CHAPTER 6

Blackmail: A Crime of Paradox and Irony

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The criminal prohibition of blackmail comes laden with irony. Blackmail derives its archaic name from a 1601 English statute that has hardly anything to do with the modern offense of blackmail. Every US jurisdiction today criminalizes what the lay public regards as blackmail, and yet few do so in the name of "blackmail." Prosecutors rarely enforce the crime in practice (Posner 1993, pp. 1841–1847), and yet lawyers, philosophers and economists continue to obsess over it. The lay public accepts blackmail as a legitimate criminal prohibition, and yet legal experts question its legitimacy. Ultimately, blackmail remains the only major offense that is commonly said to constitute a "paradox."

I shall (1) define what I mean by blackmail; (2) describe how American penal codes frame it in relation to offenses of theft, larceny, extortion, threat, coercion and intimidation; (3) describe the variable scope of state and federal blackmail prohibitions; (4) address variations in the existence and content of defenses to blackmail and (5) define the so-called paradox of blackmail, arguing that, though the paradox is genuine, it is narrower than generally supposed and endeavoring to explain, though not justify, its persistence.

Defining "Blackmail"

No consensus exists in law regarding the meaning of the term "blackmail," a failing that is due in part to the term's heterogeneous history.

The term "blackmail" stems from two archaic terms: "mail" or "mayle" from the French word "maille," referring to coins that freebooting Scottish Highland chiefs historically extorted from English landowners across the Scottish border by promising to keep the landowners safe from marauding

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brigands (whom the Highland chiefs implied were they themselves), and "black" from an English statute of 1601 which prohibited the payment or receipt of such "black mayle" (43 Eliz. ch.13, § 2).[1] For much of its history in England, blackmail referred to what was traditionally called extortion, that is, the crime of demanding protection money from others in return for not criminally harming them. English law was extended in the mid-eighteenth century to criminalize the practice of obtaining, or attempting to obtain, property of others, by threatening otherwise to accuse them of infamous crimes (Ginsburg and Shechtman 1993, p. 1851; Yehudai 2009, pp. 296–812). And the offense was further extended under Queen Victoria to criminalize what today is often called "informational blackmail," that is, the practice of obtaining or attempting to obtain property of another by threatening otherwise to disclose information that incriminates or subjects another to hatred, contempt or ridicule (McLaren 2002, pp. 31–38).

The 50 states and the US government all prohibit informational blackmail to a greater or lesser extent. But they rarely do so in the name of blackmail. Among the 50 states plus the District of Columbia, only 7 jurisdictions possess crimes denominated "blackmail," and of those 7, only 4 confine the crime to acts of informational blackmail,[2] the rest encompassing acts of extortion as well.[3] The District of Columbia and Wyoming statutes are examples of the former and latter, respectively:

D.C. Code § 22-3252

(a) A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens:

(1) To accuse any person of a crime;
(2) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
(3) To impair the reputation of any person, including a deceased person.

Wyoming Statutes § 6-2-402

(a) A person commits blackmail if, with the intent to obtain property of another or to compel action or inaction by any person against his will, the person:

(i) Threatens bodily injury or injury to the property of another person; or
(ii) Accuses or threatens to accuse a person of a crime or immoral conduct which would tend to degrade or disgrace the person or subject him to the ridicule or contempt of society.

The remaining jurisdictions, as discussed below, also punish informational blackmail, but they do so under the rubric of other offenses. Some confine blackmail to being a property offense, while others broaden it to include the use of threatened disclosures to abridge a person's freedom of action (*see "Broadening Extortion to Include Infringements of Personal Freedom," infra*).

I shall henceforth use "blackmail" to refer solely to acts of informational blackmail. I do so for two reasons. First, doing so is consistent with the lay public's use of the term. "Blackmail" is a legal term that has become part of popular discourse, where it refers to coercive threatened harms of a certain kind, namely, threats by *A* to disclose incriminating or other reputation-damaging information about *B*.[4] Second, and more importantly, the paradigmatic example of the "paradox" of blackmail is the criminalization of informational blackmail.[5]

Blackmail Within American Penal Codes

Just as jurisdictions differ over the meaning of blackmail, they differ, too, over the meaning of "theft," "larceny," "stealing," "extortion" and "coercion." To appreciate the differences, it is useful to start with a baseline, in this case ordinary-language usage. The lay public commonly uses the terms as follows:

Theft: "Theft" is a property offense that *A* commits against *B* by depriving *B* of property without *B*'s consent, by means of deception, stealth or other non-forcible means (Merriam Webster's Collegiate Dictionary 1997, pp. 1222, 1150).

Larceny: "Larceny" is a synonym for theft and stealing, and vice versa.

Stealing: "Stealing" is a synonym for theft and larceny, and vice versa.

Extortion: "Extortion" is a property offense that *A* commits against *B* by depriving, or attempting to deprive, *B* of property with the latter's consent[6] by either threatening to otherwise inflict unlawful harm in the future (e.g., "Pay me or your house will be vandalized") or, while being a public official, violating public trust by threatening to otherwise withhold or take official action (e.g., "Pay me or I'll deny you a zoning variance").[7]

Coercion: Coercion is an offense against the person that *A* commits against *B* by compelling *B* to do or refrain from a lawful act by either threatening to otherwise inflict unlawful harm without consent (e.g., "Submit to sexual intercourse or I will strike you") or unlawfully threatening to otherwise inflict harm (e.g., "Submit to sexual intercourse or I will fire you from your at-will position.") (Merriam Webster's Collegiate Dictionary 1997, p. 222).

Some jurisdictions use theft, larceny, stealing, extortion and coercion in the aforementioned way (*see*, e.g., Calif. Pen. Code §§ 484, 518; Calif. Gov. Code § 8313). Most jurisdictions, however, use the terms in different and occasionally overlapping ways, including by (1) broadening extortion to include blackmail; (2) broadening theft, larceny and stealing to include all wrongful deprivations of property (other than by immediate force or threats of immediate force); and (3) broadening extortion to include not only wrongful deprivations of property but also infringements of personal freedom of the kind associated with coercion.

Broadening Extortion to Include Blackmail

The District of Columbia mirrors lay understandings of extortion and blackmail by confining extortion to threats of unlawful harm and of abuses of public trust and confining blackmail to threatened disclosures of information (D.C. Code §§ 22-3252, 22–3251). Most jurisdictions, however, do otherwise. Rather than possessing offenses denominated "blackmail," they broaden the crime of "extortion" to encompass acts of blackmail as well. Thus, Hawaii subsumes traditional offenses of extortion and blackmail within a generic offense of "extortion":

> Hawaii Rev. Stat. § 707-764
>
> A person commits extortion if the person does any of the following: (1) Obtains … control over the property … of another … by threatening … to (a) Cause bodily injury in the future to … any … person; … (c) Accuse some person of any offense; [or] (g) Expose a secret or publicize an asserted fact, whether true of false, tending to subject some person to hatred, contempt, or ridicule ….

Broadening Theft, Larceny and Stealing to Include All Unlawful Deprivations of Property (Other Than by Means of Immediate Force or Threats of Immediate Force), Including Blackmail

Some jurisdictions, following the Model Penal Code (MPC), use "theft" as a generic offense to include all deprivations of property (other than deprivations by means of immediate force or threats of immediate force, the latter being the offense of robbery) (*see*, e.g., Ark. Code § 5-36-102). Other jurisdictions define "larceny" (*see*, e.g., Conn. Gen. Stat. Ann. § 53a-119(5)) and "stealing" (*see*, e.g., Mo. Rev. Stat. §§ 570.010, 570.030) in the same generic fashion. The consequence in such jurisdictions is that "theft," "larceny" and "stealing" cease being synonyms for deprivation of property by stealth and deception and, instead, become umbrella concepts in which blackmail is a subset. The state of Pennsylvania is an example. Theft in Pennsylvania is a generic offense of which "theft by unlawful taking," "theft by deception" and "theft by extortion" are subsets (18 Pa. Comp. Stat. §§ 3921-23), the latter of which also encompasses the offense of obtaining property by threats of accusation or exposure (18 Pa. Comp. Stat. § 3923(a)(2-3)).

Broadening Extortion to Include Infringements of Personal Freedom

Some jurisdictions are content to confine blackmail to being a property offense (*see*, e.g., Ariz. Rev. Stat. § 13-1804). Others, however, extend blackmail to include using threats of accusation or exposure to abridge freedom of action as well. They do so in two distinct ways. Some, like Pennsylvania (which has committed itself to making it a crime of "theft" to obtain property by threats of accusation or exposure), follow the MPC and make it a separate crime of "coercion" to use threats of accusation or exposure to restrict a person's freedom of action:

Criminal Coercion

(Pa. Comp. Stat. § 18-2906)

A person is guilty of criminal coercion, if, with intent unlawfully to restrict freedom of action of another to the detriment of the other, he threatens to: (a) commit any criminal offense; (2) accuse anyone of a criminal offense; (3) expose any secret tending to subject an person to hatred, contempt or ridicule; or (4) take or withhold action as an official, or cause an official to take or withhold action (emphasis added).

(A few jurisdictions do the same thing by adopting statutes denominated "intimidation" rather than "coercion"; *see*, *e.g.*, Burns Ind. Code § 35-45-2-1(d).)

Other states eschew Pennsylvania's two-statute approach. Rather than framing extortion and blackmail as subsets of property offenses of theft, stealing and larceny and enacting separate offenses against coercion or intimidation, they define blackmail and extortion as offenses encompassing deprivations of freedom as well as property. Thus, the Wyoming statute, quoted earlier, defines "blackmail" as the offense of using threatened disclosures of incriminating or shaming information *either* "to obtain property of another" *or* "to compel action or inaction by [another] against his will." Other jurisdictions define "extortion" in the same way (*see*, e.g., Iowa Code § 711.4).

Pennsylvania's two-statute approach and Wyoming's one-statute approach have advantages. Wyoming's approach has the advantage of subsuming separate offenses against property and freedom into a single offense, thus obviating the need for a separate offense of "coercion" or "intimidation." In contrast, Pennsylvania's approach has the advantage of enabling Pennsylvania to criminalize certain threats with respect to *property* that it does not criminalize with respect to threats to infringe *freedom of action*. Thus, Pennsylvania is able to make it a crime of extortion to obtain property by threats to "inflict any … harm which would not benefit the actor," while *not* making it a comparable crime of coercion to abridge a person's freedom of action by such means (*compare* 18 Pa. Comp. Stat. § 3923 *with* 18 Pa. Comp. Stat. § 2906).

The Variable Scope of State and Federal Blackmail Prohibitions

The earliest English statutes that criminalized informational blackmail distinguished between two kinds of threatened disclosures, which they penalized differently: threats to accuse persons of *crimes*, which they penalized by up to life in prison, and threats to disclose information that subjected persons to *hatred, contempt or ridicule*, which they punished by no more than three years in prison (Libel Act of 1843 § 3).

A few US jurisdictions criminalize only one or the other of the two kinds of threatened disclosures. Thus, a half-dozen jurisdictions solely criminalize threats to accuse persons of crimes,[8] while Ohio does the opposite by criminalizing only threats to expose persons to hatred, contempt or ridicule (Ohio Rev. Code §

2905.11). Still other jurisdictions subsume both kinds of threatened disclosures within a single phrase (*see*, e.g., 17A Me. Rev. Stat. § 355(2)(B)). Nevertheless, the great majority of jurisdictions continue to distinguish between the two kinds of threatened disclosures, though they no longer penalize them differently. Thus, Iowa makes it an offense, punishable by up to ten years in prison to do "any of the following with the purpose of obtaining … anything of value: (b) Threatens to accuse another of a public offense; (c) Threatens to expose any person to hatred, contempt or ridicule" (Iowa Code §§ 711.4).

Blackmail statutes vary considerably from jurisdiction to jurisdiction. But the principal differences concern the following: (1) whether threats must be in verbal form; (2) whether threatened disclosures must be of information that is outside the public domain; (3) whether the threatened disclosures must be false; (4) whether the threatened disclosures must harm reputations; (5) whether threatened persons must be identical to or personally intimate with persons whom threatened disclosures would harm; (6) whether threats to disclose public wrongdoing are confined to accusations of crime; (7) whether statutory limitations on what constitutes blackmail are subject to broader catchall prohibitions; and (8) penalties for violations.

Threats in Verbal Form

Some jurisdictions, being apparently concerned about issues of proof, confine criminality to verbal threats, whether the latter are oral or written (*see*, e.g., Fla. Stat. § 836.05). Others extend the crime to all threats, regardless of how the threats are communicated, whether through words, innuendo or actions (*see*, e.g., La. Rev. Stat. § 44-66(A)). Most, however, merely state that it is a crime to "threaten" to make certain disclosures without specifying any particular form of communication (*see*, e.g., D.C. Code § 22-3252(a)).

Information Not Yet in the Public Domain

Jurisdictions differ regarding the criminality of threats to disclose information that is already in the public domain. Some jurisdictions require that threatened disclosures concern compromising information that is "confidential" (Alaska Stat. § 11.41.520), "secret" (18 Penn. Comp. Stat. Ann. § 3923) or "not previously in the public domain" (Miss. Code § 97-3-82(2)), while others make it an offense to threaten to disclose "*any* asserted fact" (New Jersey Stat. § 2C:20–5), or "any information sought to be concealed by the person threatened" (N.D. Cent. Code § 12.1-23-10(12)(g)), that subjects a person to hatred, contempt or ridicule. It is unclear why the offense should be confined in the former way. Assume, for example, that a nursing-care attendant threatens that unless paid, he will reveal to an aged and institutionalized patient that her grandson has been publicly accused of pedophilia. If it is wrongful to extort money on such grounds *before* an accusation is made public, is it not also wrongful to do so *after* an accusation is made if the target of disclosure is unaware of the information (*see* People v. Bollaert, pp. 727–728)?

False Information

As discussed earlier, blackmail statutes commonly make it an offense to extort money or conduct by threatening to subject a person to "hatred, contempt or ridicule." Because the phrase "hatred, contempt or ridicule" is a term of art from the law of defamation, and because truth is a defense to allegations of defamation in the US,[9] at least one court in the US has construed the phrase as criminalizing threatened disclosures only if the disclosures are false (*see* Landry v. Daley; *see also* Burns Ind. Code § 35-42-2-1(d)(7) (making it a crime to threaten to harm a person's credit or business reputation only if threatened assertions are "false")). The majority view, however, is overwhelmingly to the contrary. Whether states do so by explicit statutory provision (*see*, e.g., Ark. Code § 5-13-208(a)(5)) or by judicial statutory construction (*see* Annotation), states overwhelmingly take the position that truth is not a defense to blackmail.

The consequence is that criminal prosecutors nearly everywhere do not have to concern themselves with whether threatened disclosures are true or false. Absent some other defense (*see* "Defenses to Blackmail," *infra*), it constitutes blackmail to threaten another that, unless demands are met, the actor will make or release statements that subject the other to hatred, contempt or ridicule, regardless of truth. However, this does not mean that truth is never relevant under extortion statutes. Within jurisdictions in which actors have defenses to blackmail only if they *believe* their threatened disclosures to be true, truth is relevant as circumstantial evidence of such belief. Truth is also relevant within jurisdictions that, in addition to criminalizing blackmail, separately make it an offense for an actor to threaten another with "libel" (*see*, e.g., Nevada Rev. Stat. § 205.320(3)), or "calumny" (*see*, e.g., Ohio Rev. Code § 2905.11(A)(4)), unless the actor's demands are met.

Harm to Reputation

England confined the offense of blackmail to accusations of crime and other disclosures that subject persons to hatred, contempt or ridicule, all of which are injuries to a person's character and reputation. Some jurisdictions, like Rhode Island and West Virginia, follow England by confining the offense to accusations of "crime" or disclosures that injure a person's "reputation" (R.I. Gen. Laws § 11-42-2) or "character" (W. Va. Code § 61-2-13). Others go further and extend the offense to disclosures that impair a person's "credit or business repute" (*see*, e.g., Alaska Stat. § 11.41.520(a)(3)) or reveal a physical "deformity" (*see*, e.g., La. Rev. Stat. § 14:66(A)(3)). Still others like Hawaii extend the offense to "any information" that is "sought to be concealed by the person threatened or any other person" (Hawaii Rev. Stat. § 707-764(1)(g)), regardless of whether information would injure a person's reputation. To illustrate the difference, assume that A threatens, unless paid, to disclose medical information about B that, though not damaging to B's reputation, is nevertheless private. A commits an offense in Hawaii but not in West Virginia.

Relationship Between Threatened Parties and Victims of Threatened Disclosures

Most jurisdictions make it an offense for an actor to threaten that, unless he is compensated, he will disclose compromising information about "any" person, regardless of whether the person whom the compromising information implicates is related to those being threatened (*see*, e.g., Code of Ala. § 13A-8-1(14)(f)). And some go further and criminalize threatened disclosures about persons, regardless of whether they are living or dead (*see*, e.g., N.D. Cent. Code § 12.1-23-10(12)(f)). Yet other jurisdictions prohibit threatened disclosures only if the disclosures implicate the very persons being threatened, while still others prohibit threatened disclosures only if the disclosures implicate persons who stand in an intimate relationship to those being threatened. Thus, Indiana makes it an offense to threaten to expose "the person threatened" to hatred, contempt or ridicule (Burns Ind. Code § 35-45-2-1); California makes it an offense to threaten to accuse a person of a crime, provided that the latter is the threatened person himself or "a relative" or "member of his family" (Calif. Pen. Code §§ 518–19); and Louisiana makes it an offense to threaten to accuse a person of a crime, provided that the latter is the threatened person himself, a family member or someone "held dear" to the threatened party (La. Rev. Stat. § 14-66). The latter limitations appear to reflect the view that, given the penalties for blackmail, punishment for blackmail should be confined to persons whose threats inflict severe emotional distress upon their targets.

Notice that jurisdictions that make it an offense to threaten to disclose reputation-damaging information about "any" person raise the question of whether it is a crime for a person who possesses reputation-damaging information about a public official or public figure to offer an exclusive right to information to whichever tabloid or scandal sheet pays the most for it. Since the threat to each tabloid is to disclose the information to another tabloid unless the former matches or exceeds the highest bid, the threat violates the terms of such statutes. To be sure, courts within such jurisdictions might interpret their statutes to apply only to threats to disclose that are also accompanied by *offers to suppress*, not threats to disclose in any event. However, even then, the statutes would prevent a person from offering to sell the information to whichever tabloid agreed to pay the most, provided that the latter agreed to pay more than a certain stated amount.

Threats to Disclose Legal Wrongdoing

Nearly all jurisdictions make it a crime to obtain property or abridge a person's freedom of action by threatening to accuse a person of a crime, though North Carolina limits the offense to accusations of crimes that are punishable by "death" or "imprisonment in the state's prison" (N.C. Gen. Stat. § 14-118). Other jurisdictions go further and also make it an offense to threaten to "bring charges" against a person, say, by declaring oneself willing to prosecute an

offense that has previously been reported (*see*, e.g., Ariz. Rev. Stat. § 13-1804(A)(5)). Still others also make it an offense to threaten to report a person's actual or suspected immigration status (*see*, e.g., Calif. Pen. Code § 519(5)). And at least one jurisdiction makes it a crime to threaten to report a person's violation of a civil statute (Miss. Code § 97-3-82(2)).

The Relationship Between Statutory Limitations and Catchall Prohibitions

The aforementioned limitations on blackmail liability can be effective. However, in jurisdictions that have adopted the Model Penal Code's catchall prohibition regarding extortion, the limitations can be illusory. The MPC not only makes it a crime to obtain property of another by threatening to accuse another of a criminal offense or disclose secrets that subject another to hatred, contempt or ridicule but also makes it a crime to obtain property by threatening to inflict "*any other harm which would not benefit the actor*" (MPC § 223.4(7)). Now, it might be thought having addressed a specific kind of conduct (e.g., threats to "accuse" others of "crimes" or disclose "secrets" that subject others to "hatred, contempt or ridicule"), the MPC intends such limitations to control in any case involving threatened *disclosures of information*. However, the MPC commentary makes it clear that it intends the catchall prohibition to apply to all cases encompassed by its terms (Model Penal Code and Commentaries 1980, pt. 2, vol. 2, pp. 214–216). This suggests that, within states that have made the MPC catchall part of their blackmail statutes, specified limitations on blackmail liability, for example, the requirement of "secrets" or harms of "hatred, contempt or ridicule," may be overridden.

Penalties

Jurisdictions differ regarding the degree to which they grade the offense of blackmail and the severity with which they penalize violations.

Sentencing Ranges

Sentencing judges have discretion to sentence with prescribed ranges and, hence, discretion to sentence blackmail less severely than other forms of extortion that carry the same potential sentences. Yet prescribed sentencing ranges themselves vary considerably from one jurisdiction to another. Thus, although Michigan and North Carolina both make it an offense to threaten to accuse another of a crime, Michigan penalizes such threats by up to 20 years in prison, while North Carolina penalizes it by no more than 45 days in jail (*compare* Mich. Comp. L. § 750.213 *with* N.C. Gen. Stat. Ann. §§ 14.188, 15A-1340.23(c)). Similarly, Louisiana penalizes blackmail by up to 15 years in prison, while Missouri penalizes it by no more than 1 year in jail (*compare* 14 La. Rev. Stat § 66 *with* Mo. Rev. Stat. §§ 570.030(8) & 578.011(6)).

Grading Blackmail

Jurisdictions also differ regarding whether and, if so, how to grade penalties for blackmail. Some jurisdictions penalize extortion by violence identically with blackmail, while others distinguish between them (*compare* Iowa Code § 711.4 (no difference in penalty range), *with* Ariz. Rev. Stat. § 13-1804 (penalizing extortion by violence more severely than blackmail)). Other jurisdictions grade demands for money more severely than demands for actions, while others do not (*compare* Code of Ala. §§ 13A-8-15 and 13A-6-25 (penalizing demands for money more severely than demands for actions) *with* Fla. Stat. Ann. § 836.05 (penalizing both offenses the same)). Other jurisdictions grade blackmail by the amount of money extracted, while others do not (*compare* Tex. Pen. Code Tex. § 31.03 (grading by amount appropriated) *with* 11 Del. C. § 846 (2) (no grading by amount appropriated)). And still other jurisdictions grade blackmail by whether threats succeed, while others do not.[10]

Defenses to Blackmail

The English Libel Act of 1843 was unqualified: it made it an offense, without exception, to extort money by threatening to disclose information about a person (Libel Act of 1843, § 3). Interpreted literally, the English statute would have criminalized practices that are common in civil litigation, for example, pre-litigation demand and offer letters, and offers under seal by plaintiffs in civil suits to dismiss the suits and preserve confidentiality in return for payments by defendants. It would also have made it a crime for a person to make threats such as "Pay for the damage you caused in spraying racist graffiti on my car or I'll tell the newspapers what you did" or "Stop your affair with my daughter-in-law or I'll tell your wife about it."

Not surprisingly, a majority of US jurisdictions provide statutory defenses to blackmail (Robinson et al. 2010, pp. 309–11 & nn. 74, 79–80) and others create judge-made defenses (*see*, e.g., United States v. Jackson)—some of which consist of offense-negating elements (*see*, e.g., Code of Ala. § 13A-8-15) and others which are true "affirmative defenses" (*see*, e.g., Ohio Rev. Code § 2905.12).[11] Thus, some statutes condition the state's *prima facie* case on threatened disclosures being "wrongful" (*see*, e.g., Calif. Pen. Code § 518) or "malicious" (*see*, e.g., Florida Stat. Ann. § 836.05), while others contain detailed defenses based on those of the Model Penal Code (*see*, e.g., Alaska Stat. §§ 11.41.520(c) (adopted verbatim from MPC § 223.4) and 11.41.530(b) (adopted verbatim from MPC § 212.5)).

As previously mentioned, the MPC contains two provisions for criminalizing blackmail: an extortion provision, which criminalizes demands for property, and a coercion provision, which criminalizes demands for action or inaction (e.g., "Stop your affair with my daughter-in-law or I'll tell your wife about it"). The two MPC provisions contain two respective defenses—a defense to extorting property and a defense to coercing action or inaction. Thus, it is defense to extortion of property under the MPC that the actor

"honestly claimed" the "property" as "restitution or indemnification for harm done in the circumstances to which [the disclosure] relates" (MPC § 223.4), and it is a defense to coercion of behavior under the MPC that the actor "believed [the disclosure] to be true" and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances that were the subject of the [disclosure]" (MPC § 212.5).

Defenses to blackmail all share at least one thing in common: they apply only when actors threaten disclosure in order to obtain redress for perceived misconduct or to induce others to begin conducting themselves as it is believed they ought to. Given that limitation, however, defenses differ regarding the permissible scope of threatened disclosures and the permissible kinds of property, action and inaction that actors may demand. The principal differences concern: (1) whether the defense extends beyond demands for property to include demands for conduct as well; (2) whether the defense extends to threats to accuse persons of criminal conduct; (3) whether the defense extends to threatened disclosures that are broader than needed for legal redress; (4) whether the defense extends to demands for property in excess of what is needed for redress; (5) whether the defense extends to demands for action or inaction beyond action to redress perceived wrongs; (6) whether actors must believe the threatened disclosures to be true; and (7) whether a nexus must exist between the property demanded and the subject of the threatened disclosure.

Extension of the Defense to Include Demands for Action or Inaction

As we have seen, some states follow the MPC by enacting blackmail statutes against both demands for property and demands for action or inaction. Some of these states also follow the MPC in providing statutory defenses to both offenses (*see*, e.g., Alaska Stat. §§ 11.41.520(c), 11.41.530(b)). Yet, strangely enough, and perhaps unconstitutionally as well, other state statutes do not: they prohibit both sorts of demands, and they provide statutory defenses to demands for property, but they provide no defenses to demands for action or inaction. Thus, Arkansas possesses separate statutes against blackmail demands for property and blackmail demands for action or inaction (*see* Ark. Code §§ 5-36-101(B), 5-36-103(a)(2)). The former statute states that it is a defense to blackmail for property that the property is "restitution or compensation for harm done in the circumstances to which the [threatened] accusation [of crime] or exposure [of secrets] relates" (Ark. Code § 5-36-101 (11)(B)). But the latter statute provides no defense at all to blackmail demands for action or inaction. (Interestingly, several states do the converse by providing a defense to coercion but not to larceny.)[12]

The failure to provide defenses to blackmail—as well as the enactment of stingy defenses—raises constitutional questions because it effectively criminalizes threats that may deserve First Amendment protection. Consider, for example, an employee or an airline company who discovers that a company pilot has recently experienced epileptic seizures. The employee could respond to the

danger by directly notifying the company, "Your pilot has been having epileptic seizures." If the employee did so, the First Amendment would protect the employee in prohibiting the state from punishing him for the statement. But now assume that the employee decides to respond to the danger by telling the pilot, "If you don't immediately get help with you seizures, I am going to tell the company about them." Given that the First Amendment would prohibit the state from punishing the employee for directly notifying the company, and given that employee now threatens to notify the company unless the pilot resolves the very danger that the threatened notification concerns, a court could reasonably conclude that the First Amendment also prohibits the state from punishing the threat (*see* State v. Robertson, pp. 577–590).

Courts respond in two ways to constitutional inadequacies in defenses to blackmail, whether the inadequacies arise from an absence of defenses (*see*, e.g., Whimbush v. People) or from excessively stingy defenses (State v. Robertson, p. 590). Some courts avoid declaring blackmail statutes unconstitutional by inserting judicially fashioned defenses into statutes that lack explicit defenses (*see*, e.g., United States v. Jackson). Other courts, believing that only legislatures should fashion defenses, feel obliged to invalidate blackmail statutes on First Amendment grounds (*see*, e.g., State v. Robertson).

Extension of the Defense to Include Accusations of Criminal Conduct

We have seen that most blackmail statutes prohibit both threats to accuse others of *crimes* and threats to injure *reputations*. Among statutes that do so and that also contain defenses to blackmail, most statutory defenses apply to both types of threats (*see*, e.g., Ky. Rev. Stat. §§ 509.080(2), 514.080(2)). However, at least one statute provides no defense to actors who threaten that, unless they obtain redress, they will *contact criminal authorities* or otherwise *pursue criminal charges* against wrongdoers. Thus, California has held that it is extortion for retail company's attorney to tell a store employee who has been caught stealing goods that, unless the employee pays the owner as compensation, the store will criminally prosecute the employee for theft—the court declaring that "the law does not contemplate the use of criminal process as a means of collecting debt" (People v. Umana, pp. 638–41).

The two aforementioned rules—California's rule as well as the majority rule—both serve legitimate state interests. California's rule prevents persons from suppressing criminal prosecutions of criminal wrongdoers when wrongdoers are willing to provide them with civil redress.[13] The majority rule, in turn, embodies the view that criminal law may legitimately assist victims in recovering compensation[14] and that, given the costs and burdens of bringing civil suits for wrongs that are also criminal in nature, victims should be allowed to invoke the criminal process in order to obtain civil redress. In contrast, neither policy supports the Washington statute, which provides a defense to actors who threaten to accuse others of crimes but not to actors who threaten to expose others to hatred, contempt or ridicule (*see* Wash. Rev. Stat. §§ 9A.56.120(28)(d-e); 9A.56.130(2)).

Extension of the Defense to Include Threats of Disclosure Broader Than Needed for Legal Redress

The defendant in *State v. Gile* was the husband of the ex-daughter-in-law of a wealthy couple with several grandchildren. The defendant believed that his children had been sexually molested by two of the couple's other grandchildren. The defendant threatened the wealthy couple that unless the couple provided a home for him and his sexually molested children and provided therapy for his children, he would make the sexual molestation public by bringing a tort action against the couple's son and grandsons and disclose the molestation to every available media outlet, both local and abroad.

If the defendant in *Gile* had made the threat in Ohio, he would have had a defense because it is a defense to blackmail in Ohio that the actor's sole purpose was to redress a wrong. However, in the Kansas court in *Gile* held that the defendant's threatened disclosure exceeded what he had a right to threaten in order to obtain legal redress. He had a right, the court held, to threaten the couple that, unless they compensated his children for the wrong the couple's grandchildren had committed, he would bring a civil lawsuit that would expose the couple and their family to ridicule, contempt or degradation. But he had no right to go further and also threaten to contact "every available media outlet, local and abroad, with overwhelming evidence" of sexual abuse (State v. Gile pp. **18–19).

Extension of the Defense to Include Demands for Property in Excess of What Is Owed

Some jurisdictions provide that in order for a defendant to possess a defense to blackmail, his demand for property cannot exceed or, at least, not unreasonably exceed what he claims is owed to him. Others impose no such requirement. Thus, Tennessee provides a defense only if a person "reasonably believes" that he is entitled to the compensation demanded (Tennessee Code § 39-14-112(b)), while Arkansas provides a defense to a person who merely "claims" that he is entitled to the property demanded, without reference to the reasonableness of his claim (Ark. Code § 5-36-101(11)(ix)).

To illustrate the difference, consider *United States v. Jackson*, where Autumn Jackson, who claimed to be famous comedian Bill Cosby's illegitimate daughter from an extramarital affair, threatened to make her allegations public unless Cosby paid her US$40 million. Jackson would have had a defense in Arkansas, provided that she showed that she actually believed she was entitled to US$40 million of Cosby's wealth. However, she probably would have lacked a defense in Tennessee, just as she lacked one in the federal court that ruled that she did not "*reasonably* believe she ha[d] a claim of right" to the property demanded (p. 71).

Extension of the Defense to Include Demands for Action or Inaction Beyond Action to Redress Perceived Wrongs

We have seen that, in addition to making it an offense to use threats of disclosure to demand property, some jurisdictions also make it an offense (which they typically call "coercion") to use such threats to compel persons to take unwanted actions or inaction. Some of these jurisdictions also provide statutory defenses to making threats of disclosure in order to induce action or inaction.

Among such jurisdictions, some provide a defense to threats of disclosure to induce actions or inaction but only if the induced actions or inactions provide redress for past wrongs. Thus, Delaware confines its defense to coercion to actors whose sole purpose is to compel a targeted person to take "reasonable action to make good the wrong" that is the subject of the threatened disclosure (*see* 11 Del. Code § 792).

Other jurisdictions provide defenses to actors whose purposes go beyond redressing past wrongs. Thus, Connecticut makes it a defense to coercion to "compe[l] the other person to behave in a way reasonably related to the circumstances which were the subject of the [threatened disclosure]," including not only making good a "wrong done" but also "desisting from further misbehavior" (*see* Conn. Gen. Stat. § 53a-192(b)). And other jurisdictions make it a defense not only to act to redress past behavior or prevent future misbehavior but also to protect others from self-regarding harm. Thus, Pennsylvania provides a defense to actors who intend that another "refrain[n] from taking a[n] action or responsibility for which the actor believes the other disqualified" (18 Pa. Comp. L. § 18-2906(b)) and North Dakota provides a defense to an actor whose primary purpose is to "cause the other to conduct himself in his own best interests" (N.D. Cent. Code § 12.1-17-06(2)(a)).

An Actor's Belief in the Truth of Threatened Disclosures

As we have seen, blackmail threats are actionable without regard to the truth of threatened disclosures. Yet with respect to actors who make threats of disclosure for the alleged purpose of obtaining rightful redress, jurisdictions differ regarding whether, in order for the actors to possess a defense, they must believe the disclosures to be true. Thus, Connecticut takes the position that an actor lacks a defense to demands for action or inaction unless he "believe[s]" threatened accusations or revelations to be true (Conn. Gen. Stat. § 53A-192(b)), while North Dakota imposes no such requirement (N.D. Cent. Code § 12.1-17-06(2)). Consider, for example, an actor who, in order to compel another to pay a debt he owes, threatens to accuse the other of adultery of which the actor believes the other to be innocent. The actor would have a defense in North Dakota but not in Connecticut.

The MPC is strangely ambivalent on whether an actor must believe in the truth of threatened disclosures in order to possess a defense to blackmail. The

MPC requires such a belief of actors who claim a defense to demands for action or inaction, but it does not require such a belief of actors who claim a defense to demands for property (*compare* MPC § 212.5 (action or inaction) *with* MPC § 223.4 (property)). As a consequence, under the MPC, an actor may obtain property by threatening to make a disclosure that he does not believe to be true, provided that he honestly believes he is owed the property as compensation.

A Nexus Between the Subject of the Threatened Disclosure and the Property Claimed

Some statutes provide that, in order for a defendant to possess a defense to blackmail, a nexus must exist between the subject of his threatened disclosure and the property or action he demands. Other statutes require no such nexus. Thus, Alabama states that a defendant has a defense to extortion if the property he demands is claimed as restitution or indemnification for harm done in "the circumstances to which such accusation [or] exposure … relates" (Code of Ala. §13A-8-15(b)). In contrast, Tennessee states that a defendant has a defense to extortion if the property he demands is appropriate restitution or indemnification for "harm done," regardless of whether the threatened disclosure concerns the property claimed (Tenn. Code § 39-14-112(b)(1)).

To illustrate the difference, consider *State v. Pauling*, where an ex-boyfriend tried to collect a debt from an ex-girlfriend against whom he had a default judgment by threatening her that unless she paid what she owed him, he would send nude photos of her to her neighbors. The ex-boyfriend would have a defense to blackmail in Tennessee because he used the threat to obtain what he claimed was owned him. But he would not have a defense in Alabama because the nude photos did not "relate" to whether his ex-girlfriend owed him money.

The Paradox of Blackmail

The paradox of blackmail is best illustrated by a crime that is not paradoxical, for example, the traditional offense of extortion. Extortion is not paradoxical because *both* what an extortionist threatens to do (e.g., murder, maim, assault, vandalize or otherwise criminally wrong another) *and* the verbal act of threatening to inflict such wrongs are themselves crimes. It is hardly surprising, then, that it is also a crime for an actor to use such criminal threats to extort property or conduct from another against his will.

Blackmail is different. Neither what a blackmailer threatens nor what he offers in lieu thereof and neither his threatening to disclose information nor offering to withhold disclosure is itself criminal. Thus, it is not a crime to truthfully accuse a person of a criminal offense; nor, with rare exceptions (*see* subsection "Broadening Extortion to Include Blackmail," *infra*), is it a crime to refrain from accusing person of a crime. Similarly, with rare exceptions (*see* "Conclusion," *infra*), it is neither a crime to disclose reputation-damaging information about a person, nor a crime to refrain from doing so. Nor, apart

from those exceptional areas, is it a crime to utter unconditional threats or unconditional offers regarding any of the aforementioned disclosures or non-disclosures (e.g., "I intend to disclose photos of your love child to the *National Inquirer* by noon tomorrow, and there is nothing you can do about it"). Finally, it is not a crime to commercialize criminal or reputation-damaging information by selling disclosure on the open market. Yet it *is* a crime, that is, the crime of blackmail, to condition threats of disclosure and offers of silence on demands for property or conduct. The paradox of blackmail is said to be that the law makes it a crime for a person *to demand property or conduct from another by making conditional threats and offers of disclosure and non-disclosure, respectively, that are neither criminal in themselves nor criminal to announce as unconditional intentions.*

Commentators have grappled with the paradox for decades. To understand them, it is useful to recognize that blackmail demands for property or conduct fall into three distinct categories: (1) demands in return for suppressing accusations of crime; (2) demands in return for suppressing information that, from a legal standpoint, is not only private but also of insufficient interest to the public to merit disclosure; and (3) demands in return for suppressing information, the disclosure or suppression of which is legally discretionary, that is, information such that people's interests in favor of disclosure and people's interests in favor of suppression are in equipoise. As we shall see, blackmail demands in category (1) are not paradoxical because a blackmailer's act of making the demands transforms otherwise permissible silence regarding the existence of a crime into a public wrong. And blackmail in category (2) is not paradoxical because the disclosures which blackmailers threaten are civil wrongs, and criminal law is uniquely suited to deterring threats to make such disclosures. In contrast, criminalizing blackmail demands in category (3) remains both paradoxical and problematic.

The Public Wrong of Offering to Suppress Accusations of Criminal Wrongdoing in Return for Property or Beneficial Conduct

George Fletcher pointed long ago that there is nothing paradoxical about making it a crime to demand compensation for actions or inactions that persons are permitted to perform (Fletcher 1993, p. 1617). Examples are offers to engage in sexual intercourse for money and threats or offers by public officials to grant or withhold public services in return for personal gain. Persons are ordinarily permitted to engage or refrain from engaging in sexual intercourse, as they may wish, and public officials are often permitted to exercise discretion in granting or withholding public services. Nevertheless, it is a crime, that is, the crime of prostitution, to offer sexual intercourse in return for money, and it is the crime of extortion for a public official to threaten or offer to grant or withhold public services in return for personal gain. There is nothing paradoxical about criminalizing prostitution and extortion because communities can legitimately conclude that the quid pro quo of personal gain corrupts legitimate grounds for engaging in sexual intercourse and for granting or withholding public services, respectively.

The same analysis justifies blackmail statutes that make it a crime for a person to demand property or conduct in return for not accusing another of a crime. Many jurisdictions once possessed misprision-of-felony statutes but, with rare exceptions, they no longer do (*see* Westen 2012, p. 605, n. 83). Jurisdictions have allowed misprision-of-felony statutes to lapse because jurisdictions are reluctant to prosecute the very persons who are most likely to offend such statutes: namely, persons who fear retaliation if they make accusations; persons who naturally shrink from betraying family members or other intimates; and persons who dread the exposure and demands of being involved in the criminal process.

As Mitchell Berman has insightfully observed, however, the very act of demanding money or conduct in exchange for not accusing persons of crimes negates existence of these grounds for refraining from prosecuting misprision of felony: actors who threaten to accuse others of crime reveal themselves *not* to fear retaliation, *not* to shrink from any betrayal and *not* to dread the criminal process (*see* Berman 1998, pp. 833–51). On the contrary, they reveal themselves to be ready to assist the police in enforcing the law. Allowing an actor who is willing to inform the police of criminal wrongdoing to suppress the wrongdoing in return for a personal payoff is wrongful for the same reason that it is wrongful to allow an actor who is willing to testify to suppress sworn testimony in return for a personal gain. Both actors can be justly punished because both are willing for no legitimate reason to deprive the public of information of significant social value: both actors are willing to suppress information that the actors' very act of making conditional threats and offers reveals rightly belongs to the public, namely, the identity of criminal wrongdoers and sworn testimony on matters of criminal and civil justice, respectively, that the actors' manifest willingness to suppress or disclose depending upon receipt of personal benefits reveals to be information that the actors have no legitimate grounds to suppress.

The Public Wrong of Conditional Threats to Disclose Private Shameful Secrets of No Legitimate Interest to the Public

The defendant in *People v. Payne* secretly videotaped sexual encounters with numerous men whom she had enticed into sexual liaisons and then threatened to disclose the videotapes unless the men paid her up to US$50,000 to suppress them (*see* "More Victims"). The defendant *Regina v. Rose* threatened to reveal "intimate" and "sordid" stories about his ex-girlfriend's sex life unless she paid him £200,000 (*see* "Ex-boyfriend"). The defendants in *Payne* and *Rose* would not have committed crimes if they had unconditionally disclosed the information they possessed.[15] Yet by making conditional threats of disclosure, that is, threats conditioned upon their not being paid, they ended up committing crimes of blackmail.

Contrary to what is often said, criminalizing conditional threats like those in *Payne* and *Rose* is not paradoxical, for two combined reasons. First, although

unconditional disclosure of such information would not have been criminal, it would have been tortious. The defendant in *Payne* threatened her sexual partners' privacy by threatening to reveal embarrassing information about them that she had secretly accessed by an "intentional … intrusion [that] would be highly offensive to a reasonable person" (Restatement (Second) Torts § 652B). The defendant in *Rose* threatened his sexual partner's privacy by threatening to reveal "private facts," the revelation of which would be both highly offensive to a reasonable person and of no legitimate concern to the public (*see* Restatement (Second) of Torts § 652D; Prosser 1960, pp. 392–98; Lake v. Wal-Mart Stores, Inc.). In addition, the two disclosures might have constituted the tort of intentional infliction of emotional distress (*see* Restatement (Second) of Torts § 312; State v. Pauling; Prezioso v. Thomas).

Second, although tort remedies may suffice for privacy and emotional-distress victims *once* disclosures are made, tort remedies are an inadequate remedy for blackmail. The tort remedy of damages is inadequate because, for most blackmail victims, their reputation is worth more to them in money than the monetary compensation they would receive in return for being deprived of it. And the tort remedy of injunctive relief is inadequate because, in order to bring a suit for injunctive relief, a blackmail victim would have to disclose the very information she seeks to suppress (*see*, e.g., Vafaie v. Owen (a blackmail victim must disclose her identity as a condition for suing to prevent disclosure)). Criminal condemnation and punishment by the state are appropriate protections for such blackmail victims because, given the extent to which blackmail victims fear reputation-damaging disclosures, victims are not likely to avail themselves of civil remedies that are theoretically available to them (Westen 2012, p. 603, n. 74).[16]

The Paradox of Criminalizing Blackmail Cases in Which Legitimate-to-Disclose Reputation-Damaging Information and Legitimate Reasons to Withhold it Are in Equipoise

Robert Halderman, a CBS employee, threatened CBS late-night talk show host David Letterman that, unless Letterman paid him US$2 million, Halderman would make public that Letterman had a history of sexual relations with female members of his talk show staff (*see* "David Letterman"). Given Letterman's status as a public figure and the public's legitimate interest in his late-night show, it would not have been a crime or a tort for Halderman himself to have unconditionally made Letterman's indiscretions public. Nor would it have been a crime or a tort for Halderman to conditionally offer to sell the information to a media organization, conditioned upon receiving sufficient remuneration. Nor, except possibly within a few jurisdictions (*see* "Relationship Between Threatened Parties and Victims of Threatened Disclosures", *supra*), would it have been a crime or a tort for Halderman to conditionally offer to sell exclusive rights to the information to a media organization that wished to suppress it. Nor, finally, would it have been a crime or a tort for Halderman to unconditionally withhold the information from the public out of regard for the

privacy of all involved. Yet, paradoxically, it was a crime, and, indeed, one for which Halderman was sentenced to prison, for Halderman to try to sell Letterman exclusive rights to the information for a price that, for all Halderman knew, Letterman was willing to pay.

Commentators in law, economics and philosophy have long struggled with the paradox of punishing blackmail, including cases like Halderman's.[17] Some commentators deny the supposed contrast between blackmail and extortion, arguing that, like extortionists, blackmailers threaten their targets with harms that are wrongful in themselves.[18] Other commentators accept the contrast between blackmail and extortion. That is, they concede that blackmail laws criminalize threats to make disclosures that do not themselves wrongfully harm their targets yet seek to justify the prohibition by claiming that the act of blackmailing—the act of obtaining or attempting to obtain property of another by threatening to disclose reputation-damaging information—either itself operates to wrong persons, whether the wronged persons are the targets of the actor's threats (*see*, e.g., Shaw 2012), or independent third parties (*see*, e.g., Lindgren 1984), or has the effect of imposing net costs on society, whether the costs are social or economic (*see*, e.g., Ginsburg and Shechtman 1993), or does both (*see* Elhauge 2016). Still other commentators deny that the paradox can be either negated nor justified and, hence, conclude that blackmail should be decriminalized (*see*, e.g., Block and Gordon 1985).

Blackmail doubtless tends to have deleterious social and economic effects. But economic effects cannot account for popular intuitions that have long supported blackmail's criminalization (*see* Katz 1993, p. 1582). To justify the law's long-standing criminalization of blackmail like Halderman's against Letterman, one must show that it inflicts unjustified deontic harm. Like others, I doubt that such a showing has yet been made.[19]

The fact that criminalization cannot be normatively justified, however, does not mean it cannot be psychologically explained. The most plausible explanation, I believe, is that criminalization responds to the psychological intuition that underlies the Doctrine of Double Effect ("DDE"). DDE is a contested moral proposition regarding the effect of an actor's motive on the permissibility of his inflicting a harm that would otherwise be justifiable. DDE comes in various versions. However, a common formulation is that with respect to persons who are fully aware of what they are doing and otherwise act identically, the moral permissibility of their inflicting harms may depend upon whether inflicting harm is their reason for acting or merely a known consequence of what they purposely do.[20] To illustrate, DDE advocates would say that, even if it is morally acceptable for a tactical bomber pilot in a just war to purposely bomb an enemy munitions plant knowing that the ensuing blast will kill a certain number of nearby civilians, it may be morally unacceptable for a fellow pilot who is aware of the same facts to take the former pilot's place and purposely bomb the munitions factory in identical fashion and cause identical casualties for the subjective purpose of killing those civilians in order to demoralize the population (Kamm 2004, p. 666).

DDE, having ancient roots in the Catholic doctrine, evidently reflects people's shared intuitions regarding blackmail (*see* Robinson et al. 2010, p. 296). The doctrine also manifests itself from the earliest to the latest scholarly efforts to resolve the paradox of blackmail (Gordon 1993, pp. 1758–59). These efforts come in several variations, but they are identical in claiming that blackmailers like Halderman are wrong to conditionally threaten targets like Letterman with disclosure in the event their targets refuse to pay because their threatened disclosures are improperly motivated. One variation comes directly from DDE, claiming that the reason conditional threats render otherwise permissible disclosures impermissible is that in order to coerce their targets into paying, blackmailers necessarily reveal it to be their purpose to harm their targets in the event the latter refuse to pay rather than advance any good that disclosure serves (*see*, e.g., Gordon 1993, pp. 1758–59; Katz 1993, p. 1598; Rivlin 2015, pp. 405–413 (describing the theory without embracing it)). Another variation is that, even where blackmailers do not reveal their conditional purpose to be to harm their targets, their threats render otherwise permissible conduct impermissible because they conditionally threaten to inflict what they know to be justified harm without being motivated by justifying purposes: they know that their threatened disclosures will inflict reputational harm, and they know that the disclosures may serve public purposes, but they cannot claim to be motivated by those purposes because if they were so motivated, they would be revealing the information unconditionally (Sachs 2006, pp. 260–261; Lamond 1996, pp. 231–232). Still another variation is that, even where conditional threats do not reveal motives that render otherwise permissible disclosures impermissible, they reveal motives that render otherwise blameless actors criminally culpable (Berman 2006, pp. 785–795; Berman 1998, pp. 847–849, 854).[21]

These subjectivist rationales for criminalizing blackmail, and the intuitions that underlie them, depend directly or derivatively on the validity of DDE itself. That is true regarding subjectivist versions that claim that the wrongfulness of threatened blackmail disclosures results from blackmailers' threatening to purposefully harm their targets for refusing to pay. However, it is also true with respect to subjectivist variations that the claim that the wrongfulness or culpability of threatened blackmail disclosures results from blackmailers' threatening to inflict what they know to be justified harm without being motivated by justifying purposes. For if DDE is mistaken to claim that *acting with a malevolent purpose* to inflict what actors know to be justified harm renders the harm unjustified, one is also mistaken to claim that *failing to act with a beneficent purpose* renders such harm unjustified or renders persons culpable for inflicting it (Westen 2012, pp. 627–628).

Blackmail laws, at least as applied to cases like David Letterman's, are suspect because DDE itself is suspect. Most commentators today reject DDE, denying that the intuitions that animate DDE are grounded in reason (*see* authorities cited in Overland 2014, p. 482, n. 3). If these commentators are correct that DDE lacks a grounding in reason, then insofar as blackmail laws are predicted on intuitions that underlie DDE, blackmail laws and the intuitions that underlie them lack grounding in reason as well.

Conclusion

Blackmail is one of several offenses regarding threatened and actual disclosures of reputation-damaging information. Thus, it is a crime of "revenge porn" to intentionally post sexually explicit photos or videos of another online without the latter's consent (*see* "Revenge porn laws by state"). It is a crime of "harassment" to intentionally cause another substantial emotional distress by sending sexually explicit photos of him to friends or acquaintances (*see*, e.g., U.S. v. Osinger). It is a crime of "unauthorized use of private identifying information" to maintain a website for soliciting and posting photos and private information about persons until they pay to have the information removed (People v. Bollaert).

None of the first three crimes is paradoxical. Nor is it paradoxical to criminalize threats to commit the aforementioned crimes, nor paradoxical to make blackmail a crime when it consists of threats of criminal accusation or threats of reputation-damaging disclosures that are tortious in themselves. But it is paradoxical to criminalize blackmail when it consists of offers by actors to sell suppression of information that actors are free to suppress, free to disclose and free to disclose for a fee.

Notes

1. *See* Helmholz (2001, p. 35); McLaren (2002, pp. 12–13); Ginsburg and Shechtman (1993, p. 1851). The "Waltham Black Act" of 1722, which was enacted in response to a gang of extortionists who called themselves "blacks" and painted their faces black, further solidified the use of "black" as a pejorative description of extortion. *See* ibid. p. 1851. For an alternative etymology of the term, see Mackay (1888, pp. 11–12).
2. *See* D.C. Code §22-3252; Kan. Stat. §21-5428; 21 Okla. Stat. §1488; 13 Vt. Stat. §2651.
3. *See* N.C. Gen. Stat. §14-118; S.C. Code §16-17-640; Wyo. Stat. §6-2-402.
4. For the frequency with which "blackmail" is used in common discourse, see *Oxford English Dictionary* (n.d.). For the popular meaning of "blackmail," see how it is defined in Google, *Dictionary* ("the action, treated as a criminal offense, of demanding money from a person in return for not revealing compromising or injurious information about that person").
5. This is not to say that the paradox is confined to information blackmail. To the extent the paradox exists, it extends more broadly to include statutes that, like the Model Penal Code, make it an offense to obtain property of another by threatening to "inflict any … harm which would not benefit the actor." Model Penal Code §223.4(7); Conn. Gen. Stat. Ann. §53a-119(5)(I).
6. The term *with [B's] consent* is designed to distinguish extortion, which functions by inducing victims to cooperate for fear of the consequences, from robbery, which can function by brute force, as in purse grabbing or mugging (*see* In re Stanley E.).
7. Merriam Webster's Collegiate Dictionary (1997, p. 412) ("extortion"). Some jurisdictions extend extortion to include private individuals who, while possessing legal authority to act on behalf of others, threaten to use such authority to

obtain personal benefits for themselves rather than those they represent. *See* Oregon Rev. Stat. §164.075(1)(f) (extortion for a union leader to demand monies in return for not causing a labor strike, provided the leader demands money for the benefit of himself rather than for "the group in whose interest [he] purports to act").

8. *See* 18 U.S.C. § 873; Mass. Code § 265-25; Mich. Code § 750.213; Miss. Code §97-3-82(2); North Carolina Code §14-118; Vermont Code §13-1701.
9. A majority of states treat truth as a defense to libel and slander, though some require in addition that speakers act from good motives. *See* Note (1993) (arguing that requiring a truth-speaker to act with "good motives" violates *New York Times v. Sullivan*). In contrast, in the nineteenth century in England truth was not a defense to criminal libel. *See* Yehudai (2009, pp. 799–800).
10. *Compare* W. Va. §61-2-13 (grading based on success) *with* D.C. Code §22-3252 (no grading based on success). Other jurisdictions implicitly grade based on success by, first, *defining* blackmail in terms of success and, then, separately criminalizing *attempted blackmail* but punishing it less severely. *See*, for example, Code of Ala. §§13A-8-13, 13A-4-2.
11. Under the MPC, affirmative defenses shift burdens of production to defendants but not burdens of persuasion; see MPC § 1.12(2)(a). In some states, however, affirmative defenses shift both burdens to defendants. *See* Ohio Rev. Code §2901.05(A).
12. *See* Conn. Code §§53a-119 (larceny); 53a-192 (coercion); 53a-192(b) (defense to coercion); N.D. Cent. Code § 12.1-23-10 (theft); 12.1-17-06(1) (coercion); 12.1-17-06(2) (defense to coercion).
13. But see *State v. Pauling*, stating in dictum that victims of vandalizing property have a constitutional right to threaten criminal prosecution in order to obtain compensation.
14. Consider the common practice of conditioning reduced sentences on payment of restitution. *See*, for example, 18 U.S.C. §§ 3663-64 (the "Victim Witness Protection Act").
15. New York did not have a criminal statute against revenge porn at the time Payne acted.
16. Exceptions to this may be victims of libelous blackmail. Victims of threatened disclosures of *false* information may have an adequate remedy in civil court because in contrast to victims of threatened disclosures of true information, victims of threats of libel may welcome the opportunity to litigate the truth in public.
17. *See* Lindgren (1993, p. 1975) (describing blackmail as "one of the most elusive intellectual puzzles in all of law") and articles in 2016, 2015, 2012, 2011 and 2007, referenced in note 19, infra.
18. *See*, for example, Levy (2007, pp. 1082–84). Others, including this author, seek to *partially* negate the paradox's existence by arguing that some instances of blackmail are no different from extortion. *See*, for example, Feinberg (1988, pp. 240–258); Westen (2012, pp. 599–611).
19. For critiques of older efforts to resolve the paradox of blackmail, see Westen (2012, pp. 614–632); Christopher (2006, pp. 750–769); Berman (1998, pp. 799–832). For critical commentary on more recent efforts by Einer Elhauge (2016), Ram Rivlin (2015), James Shaw (2012), Mitchell Berman (2011) and Ken Levy (2007), see Westen (2018).

20. Thomas Aquinas appears to have such a case in mind in arguing that, when A knowingly kills a person, B, who is wrongfully threatening his life, A's conduct is permissible if A's purpose is to defend himself but impermissible if A's purpose is to kill B. *See* McMahan (1994, p. 211). But see Cavanaugh (1997, p. 109).
21. Ram Rivlin argues that even where conditional threats do not reveal motives that render otherwise permissible disclosures impermissible, they reveal motives that render any consequent transfer of hush money nonconsensual. *See* Rivlin (2015, pp. 418–423). For criticism of Rivlin's view, see note 19.

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