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## IN DEFENSE OF BLACKMAIL

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Jeffrie Murphy's 'Blackmail: A preliminary inquiry' is an intriguing search for the grounds on which blackmail may properly be criminalized.<sup>1</sup> Murphy's inquiry is made more interesting and more difficult by his self-imposed restriction that the grounds on which blackmail may be prohibited cannot be such as also to justify the prohibition of all hard economic transactions. Such a hard economic transaction occurs if, e.g., knowing that you desperately want to cheer your dying child, that he will only be cheered by possession of my baseball which was autographed by Babe Ruth, and that \$60000.00 is all you possess, I successfully propose to sell you or (worse yet?) rent you the baseball for the \$6000.00. Since it is Murphy's premise that such transactions, harsh and immoral though they may be, are not to be prohibited, it is his task to uncover "a principled distinction (or indeed any interesting distinction)" (158) between such transactions and acts of blackmail. In this way Murphy is committed to finding a moderate path between the Libertarian who says: "Blackmail is just another capitalistic transaction, so leave it alone"; and the Marxist who says: 'Capitalistic economic transactions are all blackmail, so down with the lot of them'. (158)<sup>2</sup> In offering this defense of blackmail, I seek merely to undercut Murphy's attempt to discriminate between hard economic transactions and acts of blackmail. No single essay could establish Murphy's premise<sup>3</sup> that the former ought not to be prohibited or could rebut all the possible arguments for such prohibitions.

What I must do immediately is to indicate what is meant by 'in defense of' and what is meant by 'blackmail'. By the former I mean in defense of the permissibility of blackmail where the permissibility of an activity involves its being wrong to prevent the activity by use of force, specifically by use of the police power of the state. A permissible activity may be immoral in various ways, or contrary to certain of a person's moral duties or obligations – but not in the ways that open the activity to forcible suppression and not contrary to duties or obligations which ought to be enforced by law. It is the crimina-

lization of blackmail which I reject. I should add, however, that many acts of blackmail seem to me to be not merely permissible but positively moral. This claim will enter into the critique of Murphy's case for criminalization. By 'blackmail' I follow Murphy in meaning the acceptance of payment (in cash or kind) for not revealing damaging information about somebody. This cannot be information which the blackmailer already has an enforceable obligation not to reveal. And it cannot be information the suppression of which makes the silent party an accomplice to a (properly) criminal act. Nor can the information have been obtained in a morally impermissible way — such as through an invasion of privacy or property rights. And, of course, blackmail is to be distinguished from extortion. In extortion, payments are elicited through the threat of invasive acts. I am not blackmailing but extorting when I elicit payments from someone by threatening to beat him up, or by threatening to reveal his peaceful black market activities to the police, or by threatening some other release of information which is feared because of the invasive acts that will follow in the wake of the revelation or by threatening to kill or injure another. Lastly, what I threaten to communicate to some public must be true. Both Murphy and I depart from the broader historical usage in which, for instance, threatening to falsely accuse another of being a sodomite was taken to be a paradigm instance of blackmail.

As Murphy sets the problem of justifying the criminalization of blackmail there are two main barriers to overcome. The first is that, "it is difficult if not impossible to distinguish cases of blackmail (which we prohibit) from other hard economic transactions (which, even if we do not totally approve of them, we do not criminalize)". (156) The first part of Murphy's paper is devoted to a search for such a distinction, i.e., to a search for some 'intrinsic' characteristic (to use Murphy's term) possessed by acts of blackmail, not possessed by other hard economic transactions such as the sale of the baseball and which plausibly supports the impermissibility of blackmail. The traits of acts of blackmail that Murphy considers as distinguishing and damning are, in turn: (1) involving a coerced choice (by the blackmailee); (2) being an unproductive exchange; (3) involving a threat to violate privacy; and (4) involving a threat of harm (and not just a threat of withholding a benefit). But Murphy rejects each of these 'intrinsic' characteristics as distinctive to acts of blackmail or as grounds for condemnation. With regard

to (1) Murphy argues that a choice is coerced only if the threatened action which motivates the choice is something which the threatener has no right to do. But, just as the owner of the cherished baseball has a right to retain it, so too does the blackmailer have a right to broadcast his information. With regard to (2) Murphy argues that a potential purchaser of silence may well fear the prohibition of the blackmail exchange. For if the exchange is prohibited the embarrassing information may be released. Hence, one can hardly look upon the prohibition of blackmail as one looks upon the prohibition of rape and robbery. Being the subject of blackmail is not unambiguously nonbeneficial, while being the victim of rape or robbery is. Thus, blackmail is not unambiguously unproductive.<sup>4</sup> With regard to (3) Murphy points out that we can hardly prohibit the blackmailer from threatening to reveal the secrets of his victim since we would not favor prohibiting what he threatens, viz., his revelation of these secrets. Finally, with regard to (4) Murphy denies that there is any clarity or moral significance to the harming versus withholding benefit distinction. Thus he argues, one cannot distinguish between an act of blackmail and an act such as the hard baseball transaction by means of the claim that the former involves a threat of harm while the latter involves only a threat of withholding a benefit.

The considerations which, respectively, undercut features (3) and (2) as distinguishing and damning jointly generate the second main barrier to justifying the criminalization of blackmail. This is the paradox of blackmail viz.,

Since all the blackmailer threatens to do is something which he has the right to do, why should we prohibit him from making the threat and tying the threat to a demand for money — particularly since the victim, given the legally permitted alternative, is often happy to have the opportunity to respond to such a threat? (160)

We shall see shortly that in the most central sort of blackmail case Murphy never does unravel this paradox. His endorsement of criminalization in these cases is linked to a commitment to prohibit the revelation of embarrassing information (should such information exist).

Since I agree with Murphy's overall conclusion that there is no 'intrinsic' feature which marks off acts of blackmail from hard economic transactions and which constitutes grounds for forbidding blackmail, I shall not discuss the details of Murphy's rejection of characteristics (1)–(4) even where I would not accept the details of Murphy's argumentation.<sup>5</sup> Instead I shall

proceed to give an account and critique of the social policy defense of criminalization which occupies the second half of 'Blackmail: A preliminary inquiry'.

The major theoretical turn comes when Murphy abandons the search for some intrinsic distinguishing feature present in blackmail, but not in the hard but tolerated cases". In a major understatement Murphy says that this "makes it much more unlikely that we will be able to rely here on the kind of deontological moral principles of which I am fond". (162) Instead, we are to turn to teleological considerations. Here what is disturbing is that Murphy proceeds as though whenever the preferred deontically oriented approach fails to get us what we want we can easily turn to teleological policy considerations. We need not take seriously the possibility that these policies will violate the very deontic constraints previously acknowledged. But one must take this possibility much more seriously than Murphy does. For part of the point of the deontic constraints approach is to block the adoption of measures to which we would be lead by policy considerations. Specifically, one should consider whether the prohibition of an action which does not possess an intrinsic characteristic justifying prohibition will thereby itself possess this intrinsic characteristic. Murphy himself never tells us what intrinsic characteristic does deontically justify criminalization. So we cannot say whether the prohibition of blackmail itself displays Murphy's chosen deontically tainting characteristic. However, Murphy's insistence that some notion of individuals' rights underlies the distinction between coercive and non-coercive threats and between harming and not benefitting suggests that, for Murphy, prohibitable deontic wrongs are to be described in terms of violations of individuals' rights. And the neatest view about rights, prohibition and permissibility is that whatever does not violate rights is permissible and that the prohibition of what is permissible violates rights and is impermissible. Murphy must be rejecting this neat structure. But in doing so he is obligated to explain why prohibitions of non-rights-violating acts are permissible.

Murphy's proposed social policy basis for the criminalization of blackmail is not, in fact, fully teleological. As he puts it, "Disutility alone is not a reasonable basis for criminalization. But immorality *plus* disutility *is* a reasonable basis for criminalization." (163) Clearly the 'immorality' of this formula cannot be the immorality connected with possessing the long-sought deontically tainting characteristic, the rights-violating characteristic.

For the proposal of this formula is understood as an alternative strategy to isolating such a characteristic.<sup>6</sup> We are not told what counts as immorality within the 'immorality *plus* disutility' formula. In the two cases considered by Murphy the immorality is said to consist in "taking an unfair advantage of the victim's vulnerability". (163) But we don't know whether other immoralities will serve or what is required for taking advantage being unfair. In addition, it is not clear how the two subconditions work together to justify criminalization or why they have to work together. If immorality has enough moral clout to move a disutile activity into the prohibitible category, why doesn't it have enough clout, at least sometimes, to move socially useful acts into this category?

With regard to the immorality condition we should note that we can easily imagine cases in which securing payment by threatening to release embarrassing information would be judged to be moral. Imagine that you can only avert a harmful and/or wicked, but nevertheless permissible, act — say the act of demanding the entire savings from the parents of the dying child in exchange for the treasured baseball — by means of blackmail. Or imagine that you can deter a factory owner from (safely) burning his plant to the ground (and thus thoroughly eliminating many employment opportunities) for the sake of destructive glee only by threatening to reveal his secrets. Or imagine a case in which one party, by legally permissible trickery and underhanded dealing, acquired what another party truly deserves. Wouldn't it be perfectly moral for the morally deserving party to blackmail the first party into transferring that valued good — especially if what was threatened was precisely the revelation of the trickery and underhandedness?

In all these cases, one takes advantage of vulnerabilities. But either this is not unfair, or unfair advantage taking is not wrong — or it is wrong in itself, but is outweighed by other moral considerations. And even opponents of ethical egoism would tend to agree that your being among the beneficiaries of such a blackmail would not render it immoral. Why should it be moral for a third party to blackmail the factory owner on behalf of the factory workers yet not moral for one of these workers to do the blackmailing? Anyone who would grant the morality of such acts of blackmail but wants to draw the line at cash pay-offs will be faced with blackmailers quite ready to be paid in kind. Anyone who contends that in the cases I've described the blackmail wards off harm and so can be distinguished from the truly objectionable blackmail which benefits parties at the expense of the blackmailees will have

to contend with Murphy's denial of significance to the harming vs not benefiting distinction. Besides, having gone this far in granting the morality of some blackmailings, it seems a short and untroubling step to acknowledging the morality of say, blackmailing that factory owner into donating money for Cambodian relief. If you are uncertain given the case as described to this point, add the supposition that this owner was a vocal, though utterly ineffective, supporter of the Nixon - Kissinger bombings. And would it be less moral if, somehow, the innocent Cambodians themselves issued the relevant blackmail threats?

In any case, the focus throughout the rest of Murphy's inquiry is on the disutility of blackmail contrasted to the utility of hard bargaining or, at least, the disutility of prohibiting hard bargaining.<sup>7</sup> Murphy distinguishes three types of case: blackmail of non-public persons; blackmail of public figures; and blackmail of public officials. The first of these is the conceptually most central type of case. Murphy's stance on the blackmail of public figures and public officials represents the result of adjustments and readjustments to factors that are not present in the private person case. Even in the conceptually central case, however, the argument is complex — not a straight forward forecasting of consequences for blackmailer, blackmailee, and third parties. Murphy contends that,

*it is currently in nobody's economic interest to invade my privacy in an attempt to find out secret details of my [i.e., a non-public] life. But what if blackmail were decriminalized? If this happened, then there would suddenly be an economic incentive for such invasions. For now there would be a potential market for secret information about myself: I might be willing to buy it in order to avoid some undesired results of exposure. In short: There is little or no social value in having private information about me or people like me come to light. (164)*

The trust of this argument is not entirely clear. To begin with we must put aside the language of *invasion* of privacy. For the blackmailer, as defined for the purposes of the current inquiry, violates no right of privacy in either his acquisition or release of information. Furthermore, we should note the manner in which this argument seems to respond to the paradox of blackmail which asserts that if it is O.K. to release information, then surely it is O.K. to sell non-release of it. To avoid the consequent, Murphy seems prepared to reject the antecedent, i.e., to deny that persons have the right to release embarrassing information about other, non-public persons. This is the natural interpretation of his crucial premise that, "There is little or no social value in having private information about me or people like me *come to light*". (emp-

hasis added, 164) And insofar as the argument (illicitly) draws strength from invasion of privacy considerations, it strikes most powerfully against those who acquire *and release* private information.<sup>8</sup>

But neither the invasion of privacy nor the lack of social utility associated with private information coming to light is at the core of Murphy's argument. Rather, what is crucial is the point that in the private person case, were blackmail not a possibility, no loss whatsoever would threaten the relevant private person. Such persons are threatened with losses only because of the existence of a market in their privacy and, according to Murphy, "to criminalize the blackmail of such persons would prevent the development of a market in their privacy". (164) Note what, according to this argument, distinguishes the blackmail of private persons from the blackmail of public figures or public officials. In the latter cases even in the absence of any possibility of blackmail individuals have an economic incentive (along, perhaps, with other incentives) to gather and release embarrassing information. For in these cases a market for that information exists, e.g., in newspapers and scandal sheets, independently of the possibility of sale of the information back to its subject. Even though it is true of the public figures and public officials that (i) they would be better off if the seller (the blackmailer) did not exist at all, it is not true that (ii) their purchase (of silence) merely provides relief from something which would not have threatened except for the possibility of exchange to get relief from it. This is the reason why public persons may welcome the possibility of their paying blackmail. It is this sort of situation which Murphy had in mind when rejecting what he takes to be Nozick's contention that any act of blackmail involves an unproductive exchange and that this unproductivity is blackmail's distinguishing and damning characteristic.<sup>9</sup>

In the private person case, however, it appears that both (i) and (ii) are satisfied. And the satisfaction of (ii) points to the fact that in the case of private blackmail no interest of the purchaser of silence is served which would not have been served had private blackmail been (effectively) prohibited. In the private case whatever is paid is a pure loss compared to the purchaser's situation had blackmail been impossible. All this, I believe, factors into Murphy's explanation of why private blackmail is socially disutile. For it is not wildly unreasonable that in general and on the average the utility loss to the blackmailee from the monetary transfer equals the utility gain to the blackmailer from that transfer. To these factors we have to add the psychic costs to both parties and the additional expenses of the blackmailer in gather-

ing information and issuing a credible threat. Altogether we see that blackmail of the private persons must, in general and on the whole, involve net disutility. This stands in contrast to the blackmail of a public person where, given a context of freedom of speech and press, not only the blackmailer but the public person also gain relative to their positions if such blackmail were impossible.

In contrast, since the public figure would benefit, given the context of free speech and free press, from the chance to purchase the silence of those who have acquired embarrassing secrets about him, Murphy would allow such purchases. But, according to Murphy, the blackmailer may only charge the public figure what he would sell this information for if sale of his silence (to this public figure or to anybody?) were impossible.<sup>10</sup> This allows the information-holder to remain silent without suffering an economic loss. However, according to Murphy, no blackmail of public officials should be permitted. For it is not in *our* interests that they be able to project themselves from exposure.

What, then, are we to think about Murphy's several recommendations? I shall focus my criticism on the central case for the criminalization of private blackmail. If the argument for this central case collapses, the most that Murphy may be able to salvage is a prohibition of blackmail payments by public officials justified by the special features of this type of case.<sup>11</sup> We may begin by noting the unclarity of the lines demarcating the private person, public figure and public official cases. Certainly the line between the latter two is vague. It would be arbitrary to consider only governmental officials to be public persons of the sort in whose secrets we have a non-prurient interest. Nor is it obvious why the satisfaction of our non-prurient interests justifies us in forbidding public officials from purchasing silence about even their personal, non-official, little secrets while the satisfaction of our prurient interests does not justify us in forbidding public figures from purchasing silence about their little secrets. Greater problems exist for the private person-public person distinction. For there is a public for information about many if not most individuals who we think of as private. In one obvious sense some interested public is necessary for any act of blackmail. For her neighbors and bridge club (i.e., her relevant public) it is valuable information that the PTA vice-president used to be a prostitute. The only way to preserve any distinction between private and public persons (or, at least private and public respects of persons) is to follow the Nozickean path of asking about the motives of the blackmailer. If the blackmailer who threatens to reveal her past to the PTA



vice-president's public is motivated solely by a desire to elicit payments for his silence, then he is treating the vice-president as a private person. Condition (ii) is satisfied along with condition (i). For if she purchases his silence the vice-president merely gets relief from something which would not have threatened if this blackmail had been effectively prohibited. On the other hand, if the information-holder would like to reveal this secret out of malice or for the sake of gaining influence in the PTA, then the vice-president is being treated as a public person (figure or official?). The silence of this blackmailer is not relief from something which would not have threatened except for the possibility of exchange to get relief from it. But this means that we can only determine whether, with respect to this blackmail, the vice-president is a private or public person by determining what motives the blackmailer would have for releasing the information were he, contrary to fact, to know that this blackmail was impossible. It is obvious that we often could not make this type of determination.<sup>12</sup>

Still, in the absence of plausible counter-examples to Murphy's 'immorality plus disutility' criterion these difficulties may not appear fatal to Murphy's program. One way to proceed would, then, be to cite cases such that: (i) the action involved is immoral; (ii) the action has social disutility, and its prohibition would not involve greater social disutility; and yet (iii) the action ought not to be illegal. But given the diversity of moral and legal perspectives, it will be difficult to find many cases which to most people's minds satisfy all these conditions. My own view would be that most forms of racial (or sexual) discrimination nicely satisfy all these conditions. But many would hold that such immoral and socially disutile acts should be illegal. It would also be my view that raising one's child to revere political leaders clearly satisfies all these conditions for being a counter-example to Murphy's formula. But some would deny that this heinous activity satisfies conditions (i) and (ii).

So rather than scrounge through the maze of people's moral intuitions, I shall focus on a special class of activities structurally very similar to acts of blackmail. I have in mind (peaceful) boycotts or, more precisely, boycott threats and the payoffs that avert or end boycotts. Like blackmailings some boycotts are moral and others are immoral. Some are socially utile and others are socially disutile. But none of them, I would maintain, should be criminalized. If this is so, then by analogy no acts of blackmail, even immoral and social disutile ones, should be criminalized. In particular, we can focus on the special subclass of boycotts which are analogous to the conceptually cen-

tral cases of blackmail of private persons. These special boycotts are those in which the only motive of those threatening the boycott is to elicit some re-direction in behavior in the persons threatened by the boycott.

When *X* boycotts *Y* he offers *Y* his future patronage solely on condition of *Y*'s changing his ways in some manner pleasing to *X* where this change is external to the normal conception of what *Y* sells. Thus, *X* boycotts *Y* if he indicates that he will not patronize retailer *Y* unless *Y* ends racial discrimination in his hiring practices or unless *Y* begins racial discrimination or unless *Y* supports this or that political campaign, etc. Since what is demanded of *Y* is external to the normal conception of what *Y* offers on the market, *Y* will see the financial and psychic costs of securing relief from the boycott as purchasing something which he would have gotten anyway in the normal course of events. He will be tempted to describe the boycott as 'blackmail' even more than we are all so tempted whenever the parties we are bargaining with strongly resist *our* favored terms.

To consider boycotts in more detail imagine that a wicked retailer racially discriminates in hiring and that there is no recourse to law against him. The good guys among those who have been patronizing this retailer pledge themselves to a boycott. They pledge to withhold their business from this retailer unless he agrees to abandon discrimination. Their threat is based, let us suppose, on the expectation that the retailer will accede to their demands. Their hope is to stop the discrimination. If they were to see that they could not secure the retailer's non-discrimination, they would regretfully continue their patronage. (But the retailer does not know this.)

Such a special boycott, then, is like the blackmailing of a private person since no motive is involved in the posing of the boycott threat except that of securing the special 'payment' from the retailer. The special boycotters would not enter their boycott were such payment effectively forbidden or impossible. If such a boycott succeeds, the retailer gets only the patronage that he otherwise would have gotten and he pays a higher price — the surrender of the normal goods plus his preferred racial or political stance. If we again assume that in general and on the average the gross gain to the boycotters equals the gross cost to the retailer (and that on the average third parties neither gain or lose), then the fact that the process itself is costly leads to the conclusion that such boycotts are socially disutile. And surely they involve taking advantage of another's vulnerability in just the way found in blackmail.

Now I am certainly not claiming that all such peaceful special boycotts satisfy the 'immorality plus disutility' formula. On the contrary. But if Murphy holds that some do not satisfy this dual criterion and hence should not be criminalized then he must retract his proposed general ban on private blackmail. If Murphy holds, as I would expect he would, that even unattractively motivated special boycotts should not be forbidden, then analogously he must endorse the general permissibility of blackmail of private persons. It may be argued, of course that agreements under the threat of boycotts are simply instance of the hard economic transactions which, all along, Murphy has taken to be permissible. The response is that they are indeed instances of such transactions and their similarity to cases of blackmail shows that acts of this last category also are instances of hard economic transactions — as, all along, the Libertarian and the Marxist have maintained. If we combine this conclusion with the premise shared by the Libertarian and Murphy that hard economic transactions are to be permitted, we arrive at the conclusion that blackmail, at least of the conceptually central private sort, is permissible.<sup>13</sup>

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#### NOTES

<sup>1</sup> Jeffrie Murphy, 'Blackmail: A preliminary inquiry', *The Monist* 63 (1980), pp. 156–171. Page citations to Murphy will appear parenthetically in the text. This response to Murphy is a revision of a response delivered at a symposium on Blackmail, Coercion and Exploitation at the APA Eastern Meetings, December 1979.

<sup>2</sup> In these remarks I do not take up the fascinating question of what best accounts for the fact noted by Murphy that the Libertarian and the Marxist agree that one's stance on the permissibility of blackmail should be generalized across all economic transactions.

<sup>3</sup> For some recent comments along these lines see, Eric Mack, 'In defense of 'Unbridled' freedom of contract', *The American Journal of Economics and Sociology* (forthcoming).

<sup>4</sup> We shall see that Murphy's views on blackmail are complexly related to Robert Nozick's invocation of the notion of unproductivity. Indeed, Murphy's stance on blackmail closely parallels Nozick's. Here we will only note that where Murphy takes himself to be considering cases of unproductive exchange (158–159) he is actually considering cases in which only the first of Nozick's two necessary conditions for unproductivity in exchange is satisfied. In fact, it is just the feature of such cases which Murphy points to, viz., the way in which such exchanges remain mutually beneficial, which leads Nozick to add his second condition. See Robert Nozick, *Anarchy, State and Utopia* (Basic Books, New York, 1974), pp. 84–87.

<sup>5</sup> For example, I would argue that there is a morally relevant and significant causal difference between the release of information and the retention of the baseball in that the former causes harm while the latter (at most) fails to prevent harm. This, of course, is controversial. It is, in any case, consistent with maintaining that the harm done by revelation is not the sort which ought to be legally prohibited.

<sup>6</sup> The waters are muddied somewhat by Murphy's description of both blackmail and hard economic transactions as 'intrinsically immoral'. (163).

<sup>7</sup> Regarding such prohibitions of hard bargaining Murphy rhetorically asks, "Do we say 'You cannot sell baseballs' or 'You cannot ask too much for a baseball' or 'You must be generous when pricing baseballs (or anything else?) to a father who wants one for his sick child' or what?" (166) Of course, many economic transactions which are or appear hard are prohibited. The prohibition on 'scalping' tickets for sporting events is a nicely related example. Such a prohibition is demonstrably social disutile – blocking the efficient allocation of tickets and closing down entrepreneurial opportunities.

<sup>8</sup> Murphy does not recognize that he is committed to limiting free speech about non-public persons. This may be because he does not believe that occasions for imposing this limitation will arise. For he seems to assume that (a) if the blackmail of private persons is criminalized no one will expect to be able to carry out private blackmail and (b) that if no one will expect to be able to carry out such blackmail, no embarrassing information about private persons worth publishing will be produced. Needless to say, both (a) and (b) are false.

<sup>9</sup> In fact, Nozick does not identify unproductivity with the satisfaction of (i). Rather, he takes both (i) and (ii) to be necessary (and jointly sufficient) for unproductivity. Thus, contrary to Murphy's understanding, the proposal that Murphy rejects is not Nozick's and the stance he adopts for private persons is very close to Nozick's. Their difference lies in the fact that for Murphy it is ultimately the disutility associated with the blackmail of private persons which, conjoined with the immorality of such acts, warrants blackmail's prohibition.

<sup>10</sup> Here, too Murphy follows Nozick who would allow the seller of silence charge, "the payments others would make to him to reveal the information". (Nozick, p. 85) Nozick, however, would *require* the sale of silence at this price.

<sup>11</sup> For instance, it might be argued that, in voluntarily becoming an official, one tacitly consents to this useful prohibition.

<sup>12</sup> On this and related issues see: Michael Gorr, 'Nozick's argument against blackmail', *The Personalist* 58 (1977), pp. 187–191.

<sup>13</sup> Decriminalization would, incidentally, allow for the legal enforcement of contracts binding the blackmailer to silence. Thus, the black-mailer would no longer be able to sell his silence "again, and again, and again – endlessly". (166)