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### Blackmail: The Paradigmatic Crime

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# BLACKMAIL: THE PARADIGMATIC CRIME

GEORGE P. FLETCHER\*

The ongoing debate about the rationale for punishing blackmail assumes that there is something odd about the crime. Why, the question goes, should demanding money to conceal embarrassing information be criminalized when there is nothing wrong with the separate acts of keeping silent or requesting payment for services rendered? Why should an innocent end (silence) coupled with a generally respectable means (monetary payment) constitute a crime? This supposed paradox, however, is not peculiar to blackmail. Many good acts are corrupted by doing them for a price. There is nothing wrong with government officials showing kindness or doing favors for their constituents, but doing them for a negotiated price becomes bribery. Sex is often desirable and permissible by itself, but if done in exchange for money, the act becomes prostitution. Confessing to a crime may be praiseworthy in some circumstances, but if the police pay the suspect to confess, the confession will undoubtedly be labelled involuntary and inadmissible. If there is a paradox in the crime of blackmail, these other practices of criminal justice should also strike us as self-contradictory.

Contrary to the popular view in the literature, I wish to argue that blackmail is not an anomalous crime but rather a paradigm for understanding both criminal wrongdoing and punishment. That is an ambitious claim, one that requires at least a clear plan of exposition. My project is to seek "reflective equilibrium"<sup>1</sup> across ten cases that are pivotal in the debates about the rationale for criminalizing blackmail. Reflective equilibrium requires a convincing fit between the agreed-upon outcomes in the ten cases and general principles that can account for these outcomes. After stating the cases and their legal resolutions, I will consider possible explanatory principles. The desiderata that I set for a sound analysis are not only that we explain the results but that we explain

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<sup>1</sup> On the methodology of reflective equilibrium, see JOHN RAWLS, *A THEORY OF JUSTICE* 48-51 (1971). Rawls explains the process of reflective equilibrium as follows: "When a person is presented with an intuitively appealing account of [a problem] . . . he may well revise his judgments to conform to its principles . . . . He is especially likely to do this if he can find an explanation for the deviations which undermines his confidence in his original judgments . . . ." *Id.* at 48.

why blackmail is *criminal*—not only in the United States but in all civilized legal systems.

The latter requirement bears underscoring. It will not be sufficient, for example, to explain blackmail's status as a crime simply on the ground that it is immoral or that it leads to the inefficient use of resources. Countless immoral and inefficient activities are not punished.<sup>2</sup> Affixing these labels to blackmail could, at most, be a first step in explaining why it is a crime. The inquiry would then focus on why the immorality or inefficiency warrants punishment. As we shall see, explaining the simple phenomenon of punishing blackmail requires an excursus into the tangled web of theories justifying the entire institution of criminal punishment. In order to account for blackmail as a crime, I offer a novel retributive theory of punishment—a theory that, so far as I know, has never before been articulated in the literature on punishment. The task is complex but simple. Blackmail turns out not to be a paradox but rather a paradigm for thinking anew about the nature of crime and punishment.

## I. TEN CASES

We begin, then, with standard cases that fall on both sides of the line, some constituting blackmail, others, falling illuminatingly in the category of lawful behavior.

1. *Crime case*: *D* threatens, if not paid, to report *V*'s suspected crime to the local prosecutor.<sup>3</sup>

*Blackmail*

2. *Tort case*: *V* rams his car into *D*'s. *D* threatens to sue if *V* does not compensate *D* for the resulting damage.<sup>4</sup>

*No Crime*

<sup>2</sup> For example, negligently causing personal injury and property damage is inefficient, but as a rule it is not subject to criminal punishment. See George Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 402 (1971).

<sup>3</sup> See MODEL PENAL CODE § 223.4 (1962) (theft by extortion) ("A person is guilty of theft if he purposely obtains property of another by threatening to . . . (2) accuse anyone of a criminal offense . . .").

<sup>4</sup> The Model Penal Code states:

It is an affirmative defense to prosecution based on paragraph[] (2) . . . that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or

3. *Hush money*: *D* threatens to reveal a damaging truth, say a sexual peccadillo, about the celebrity *V* unless the latter pays "hush money." The threat is supported by incriminating pictures.<sup>5</sup>

*Blackmail*

4. *Late employee*: *D*, *V*'s employer, threatens to fire *V* if he does not get to work on time.

*No Crime*

5. *Lascivious employer*: *D*, *V*'s employer, threatens to fire *V* unless he sleeps with her.<sup>6</sup>

*Blackmail*

6. *Baseball case*: *D* offers to sell *V* a baseball autographed by Babe Ruth with knowledge that *V*'s child, who is dying, would receive solace from having the ball. *D* demands \$6000 for the ball.

*No Crime*

7. *Dinner kiss*: *D* says to *V*: "If you do not go to dinner with me, I will not kiss you." Alternatively, *D* says to *V*: "If you do go to dinner with me, I will kiss you."

*No Crime*

8. *Tattoo case*: *D* tells his friends that unless they pay him money, he will have his entire body tattooed.

*No Crime*

9. *Political embarrassment*: *V* is a black political candidate. *D* is a black activist with antiwhite views, whose connections to *V* are an embarrassment to *V*. *D* goes to *V* and tells him that unless he is paid off, he will speak out and repeatedly declare his support for *V*, thereby sabotaging *V*'s electoral chances.

*Blackmail*

indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or a compensation for property or lawful services.

*Id.* This provision seems to suggest that there would no criminal blackmail even in case 1, if the threat to complain to the local prosecutor was motivated by an "honest claim" for "restitution or indemnification."

<sup>5</sup> See *id.* ("A person is guilty of theft if he purposely obtains property of another by threatening to . . . (3) expose any secret tending to subject any person to hatred, contempt or ridicule . . .").

<sup>6</sup> Model Penal Code § 223.4 is limited to the acquisition of property. See *id.* Nonetheless, extortion of the lascivious-employer variety is typically considered a form of criminal blackmail. See 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL

10. *Paid silence*: Same story as in 9, but *V* goes to *D* and offers him \$20,000 to "lay low" until after the election.<sup>7</sup>

*No Crime*

Of these ten cases, four represent clear instances of criminal blackmail; six are related cases where the consensus appears to be that the behavior is not subject to conviction either for blackmail or for any another offense. Yet the cases are very closely related. They all involve inducements by *D*, an offer of a benefit or the threat of a harm, designed to bring about a certain form of behavior in *V*. How should we go about distinguishing them? What categories should we use for classifying them?

Taking these cases as our guide, we can quickly dispose of several false leads. We will not take seriously, for example, the conventional distinction between threatening to disclose information (no. 3, *hush money*) and threatening other forms of harm, such as dismissing an employee (no. 5, *lascivious employer*). A principled distinction among the cases based on the mode of trying to get the behavior one wants is hard to imagine. Nor should we put much emphasis on whether the desired behavior consists in the surrender of property (no. 3, *hush money*; no. 9, *political embarrassment*) or sexual favors (no. 5, *lascivious employer*). Recognizing this distinction, as German law does,<sup>8</sup> suggests that blackmail is a crime against property—something like theft or acquiring property by false pretenses. But that seems to place excessive emphasis on the blackmailer's acquisitive end, with insufficient attention to the means of realizing that end.

The striking feature of blackmail is the way the defendant seeks to induce the behavior of another, not the peculiar interest that the victim sacrifices. Even if we did distinguish between inducing property transfers, on the one hand, and inducing other sorts of behavior, on the other, all we would gain would be two versions of

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LAW: HARMLESS WRONGDOING 239 (1988) (proposing the exploitation principle as a rationale for blackmail's criminalization).

<sup>7</sup> Cases 9 and 10 are based on then-candidate David Dinkins's reportedly paying \$9500 to a controversial group headed by Sonny Carson. Roger Ailes, the opposition's campaign manager, charged that the money was "a payoff for . . . keeping [Carson] quiet until after the election." Howard Kurtz, *With Ailes's Aid, Convict Becomes "Willie Horton" of N.Y. Campaign*, WASH. POST, Oct. 20, 1989, at A14. I use this example in the text without implying that Roger Ailes was right or that Mayor Dinkins did anything improper during his 1989 campaign.

<sup>8</sup> See STRAFGESETZBUCH [StGB] §§ 240 Nötigung (Coercion), 253 Erpressung (Blackmail).

blackmail running parallel to each other. Of course, the interest sacrificed must be significant, however vague that threshold may be: it is not enough that one is induced to go to dinner for fear of not being kissed (no. 7, *dinner kiss*). We may concede that blackmail in the narrow sense is limited to the acquisition of property; but blackmail in the broad sense encompasses all actions aimed at inducing the victim to give up something significant, something like money, property, sexual favors, or political liberties. We shall be concerned with blackmail in this broad sense.

## II. THREATS AND OFFERS

It is tempting to stake out a path through the ten case results by distinguishing between threats and offers. The argument is that in the *baseball* case (no. 6) the refusal to sell at a lower price is not blackmail because it represents the withholding of an offer, not the making of a threat.<sup>9</sup> Threats are coercive, but withholding offers is not. Coercion is immoral because it deprives the victim of an option that she would have had, and this deprivation interferes with her autonomy, i.e., her freedom of action.

Yet not all threats, not all acts of coercion, are immoral or criminal; for example, the threat to sue in the *tort* case (no. 2), is considered permissible. So too the threat in the *tattoo* case (no. 8). An all too facile resolution of these cases is that they contain threats that *D* has the right to make. Joel Feinberg distinguishes these cases from the criminality of threatening to lodge a criminal complaint on the ground that one has a duty as well as a right to file the complaint.<sup>10</sup> There is no duty to sue in tort and no duty to tattoo or abstain from tattooing oneself. It is unclear why it should matter whether *D* is under a duty. True, Anglo-American contract law addresses whether demanding payment for the performance of a pre-existing duty constitutes valid consideration. But contract doctrines have little to teach us about the nature of criminal wrongdoing.

That the defendant's action constitutes a threat is clearly not a sufficient condition for blackmail, though it might be a necessary one. Accordingly, the distinction between threats and offers, if

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<sup>9</sup> Scott Altman, for example, relies heavily on this criterion in developing his account of coercion and exploitation as the basic wrongs of blackmail. See Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639, 1640-45 (1993).

<sup>10</sup> See FEINBERG, *supra* note 6, at 241.

sound, could help us understand some of the cases. One could say, for example, that the precise difference between the *political embarrassment* case (no. 9) and the *paid silence* case (no. 10) is that in the former *D* makes a threat, while in the latter *V* makes an offer. Yet the distinction between offers and threats is not so easily drawn. The two versions of the *dinner kiss* (no. 7) are functionally equivalent. If you do not come, I do not kiss; if you do come, I do kiss. It appears to be the same deal. Is the kiss an offer or the withholding of the kiss a threat? The classification does not depend on whether it is good or bad to be kissed. If it is bad to be kissed, then withholding becomes the offer, and puckering up, the threat.

To make the distinction between offers and threats, one must first discern the normal state of affairs. If *A* kissing *B* is normal, then withholding the kiss is a threat rather than an offer; if two parties normally keep their distance, then the threat consists in making contact. If we know the baseline of normalcy, we may regard proposed changes for the worse as threats, and proposed changes for the better as promises to confer benefits. The baseline of normalcy is fairly obvious in the *baseball* case (no. 6), in which the seller proposes to give the parent the benefit of the autographed baseball, however outrageous the price. The baseline here is the seller's ownership of the ball; the proposed benefit, the definitive transfer of title and control. Because we are clear about the baseline, we readily perceive the transfer of title as an act conferring a benefit on the purchaser.<sup>11</sup>

This, I take it, is the point of Nozick's distinction between productive and nonproductive exchanges.<sup>12</sup> Selling the baseball is clearly productive in the sense that both sides gain something by the trade. In cases of blackmail, however, the exchange is not productive for "if [nonproductive exchanges] were impossible or forceably prohibited so that everyone knew they couldn't be done, one of the parties to the potential exchange would be no worse

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<sup>11</sup> One can imagine a variation of the *baseball* case (no. 6) in which setting the price at \$6000 constitutes a threat. Suppose that *D* sells sports memorabilia and the normal asking price for the ball autographed by Babe Ruth is \$600. If *V* has an expectation and a right to buy at \$600, then *D*'s setting the price ten times higher constitutes a threat to withhold the ball unless *V* pays the exploitative price. It is as though *D* threatened to take the ball away from *V* if *V* did not pay an additional \$5400.

<sup>12</sup> See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 84-87 (1974) (defining a productive activity as one that makes the purchaser better off than if the seller had never existed, and an unproductive activity, like blackmail, as one that leaves the purchaser no better off than she was before the sanction).

off.”<sup>13</sup> In other words, in the paradigmatic *hush money* case (no. 3), the normal situation presumably is that the pictures and the information remain suppressed. Relative to that baseline, *V* would be no worse off if revealing the pictures were strictly enjoined. Of course, if the normal situation is that the information leaks out, then *V* is surely worse off if she is prohibited from paying hush money. Whether the exchange is taken to be productive or nonproductive depends on what we take to be the normal state of affairs apart from the blackmailer’s offer.

I am skeptical about whether a coherent account is available for these parallel distinctions between threats and offers and between nonproductive and productive exchanges. The basic idea is that some things that we do to and for others increase their freedom (their “opportunity set”) and other actions decrease their freedom. Whether *A*’s acts increase or decrease *B*’s freedom depends, however, on what would happen if *A* were not present in *B*’s life. Yet the latter condition, “if *A* were not present,” is insuperably ambiguous. Does it mean that *A* does not have the information that *A* could release to the press or does it mean that *A* does not ask for payment to conceal the information? When the mugger *A* says to *B*, “Your money or your life,” the same ambiguity is inescapable. If *A* never confronts *B* with a gun, *B* is of course better off, but if *A* does point a gun at *B*, *B* is also better off if she has the option of paying in order to avoid getting shot. In one sense the exchange is unproductive (as compared with *A*’s never pointing the gun at *B*), but in another sense, it is productive (as compared with *A*’s shooting *B*). The familiar problem of time-frame ambiguity—narrow or broad?—makes it virtually impossible to decide whether these transactions decrease or increase freedom.

### III. THIRD-PARTY CHIPS

If the distinction between threats and offers is not likely to get us very far, maybe James Lindgren’s effort to unravel the “paradox of blackmail”<sup>14</sup> hits closer to the mark. His comprehensive study reviews the literature, pans all competing theories, and then offers a test for distinguishing between blackmail and permissible commerce. The wrong, says Lindgren, is that the blackmailer seeks

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<sup>13</sup> *Id.* at 85.

<sup>14</sup> See James Lindgren, *Unraveling The Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984).



to bargain with something that does not belong to him or her: "In effect, the blackmailer attempts to gain an advantage in return for suppressing someone else's actual or potential interest. The blackmailer is negotiating for his own gain with someone else's leverage or bargaining chips."<sup>15</sup>

With this criterion in hand, Lindgren rolls through the cases. The *crime case* (no. 1) is blackmail because *D* is "bargaining with the state's chip."<sup>16</sup> The *hush money case* (no. 3) falls into the same category because *D* tries to sell the public's right to know the content of the pictures. Because *V* pays "to avoid being harmed by persons other than the blackmailer,"<sup>17</sup> *D* supposedly engages in an act that is criminally wrong. The *lascivious employer case* (no. 5) is not so easy to explain on Lindgren's theory, but I suppose he might argue that by misusing her authority (threatening to dismiss an employee for reasons unrelated to job performance), the employer is bargaining with chips that belong to her partners, clients, or stockholders. With similar imagination, one can dispose of the *political embarrassment case* (no. 9): *D* seeks gain by invoking the interests of the electorate or at least those of the competing political party.

There is no theoretical harm in this imaginative play about whose chips are really at stake in an alleged blackmail transaction. It hints at the difference, for example, between threatening to sue after an accident (okay) and threatening to file a criminal complaint (not okay), or between threatening to dismiss *V* if he does not get to work on time (okay) and threatening to fire him if he refuses sexual favors (not okay). Yet the argument does not go far enough. It fails to account for the difference between the *political embarrassment* and *paid silence* cases (nos. 9 & 10). In the intuitive response of most people, it makes a difference whether the candidate *V* is subject to the threat of political embarrassment, or whether he takes the initiative to keep the source of embarrassment out of harm's way. He is not the victim of blackmail if he initiates the transaction. In either case, however, *D* plays with a chip that seems to belong to someone else. Lindgren's analysis focuses entirely on the content of the transaction, and fails to consider who initiates the interaction or whether the transaction lends itself to repetition. As we shall

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<sup>15</sup> *Id.* at 702.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

see, the latter factor turns out to be critical in developing a proper understanding of blackmail.

Lindgren's criterion—emphasizing the unfair trafficking in other people's chips—calls into question our assumed distinction between selling the baseball at an outrageous price and the other stipulated cases of blackmail. In the *baseball* case (no. 6), the seller takes advantage of the sick child's vulnerable condition and her special love for Babe Ruth. The baseball might be worth no more than \$600 on the collectors' market, but under these circumstances, the seller reaps an unexpected profit. She drives a hard, exploitative bargain, but one that is neither criminal blackmail nor any other form of crime. The windfall profits derive from her taking advantage of something that does not belong to her, namely, the child's and parent's consumer surplus in possessing the ball. She is bargaining with a chip that does not belong to her, and for Lindgren, that should be enough to render her demand criminal. Since by common agreement it is not criminal, there must be something awry in Lindgren's argument.

One might object that I am playing fast and loose with the notion of chips and the people to whom they belong. Perhaps, but so does Lindgren. After all, how does one know whose chips are at stake in the *lascivious employer* and *political embarrassment* cases (nos. 5 & 9), when one party makes an unfair threat against another? Lindgren's implicit theory of bargaining chips seem to turn on a notion of extra-legal moral rights. Some people other than the potential blackmailer have a morally defensible interest in the item being sold—whether the item is pictures in the *hush money* case (no. 3), a job in the *lascivious employer* case (no. 5), or an improved chance of winning the election in the *political embarrassment* case (no. 9). Even if we could solve these problems, it is not clear what should follow. Lindgren's claim about playing with other people's chips trades on a general principle of fairness: play only with your own chips and do not cheat. This may be a sound moral principle, but cheating and sharp dealing are, at most, tangential concerns in the criminal law. We do not penalize cheating on exams, committing adultery with other people's wives or husbands, or even stealing numerous forms of intellectual property protected under tort law. By like token, there is no reason to punish the particular form of cheating that Lindgren espies in cases of blackmail.

We are left with the problem posed at the outset: How do we generate a principle to cover these ten cases that, at the same time, connects with general criteria of crime and punishment? None of

the tests and criteria proposed in the literature are capable of satisfying these desiderata. We must make a clean break with the conventional approaches to the problem. The break consists in broadening our focus from the intrinsic nature of the transaction to the kind of relationship that the transaction engenders between the parties. We must look at the aftermath of the suspected blackmail to determine whether the act is criminal or not. First, I will illustrate how this approach accounts for the ten cases; then broaden the thesis to suggest a general approach to crime and punishment; finally, I consider several objections to the thesis.

#### IV. DOMINANCE AND SUBORDINATION

The proper test, I submit, is whether the transaction with the suspected blackmailer generates a relationship of dominance and subordination. If *V*'s paying money or rendering a service to *D* creates a situation in which *D* can or does dominate *V*, then the action crosses the line from permissible commerce to criminal wrongdoing. The essence of *D*'s dominance over *V* is the prospect of repeated demands. Consider the difference between the *crime* and *tort* cases (nos. 1 & 2). In one case *D* threatens criminal prosecution; in the other, a private law suit. The critical point here is that if *V* pays *D* an amount necessary to settle the tort dispute between them, *D* must release his claim. He cannot thereafter come back to *V* and demand more. But if *V* pays *D* money to suppress a criminal investigation, *D* retains the option of coming back for more. It turns out, therefore, that these first two cases neatly illustrate the thesis. Blackmail occurs when, by virtue of the demand and the action satisfying the demands, the blackmailer knows that she can repeat the demand in the future. Living with that knowledge puts the victim of blackmail in a permanently subordinate position.

Let us see whether the same test provides a guide to the other eight cases. The recurrent *hush money* case (no. 3) is readily resolved. If *V* pays *D* to keep the information to himself, the latter has every incentive to demand more money in the future. *V* places his life and fortune at the disposal of the blackmailer. Even if *D* says that she is surrendering the pictures and the negatives, there is no assurance that copies have not been made. Nor is there any way to expunge *D*'s personal knowledge of the pictures and what they reveal. Scott Altman makes the same point after he fails to find an adequate explanation of why selling an embarrassing video at the

market price to the victim should be punishable.<sup>18</sup> The case puzzles him because demanding only that the victim pay the price that a television station would have paid for the video insulates the transaction from the stigma of exploitation. Yet, he concedes, "there cannot be any guarantee that a first payment will not be followed by more demands."<sup>19</sup> And the maker of the video, even should she surrender all copies, "might later demand further payment not to tell people what she saw."<sup>20</sup> This is the essence of the blackmail—not the transaction itself, but the relationship of dominance implicit in taking the first step of inducing the victim to pay money for her own protection.

The *late employee* case (no. 4) illustrates the converse thesis that unless further threats are imminent in the transaction, there is no criminal blackmail. So long as *V* shows up on time, *D* can make no additional threat of dismissal. This case thus falls into the pattern of the *tort* case (no. 2). But, if in the following case (no. 5), *V* sleeps with *D*, he places himself in her power. The initial submission establishes a relationship of dominance and subordination that encourages further sexual demands. The thesis is clearly borne out by these two cases.

And what about the troublesome *baseball* case (no. 6)? The theory proves its mettle in neatly accounting for why a tough one-shot transaction cannot be considered criminal blackmail. Once the parent purchases the baseball, the seller *D* can demand nothing further. In no sense does the parent place herself in ongoing subordination to the seller, and there is thus no criminal wrong in demanding an exorbitant price for the baseball. This strikes me as a far more persuasive account of this case than one that focuses on the supposed distinction between offers and threats. Significantly, no analysis of "baselines" or "normalcy" is necessary to dismiss this case as exploitative commerce rather than criminal blackmail.

Neither variation of the *dinner kiss* case (no. 7) poses a problem of dominance and subordination. The threat and the demand are minimal. *V* can easily tell *D* to "take a walk" and be free of the minimal threat. Dominance requires something more than withholding a kiss or making unwanted bodily contact. Exactly what is required, however, is not clear. The message of the *tattoo* case (no. 8) is that no one can dominate someone else by asking for

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<sup>18</sup> See Altman, *supra* note 9, at 1648.

<sup>19</sup> See *id.*

<sup>20</sup> *Id.* at n.34.

money to do or not to do that which is in one's recognized domain of freedom. The case resembles the problem of the landowner who threatens to build a wall on his own property that will deprive his neighbor of light. The neighbor has no easement to interpose against the landowner, and if the latter thus demands payment to forgo building the wall, the demand is within the landowner's rights; there is no blackmail in demanding payments to do or not to do that which one has a right to do. For the neighbor to complain of subordination to the whims of the wall-builder, he would have to have some legitimate interest that is put in jeopardy by the repeated demands for payment.

The great virtue of the dominance-and-subordination test is that it neatly accounts for the distinction between the *political embarrassment* and *paid silence* cases (nos. 9 & 10). Indeed, the test grows out of my effort to make sense of this distinction. Think of these two cases as posing variations on the interaction between the candidate and the activist who has the power to embarrass him. If the candidate submits to the activist's demand (no. 9) and pays him to keep quiet, the candidate comes under the sway of the activist who, like other blackmailers, would continue to make demands. On the other hand, if the candidate takes the initiative, seeks out the activist, and offers him "walk-around money" to stay out of sight until after the election (no. 10), the candidate is the master of the transaction. He certainly is not being blackmailed, and neither is the activist, who is simply being paid a salary for remaining quiet for a certain period of time. If our fictional candidate is smart, he will structure the payment in the *paid silence* case in staggered installments so that the activist has an incentive to keep his side of the bargain. Of course, the latter might realize that more money is to be had by selling his silence. If he starts threatening the candidate that he will speak if he does not receive more, however, the situation reverts to the pattern of the *political embarrassment* case (no. 9).

We have now generated a coherent and convincing fit between the principle of dominance and these specific cases. Unless some counterexample might challenge the principle, we should move to the next stage of the two-part test for what constitutes a convincing account of blackmail. Does the principle of dominance explain not only why blackmail is undesirable but also why it is conventionally regarded as a crime subject to punishment? The question invites us to consider whether punishment fulfills an important function in counteracting relationships of dominance. This inquiry, in turn,

necessitates a slight detour to survey the theoretical positions typically considered in the literature on punishment.

## V. PUNISHMENT AS THE NEGATION OF DOMINANCE

Punishment is one of those topics on which consensus eludes us. Since the eighteenth century, utilitarians and Kantians have been arguing about whether punishment is justified by the good it brings about or simply as an imperative of justice, regardless of its social costs and benefits. In the works of Beccaria<sup>21</sup> and Bentham,<sup>22</sup> we encounter the systematic utilitarian argument that the deterrent value of the penalty must outweigh the suffering of the prisoner. The welfare represented by a safer society justifies the pain inflicted on the offender.

Referring to this approach as the "principle of happiness" or "eudaemonism,"<sup>23</sup> Immanuel Kant found a loophole in the utilitarian argument. Justifying punishment by appealing to its beneficial consequences could readily justify differential punishment for the same crime—depending on the social needs of the moment. Kant dismissed this potential result of utilitarianism with outrage: "The principle of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment . . . ."<sup>24</sup> Kant insisted that punishment is an imperative of both morality and justice. And "if justice goes, there is no longer any value in men living on the earth."<sup>25</sup>

The opposition between Bentham and Kant provides the framework for most contemporary debates about punishment. For Benthamite utilitarians, the primary justification for punishment is deterrence; for Kantians, it is the retributive justice implicit in making the punishment fit the crime. Retribution seeks retrospective justice: it looks only to the crime, and not to the beneficial consequences of punishment. On this axis of time, utilitarianism is prospective: it looks to the beneficial consequences of punishment

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<sup>21</sup> See CESARE B. BECCARIA, ON CRIMES AND PUNISHMENTS 17-19 (David Young trans., Hackett Publishing Co. 1986) (1764).

<sup>22</sup> See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165-74 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789).

<sup>23</sup> IMMANUEL KANT, THE METAPHYSICS OF MORALS 183 (Mary Gregor trans., Cambridge University Press 1991) (1797).

<sup>24</sup> *Id.* at 141.

<sup>25</sup> *Id.*

rather than to any imperatives urged by the facts. There are, we should note, many variations on the axis of retrospective and prospective or consequential theories. Let us distinguish among some of them:

1. *Purely retrospective*: The only permissible punishments are those based on events in the past, and particularly on the details of the crime.

2. *Factually consequential*: Punishment is justified by deterrence, both special (the criminal himself) and general (the rest of society). This argument represents a factual prediction; if neither the criminal nor the rest of society is deterred, then the prediction is false. Whether punishment is justified on these grounds, therefore, requires careful observation of what happens in the aftermath of punishing. In testing a penalty's efficacy, the problem is distinguishing between those things that would have happened anyway from consequences solely attributable to the act of punishment.

3. *Conceptually consequential*: Some of the consequences by which punishment is justified are conceptually linked to the act of punishing; the desirable consequences follow logically from the punishment. For example, Hegel's argument for punishment is that it vindicates the Right over the Wrong represented by the crime.<sup>26</sup> This act of vindication is conceptually connected to the punishment in the sense that if one is convinced the vindication occurs, no facts can undermine this conviction.

4. *Mixed theories*: To avoid the conflict among these variations, many theorists today argue that punishment must satisfy both of these desiderata. It must have a deterrent effect and it cannot exceed the punishment that the defendant deserves for the deed, considered purely retrospectively.

As we shall see, the argument that punishment counteracts criminal dominance—the rationale that I have proposed for punishing blackmail—lies somewhere between the poles of factual and conceptual consequentialism. The claim is that punishing criminals restores the dignity of the victim. Whether this is a factual or conceptual consequence remains to be seen.

The debate about the rationale for punishment has appeared to be endless because none of the proffered positions escapes telling criticism. Utilitarians suffer the charge of not taking human autonomy and responsibility seriously; i.e., they treat criminals as

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<sup>26</sup> See GEORG W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* § 99 (T.M. Knox trans., Oxford University Press 1952) (1821).

organisms to be manipulated rather than as human ends in themselves. Yet retributivists do not agree on why it is right to punish somebody, whether a new social benefit follows or not. The best way to appreciate the defects in the standard retributive argument is to consider the many unconvincing arguments Kant offers for his position. After surveying these diverse approaches, I will seek to defend my own thesis—that criminal punishment negates the blackmailer's dominance—by invoking the least popular passage in Kant's defense of punishment. This passage calls for the execution of the last murderer languishing in prison before society voluntarily disbands.<sup>27</sup>

Most of Kant's arguments in favor of retributive punishment turn on the themes of equality and universality. First, in the context of the "woe to him . . ." passage quoted above,<sup>28</sup> Kant develops a general critique of the inequalities engendered by a case-specific calculation of the social advantages and disadvantages of punishing a particular person. Kant believed, above all, that punishment required the equal application of the law. There should be no exceptions, not even for those whose punishment benefits society.<sup>29</sup> The term "categorical imperative" that Kant casually invokes is not, in this passage, used in its ordinary sense.<sup>30</sup> It means no more here, it seems, than a commitment to general and universal laws, equally applied.

In his second argument in favor of nonutilitarian punishment, Kant stresses the equality or equivalence between the crime and the punishment. Drawing on the teachings of the *ius talionis*, he insists that the scales of justice as well as the concept of law itself require this equivalence.<sup>31</sup> No other standard would, he claims, be sufficiently precise to meet the good identified as "strict justice" under law.<sup>32</sup>

The third argument elicits Kant's understanding of "retribution" as captured in the German term *Vergeltung*. The categorical imperative in its ordinary sense requires people to act on their maxims (subjective plans) only if these maxims can be universalized

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<sup>27</sup> See *infra* text accompanying notes 39-41.

<sup>28</sup> See *supra* text accompanying note 24.

<sup>29</sup> For example, one could benefit society by voluntarily submitting to medical experiments. See *id.* at 141.

<sup>30</sup> See *infra* text accompanying note 33.

<sup>31</sup> See KANT, *supra* note 23, at 141.

<sup>32</sup> See *id.*



and made to apply (*gelten*) as a universal law.<sup>33</sup> If one applies a negative version of the categorical imperative that Kant, trading on the association with *gelten*, calls *vergelten*, the same should be true of criminals. The justification for punishment, as it emerges in this argument, requires that the criminal's maxim be universalized and applied to him.<sup>34</sup> If he kills, his killing should be universalized and applied to him. If he steals, his stealing should be regarded as a universal law, which would imply that all property would be subject to theft. If property is undermined, then the criminal should be treated as not having any resources of his own. If he has no resources, Kant concludes (playfully, it would seem) that he should be imprisoned, and forced to work for his sustenance.<sup>35</sup>

Though this argument blurs the distinction between the poorhouse and the prison, one should recall that, at the time of Kant's writing in 1795, imprisonment had yet to become the common mode of punishment. Kant struggles to find a rationale for putting people behind bars rather than executing, exiling, or castrating them. The latter forms of punishment he regards as fitting, respectively, for murder and treason,<sup>36</sup> sex with animals,<sup>37</sup> and rape.<sup>38</sup> The general theme in Kant's writing on punishment is that the crime should be turned back on the criminal. Sometimes this can be done by universalizing the criminal's maxim and making him suffer the consequences, or by making the punishment "fit" the crime, just as castration fits rape. The notion of a fitting punishment bears some resemblance to Michel Foucault's thesis that punishment was originally thought to expiate the crime by reenacting the horror of the crime on the body of the defendant.<sup>39</sup>

The most intriguing of Kant's arguments for retributive punishment is the most often derided. He imagines that a society is about to disband, but it has a problem: murderers, condemned to die, still languish in prison. What should be done about them? Kant insists that the murderers should be executed "so that each has

<sup>33</sup> See *id.* at 51.

<sup>34</sup> For the background to this analysis in Kant's legal and moral theory, see generally George Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533 (1987).

<sup>35</sup> See KANT, *supra* note 23, at 142.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.* at 169.

<sup>38</sup> See *id.*

<sup>39</sup> See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 3-16 (Alan Sheridan trans., Pantheon Books 1977) (1975).

done to him what his deeds deserve and blood guilt does not cling to the people."<sup>40</sup> Executing them seems to be pointless because no societal benefit could possibly follow. But this is precisely Kant's point.

The notion of a society's disbanding should be treated as a thought-experiment, very much like the idea of a society's coming together in a social contract. Neither of these events ever occurred in history, but they are useful constructs for testing our intuitions about the conditions of a just social order. Further, the biblical reference to blood guilt is highly suggestive. In biblical culture, a murderer acquired control over the victim's blood; the killer had to be executed in order to release the victim's blood, permitting it to return to God as in the case of a natural death.<sup>41</sup> The failure to execute the murderer meant that the rest of society, charged with this function, became responsible for preventing the release of the victim's blood.

Whatever the metaphysics of gaining and releasing control of blood, the biblical idea should be understood today as a metaphor for society's complicity in a crime for failing to punish the criminal. Once the institution of punishment becomes the conventional response to an obvious crime, the decision either to prosecute or not to prosecute carries social meaning. The state's intervention communicates condemnation of the crime and solidarity with the victim. By prosecuting, the state's officials say to the victim and his or her family: "You are not alone. We stand with you, against the criminal."

Conversely, refusing to prosecute and convict for an obvious crime also carries meaning. When the state court jury acquitted the four officers charged with beating Rodney King,<sup>42</sup> they communicated implicit approval of the police behavior, thus engendering rage among African-Americans in Los Angeles.<sup>43</sup> The existence of

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<sup>40</sup> KANT, *supra* note 23, at 142.

<sup>41</sup> See DAVID DAUBE, *STUDIES IN BIBLICAL LAW* 122-24 (1947) (noting how, in ancient times, the victor in a battle drank the blood of the vanquished).

<sup>42</sup> See Richard A. Serrano & Tracy Wilkinson, *All 4 Acquitted in King Beating: Violence Follows Verdicts; Guard Called Out*, L.A. TIMES, Apr. 30, 1992, at A1.

<sup>43</sup> As a technical matter, of course, the jury in the Rodney King case only concluded that they had a reasonable doubt about whether the four indicted officers used excessive force. I am speaking here of the popular understanding of the verdict, not its technical meaning. For more on this point, see GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 199-217 (1988) (analyzing how many unfortunately interpreted the Goetz verdict in racial, rather than legal, terms).

the institution of punishment creates an opportunity to counteract the criminal's attainment of an unjust position of power over others. The failure of police, prosecutors, and juries to invoke their established power, their inaction when there is an opportunity to act, provides the foundation for the perception of shared responsibility. If they willfully refuse to invoke the traditional response to crime, they effectively disassociate themselves from the victim. Abandoned, both the victim and the victim's community feel betrayed by the system.

Punishment expresses solidarity with the victim and seeks to restore the relationship of equality that antedated the crime. This may not be so obvious in a culture that has become accustomed to thinking of punishment as a utilitarian instrument of crime control. To appreciate the psychological significance of the state's standing by the victim, consider the cases in which the state refuses to prosecute and thereby abandons the victim to solitary suffering. For example, during the terror in Argentina that led to approximately 9000 *desaparecidos* in the early 1980s, many victims' families realized, to their horror, that they could not turn to the police. The police were often the ones engaged in the round-up of suspected terrorists.

The failure of the state to come to the aid of victims, as expressed in a refusal to invoke the customary institutions of arrest, prosecution, and punishment, generates moral complicity in the aftermath of the crime. The state's failure to punish also reaffirms the relationship of dominance over the victim that the criminal has already established.

This argument for punishment admittedly relies on a double-negative. It is less an argument *for* punishment, in fact, than an argument about why *not punishing* is sometimes tantamount to complicity in evil. And it is not an argument for punishment *ab initio*. Some other argument is necessary to explain why it is better for the state to punish than to impose civil penalties or simply to have its officials declare that they sympathize with the victim.

Generating a positive argument for punishment requires that we return to the theme of domination as I advanced it in the context of blackmail.<sup>44</sup> Extending the thesis to all crimes of violence and even to theft and embezzlement is not a difficult task. The argument is that all of these crimes carry in their train a relationship of dominance and subordination. Rape victims have good

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<sup>44</sup> See *supra* part IV.

reason to fear that the rapist will return, particularly if the rape occurred at home or the rapist otherwise knows the victim's address. Burglars and robbers pose the same threat. Becoming a victim of violence beyond the law means that what we all fear becomes a personal reality; exposure and vulnerability take hold and they continue until the offender is apprehended. It would be difficult to maintain that all crimes are characterized by this feature of dominance. We can say, however, that this relationship of power lies at the core of the criminal law. It is characteristic of the system as a whole.

In order to counteract the power of the criminal over the victim, the state must intervene by exercising power over the criminal. It is not enough to make the offender pay damages or a fine, for all this means is that she purchases her ongoing status exempt from the prohibitions that apply to others. The state must dominate the criminal's freedom, lest the criminal continue her domination of the victim. The deprivation of liberty and the stigmatization of the offense and the offender—these means counteract the criminal's dominance by reducing his capacity to exercise power over others and symbolically lowering his status.

## VI. ONE, TWO, MANY OBJECTIONS

Any novel way of thinking about crime and punishment is likely to engender skepticism, and this is undoubtedly the case both with this account of blackmail as a paradigmatic crime and with my theory of punishment. Let me try here to anticipate and respond to probable objections.

Some may argue that not all crime generates a relationship of dominance. This is obviously true, and I could not possibly insist that every case conforms to the thesis. The most that I need to show, however, is that the core of the criminal law is expressed in an act of achieving dominance over others. If the thesis is persuasive, it provokes questions about nonconforming cases, such as homicide.<sup>45</sup>

Others may posit a much more serious objection, arguing that it is unclear how punishment counteracts the criminal's dominance over the victim. This objection challenges the notion that the

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<sup>45</sup> Homicide seems to be a special case. We could treat the decedent's loved ones as secondary victims, but they do not suffer from the same fear of recurrence that characterizes other forms of violent crime.

consequence of punishment is conceptually connected to the act of punishment, that punishment negates the criminal's wrong and vindicates the right.<sup>46</sup> There should be some data, some factual consequence, that determines whether this objection is correct or incorrect. It might even be correct under some circumstances but not others. The data that would validate the claim would be the experience of victims, their testimony that apprehending, prosecuting, and punishing those who prey on them enables them to reintegrate into society and overcome their humiliation.

The testimony that one can come by is largely anecdotal. And it is easier to find stories that support the negative proposition that *not punishing* those who have committed crimes demoralizes victims and requires them to live under inhumane psychological stress. I was led to this thesis, in part, by a story that I have never been able to verify in the press. Upon President Raúl Alfonsín's replacing the military junta in Argentina, the father of an abducted child—a *desaparecido*—expected the newly elected government to take rapid action against criminal elements in the military. Nothing happened for several months. As a result, the father despaired and eventually committed suicide. In this particular case, of course, there may have been psychological factors that pushed the father over the edge. But I still understand and empathize with his distress, and that of a man I interviewed shortly after the verdict in the *Goetz* case. He called into a talk show and reported:

I'm a New Yorker, black. Over the past seven years, three members, boys, in my family has [sic] been killed, the last one shot, with the killer that we see weekly—today—walking around. My wife has been mentally disturbed ever since this happened because no one is serving time for any of this . . . The question is: where is the justice?<sup>47</sup>

The caller sympathized with Goetz. If the system does not respond to the plight of victims, they invariably fantasize that a vigilante will vindicate their dignity.

A third objection, raised by Stephen Latham at the Blackmail Symposium, is whether one can give a persuasive account of blackmail merely by focusing on the relationship of dominance induced by the interaction between the parties. The dominance might be justified. Determining whether it is requires consideration

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<sup>46</sup> See HEGEL, *supra* note 26, § 99.

<sup>47</sup> See FLETCHER, *supra* note 43, at 199-200.

of the intrinsic merits of the act itself, not just its aftermath. The legal system is arguably a system of justified dominance. It must be the case, therefore, that the blackmailer's actions are somehow intrinsically wrong and unjustified.

Many words and expressions at hand express what is wrong with blackmail. In fact, too many things are wrong with it. Blackmail represents coercion of the victim,<sup>48</sup> exploitation of the victim's weakness,<sup>49</sup> and trading unfairly in assets or chips that belong to others.<sup>50</sup> It represents an undesirable and abusive form of private law enforcement.<sup>51</sup> It leads to the waste of resources so far as blackmailers are induced to collect information that they are willing to suppress for a fee.<sup>52</sup> None of these arguments, however, offers a convincing account of the difference between cases of punishable and nonpunishable conduct. All of them capture a portion of blackmail's evil, but none accounts systematically for the cases.

Of all the arguments about the wrong immanent in blackmail, only one accounts persuasively for the distinctions implicit in the ten cases considered above, and that is the impact of the alleged blackmail on the ensuing relationship between *D* and *V*. When *D*'s demand is a one-shot affair, as when *D* threatens to sue in tort if *V* does not agree to the payment demanded, there is no crime. There is no way to explain this or the other cases of nonpunishable threats except to note that *V*'s payment effects a settlement and thus negates the possibility of repeated demands. Conversely, all the cases of punishable blackmail generate a situation that invites repeated threats and exploitation.

Finally, some may argue that if the aftermath of the alleged blackmail is the determinative factor, why not define the crime as the second act of blackmail? Douglas Ginsburg and Larry Alexander raised this objection at the Blackmail Symposium, and though I was initially puzzled by it, I see now that it poses no serious challenge to my thesis. Ginsburg and Alexander obviously understood dominance as a state of affairs that crystallizes only as a result of repeated demands. Therefore, one must wait for the second demand to ascertain whether the blackmailer intends to exercise his

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<sup>48</sup> See Altman, *supra* note 9, at 1641-43.

<sup>49</sup> See *id.* at 1644-45.

<sup>50</sup> See Lindgren, *supra* note 14, at 70

<sup>51</sup> See Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1823-26 (1993).

<sup>52</sup> See Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1859-65 (1993).

power. But, in fact, the relationship of dominance and subordination comes into being as a result of the victim's making the first payment or engaging in the first coerced act of submission. The dominance consists in the knowledge that the victim is now fair game for repeated demands. Dominance and subordination are states of anticipation. When both parties know that the victim has submitted once and has no defense against submitting again, he is at the mercy of the blackmailer. His only hope lies in the intervention of the police or other agents of the criminal law.

The existence of criminal sanctions gives him the possibility of asserting a counter-threat of going to the police. Some might object to the permissibility of reciprocal blackmail, for threatening prosecution, considered by itself, violates the same criminal prohibition. Yet as a defensive move, as a way of protecting oneself from blackmail, the counter-threat of invoking the criminal law seems fully justified.