailer commonly approaches the blackmailee, but sometimes the reverse takes place.

Upon initial examination, Altman’s hypothesis sounds reasonable. After all, given that blackmail is a house with many rooms, each “room” might be accounted for in a different way. But how can the variations call for a different explanation, when they all have something in common, by virtue of which they are called blackmail¹³? Namely, what is threatened (or offered) is entirely legal, and what is demanded or requested is likewise within the law.

1 BLACKMAIL AS COERCION AND EXPLOITATION.

Despite the foregoing considerations, Altman presses ahead. His first stab at the problem, is the claim that blackmail is different than the ordinary commercial transaction in that “Blackmailers sell secrecy, a product many of them would give away if unable to bargain. Grocers would not give away food if they could not demand payment¹⁴.”

There are problems here. First of all, why is it at all relevant to anything that a seller would give away his wares for free if he were somehow unable to consummate a deal? How does this help the case of prohibitionism? Secondly, Altman’s case is not a telling one, because some (many?) grocers **do** “give away food if they could not demand payment”. I refer, here, to “day old” food which is often given to the poor, or to homeless shelters or some such. There are some who even give away freshly baked bread, sometimes in the form of money, e.g., charity, and other times directly, also as a

¹² For a critique of Katz See Walter Block: *A Libertarian Theory of Blackmail: Reply to Leo Katz*, forthcoming.

¹³ Strictly speaking there is a third dimension here. The person who condemns the act as criminal must regard the conflation of these two events as evil or reprehensible. Otherwise, there is no way of distinguishing blackmail from ordinary trade. For in the latter case, each party also makes (a legal) threat and (a legal) demand for money or some other valuable item. Take the rather pedestrian case of the newspaper vendor and his customer. The former says to the latter: “Give me a pound (demand for money), or I won’t give you this newspaper (threat)”. The latter says to the former, “Give me a newspaper (demand for consideration), or I won’t give you this pound (threat)”. But most people do not condemn the sale and purchase of newspapers, so this is not considered blackmail.

¹⁴ Altman: *supra* note 3- p.1640.

charitable donation. True, a grocer would not long continue in business if **no one ever** paid him for his wares, but no less can be said for the blackmailer.

Nor is this an end to the difficulties, for Altman further attempts to drive a wedge between blackmail and ordinary commercial arrangements: “*Both grocer and customer benefit from the opportunity to bargain. On the other hand, the possibility of blackmail transactions primarily benefits blackmailers*¹⁵.”

Now this is more than just merely curious. No doubt both grocer and customer benefit from their deal. How could it be otherwise, at least in the *ex ante* (anticipations) sense. We know this from the fact that the bargain was consummated. If the grocer preferred the money he was offered to the produce from which he had to part, it is equally true that the consumer opted for the foodstuffs over and above the money foregone. But the same is true for the blackmailer and blackmailee. If the blackmailer preferred that everyone hear the blackmailee’s secret more than the money he received to keep quiet about it, he would have “*blabbed*”.

From the fact that he forbore, we are entitled to deduce that he preferred the money to the option of engaging in his free speech rights to engage in gossip. But no less applies to the blackmailee. He chose to pay the blackmailer for his silence, instead of keeping the money it cost him to buy this service. Were matters different, had the blackmailer asked for too much, the person with the secret would have said “*Publish and be damned*¹⁶!” Similarly, had the grocer wanted to charge too high a price, the consumer would have said, “*Take your provisions and *@£! them !*”

The two cases are as parallel as they can be. And what is this about “*blackmail transactions primarily benefits blackmailers?*” There is no warrant in either the grocery or the blackmail case, to determine by **how much** either party gained. Blackmail no more **primarily** benefits blackmailers than grocery sales **primarily** benefit buyers. Or sellers. Further, to say, as does Altman, that “*blackmail transactions primarily benefits blackmailers*” is to concede that they at least partially, or more accurately, secondarily benefit blackmailees! And this concession is totally at variance with his main point that blackmail is a crime because it “*exploits*” its so-called victims. There are no victims. This is a “*victimless crime*”. No one is exploited. Both parties to this transaction gain, as is true of **all** voluntary commercial arrangements.

1.1 Coercion.

In this section, Altman wrestles with the concept of coercion, and then links it to blackmail.

Now we all know what coercion means. There is a hard and fast line between

¹⁵ Altman: *supra* note 3- p.1641.

¹⁶ Statement of the Duke of Wellington. 1 Elizabeth Longford: *Wellington: The Years of the Sword, 166-* (1969), cited in Posner (1993): *supra* note 3- p.1839n.

your fist and my nose¹⁷, and whenever that barrier is breached¹⁸, coercion has taken place. In order for this to be the case, property rights must be established. That is, it must be clear that the proboscis at the end of my face is indeed my nose, owned by me, and that the implement you are about to strike me with, your fist, is actually your possession.

But this is an easy case. Very few people would quarrel with this example of coercion. The situation is somewhat more difficult when it comes to possessions. Rothbard states:

“Suppose we are walking down the street and we see a man, A, seizing B by the wrist and grabbing B’s wristwatch. There is no question that A is here violating both the person and the property of B. Can we simply infer from this scene that A is a criminal aggressor, and B is his innocent victim?

*“Certainly not- for we **don’t know** simply from our observation whether A is indeed a thief, or whether A is merely repossessing his own watch from B who had previously stolen it from him¹⁹”.*

Coercion, then, is equivalent to a taking of someone else’s legitimately owned property, and/or a physical interference with his person, or the threat thereof.

How does Altman fare in his attempt to deal with this concept? Not too well. He expresses the opinion that *“Professional blackmailers might turn to kidnapping rather than journalism²⁰.”* That is, if the intended blackmailee proves obdurate, and will not fork over the requisite cash, and since while *“some blackmailers could sell their information elsewhere, they could rarely do so as profitably”*, and since it does the blackmailer no good to *“reveal the information”*, he might as well turn to something else in the same line of work, e.g., kidnapping.

But there is all the world of difference between kidnapping and blackmail. The former involves an uninvited border crossing, or coercion e.g., the initiation of violence against innocent people. The latter, it cannot possibly be over emphasised, involves nothing of the kind. Instead, it is a threat to do something that the threatener has every right to do, namely, engage in gossip.

Moreover, it is a strange sort of indictment to level at someone that he *“might turn to kidnapping”*. Anyone might do practically anything in the future! Pigs might fly, Altman himself might turn into a murderer, aliens might abduct us. If I don’t get

¹⁷ There is a grey area, too, in that when your fist comes within one inch of my nose, headed in my direction, that is clearly coercive, even though no physical contact has (yet) taken place. On the other hand, if you shake your fist at me from 300 yards away, that is not (yet) coercive. Where the precise line between one inch and 300 yards should be placed is a continuum problem, with no fixed solution.

¹⁸ Without my permission, that is. Voluntary sado-masochism between consenting adults should not be considered coercive.

¹⁹ Murray N. Rothbard: *The Ethics of Liberty 51* (Humanities Press, 1982).

²⁰ Altman: *supra* note 3- p.1641.

the raise to which I think I am entitled, I myself might turn to kidnapping. If this is the basis upon which Altman intends to tarnish blackmail, the case for legalisation is to that extent very secure despite his best efforts.

This author's understanding of this concept is flawed in yet another way. He states: "*the removal of important available options to alter someone's actions is coercion*"²¹.

This is not at all the case. Suppose one of your most important options is to be friends with me. And I threaten you as follows: "*Unless you do X, I won't be your friend.*" Here, I have removed an important option of yours in order to alter your action from what they would otherwise have been. But have I coerced you? To ask this is to answer it.

In his scatter shot approach to the problem, Altman finally hits the target, in yet another try. But he does so in a way which further illuminates why his previous attempts were failures and helps him not one whit in his overall bid to explain on rational grounds and justify the illegality of blackmail. He states: "*Many blackmailers coerce... because they propose to reveal information they are obliged not to reveal*"²².

He might just as well have said, "*Many automobile repairmen coerce, because they pad their bills, or use shoddy merchandise instead of the higher quality goods they were contractually obliged to employ.*" Both are plausible, but neither gets to the point. Yes there are many tradesmen and professional who cheat and cut corners; but his does not impact negatively on their activities *per se*. We should not penalise all automobile repairmen, only those guilty of fraud. Similarly, we should not jail all blackmailers, only those who, in Altman's words, "*reveal information they are obliged to reveal.*"

Why, it may be asked, might a blackmailer be properly obligated not to reveal secret information or even sell his silence about it? One possibility is that the information was attained illegitimately, e.g., by use of real coercion, that is, violence, force, trespass, etc. In this case it is not the blackmail that is illegitimate, but rather the means to attain the ammunition for it. Here, the licit blackmail is poisoned by the illicit prior act.

Let us consider an analogy. Suppose I rob a bank and then buy a toy for my child with the proceeds. In ordinary circumstances, my second act in this little two-act play- the purchase of the toy- is unexceptionable. That is to say, there is nothing wrong with a plaything for his child. However, in this case the acquisition is poisoned by the fact that it was obtained through unlawful means, robbery.

There is another reason why a blackmailer may be legitimately obligated not to

²¹ Altman: supra note 3- p.1642.

²² Altman: supra note 3- p.1642n.

reveal secret information: he contracted not to do so. That is, were blackmail legal, and I had the "goods" on you, but agreed to keep quiet about it for a fee, whereupon I told all anyway, I should be penalised to the fullest extent of the law. But as the wrong here is contract violation, not blackmail, this hardly helps Altman's case.

The author's next attempt to besmirch the ancient, honourable and (should be) legal practice of blackmail is a further elaboration of his concern about removing options. Here, he considers the case of the person who proposes to throw the drowning swimmer a rope for a fee²³. He then supposes that demanding money for this service were somehow impossible. Then, if the person on shore would have done the good deed anyway, the monetary demand "*removed the otherwise available of being saved without promising cash.*" But since removing options is tantamount to engaging in coercion, and coercion is illegal, then demanding money in this circumstance is akin to criminal blackmail.

Of course, there is a perfectly good English word which fully expresses what is meant by removal of options. It is loss of wealth, or poverty. But such an expression will not help Altman's case. Who, after all, would want to outlaw every case where a man's action reduces someone else's wealth? If I compete successfully with your grocery by opening my own, across the street I will have decreased your economic well being. But only a demagogue would advocate jailing me for that. So, instead, Altman characterises impoverishment emanating from such a cause as a loss of "*freedom*"²⁴. This is an attempt to smuggle in a phrase relevant to the law where options language would not suffice. This attempt must be resisted, lest we incarcerate people who threaten loss of friendship, or grocery competition if they do not get their way.

Altman worries that "*if each of us took every opportunity we have to threaten others everyone would be worse off, including even those who sometimes benefit by making threats*"²⁵. He does not seem to realise that we already do this, everyday of our lives. Katz²⁶ points out a pretty common one: "*I won't sell you X, if you don't pay me Y,*" and notes, "*...most contracts involve the threat of an omission*" of this sort. He might well have said "*all*".

Nor can we see our way clear to agreeing with the author on noise pollution. Again, he confuses threatening real coercion of the involuntary property border crossing variety with the threat of what would be entirely legal if carried out. According to Altman: "*At every moment someone would be demanding payment not to make noise or to do some act for which we all depend on others each day*"²⁷.

²³ Altman: *supra* note 3- p.1643.

²⁴ Altman: *supra* note 3- p.1643n.

²⁵ Altman: *supra* note 3- p.1643.

²⁶ Katz and Lindgren: *supra* note 4- p.1603.

²⁷ Altman: *supra* note 3- p.1643.

instead gets £30,010,000, then his producer surplus is thirty million. Yes, to be paid only £10,000 for his services (a common annual salary in the early years of the NBA) would not "*disallow (Jordan) from receiving a minimum asking price*" of £10,000, but it seems a bit harsh to accuse him of criminal blackmail for receiving any more than this. It is easy to see why Gerry Reinsdorf, president of the Chicago Bulls might appreciate this economic **analysis**, but hard to understand how this "*benefits everyone at little social cost.*" Surely Michael and his agent would not at all be happy with it.

One last point on this. We have been charging all throughout this paper that Altman confuses blackmail, a "*threat*" to do that which one has a right to do, with "*theft and physical violence.*" Nowhere is it more clear that he does just that than in this quote.

1.2 *Exploitation.*

We move, now, to the topic of exploitation, which Altman defines as "*benefiting at another person's expense from her difficulties*"³¹. This, in turn, means "*obtaining a better deal in negotiation than one would have obtained for the same good or service had that person lacked the difficulty.*"

There is nothing wrong with this definition. Many societies use the word in this way. Indeed, it has a long Marxist pedigree behind it. People can define words in any way they want. But when an interpretation is going to serve as the basis of criminalising behaviour, some semblance of caution would seem to be indicated.

Defined in this way, virtually the entire institution of free enterprise appears to be indictable³². For the essence of the market is to "*take advantage*" of the needs of other people- by supplying the very goods and services they require most desperately! This is practically the sole private financial incentive to invent a cure for AIDS, cancer, etc.

The people suffering from these ailments are, presumably, the most desperate potential consumers of all. Imagine if things were otherwise; that is, suppose that the market system were **not** predicated on "*exploitation*" as defined by Altman. Then, instead of allocating resources heavily in the direction where people found themselves in the greatest of "*difficulties*", more money would be spent on fripperies. *Gerry MacGuire*, a recent hit film became famous for the expression "*Show me the money*". This is precisely the moral compass of capitalism: for the "*money*" leads unerringly in the direction of the greatest misery, and this serves as the best guideline the world has ever known for alleviating the greatest distress. Were we seriously to entertain putting

³¹ Altman: *supra* note 3- p.1644.

³² As part of his indictment Altman: *supra* note 3- p.1644 avers that "*Blackmail victims... can be driven to irrational or criminal behaviour.*" But this is over-inclusive. Many phenomenon lead to these results. Probably, rap "*music*" renders irrational many teenagers. Some men are undoubtedly driven to criminal behaviour by wives nagging for luxury goods. Should we have preventative detention for rap singers and nagging wives?

This is neither the time nor the place for a full-blown legal analysis of noise and noise pollution²⁸. Suffice it to say that under a private property rights regime, people would own the right to emit noise based on homesteading²⁹. This means, for example, that if the airport “*got there first*,” and had been accommodating take off and landing traffic, and that if you then arrived on the scene and demanded the quiet of the tomb, you should have no case in law.

On the other hand, if the airport was built in the middle of a quiet residential area already in existence, it would be guilty of the equivalent of a criminal trespass. Any airport (or factory, or steel mill, or symphony orchestra for that matter) which threatened (unless paid off to desist) the peace and quiet of property owners who had already homestead “*quiet*” rights would thus be guilty of extortion, not blackmail, for it would be threatening that which it had no right to carry out. So, let people threaten to do things they have every right to do; let them do this “*’til the cows come home*”; it will not disarrange society by even one iota. But let not a single threat be heard, without a punitive response from the police and courts, when it consists of doing something illicit.

But this does not end the difficulties we see in this section. As a parting shot, Altman unburdens himself of the following remark:

“A norm against asking to be paid for what one is willing to do for free does not prevent beneficial bargains because it never disallows anyone from receiving a minimum asking price. Because a general rule against threats benefits everyone at little social cost, it should be regarded as a prima facie moral rule no less than rules against theft and physical violence³⁰.”

There are problems here. As we write this, Michael Jordan is in the process of dispatching the *Miami Heat*. We don’t know this man, personally, but we are willing to speculate that he loves the game of basketball. We imagine, further, that were the world constituted in such a way such that he could not be paid enormous sums for leaping 40 feet in the air and slamming the ball into the basket, he would still be “*willing to do it for free*”. If so, then according to Altman, Michael Jordan should be slapped in jail, forthwith, if he has the audacity of demanding **any** salary, let alone the multimillion dollar contracts to which he has become accustomed. Why? Because this would constitute a threat **not** to play unless he is paid, and we can’t have people running around making threats of this sort, now can we?

Altman seems unacquainted with what economists call psychic income or producer surplus. If Michael Jordan would have been willing to play for £10,000, but

²⁸ See Murray N. Rothbard: *The Ethics of Liberty* (Humanities Press, 1982); Walter Block: *Ethics, Efficiency, Coasian Property Rights and Psychic Income: A Reply to Demsetz* (1995) 8 Rev. Austrian Econ. 61.

²⁹ See Hans-Hermann Hoppe: *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Kluwer, 1993).

³⁰ Altman: *supra* note 3- p.1643.

into effect Altman's perspective, we would render our economy very much less efficient than it is today.

That we spend a significant amount of what most people would consider inessential is due to several things; diminishing marginal utility (the more food, clothing and shelter you have, the less valuable is any additional increment; the fewer lipsticks, jewels and violins you have, the more important they become), risk (the more money allotted to cancer research, the less likely the marginal dollar is to uncover the cure, since, presumably you first finance the best prospects), and subjectivity (one person's luxuries are another person's necessities).

Altman does not seem to understand this when he says "*charging higher than face value for scarce tickets to a sporting event does not exploit the buyer because there is no reason to think the buyer's desire to attend stems from any hardship*"³³. For most people, he is undoubtedly correct. But there are those fanatics³⁴ who will go without shelter and all but a modicum of food to see their favourite athlete or movie star. On what basis can our author deny they are "*exploited*" by high-ticket prices?

Altman then asserts "*charging poison victims who face imminent death more for medication than one would charge less desperate purchasers of the same drug exploits their hardship*"³⁵. He does not seem to realise that those societies which allow free enterprise (anyone can charge anything he wants for his own property no matter how improper interventionists like Altman think it is) are far more likely to have medicines which save lives than ones which embrace socialism, regulationism, interventionism, and other interferences with the free economy such as those advocated by that author. If I faced imminent death for want of a medicine, other things equal, I would rather take my chances in the U.S., or Switzerland or New Zealand or Hong Kong or Singapore, which are relative bastions of free enterprise³⁶ than in any of the countries run on the fascist model favoured by Altman. So much for mere utilitarian considerations, which, perhaps, are not worth the ink expended on them.

On a deeper philosophical level, then, Altman's viewpoint is flawed because, once again, it is unable to distinguish between violation of the person and property rights, on the one hand, and being politically correct, on the other.

Further, Altman focuses on mere prices; why are we quibbling about them? Either something is lawful or it is not and to focus on the price charged for it, as the determinant of its legality, is to push the clock backward to medieval times, when scholars and theologians would debate the "*just price*". Altman bases the criminality of

³³ Altman: *supra* note 3- p. 1644.

³⁴ Sports "*fans*" is derived from this concept.

³⁵ Altman: *supra* note 3- pp.1644-5.

³⁶ Several attempts have been made to measure economic freedom and rank countries based on how much of it they have. For examples, See James Gwartney, Robert Lawson and Walter Block: *Economic Freedom of The World, 1975-1995* (Cato Institute, 1995); Bryan T. Johnson, Kim R. Holmes & Melanie Kirkpatrick: *1998 Index of Economic Freedom* (Heritage Foundation and The Wall Street Journal, 1998).

an act on the price paid for it; surely this is mistaken. What the rapist and the murderer do is per se unlawful; the price they do it for (e.g. as in Murder, Inc.) is totally irrelevant. But in Altman's analysis of blackmail, price takes centre stage. This is but one more bit of evidence showing the philosophical chasm between real crimes such as murder and rape *vis-à-vis* victimless ones such as blackmail.

Another difficulty, this time on a practical level, is that it is by definition impossible for a third party to ever know if blackmailers "*demand more for silence than the price for which they could have sold the information*"³⁷." How can the forces of law and order, charged with eliminating crime, know whether the price charged is higher than this hypothetical level?

Altman makes much of the point that "*blackmailers frequently demand repeated payments for their silence*"³⁸." So what? As every economics student knows, stocks can always be converted into flows, and vice versa, through the intermediation of an interest rate and the concept of present discounted value. Landlords, too, typically demand repeated payment for their services. Are they to be confined to the prison Altman reserves for blackmailers on this ground?

2 PATCHING THEORIES TOGETHER.

Having disposed of the preliminaries, Altman is now ready to put things together. He terms it coercion to "*prevent...The wrongful act of another*"³⁹." Suppose I see you poised over a baby carriage, knife held high, in the process of plunging it into the body of the occupant. I lasso your striking arm, thus saving the life of the baby and preventing you from murdering it. Have I "*coerced*" you? This seems to be an altogether unusual, not to say perverse, use of language. Coercion, more naturally and accurately, applies to the use or the threat of force against an innocent person, not stopping a person in the act of committing a crime. It is the person in the act of killing a helpless baby who is the coercer; this appellation hardly applies to the person who stops him.

On the basis of this premise, however, Altman claims that "*blackmail is often worse than revealing embarrassing information. Revealing embarrassing information, although it alters options, does not usually coerce. It does not coerce because the purpose of the revelation is not usually to induce the person to do anything*"⁴⁰."

But this is fallacious. Suppose I have come to know that you take a bath with a rubber duck, and this would prove highly embarrassing to you should I publicise this perversion of yours. So much so that you would be prepared to pay me a top offer of £10,000 to keep quiet. However, you conceal from me just how devastating the release

³⁷ Altman: *supra* note 3- p.1645.

³⁸ Altman: *supra* note 3- p.1645.

³⁹ Altman: *supra* note 3- p.1645.

⁴⁰ Altman: *supra* note 3- p.1646.

of this information would be to you⁴¹, and manage to buy my silence for a mere £2,000. Altman says blackmail is worse than gossip. But in this case, if I gossip about you, you lose what you value at £10,000. If I merely blackmail you, you lose only £2,000. Blackmail may be worse to Altman, but not to you.

But, our author would object, the blackmailer puts you in fear of being beholden to him forever. However, in the free society, where blackmail contracts would be legal, we would sign a contract stipulating my silence forever, for a payment of this £2,000. Thus, if after you had paid that amount I came back to you and asked for more money- for what I had already been paid to do in full- and you feared that I would keep doing this every year for the rest of your life, you would now have something to hold over my head: a lawsuit for contract violation. This is something not available to the blackmailee under the present legal regime.

Altman is also wrong in claiming that gossip is not usually intended to persuade its subject to change his behaviour. Traditionally, before political correctness came along, and even nowadays to a great extent, gossip was always used as a form of non-criminal sanctions to induce people to follow societal mores. If I gossip about you and your rubber duck and you are sufficiently humiliated by it, you will tend to stop this deviant practice. Other rubber duck users, whose evil ways have not yet been ferreted out, will have an incentive to cease and desist from this horrid practice.

But these considerations will not suffice to “*solve the longstanding problems of blackmail*”⁴², because they “*alone cannot explain the immorality*” of this practice. For that, we must resort to the “*patchwork*,” to which our author now turns.

2.1 *Non-Coercive Blackmail.*

Altman considers the case of the “*newspaper publisher who proposes to publish information if not paid.*” He castigates this as “*morally corrupt*” on the grounds that “*most newspaper publishers have assumed an obligation to make publication decisions based on judgements about news worthiness*”⁴³.

But newspaper publishers are not licensed. They are thus not obligated legally to do any such thing. If it is a moral obligation, how can this be true only of **most** newspaper publishers. Surely, the obligation would then rest on all those who take up this occupation. The only way to make sure of Altman’s statement is to assume that this obligation stems from a contract which most, but not all publishers have signed. But this gets us out of the realm of blackmail and into the realm of contract violation, where we belong⁴⁴. Further, if word got out that a newspaper was basing publication

⁴¹ *Quaere*: Are you exploiting me?!

⁴² Altman: *supra* note 3- p.1645.

⁴³ Altman: *supra* note 3- p.1647.

⁴⁴ Altman: *supra* note 3- p.1648n. rejects such remedies on the grounds that “*victims can be induced over time to pay more for secrecy than it is worth to them.*” In effect, he is saying that if the blackmailee values the

decisions upon side payments, and not news worthiness, the odds are that it would go bankrupt very quickly.

Next Altman offers us the case where Susan accidentally films Allan, a Hasidic Jew, eating pork⁴⁵. She can sell the video to win a contest for £100. Instead, she offers her only copy of this evidence to Allan for that exact amount, thus not exploiting him.

We are here back to “*just price*” doctrine. Before determining whether an act is moral or not, we must first determine whether or not the “*price is right*”. One yearns to say in response, if an act is licit, it is licit at whatever the price; if it is not, a different price will not make it so⁴⁶.

But Altman is made of sterner stuff than his analysis, strictly speaking, would imply. For although he refuses to characterise this purchase as immoral, he “*nonetheless support(s) a law prohibiting Susan’s behaviour...for prophylactic reasons*⁴⁷.” And what are these? “*This situation is probably rare, and difficult to distinguish from serious moral wrongs*⁴⁸.” But this is most unsatisfactory. It means that poor Susan, guilty merely of “*market price only blackmail*,” will be incarcerated for doing absolutely nothing wrong⁴⁹.

Next Altman tackles head on the issue of payer initiated blackmail, one of the most powerful arguments on behalf of its legislation. This is because if the blackmailee first approaches the blackmailer and offers to pay for the latter’s silence, it constitutes *prima facie* evidence that the former benefits from the arrangement. In the intuition of most people, blackmail at least of this type should be legalised. And with so powerful

secret at £2,000 he might still be willing to pay £10,000 to keep it under wraps. Either this is arrant nonsense, or the blackmailee has made a mistake in calculation. Contracts, obviously, cannot help with the latter problem, in this area or in any other.

⁴⁵ Altman: *supra* note 3- pp.1647-8.

⁴⁶ A man approaches a woman and asks if she will go to bed with him for £1 million. A virtuous woman, her initial (unspoken) reaction is to refuse with indignation. However, upon more sober reflection, contemplating, no doubt, just how large a sum of money this is, she agrees. Whereupon he asks her if she will perform this service for £10. At this point she casts a withering glance at him in refusal, and haughtily asks “*What kind of woman do you think I am?*” The man’s response? “*We have already established what kind of woman you are; we are now merely haggling over the price.*”

⁴⁷ Altman: *supra* note 3- p.1648.

⁴⁸ Altman: *supra* note 3- p.1648.

⁴⁹ Altman is much mistaken moreover, in singling out commercial arrangements of this sort as “*market price only*.” On the contrary, all voluntary trades, all capitalist acts between consenting parties, of necessity, are concluded at market prices. For that is all that is meant by a market price: one agreed upon by a buyer and seller. Altman is confusing this with the idea of making a sale at a zero profit, the proper characterisation of the Susan-Allan deal. To see this as “*probably rare*” is mistaken. No trade, no human action, (purposefully) occur at zero profit. In every acquisition of any kind there is always an attempt to improve one’s lot; to make the future a more preferable one than that which would have obtained in the absence of the bargain. On this, see Ludwig Von Mises: *Human Action* (Regnery, 1966). But the difference between the preferred future as a result of the act, and the dispreferred future, which would ensue without it, is profit. This stretches all the way from complex multinational trade deals to the simplest of human activities. For example, the reason you are now reading this (or any other) article, is because you expect to earn a profit by so doing.

an entering wedge, why should any variety of blackmail be exempt from decriminalisation?

Our author, perhaps glimpsing this abyss, pulls back sharply. He begins by conceding:

“... that payers would not offer to pay for silence unless they had reason to think the other party planned to reveal the information. If so, permitting such bargains roughly reflects the acceptability of non coercive blackmail⁵⁰.”

This is an important concession because once one allows the concept of “*non-coercive blackmail*” to gain currency, it will be hard to keep a straight face on its present prohibition. If it is non coercive, why should the law prevent it?

Reaching deeply, Altman comes up with an answer to this conundrum:

“Evidentiary and definitional problems with payer initiation can undermining any power it has to separate coercive from non coercive transactions. Some bargains appear payer initiated because the payer initially suggests the deal. But the payer might only learn of the other party’s intent to reveal the embarrassing information after that party discloses this intent in order to elicit an off or payment. Because this case cannot easily be distinguished from genuine payer initiation, permitting payer initiation can insulate paradigmatic blackmail cases from punishment⁵¹.”

Let us see if we understand this by use of an analogy between sexual and blackmail relationships. Especially in the eyes of third parties, there is not always a clear and sharp distinction between seduction and rape. Therefore, not just one but both practices should be deemed illicit. This seems to be what Altman is saying, as can be shown with the following transposition:

“Evidentiary and definitional problems with (sex) can undermine any power (the law) has to separate coercive from non coercive (coitus)... Because this case (of seduction) cannot easily be distinguished from genuine (rape), permitting (voluntary sexual congress) can insulate paradigmatic (rape) cases from punishment.” Therefore, we should outlaw not only (rape) but also (seduction) between consenting adults.

This is spurious. If there is indeed a valid distinction to be made between evil “*paradigmatic blackmail*” and inoffensive “*noncoercive blackmail*”, as even our author concedes, then only the former should be prohibited, not the latter, even if it is difficult to distinguish between them in practice. As the old saying goes, “*Better that*

⁵⁰ Altman: *supra* note 3- p.1649.

⁵¹ Altman: *supra* note 3- p.1649.

1,000 guilty men should be set free than that one innocent one be incarcerated.” And this is on the assumption that “paradigmatic (non payer initiated) blackmail” is indeed akin to rape. But, as we have taken pains to show, and Altman has not so much even attempted to refute, even the supposed evil **payee** initiated blackmailer does no more than to threaten that which he has every right to do, namely, gossip.

On the other hand, Altman does adopt a modest stance⁵². He admits that “*the criminalisation of blackmail makes some potential blackmail victims worse off*”⁵³. And again: “*Like any market intervention, its wisdom depends in part on the number of consumers benefited compared to the number of consumers hurt as well as on the magnitude of the effects*”⁵⁴. Further, “*I can hardly insist that I am right about either the frequency of wrongful blackmail or the practicality of such defences*”⁵⁵ (claiming that the “blackmailer somehow could not easily have demanded additional payments.”).

This is unsatisfactory on two grounds. First, this resort to blatant utilitarianism is intellectually bankrupt. Interpersonal comparisons of utility are invalid. We simply have no way of telling “*how much*” some people are hurt and helped by legislation. Second, even if it were somehow possible to discern these comparative values, to make utilitarian considerations of this sort the touchstone of the law is to eschew justice⁵⁶. Third, **there are no blackmail victims**. Whether payer or payee initiated, the commercial transaction of blackmail makes both parties to it better off, at least in the *ex ante* sense. There would hardly be an agreement, otherwise. That the blackmailer gains there can be no doubt. But the blackmailee also benefits, since he values the payment he must make as of less import than the secret being publicised. He is paying for silence, and contemplates that he is getting his money’s worth, otherwise he would not pay.

2.2 A Less Controversial Patchwork.

With this introduction to his patchwork theory, Altman now pauses for breath and recapitulation. He claims that his explanation of blackmail is essentially a moral one. Previously he focused on the “*coercive and exploitative*”⁵⁷ aspects of this activity. Now, he will defend the outlawry of blackmail on several new ethical grounds. The problem with this agenda is that so many things are, or have been considered to be by

⁵² Altman: *supra* note 3- p.1650.

⁵³ Altman: *supra* note 3- p.1650.

⁵⁴ Altman: *supra* note 3- p.1659.

⁵⁵ Altman: *supra* note 3- p.1650.

⁵⁶ Joe is a slob who values his own life. There are many gourmets, aesthetes, artists, connoisseurs and other such types who have a sadist cast of mind. They would simply love to see innocent person Joe tortured to death. Even if their utility is seeing this foul deed done vastly exceeded Joe’s loss in undergoing it (remember, we are now assuming that interpersonal comparisons of utility are intellectually coherent), it would still be unjust for the law to allow it, let alone compel it- the logical implication of Altman’s remarks.

⁵⁷ Altman: *supra* note 3- p.1651.

some, immoral⁵⁸. Included are homosexuality, heterosexuality, masturbation, fornication, addictive drugs, greed, envy, sloth, premarital sex, intermarriage, etc. If we accept Altman's notion that blackmail ought to be legally proscribed because it is thought immoral, and we want to be logically consistent, then we would have to ban all these other practices as well.

Let us in any case, consider the immoralities discussed by our author.

2.2.1 *Rights and Duties.*

One of them is that "... *all acts of blackmail breach obligations...*"⁵⁹ In order to determine if and to what extent this is so, we must enquire as to the genesis of duties. One possible source is etiquette: one is obliged to use the correct fork, etc. Another is morality: it is unethical to be envious. Both of these considerations yield duties, but neither will serve as a rational basis of law.

A more reasonable cornerstone is contractual: I can obligate myself to pay you £10 for a book if I agreed to do so. To take the book and to give you anything less than this amount of money would be theft. Then there are those duties properly imposed upon me whether I agree to them or not: I must keep my fist off your nose, my hands out of your pockets, and my fingers away from your neck. Failure to live up to these obligations constitutes assault, robbery or murder⁶⁰.

Where does the obligation which will be breached by blackmail fit into all of this? It certainly violates social mores. Blackmail simply is not done in the finest of drawing rooms. If ever we were told exactly what immorality is, we could say for sure whether blackmail is contrary to it; as it is, we can only accept this as a presumption. However, even if true, this is insufficient to establish the case for outlawry.

What about contracts? Yes, if you and I signed an agreement precluding you from blackmailing me, and now you do so, you ought to be penalised to the fullest extent of the law. But in the absence of such an event (which is totally irrelevant to blackmail per se), there is nothing in the act of offering to keep silent for a fee which violates any obligations such that it should be legally proscribed on that ground. Nor can this conclusion be drawn from the case of duties incumbent upon us whether we have agreed to abide by them or not. Blackmail simply does not constitute an uninvited

⁵⁸ In the absence of a clear definition of immorality or morality, it is difficult to distinguish between these two states of affairs. The only "help" on this vouchsafed us by Altman: *supra* note 3- p.1639 is we as a society "do not agree on what constitutes immorality." True to this lack of understanding of morality, Altman is often forced to express himself in a very tentative manner: e.g. "many people believe," "most people believe," Altman: *supra* note 3- p.1652. It is strange to predicate an entire theory on such shaky foundations.

⁵⁹ Altman: *supra* note 3- p.1653.

⁶⁰ This assumes, of course, that you have not invited me (and even paid me) to punch you in the nose (as occurred in the movie, *Dirty Harry*), or kill you (as in the case of Dr. Kevorkian). Such cases of voluntary sado-masochism do not constitute violation of obligations.

border crossing as do theft, murder and rape.

2.2.2 *Third Party Interests.*

“...if I tell you that I will inform your neighbours that your father was a war criminal unless you pay me a large sum, I have committed a serious wrong even though I have not used anyone else’s rights or settled anyone else’s disputes inappropriately⁶¹.” This attack on Lindgren⁶² is well conceived. No one can own information (so far) given to them. If they could, it should be illegal for teachers to charge a fee for imparting knowledge. This should be given to the students for free, as they already (in justice) really own it. However, it is hard to see why threatening to tell someone’s secret is a “*serious wrong*” given that it is **not** a serious wrong to actually tell it. It is, further, difficult to follow Altman given that the son of the war criminal voluntarily agrees to pay for silence, perhaps even makes the initial offer, in order to forestall gossip about his father.

2.2.3 *Promoting Virtues.*

Altman⁶³ criticises several authors⁶⁴ who justify the prohibition of blackmail on the ground that this promotes virtue. However, our author does so not because this is a nonsensical argument, but based on the claim that these theories are incomplete. He states: “*Nonetheless as part of a patchwork, each adds a good reason for condemning some blackmailers.*”

But to say this is to give up on a theory of why blackmail should be outlawed. Here, in effect, blackmail of type A should be prohibited for reason A¹, blackmail of type B should be prohibited for reason B¹, and so on. One problem here is that there is no one overarching reason to consider **all** blackmail illegal. Notice, we do follow this pattern with regard to any other crime; arson, murder, rape and theft are all illegal for one reason and one reason alone: they all violate people’s rights in their properties and/or in their persons. A more basic problem, however, is that, as we have seen, each of the reasons A¹, B¹, etc., do not sufficiently account for prohibition.

Should the law promote virtue? Well, it is virtuous not to kidnap, and the ban on this activity certainly reduces the incidence of this particular crime, so, score one point for this theory. However, as in the case of immorality, so many, many other things are also virtuous: cleaning your plate, being solicitous, brushing your teeth. Let the law intrude into all such areas, and it will become even more of a shambles than at present.

Consider now this example:

⁶¹ Altman: *supra* note 3- p.1654.

⁶² Lindgren (1984): *supra* note 3.

⁶³ Altman: *supra*, note 3- p.1654-55.

⁶⁴ Gordon (1993): *supra* note 3; Waldron, unpublished.

“... if I discover that a neighbour is a movie star living in secret to avoid the throngs of adoring fans who make her life difficult, it would be immoral and appropriately criminal to demand payment to forego telling the tabloids⁶⁵.”

Suppose the tabloid found out this fact for itself. Should it be prevented from publishing? This seems to be the implication of our author's position on the matter, yet it flies in the face of everything we know and love about press freedom. If newspapers cannot publish anything that might be inconvenient for anyone are negative book and movie reviews, and intellectual critiques such as the one you are now reading to become *verboten*.

On the other hand, if, more reasonably, it is legitimate for the tabloid to print the movie star's address, why cannot the gossipier impart that information to the journalist? (How else are journalists to know what is going on if no one can tell them anything?) And if the gossipier can indeed do this, why cannot he be paid not to do so? It would certainly save the actress a lot of time, effort and aggravation if she could pay the snooper off and keep him quiet⁶⁶.

Next, consider Altman's critique of Waldron's "complicity" theory of blackmail prohibition⁶⁷. ("Blackmailers who demand payment to keep silent about evil acts are complicit with evil.") Altman refuses to abandon his opposition to legalised blackmail even though "Some supposed victims are vicious people who deserve to be exposed and punished⁶⁸." And this for two reasons. "First, not all blackmail victims are vicious people deserving punishment." Our reply here is that there are no blackmail "victims". All blackmailees (the neutral descriptive terminology) engage in a voluntary transaction. If anything, they are **beneficiaries** of the blackmailer, as they value his silence more than the money they pay (otherwise, they would not have **agreed** to the deal).

Certainly, the blackmailee is in a far better position with a blackmailer willing to sell his silence for a fee than in the hands of a gossipier, who will let the cat out of the

⁶⁵ Altman: *supra* note 3- p.1655.

⁶⁶ The real reason movie star's lives are uncomfortable is due to public sidewalks, streets and roads, where *hoi polloi* can congregate, gazing at their betters with impunity. In the totally free society, where all such property is privatised, movie stars and other high profile people will be as well protected everywhere as they are now in their gated and exclusive communities. See Walter Block: *Free Market Transportation: Denationalizing the Roads* (1979) 3 *J.Libertarian Stud.* 209; Dan Klein: *The Voluntary Provision of Public Goods? The Turnpike Companies of Early America*, *Econ. Inquiry* 788, Oct 1990; Dan Klein and G. J. Fielding: *Private Toll Roads: Learning from the Nineteenth Century*, *Transp. Q.* 321, July 1992; Dan Klein and G. J. Fielding: *How to Franchise Highways*, *J. Transp. Econ. & Pol'y* 113, May 1993. On the other hand, given that we do not now enjoy the benefits of full free enterprise, why should rich people like our movie actress be singled out for special protection not available to others, or, if so, only at a high price? That is to say, if the actress wants to be free of the attentions of her "adoring" fans, why doesn't she move to a gated community, or to a high rise apartment house with a staff of doormen and bouncers? In that way, she could attain a modicum of privacy unavailable to her, presumably, in her present domicile.

⁶⁷ Altman: *supra* note 3- p.1654.

⁶⁸ Altman: *supra* note 3- p.1655.

bag no matter what. From the point of view of the blackmailee, at least the blackmailer has the decency to allow him to buy his way out of being exposed; the gossip offers no such consolation⁶⁹. As well, even on Altman's own terms, why doesn't he advocate legalisation **in those few cases** where even he admits that the blackmailee is indeed "vicious"?

Altman's second critique of Waldron is as follows:

"...people who deserve punishment are wronged if harmed by someone not entitled to carry out the punishment. The fact that wrongdoers do not deserve pity does not prevent condemning those who act badly toward them. For example, it is both illegal and prima facie immoral to steal from a thief⁷⁰."

We do not know what "*prima facie immoral*" means since Altman has never given us an explanation of this term. That it is deemed illegal to steal from a thief we have no doubt; our question is **should** this be so⁷¹?

Consider once again Rothbard's wristwatch example⁷². What follows from it is that **if** A is really the rightful owner of the wristwatch, he may justly seize it from B. That is, it is not only true that he would have been justified in defending it from B's initial attack, when B first stole the watch from A, but **also** that he is **later** (**not** in "*hot pursuit*") justified in seeking out and finding A, and then relieving him of his ill gotten gains. If so, then we have to qualify Altman's assertion. Yes, it is presently illegal to steal, and, who knows, it may even be immoral to do so; however it **should not be** illegal to seize stolen property from a thief, for one may merely be repossessing one's own property.

But we can go further. If it is licit for A to retake his own watch from B, the thief, it is also legitimate for A to hire C to do this in his behalf. This seems to be unobjectionable. How about if C does this on his own initiative? This, too, would appear to be a reasonable extension of the view we are developing, since B, the thief, by definition, has no proper legal title to the watch.

But we can go even further! Forget about whether it is legal, or moral, or should be legal to steal from a thief. Is it even possible to do so? And the answer emanating from this quarter is that it is not. That is to say, given that the thief paradigmatically can have no legitimate property title to the stolen goods now in his possession, and given also that theft is the taking of rightfully held property, then it is not a logical impossibility to steal from a thief. One cannot steal from a crook, one can only relive him of his booty.

⁶⁹ Walter Block: *Defending the Undefendable* 53 (Fox and Wilkes, 1985).

⁷⁰ Altman: *supra* note 3- p.1655.

⁷¹ Brown: *supra* note 3, discusses blackmailing criminals as a form of punishment.

⁷² Rothbard (1982): *supra* note 4- p.51.

Let us put this in another way, since it is so contrary to received opinion on the matter. In Altman's view, if someone not entitled to carry out a punishment nevertheless does exactly that, then the punishee, even if he deserves what he gets, is still wronged. But the police, courts and jailors of a nation are certainly "*entitled to carry out that punishment*". Under democratic theory they are merely the (albeit indirect) agents of the citizenry. If so, then why may not the individual himself seize his own property back from the thief? If the citizen can delegate this authority to the state, he may surely keep it for himself⁷³.

If you kidnap my child and I see you walking down the street with him, and I grab him back from you, am I to be jailed as having "*wronged*" the "*victim*"? (Remember, in Altman's view, the "*wronged*" victim is the kidnapper from whom I seize back my child; the person "*not entitled to carry out the punishment*" is me, the parent who grabs back his kid). This would appear to be the thicket into which Altman has enmeshed himself. Thus, even if blackmail is a legal wrong, which it is not, it should still be lawful to blackmail a thief⁷⁴.

2.2.4 *Domination.*

In this section⁷⁵, Altman offers a devastating critique of Fletcher⁷⁶. The latter saw the particular evil of blackmail that the payee could always come back to the payer and demand more money. Altman states:

"... the criminal nature of making repeated demands does not explain why the first demand should be criminal... (and)... we condemn and prohibit blackmail even when future demands are unlikely or impossible⁷⁷."

That is, for example, in the case where the blackmailee dies soon after the first payment, and thus can no longer can be blackmailed, most people would still condemn the first instance of this commercial interaction.

This point is symptomatic of the University of Pennsylvania (Vol. 141, No. 5, May 1993) symposium (dedicated in its entirety to defending the outlawry of blackmail). In virtually every case where one participant disparages the theory of the other, the critic is invariably correct. This leads to one of two explanations. The first is that like some N.B.A. teams, the contributors to this volume are better on "*Offense than Defense*". The second, more pertinent to our present discussion, is that it is very

⁷³ Some might say that through the constitution the citizen **has already** delegated this authority to the police power of the government, and thus may not also keep it for himself, any more than he can eat his cake and have it too. For a disabusement of this position, See Lysander Spooner: *No Treason* (1870) (Ralph Myles, 1966).

⁷⁴ Given that there are no positive obligations other than contractual ones, the blackmailer has no duty to turn the blackmailee over to the police.

⁷⁵ Altman: *supra* note 3- pp.1655-56.

⁷⁶ Fletcher: *supra* note 2.

⁷⁷ Altman: *supra* note 3- pp.1655-56.

easy to attack the mistaken view that blackmail should be a crime, and difficult to defend this erroneous position. We lean toward the latter explanation.

2.2.5 *Waste and Subsidiary Harms.*

This is a brief but curious section of the paper. As in the previous one, Altman⁷⁸ ransacks several other defences of blackmail prohibitionism, this time of the consequentialist variety. Included here are Isenbergh⁷⁹, Ginsburg and Schechtman⁸⁰, Shavell⁸¹, and Posner⁸². Each of them claims that blackmail has one or another distasteful consequences, but Altman pithily observes: "*these insights alone... do not account for the strong intuition that blackmail is a wrong to the victim*"⁸³."

Instead of concluding that these failures further weaken the case for the status quo in this regard Altman takes the very opposite position. It is as if "*correct*" arguments for our author's perspective strengthens it, but flawed or inconsistent ones do too. Heads Altman wins, tails his opponents (including the present authors) lose. We would hate to play the poker with this man!

He says in his own defence against this charge: "*We should not reject partial accounts merely because they fail to explain one case or another. They might be valuable elements in a theory when paired with moral accounts that apply to other examples...*"⁸⁴ But here he does himself an injustice. If his own critiques of competing theories were a little less thorough, he could perhaps rely on this line of argument. But after reading them, none of his opponents have much of a leg to stand on. Thus, Altman cannot now turn around and make use of the very arguments which he has previously annihilated to promote his own conclusions. The point is, these are not really **partial** accounts; instead they are **mistaken** accounts, as Altman himself has so witheringly shown. That he nevertheless is willing to weave them together to form a "*patchwork*" on behalf of blackmail prohibition perhaps shows only how desperate he is to defend this conclusion.

3 OTHER MARKET TRANSACTIONS.

In this section Altman tries to defend himself against the charge that he is overinclusive.

First up in the batter's box are "*rescue bargains*" (e.g. I toss a rope to a drowning victim after demanding all his money to do so). If we are prohibiting blackmail on the ground that it exploits its "*victims*" (e.g. the blackmailees), should we not also outlaw a

⁷⁸ Altman, *supra* note 3- pp.1656-57.

⁷⁹ *Supra* note 2.

⁸⁰ *Supra* note 2.

⁸¹ *Supra* note 2.

⁸² *Supra* note 2.

⁸³ Altman: *supra* note 3- pp.1656-57.

⁸⁴ Altman: *supra* note 3- p.1657.

commercial transaction to save a desperate person's life at exorbitant prices for this reason? Altman says no: "*That rescuers demand high payments for their services does not prove that they coerce or exploit*⁸⁵." Now, Altman does not have to convince us. We are on record with the view that coercion and exploitation cannot take place unless there is the threat or use of physical force or fraud against an innocent property. We agree that no rescue bargain, at **any** price, can be rendered illegitimate under such a criterion. But Altman, with very different views on compulsion, cannot logically avail himself of these arguments.

The only avenue open to him is to show that on his own account of coercion, the blackmailer, but not the rescuer, is guilty. Here is his first attempt: "*Unlike many blackmailers, these rescuers provide a service they would not otherwise provide*⁸⁶." But this, surely is incorrect. For the blackmailer too, provides a service, silence, he would not otherwise have provided. This is a valuable consideration, as shown by the high price the blackmailee is willing to pay for it. Nor can Altman hide behind the argument that the blackmailer would otherwise have not provided this silence. On the contrary, were he not paid off to be quiet, presumably the blackmailer could well have "*spilled the beans*." Perhaps because of the psychic enjoyment the human animal has at the prospect of relishing other's discomfort, many are the people who can "*dine out for free*" for many months because they are the source of titillating gossip.

Altman's second attempt to extricate himself from these difficulties is as follows:

*"Unless the rescuer charges a higher price for a rescue of equal difficulty when the rescuer finds that the victim faces imminent suffering or death, the rescuer has not taken advantage of the victim's hardship*⁸⁷."

Unfortunately, this will not work either. Altman himself admits that "*some rescuer negotiations, like most blackmail obligations, involve coercion and exploitations*⁸⁸." In the case of blackmail (which for Altman is part exploitative and part not) he takes the former part as the general rule and throws out of court the entire concept because of it. In the case of rescue bargains, however, Altman takes the very opposite track. Again, he admits there is an exploitative aspect, but this time he ignores it in behalf of the non exploitative aspect.

States Altman: "*One might think that the principles justifying blackmail laws would also justify criminalising some demands for payment by rescuers*⁸⁹." Yes, one might **indeed** think that. But no, Altman squeezes out of this requirement of logic because there are "*practical reasons...not to criminalise such demands*⁹⁰," and this

⁸⁵ Altman: *supra* note 3- p.1658.

⁸⁶ Altman: *supra* note 3- p.1658.

⁸⁷ Altman: *supra* note 3- p.1658.

⁸⁸ Altman: *supra* note 3- p.1658.

⁸⁹ Altman: *supra* note 3- p.1658.

⁹⁰ Altman: *supra* note 3- p.1658.

after he had just finished lambasting consequentialists in his treatment of waste and subsidiary harm⁹¹.

Altman cannot have it both ways. Either “*practical considerations*” indicate we should legalise **all** blackmail, whether “*exploitative*” or not, in which case we should also decriminalise **all** rescue bargains; or they do not, in which case we should not legalise either of these contracts. Altman has not succeeded in showing a relevant difference between the two and thus is not entitled to treat them differently.

Amazingly enough, Altman **sees this point**, and yet still insists on prohibiting all blackmail, while allowing all rescue bargains:

“Criminalising blackmail deters some individuals from purchasing silence at a price that they would be happy to pay and in contravention of no moral or legal obligation. Permitting rescuers to demand payment sometimes leads needy people to pay for rescues they might have had for free, and to pay prices inflated by their desperation”⁹².

Arguing with Altman is to attempt the impossible.

Nothing daunted, Altman gives three reasons for his stance:

*“(1) we cannot easily distinguish particular threats from particular offers; (2) we suspect that coercion and exploitation are far more common among blackmailers than among rescuers; and (3) the risk of deterring rescue is more dangerous than permitting immoral rescue bargains, while the risks of permitting coercion and exploitation in the sale of secrecy seem more serious than the harms of deterring bargains for silence. **The distinctions, are not those of principle. They result from the practical balancing typical in legal decision-making**”⁹³.*

Well, at least Altman can agree with us that there is no difference in principle between hard rescue bargains and blackmail. (We would say between **any** bargains and blackmail). We certainly don’t agree about the incidence of illegitimate activity- our position being that no exploitation or coercion takes place in **either** case.

But let us take Altman at his word. Surely he will agree with us that black male teenagers commit crimes (real crimes, that is) at rates far in excess of their proportional representation in the population. Surely, then, the risk of not engaging in preventative detention for this group of people is greater than that of allowing “*exploitative*” bargains for silence. If it a matter of principle, then this age sex cohort is safe from so unjust an act. But if it a matter of the “*practical balancing in legal*

⁹¹ Altman: *supra* note 3- pp.1656-57.

⁹² Altman: *supra* note 3- p.1659.

⁹³ Altman: *supra* note 3- p.1659 (Emphasis added).

decision-making," these young people are in grave danger⁹⁴.

Consider now the last case and the analysis thereof offered by Altman:

"Imagine that everyone wrongly believes Rich is a member of the Ku Klux Klan. Bob discovers evidence showing that the rumour is false. Bob tells Rich that he will share the evidence in exchange for one million dollars. This proposal is likely to be coercive and exploitative. In this regard it resembles blackmail. But prohibiting the proposal could be problematic. Some exculpatory information is discovered intentionally and through some effort. I would hesitate to enact criminal laws that could deter discovery and disclosure of exculpatory information. In this regard Bob's proposal is more like a rescue proposal than a typical blackmail proposal⁹⁵."

Our response is that **all** blackmail is actually rescue. The blackmailer is "rescuing" the blackmailee from the gossip, himself in this case⁹⁶. If Altman is serious about legalising all voluntary rescue contracts, no matter how odious anyone thinks them, and wishes to be logically consistent, he must also change his mind and now advocate the decriminalisation of all voluntary blackmail contracts, again, no matter how odious.

4 CONCLUSION.

Wittgenstein⁹⁷ used the example of a very long rope composed of many strands, none of them, however, substantial enough to stretch for its entire length. Altman is arguing, analogously, that the case in behalf of banning blackmail is composed of many arguments (e.g. strands), none of which alone can justify this conclusion, but a few of which, together, are sufficient to this task. Our reply is two-fold. First, this may apply to rope, but not to the philosophy of law. In the latter case we seek an overarching explanation, not dozens, or even several. Second, even if we accept the "rope" analogy, we must still insist that each strand be acceptable on its own merit and that none of them be incompatible with any another.

Altman exposes the fallacies of many if not all of these strands, and then somehow thinks he can weave a sound rope out of them. No! Borrowing from a related context, Altman's rope is as weak as its weakest strand. Nor is the entire rope any the stronger for being composed of many pieces, none of them valid.

⁹⁴ According to the old saying, "No man's life or liberty is safe while the legislature is in session." If we add the Altmanian insights, this becomes "No man's life or liberty is safe while the legal decision-maker is in session."

⁹⁵ Altman: *supra* note 3, p. 1660.

⁹⁶ Superficially, this sounds like a Mafia protection racket: the criminal will "protect" you from himself for a (large) fee. But there is a real difference between the two cases: the blackmailer has an absolute right to engage in gossip, the threatened activity. In contrast, the hoodlum has **no right at all** to do that which threatens to do in order to get you to pay "protection" money.

⁹⁷ *Supra* note 10.

