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INTRODUCTION

Around the laws that regulate information and communication swirl a host of related nonlegal norms: norms of secrecy, confidentiality, and privacy; of anonymity, source-identity, and citation; of quotation, paraphrase, and hyperbole; norms of free copying and norms of obtaining permission; norms of gossip and of blackmail. The articles by Saul Levmore¹ and Richard McAdams² provide useful windows on some of the ways these laws and norms interact. The two articles also provide insight into the comparative advantage possessed in some circumstances by law and by nonlegal norms, respectively, when information and communication are at issue. In my brief Comment I will discuss these two articles, and some relevant issues of commensurability and commodification.

Levmore’s concern is with one particular set of tools: anonymity, source-disclosure, and intermediation. These tools appear in both legal and social settings, and are governed by different norms in each. Levmore tracks their variants and examines how deployment of these tools can assist in the enforcement of yet other norms (as, for example, anonymous teacher evaluations are administered in the hope of encouraging professors to adhere to norms of high teaching quality).³ McAdams’s article also examines group norms. It focuses on how the enforcement, articulation, and reformation of group norms can be affected by laws that criminalize blackmail. McAdams’s overall concern is to examine what attitudes our law generally evidences toward group norms.

Most of the Symposium’s participants refer to the enforcers of nonlegal norms as the “village gossips.” Calling something a village is roughly equivalent to identifying it as a community characterized

† Professor of Law and Paul J. Liacos Scholar in Law, Boston University School of Law. Copyright © 1996 by Wendy J. Gordon. Thanks are owed to Sam Postbrief, my in-house sociology expert and polymath. I also extend thanks to Richard McAdams, from whom I have learned much despite our continuing disagreement on the issues, and to Eric Blumensen, Bob Bone, and Rob Greenberg.

³ See Levmore, supra note 1, at 2203-06.
by repeated interaction, shared information, availability of mutual sanction, and like considerations. If one dispenses with any requirement of geographical propinquity, the writers and readers of this Symposium are members of one such "village." One of the norms that determines our behavior is the unspoken consensus on what kinds of questions belong on the academic agenda. And until recently, nonlegal norms remained outside of most lawyers' scholarship.

Our growing inquiry into norms may betoken a new egalitarianism and openness to concerns of noncentralized authority, and certainly has called forth much intriguing scholarship, such as the contributions by Professors Levmore and McAdams discussed below. Yet our usual methodologies might require significant adaptation if they are to succeed in this new arena. Levmore's article is conceptually straightforward and will teach any reader a great deal; McAdams's article—though it contains as many wonderful nuggets as does Levmore's—is in the end unpersuasive, because of its intricate attempts to construct an exhaustive analysis upon a largely speculative base.

I. LEVMORE ON ANONYMITY

Levmore's article discusses the norms governing anonymity, and how these norms mediate between sometimes conflicting societal goals. The goals Levmore has in mind are primarily the following: increasing the quantity of information; increasing the reliability, and thereby improving the quality, of information; and protecting the feelings of, and the relationships among, a speaker, a recipient of information, and third parties. One of Levmore's themes is the potential to improve the yields, on all these very different scales, by combining anonymity with the use of an intermediary—such as a publisher who distributes a pseudonymous novel or a policeman to whom an informant desiring anonymity supplies a tip. The intermediary keeps the name secret, but acts as a filter to provide the audience some assurances about the quality of the information supplied.

Levmore further examines whether the set of social anonymity norms has anything to teach lawmakers about how to structure

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4 I use "anonymity norms" as shorthand to embrace both norms that recommend anonymity and norms that recommend its alternatives, such as full disclosure and intermediation.
anonymity rules within the law itself. In particular, he discusses the current rule that allows individual jurors to be polled. This rule aims at discouraging corruption by eliminating the possibility that a juror may keep her vote anonymous. This practice of post-trial jury polling, however, has a danger; in order to avoid adverse comments from friends and community members once the trial is over, some jurors may vote contrary to their actual but unpopular convictions. Levmore admits that this harm, potentially resulting from disclosure of juror names and votes, may be less damaging to the polity than the kind of corruption that jury anonymity might invite. But Levmore suggests that any such bipolar choice between full disclosure and anonymity is unnecessarily restrictive.

It is at least conceptually possible, he points out, for the judge to act as an intermediary. Under such a revised practice, individual juror votes could be disclosed to the judge; the judge could then be given the discretion to disclose which juror cast which vote, but only upon a showing that evidence of jury tampering existed and warranted investigation.

But this intermediary solution is not used in the jury-polling context. One of Levmore’s descriptive contentions is that the law uses intermediaries less often and less effectively than do social actors. Sometimes, as he points out, the intermediary solution is simply not physically available, but often there is no clear reason why the legal system is reluctant to embrace the intermediary route. Part of the puzzle Levmore poses to the reader—and leaves for further research—is why the law might prefer a bipolar approach between anonymity and full disclosure.

Levmore is also concerned with the limits and abuses of the intermediary’s role. Much more, however, could be done on that tack. For example, consider the very question Levmore poses, as to why the law supposedly does not use intermediaries as much as social actors do. One answer might be that legal intermediaries have power and privileges that largely immunize them from scrutiny. Consider, for example, how long it took for police brutality to become an available and common form of lawsuit, and how many tort privileges still remain attached to governmental actors. By contrast, social intermediaries are individually chosen, case-by-case, by the participants themselves, so that only those meriting trust will be likely to receive it, and any abuses will be societally rebuked.

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5 See Levmore, supra note 1, at 2216-18.
Thus, it may be the question of "who watches the watchers"—the need for some entity to restrain and discipline the intermediaries—that militates against the law using intermediaries more often. Levmore hints at this, but the potential for abuse by intermediaries warrants more discussion.

In addition, the reader may not be persuaded by Levmore’s descriptive claim that the law is much more reluctant to use intermediaries than are social actors, and that the law is bound to binary choices, in particular, the yes/no of either full disclosure or anonymity. In fact, the law often uses intermediaries.

For example, the grand jury, with its sharp confidentiality restrictions, can be seen as exactly the kind of intermediary Levmore has in mind: all sorts of unsorted evidence are brought to the intermediary (the grand jury) to be sifted and evaluated; if the intermediary finds the evidence sufficiently persuasive, it issues an indictment. The indictment does not name all the evidence presenters—that is, it preserves their anonymity—but makes use of the information they present, precisely as social intermediaries often do.

Levmore himself gives other examples where the law does use intermediaries, but ordinarily dismisses them as the exception that proves the rule. Many readers will see them instead as tending to refute the rule. Thus, a reader might come away from the article doubting Levmore’s description of the law as predominantly confined to a binary choice between anonymity and full disclosure. Nevertheless, those same readers will have been delighted by Levmore’s exploration of complex territory, and intrigued by his implicit suggestion that the current rules on post-trial jury polling could be improved by the use of the judge as an intermediary.

One of the many virtues of Levmore’s article is the maturity of his style. Just as economics becomes more realistic as it ventures

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6 See, e.g., id. at 2231 (noting that with government intermediaries, “there is always the question of entrapment”).
7 In fact, the law here is so eager to provide an intermediary that it sometimes ignores the damage that the intermediation can do: because grand jury proceedings are secret, a person called to testify has no way to prove to her (perhaps) well-armed criminal associates that she did not inform on them.
8 Levmore mentions the grand jury’s use of jury-poll anonymity, see Levmore, supra note 1, at 2217 n.42, but not that institution’s role as an intermediary.
9 Given that our topic is communication norms, it should be noted that one thing that makes ideas and information circulate is enjoyment. To quote Jim Lindgren, “Style matters.” James Lindgren, Style Matters: A Review Essay on Legal Writing, 92 YALE L.J. 161 (1982) (book review). In a law review article, enjoyment requires clear
out into societally softer territory like that of norms, Levmore's article has a wonderfully novelistic quality as it explores the nuances of behavior. It is a risk-taking article, and a successful one. It is also usefully self-critical.

For example, although Levmore might suggest that efficiency is arguably consistent with a given observed practice, he is clearly open to the possibility that the same claim of arguable efficiency might be made even if the opposite practice were dominant. His tone cautions us to avoid the dangers of post hoc propter hoc, a far cry from the casual dealing with factual assumptions that characterized early law and economics claims for the efficiency of various legal rules. Perhaps we are moving into an era of data gathering, of specificity, of which Ronald Coase would finally approve.

Thus, Levmore's article is useful not simply because of its content. Here we have a past master of traditional analytic law and economics venturing into Henry James territory—which is where we all really live. That is an invitation to creativity and to observation of actual practice that many of us should be willing to engage.

presentation, lively examples, and thought-provoking slants on issues previously taken for granted. In all these things, Levmore (as usual) excels.

10 "An Indian-born economist once explained his personal theory of reincarnation to his graduate economics class. 'If you are a good economist, a virtuous economist,' he said, 'you are reborn as a physicist. But if you are an evil, wicked economist, you are reborn as a sociologist.'" Paul Krugman, Peddling Prosperity: Economic Sense and Nonsense in the Age of Diminished Expectations at xi (1994).

The meaning of the joke depends on the audience. For most lawyer/economists, the punchline depends on an assumed superiority of hard physics over soft social science. But Krugman argues that the Indian economist was "talking about something else entirely: the sheer difficulty of the subject. Economics is harder than physics; luckily it is not quite as hard as sociology." Id.

11 See, e.g., Levmore, supra note 1, at 2223-24.

12 A primary burden of Coase's work has been to stress the importance of transaction costs and other data that can be determined only by observation. For an example, see R.H. Coase, The Lighthouse in Economics, in The Firm, The Market, and The Law 187 (1988), where Professor Coase examines whether a classic economic assumption—that lighthouse services need to be provided by government—is consistent with the available facts. Professor Coase writes:

I think we should try to develop generalizations which would give us guidance as to how various activities should best be organized and financed. But such generalizations are not likely to be helpful unless they are derived from studies of how such activities are actually carried out within different institutional frameworks.

Id. at 211.

15 For an exploration that contrasts the novelistic and utilitarian imaginations, see Martha C. Nussbaum, Poetic Justice: The Literary Imagination and Public Life (1995).
The primary concern of Richard McAdams's accomplished article is how law affects "the conditions under which members of close-knit groups can threaten to invoke certain norm sanctions, such as shame and reputational loss." Given the current debates about liberalism and its goal of maintaining political neutrality among competing conceptions of the good, McAdams is right on the money in choosing to examine the impact of law on group norms in general—for such norms constitute, almost by definition, competing conceptions of the good.

Seen through the lens of liberalism, the torts of defamation and "false light" privacy can be seen as fairly sharp-edged tools for helping communities maintain accuracy of information about their members' norm compliance. McAdams's chosen turf, however, is blackmail law, the impact of which on primary group norms is much more controversial.

14 McAdams, supra note 2, at 2291.
15 This Comment will shortly turn to issues of commensurability. On the relationship between liberalism and commensurability, see, for example, infra note 55 and accompanying text.
16 The liberalism inquiry leads to several interesting ways to recast classic doctrinal issues within this branch of tort law. For example, courts differ on what descriptions or attributions are "defamatory" and thus actionable; to treat one description as actionable and to deny action for another is to distinguish between conceptions of the good. One conception is being respected, and one is being treated as trivial.
17 Criminalizing blackmail means that the law forbids certain market transfers of information, yet permits free exchange (disclosure) of the information. Using Professor Radin's terms, blackmail criminalization makes embarrassing information partly "market-inalienable" insofar as the law restricts its sale but allows the information to be given away. See Margaret J. Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1853 (1987). The market-inalienability is "partial" because although the law prohibits its sale to the person who wants the information to be kept silent, an information-holder is permitted to sell the information to other parties—notably, those who are unlikely to keep it secret, such as tabloid news media and the police.

Laws that forbid sale but permit gifts and other nonmarket transfers have long been a topic of scholarship. The legal academy's investigation of the laws that criminalize blackmail (sale of information), prostitution (sale of sex), and other inalienabilities took on a distinctly economic bent with the publication of Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1092 (1972); for later explorations, see, for example, GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978); Radin, supra; Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 COLUM. L. REV. 931 (1985).
18 To outline his argument, three categories of norms should be identified: primary norms of ordinary behavior (such as "do not cheat on tests" or "do not use..."
McAdams focuses on the impact that blackmail laws have on the cost of gossip—in particular, whether the lawful availability of blackmail revenue would decrease the now fairly free exchange of information ("gossip") about norm violation. He also examines whether norm internalization and norm critique and refinement—all of which may require public disclosures—are better served by blackmail's criminalization or by legalization. He argues that criminalization best serves groups' interests in encouraging disclosure and facilitating the internalization and reformation of primary norms.19 Conversely, McAdams suggests that the availability of lawful blackmail would inhibit disclosure of norm violations, on the ground that the promise of earning money through blackmail would work to dissuade the ordinary group member from freely disseminating any injurious information he happened to possess.

McAdams's primary concern is whether the dynamics of behavior will lead toward, or away from, efficiency. In particular, he is interested in evaluating how outlawing blackmail—either commercial blackmail, which involves research into the victims' pasts or their peccadilloes, or opportunistic blackmail, which involves use of adventitiously acquired information—will affect efficient and inefficient small-group norms.20 Preliminarily, let me suggest that the usage of "efficiency" notions here is a bit strained.21 Efficiency ordinarily means the maximization of monetary value of goods or services, and policy-

more than your share of the common pasture”), norms of blackmail behavior (such as “do not blackmail” or perhaps “blackmailing is acceptable”), and norms of disclosure and nondisclosure (gossip versus privacy). (Note that McAdams does not discuss most of the variants on disclosure explored by Levmore.)

19 He makes the argument that criminalization best serves the goals of internalization and reformation of primary group norms in part because privacy norms correct for the tendency toward overdisclosure ("gossip" again) which he sees otherwise resulting from the blackmail prohibition.

20 McAdams argues that blackmail's effect on the expected cost of norm violations is "ambiguous," but that criminalizing blackmail aids in the internalization and refinement of norms. See infra text following note 30.

21 Professor Radin would probably classify this McAdams article as exhibiting an urge toward "universal commodification," because it seems to assume that "market theory itself, using a market failure analysis, can determine when things should not be bought and sold." Radin, supra note 17, at 1859. Professor McAdams undoubtedly would not want his analysis pressed so far as to evaluate everything in fungible efficiency terms; as Professor Radin herself notes, "[u]nuniversal commodification is an archetype, a caricature" that even economic analysts do not fully embrace. Id. at 1862.
makers who consider economics a useful criterion of social welfare usually do so because monetary value provides an objective measure (albeit highly inexact) of utility. Efficiency makes a great deal of sense as a criterion for judging commercial norms (for example, among diamond merchants\textsuperscript{22}) or norms of land use (for example, among ranchers and farmers in Shasta County\textsuperscript{23}). Its usefulness, however, diminishes sharply when moving to norms governing less quantifiable behavior, in particular, behavior that we ordinarily judge less by its ability to produce satisfaction ("utility"\textsuperscript{24}) than by its moral status.\textsuperscript{25} Not all of us are Benthamites who believe that moral norms are simply codes through which utility expresses itself.

As Cass Sunstein points out, some norms have to do with the kind of persons we want to become and the kinds of preferences we want to have.\textsuperscript{26} A norm can be desired, respected, and valued by virtually all members of a community even if the norm fails to maximize either monetary value or emotions of utility satisfaction.

It is possible that McAdams's analysis could apply to norms that have nothing to do with utility or money. That is, if his analysis were internally powerful, it might tell us something useful about disclosure of norm violations, internalization of norms, and refinement of norms, even if those norms were desired for reasons other than efficiency. But is his analysis persuasive? In some aspects, yes, particularly in regard to some of the connections he explores between blackmail law and privacy norms.\textsuperscript{27} Nevertheless, key segments falter precisely because he fails to note that some norms can trump both money and utility.


\textsuperscript{24} "Utility" is the criterion often employed by those ethicists who view all values as commensurable. For discussions highlighting some intriguing issues of commensurability, see, for example, Margaret J. Radin, \textit{Compensation and Commensurability}, 49 DUKE L.J. 56 (1998); Radin, supra note 17; Frederick Schauer, \textit{Commensurability and Its Constitutional Consequences}, 45 HASTINGS L.J. 785 (1994); Cass R. Sunstein, \textit{Incommensurability and Valuation in Law}, 92 MICH. L. REV. 779 (1994).

\textsuperscript{25} Cf. infra note 48 (discussing the distinction between \textit{Gemeinschaft} and \textit{Gesellschaft}).


\textsuperscript{27} The connection with privacy norms is explored in Part II of McAdams's article. See McAdams, supra note 2, at 2266-91. My critique focuses primarily on Part I of that article.
McAdams's analysis depends in significant part on predictions he makes about which norms will evolve for or against committing blackmail. Yet he skims over the concept of "honor," itself a norm, which will keep many people from considering as possible revenue the money they could reap from committing blackmail. Rather, he makes a large assumption: that legalizing blackmail will have only one large effect on norms, and that will be toward making blackmail a more socially acceptable activity. He realizes blackmail is currently considered unsavory, but his argument suggests that if blackmail were legalized, the number of people engaged in it would increase sharply. Apparently it would become no more a subject of social opprobrium than hard bargaining or being a slumlord. He assumes—and this is key—that all people will routinely include in their utility calculations the likely payoff from committing blackmail.29

The latter is the concealed centerpiece of much of his analysis: that after the legalization of blackmail, everyone—not just the bad apples who might go into the business of commercial blackmail—will be willing to blackmail if the price is right.30 Gossip, the free exchange of information within groups, will decrease, and persons who accidentally acquire evidence of norm violation will have an incentive to keep the evidence concealed. If this happens, McAdams argues, there will be two categories of effect.

(1) Members of groups will increasingly engage in blackmail rather than disclose instances of norm violation, which will (a) have an indeterminate effect on the cost of norm violation and more definitely (b) reduce the visibility of norm violations and thus reduce opportunities for public education and norm internalization; and

(2) group members will decrease their involvement in criticizing and refining norms, since narrowing the group's norms might deprive group members of potential blackmail revenues.

Are these outcomes likely?

The strongest effect of legalizing blackmail will be the creation of commercial blackmail firms, like Richard Epstein's hypothesized

28 McAdams does, however, suggest interestingly that honor is often eroded by rationalization. See id. at 2262 n.72.
29 See id. at 2246, 2260, 2283-84.
30 Of course, McAdams does not contend that everyone will blackmail; at any given "reward" for blackmailing, only those at the margin will be affected.
Blackmail, Inc.,31 whose business will be digging up dirt. The existence of commercial blackmailers—the slumlords of information—could mean that everyone with money would be subjected to the garbage-sorting scrutiny that today only celebrities must bear.

If blackmail were legal, many disclosures of norm violation would result as fallout from the blackmail business—such as accidental disclosures, disclosures made to establish “credibility,”32 and disclosures made when blackmail payments are not offered in satisfactory amounts. My guess33 is that the disclosure-increasing impact of allowing commercial blackmail will outweigh the disclosure-decreasing impact of allowing opportunistic blackmail.

If so, legalizing blackmail will increase the likelihood of norm violations being disclosed and punished by social opprobrium, with the consequent educational and internalization effects. Thus, the net effect of allowing commercial blackmail is likely to be an increase in the very effects McAdams thinks legalization would inhibit.34

If we turn our attention from commercial to opportunistic blackmail, we first note that possessors of casual information are more likely to be friends than strangers.35 Thus, its practitioners are more likely to be group members in good standing rather than staffers of Blackmail, Inc. If so, are ordinary group members really likely to take the possible profits from blackmail into account? McAdams himself notes that norms tend to be weakest when the violators are acting on “victims outside their social groups.”36 Speaking as a matter of observation, most people do not engage in

32 Commentators have long argued that blackmailers will need to disclose occasionally, in order to demonstrate the sincerity of their threats. See, e.g., Wendy J. Gordon, Truth and Consequences: The Force of Blackmail's Central Case, 141 U. PA. L. REV. 1741, 1751 (1993) (describing such a motivation as an “affirmative and independent motive[ ] to disclose”).
33 Note my use of the word “guess.” Neither McAdams nor I am predicting; real prediction requires an extensive knowledge base. We are engaging in conjecture, and there is a risk that the very elaborateness of McAdams’s analysis may lend it a seeming reliability that even he would not claim.
34 In my view, allowing commercial blackmail would also lead to an increase in the cost of norm violation. McAdams is agnostic on whether legalization will increase the cost of violating norms.
35 Admittedly, strangers such as hotel clerks and credit-card staff also have access to a great deal of information about each of us, but employer confidentiality codes restrain credit-card account clerks and the like. Thus, independent of blackmail bans these businesspeople have an incentive to keep the information private: their desire to keep their jobs, and our custom.
36 McAdams, supra note 2, at 2245 n.24 (discussing property crimes).
hard bargaining within their own social set over noncommercial matters even where such behavior is lawful. This observation hardly suggests that a significant increase in intragroup blackmail will follow from legalization. Nor are people who play status-games through disclosing others’ norm violations\textsuperscript{37} likely to see monetary payments as commensurable with the gains that gossip gives them.

It is even less plausible that high-status people—those most likely to be persuasive norm critics—will \textit{stop} criticizing norms, simply because they hope that overbroad norms will entrap the unwary and thus bring these same high-status folk blackmail revenues.\textsuperscript{38} Here McAdams also understates the reciprocity that exists among a group’s members. One day’s blackmailer may be the next day’s victim. Failing to engage in criticism and refinement of overbroad norms can entrap many an unwary hypocrite.

To repeat: it is mere speculation that blackmail norms will alter by legalization to a degree sufficient to make the average person willing to consider blackmail a real source of revenue. Think, for example, of whether the legality of the matchmaking business would lead you to charge two friends a finder’s fee (unless matchmaking were your business) for bringing them together. The mere introduction of money into the social context is likely to be seen as an insult.\textsuperscript{39} McAdams overstates when he claims that “[a]nti-blackmail norms are essentially the same as disclosure norms.”\textsuperscript{40} Blackmail involves commodification, while disclosure by social group members usually does not.

James Boyle goes so far as to maintain that commodification is central to blackmail’s criminalization: “[B]lackmail prevents the commodification of silence about private information partly because of a romantic notion of privacy, home, and hearth and an associated belief that we must keep the market away from that realm[.]”\textsuperscript{41} This is closely connected to a point McAdams makes, that criminalizing blackmail helps to maintain a


\textsuperscript{38} McAdams writes: “The possibility for blackmail creates an expectation of profits from blackmailing others after discovering their norm violations. The profits create an opportunity cost to reforming inefficient norms.” McAdams, \textit{supra} note 2, at 2260.

\textsuperscript{39} See Sunstein, \textit{supra} note 24, at 787.

\textsuperscript{40} McAdams, \textit{supra} note 2, at 2284 n.126.

structure where nonmarket norms (of privacy) can dominate.\textsuperscript{42} It is ironic that McAdams fails to take sufficient account of the effect that antimarket norms can have on behavior.

The antiblackmail norm is likely to be stable after legalization for yet another reason. Informational blackmail, whether commercial or opportunistic, entails profiting by a norm violation or by some painful experience that the victim would prefer to conceal. It is hard to imagine any group that would approve of someone profiting by means of another’s violating the group’s own norms.\textsuperscript{43} (At least, such approval is hard to imagine short of the special circumstances and socialization that permits criminal lawyers to view their tasks as honorable even when defending the guilty.) For this and related reasons, most people do not consider blackmail among their options for reasons that appear (to me at least) moral, a matter of character, and largely unrelated to illegality.

It strikes me as an obvious human trait—a matter of internal consistency—to have distaste not only for acts that violate one’s norms (whatever the specific norms might be) but also for acts that profit from that violation, especially if the profit comes from covering up the violation. Incentives may also help to explain this trait. Crime annals suggest that would-be blackmailers hone tools of temptation and entrapment; if so, legalizing blackmail might increase the incidence of norm violation as people fall into blackmailers’ traps. Another part of the distaste is symbolic: upholding the underlying norm by frowning on those who profit by its violation.\textsuperscript{44} Further, as I have argued elsewhere at some length, blackmail violates principles of equality through the infliction of an unjustified injury, and as such is a deontologic wrong.\textsuperscript{45} This, too,
is likely to give stability to the antiblackmail social norm even in the face of blackmail legalization. But only empirical investigation can determine if this supposition is correct.

The realm of norm enforcement is layers more complex than McAdams's article suggests. His intricate rational choice structure is built on a paucity of factors that fails to capture the most important features of how humans make decisions in morally charged settings. Also, it is instructive to compare his approach

1. the thing the seller wants the buyer/victim to purchase is such that the buyer would be better off, in regard to that thing, if the seller and his resources did not exist,
2. the buyer/victim would be better off if the transaction were impossible and known by all parties to be impossible, and
3. the buyer/victim has done nothing to the other party that would give that party a corrective justice right against her.

Id. at 1772 (footnotes omitted).

If selling silence were impossible, the commercial blackmailer would never have bothered to research the negative information. Thus, the commercial blackmailer clearly proposes an injurious transaction. By contrast, regarding information accidentally acquired, a victim might indeed be worse off if money-for-silence transactions were impossible—after all, the opportunistic blackmailer's acquisition of the information did not depend upon the hope of a blackmail payment.

It is also possible that, instead of eroding antiblackmail norms, legalizing blackmail will strengthen those norms by increasing the psychic rewards for norm compliance and the social opprobrium for norm noncompliance. Although this seems unlikely, consider in this regard the argument Landes and Posner have made for not imposing a duty to rescue: that moral claims are stronger, and social rewards like praise are greater, when persons do creditable things beyond what the law requires them to do. See William M. Landes & Richard A. Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. LEGAL STUD. 83, 93-100 (1978) (suggesting that monetary incentives would reduce rather than increase overall incentives toward heroism).

Admittedly, any social science abstracts from reality and eliminates some factors to concentrate on others. The issue is whether the most useful factors are preserved, and whether the assumptions that are made about those factors are close enough to reality to provide useful approximations.

McAdams's transaction-cost analysis is also flawed. Although he is of course correct in asserting that many affected third parties are not in a position to bargain with potential blackmailers, he is mistaken in asserting that, in a world without transaction costs, the market would "solve" the blackmail problem in a way guaranteed to maximize utility. Compare his treatment with Gordon, supra note 32, at 1754-57 (discussing the impact of wealth effects when reputation is at issue). To the extent that someone feels that her good reputation or other characteristic is "priceless," the more likely it is that the price she would demand to sell the characteristic will be almost infinite—and thus (assuming the individual is not a billionaire) will greatly exceed the price she could afford to pay for the characteristic if the law failed to give her an entitlement to it. See id.

Thus, the so-called wealth effect or "ask/offer phenomenon" can be seen as expressing an aspect of incommensurability. A similar point is made by Sunstein,
with work that examines specific and actual small groups, like the work of Robert Ellickson and Lisa Bernstein. It is exceedingly difficult to attempt generalizations, as McAdams does, about an abstract small group. But in the process McAdams does bring a host of useful questions to the fore, and has provided a useful platform for future research.

A caveat is also in order regarding McAdams’s assumption that the law of blackmail reveals a great deal about the law’s general attitude toward nonlegal norms. Note that although gossip helps in the enforcement of nonlegal norms, it also helps in the enforcement of legal rules; rumor often helps to identify the perpetrator of a crime. Therefore, even if blackmail prohibitions are constructed in part to induce certain information disclosure via gossip, the information may be more important for the law’s own maintenance than for the enforcement, articulation, and reformation of nonlegal norms.

To resolve this question, it would be necessary, inter alia, to examine the legislative history of the blackmail statutes to see why they fail to distinguish between those “occasions of ridicule or shame” that are caused by violations of nonlegal norms and those that are caused by violations of law. My suspicion is that the primary explanation lies not with a desire to uphold small group norms, but rather with administrative convenience, and a desire to avoid the violence to which blackmail victims might be prone.

III. AN EXAMPLE

One problem with the McAdams article is the dearth of specific examples. Let me therefore borrow an example from Levmore. It can be used to illustrate the actual complexity of the behavior involved and to examine the plausibility of McAdams’s implicit
claim that, if blackmail were legalized, the likelihood of blackmail revenues would be taken into account by all actors.

Levmore describes a situation in which one social guest watches another social guest slip one of the host’s valuable knick-knacks into a pocket. The watching guest thinks this is probably an act of theft—undoubtedly a norm violation. His question is, what to do? Speaking to the host directly might alienate the host, and might even cast suspicion on the speaker as the person really responsible for the missing item. Speaking to the full-pocketed guest might create justified anger—“What do you mean, spying on me? This knick-knack happens to be something I lent the host last year, which he left out on the table so I wouldn’t forget to take it home with me”—and would certainly create a scene.

It is hard to imagine that this awkward scenario would change in any way were blackmail legal. What is our protagonist—the watching guest—concerned with? He is concerned with upholding norms, protecting feelings, and safeguarding his own standing and respect among peers. Although rewards are certainly lawful, he is not thinking of the reward money he could earn by turning in the other guest. Why would making blackmail lawful make him consider selling his silence to the pilfering guest?

McAdams makes clear the central point about inalienability: by forbidding information-holders from exchanging their disclosure-potential for money, it requires those persons to resolve their decisions about disclosure according to nonmonetary norms. But I doubt that one needs to outlaw money-for-silence transactions in order to make this happen. Michael Walzer has suggested that our social and legal worlds are subdivided into many spheres, and that within each sphere different criteria govern. An important part of our childhood social conditioning constitutes training in how to keep the various spheres separate—so that, for example, we do not sell our honor for a cookie or for a promise to “be your best

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49 See Radin, supra note 17, at 1855. Thus, to the extent society views a certain good or characteristic as nonfungible, its perceived incommensurability can be safeguarded by prohibiting its possessor to exchange the good for money. (Dollar bills are, of course, the ultimate in fungibility.) Barred from the market, an individual will then have to make decisions on the basis of nonmonetary values thought to be more appropriate. Thus, McAdams usefully points out a blackmail ban can help free a space for nonmonetary privacy norms to operate.

50 See Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality (1983). On inalienability and incommensurability, see Radin, supra note 24; Radin, supra note 17; Rose-Ackerman, supra note 17; Schauer, supra note 24; Sunstein, supra note 24.
friend." McAdams needs to explain why merely making it lawful to extract blackmail payments, and inserting that fact into Levmore's guest/host example, would change the nature of the protagonist's concerns, or our views that money should not be relevant to friendship. The burden is on McAdams to make this showing if he wishes to be persuasive: because most of us learn that it is ignoble to transform social relations into money, after childhood the norm largely self-polices. Nevertheless, McAdams has usefully begun the inquiry into whether the legal system assists in this boundary maintenance.

CONCLUSION

Economists are accustomed to working with narrow sets of assumptions, with rational actors so minimally described that even gymnasts might envy the way they are stripped for action. This methodology, often fruitful precisely because its models' simple assumptions allow complex results to be derived, depends among other things on commensurability: that all goods and all values can be measured by some common yardstick. The assumption is that human rationality can sort all choices by some overriding algorithm. Yet some choices may be incapable of being so resolved.

This is not necessarily a defect in rationality. Even within the most rational of us, many sources and types of values compete for our allegiance. But as lawyers we are committed to the public sphere, and in that sphere decisions must be made and accountability assessed. We therefore may be prone to thinking that because the use of consistent criteria is desirable in principled public decisionmaking, it is necessary to all private decisionmaking as well.

51 The yardstick utilized by most economists is, of course, "willingness to pay." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 12 (4th ed. 1992).

52 The worst of these we refer to as "tragic." Bernard Williams defines tragic choices as those where "an agent can justifiably think that whatever he does will be wrong." BERNARD WILLIAMS, Conflicts of Value, in MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980, at 71, 74 (1981); see also CALABRESI & BOBBITT, supra note 17, in which Judge Calabresi shows the instability of criteria that can result when inevitable but insupportable choices must be made.

53 Williams argues that "it must be a mistake to regard a need to eliminate conflict as a purely rational demand." WILLIAMS, supra note 52, at 81.

54 See, e.g., THOMAS NAGEL, MORTAL QUESTIONS 128 (1979) (discussing "some problems created by a disparity between the fragmentation of value and the singleness of decision").

55 Williams argues:
That would be an error, at least if the kind of consistency expected is of the algorithmic type.

If not all goods and values are commensurable with money, that suggests that increasing the amount of money attached to a given behavior will not always generate a significant increase in the behavior.\(^5\) Thus, for example, even if blackmail were lawful, many persons might be unwilling to trade off their sense of honor for a chance at blackmail revenues. Of course, some might do so—but the issue is whether the shift in behavior is likely to occur frequently enough that the law should take note of it.

What do I mean by claiming that our morality has several, non-commensurable strains within it? The simplest illustration is, admittedly, a bit extreme, but for the sake of clarity, let us use it: the conundrum of the evil deity, famously posed by one Karamazov brother to another.\(^5\) Assume a deity exists that has the power to free the world from war and all sorts of evil; this deity can bring on a time of peace, health, and plenty in which no one—least of all children—would ever again suffer. But further assume that this deity is perverse and demands as the price of this world-wide transformation that you (yes you, personally) torture a designated small child to death. Would you do it?

Part of you probably feels horrified. To that part of you, it is paramountly clear that the child is morally entitled to be free of your torture. Yet you also know that as a result of your reluctance, other children—hundreds and thousands of children this year, then

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\(^5\) Some new accord must be found between private understanding, which can live with a good deal of 'intuition' and unresolved conflict, and the public order, which, unless we are to give up the ethical ambition that it be answerable, can only live with less. . . .

\(^6\) If philosophy is to understand the relations between conflict and rationalisation in the modern world, it should look towards an equilibrium—one to be achieved in practice—between private and public.

WILLIAMS, supra note 52, at 82.

Arguably, that is the role of liberalism: to allow competing conceptions of the good to coexist with government. But of course, the relationship among commensurability, commodification, and liberalism is quite contested. Compare, e.g., FREIDRICH A. HAYEK, THE ROAD TO SERFDOM 56-71 (1944) with Radin, supra note 17, at 1887.\(^5\) In fact, a growing body of psychological data suggests that extrinsic rewards such as money can even discourage valuable behaviors, by damping the intrinsic sense of satisfaction that often motivates the best work. See generally ALFIE KOHN, PUNISHED BY REWARDS: THE TROUBLE WITH GOLD STARS, INCENTIVE PLANS, A'S, PRAISE, AND OTHER BRIBES (1993) (summarizing the psychological literature from this perspective).

millions more children as the years roll by—will suffer as bombs fall, illnesses spread, and abusive relatives batter. All this pain could be obviated by one day’s horrible act by you. So another part of you may feel morally obligated to torture the child today in order to obtain freedom from torture for all children for all time in the future.  

Ethicists usually use the term “deontologic” to refer to that component of your moral thinking that will have nothing to do with causing pain to the child. This part of your moral self sees the individual child as an end in herself. A deontologist obeys rules whose content does not vary with consequences.

By contrast, ethicists usually use the term “consequentialist” or “utilitarian” to refer to that component of your moral thinking that does care about how many people will be injured. This part of your moral self cares more about what eventuates than about how an end is achieved. It is the consequentialistic component of your moral thinking that feels obligated to procure the world its universal happiness even if it means torturing a child and damning your own self.

How can a single individual hold such divergent views? One part of the answer is surely our ability to visualize differing images sequentially: our allegiance undoubtedly shifts as our mental attention focuses first on one aspect of the scene (this child), then on another (my act), and finally on another (the welfare of tomorrow).

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59 Similarly, many religious views see “a world in each individual.” Note that a deontologist may care about both the child and the others affected; there can be incommensurability within a given moral view in addition to the incommensurability that can result from having allegiance to more than one moral view.

60 This part of your moral self also cares about how things happen: that you do evil matters as a moral fact in itself. See THOMAS NAGEL, THE VIEW FROM NOWHERE 165-88 (1986).

61 See id.

62 In a Borges story, the possibility is raised that the true savior is Judas because Judas, in order to carry out the prophecy, does something that causes him to be eternally damned—surely a greater sacrifice than allowing one’s self to be crucified. See JORGE LUIS BORGES, Three Versions of Judas, in Labyrinths: Selected Stories & Other Writings 95 (Donald A. Yates & James E. Irby eds., 1964). Of course, part of the paradox here is the puzzle of how a true sacrifice could warrant damnation: the answers are at least two—that the deity is perverse, as posited in The Brothers Karamazov, or that there can indeed be situations, as Williams claims, in which there is nothing one can do which would be right. See supra note 52 (discussing tragic choices).
row's generations). I would hardly be the first to suggest that as humans we define ourselves in part by choosing the one vision we find most persuasive (or most vivid or most moving) from among the many narratives within calling distance of our empathy.

As Roger Shattuck notes:

Walt Whitman lived at peace with the fact that he contradicted himself. He said that he contained multitudes. Proust asks the next question. How much of his multitudinous self can a person be or embody at one time? ... No matter how we go about it we cannot be all of ourselves all at once. Narrow light beams of perception and of recollection illuminate the present and the past in vivid fragments. ... To summon our entire self into simultaneous existence lies beyond our powers. We live by synecdoche, by cycles of being.63

Although we may live by synecdoche, we nevertheless try to make social decisions by some relatively consistent vision, and to pre-announce shifts in the rules of the game when our public criteria alter. And, truth be told, I have yet some hope of working out a guide for my own rocky choices among seemingly incommensurable values. But no matter how utilitarian my own personal algorithm turns out to be, I am sure that in some areas consequentialism would not rule.

Social science always involves approximation, and one salutary effect of studying norms should be to increase our knowledge of where it is dangerous—even as an assumption—to treat the bulk of personal decisionmaking as commercially motivated. In realms where nonmonetary and antimoneyary norms play a strong role, it is not the best use of scholarly energy to assume that a law which alters monetary payoffs will necessarily have significant behavioral effects. In such realms, it is certainly possible that the monetary changes will alter behavior, but the degree of such impact should be investigated empirically.

63 ROGER SHATTUCK, MARCEL PROUST 5-6 (1974).