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TRUTH AND CONSEQUENCES:
THE FORCE OF BLACKMAIL'S CENTRAL CASE*

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INTRODUCTION

Blackmail commentary continues to proliferate. One purpose of this paper is to show what we agree on. Its primary tool will be to define what I call the "central case" of blackmail literature, and to supply the connecting links that will allow us to see how various normative theories converge in condemning central case blackmail. Admittedly, the law criminalizes more than my central case. But once we recognize that the central case is neither puzzling nor paradoxical, it may be easier to handle the border cases that arise.

The Article first demonstrates why criminalizing blackmail involves neither a paradox nor a contradiction, notwithstanding the fact that blackmail law prohibits offers to sell discreditable information that the law would permit the seller to disclose without penalty.¹ The Article then sets out the central case of blackmail,² the standard economic argument for its criminalization,³ and the nonstandard uncertainties that wealth effects produce in this area.⁴

The Article then turns to its primary topic: presenting a deontologic moral justification for criminalizing blackmail.⁵ The nonconsequentialist moral view best captures, I believe, the primary reasons why courts and legislatures have in fact made blackmail unlawful. I argue that most of the supposed ambiguities surrounding the deontologic case are red herrings obscuring the simple nature of the wrong committed by the blackmailer.⁶ I also defend

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† Professor of Law, Rutgers University School of Law-Newark. I am grateful to Bruce Ackerman, Dan Dobbs, Claire Finkelstein, Gary Francione, Sam Postbrief, George Thomas, and Paul Tractenberg for comments on this paper in draft. I would like to thank Warren Schwartz for first suggesting to me the relevance of blackmail to property theory. For discussions on the general topic of blackmail I am grateful to Allan Axelrod, Russell Hardin, Jennie Metzstein, and, in particular, the always generous Jim Lindgren.

¹ See *infra* part I.

² See *infra* part II.

³ See *infra* part III.A.

⁴ See *infra* part III.D.

⁵ See *infra* part IV.

⁶ See *infra* parts IV.A-C.

this argument against challenges such as the libertarian view that blackmail is indistinguishable from an ordinary commercial transaction.⁷

The final sections of the Article return to discussing blackmail law from a consequentialist perspective, but with a twist: I present consequentialist arguments for criminalizing blackmail based upon the impact that noneconomic motives can have on the outcomes of blackmail attempts, and the impact that law can have upon these noneconomic motives.⁸ I suggest in conclusion that truth cannot be found in either the economic (consequentialist) or deontologic (nonconsequentialist) approaches standing alone, but that some union of the two is necessary for satisfactory resolutions of complex cases.⁹

I. THE NONEXISTENT PARADOX

At the core of blackmail law supposedly lies the following paradox: Everyone has the right to seek money if he so chooses, and a possessor of information is ordinarily at liberty to disclose the information or keep it secret as he chooses, "but if I combine these rights it is blackmail."¹⁰ That is, it is criminal for the possessor of information to demand money in exchange for not doing something—disclosing information—that it is lawful for him to do or not do.¹¹

Though this may be a surprising conjunction, it is, strictly speaking, no paradox. A paradox is "[a] statement whose truth leads to a contradiction and the truth of whose denial leads to a contradiction."¹² Suppose a judge stated that "blackmail is unlawful, and 'where a person has the right to do a certain act . . . he has the right to threaten to do that act'¹³ unless paid." This statement

⁷ See *infra* parts IV.D-E.

⁸ See *infra* part V.

⁹ See *infra* notes 182-86 and accompanying text.

¹⁰ James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 670-71 (1984).

¹¹ See *id.* at 670-71 & n.7.

¹² Boruch A. Brody, *Logical Terms, Glossary Of*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 57, 70 (Paul Edwards ed., 1967). Colloquially, a paradox is a surprising conjunction—"a statement that goes against generally accepted opinion." John van Heijenoort, *Logical Paradoxes*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY, *supra*, at 45, 45. Blackmail is admittedly paradoxical in this looser sense.

¹³ Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 557 (1983) (emphasis omitted).

contains a contradiction,¹⁴ which completes half of the conditions for a paradox. To constitute a paradox, however, the statement must also yield a contradiction if assumed to be false. The judge's statement will be false if any of its components¹⁵ are false. But if the second portion of the judge's statement is false, it leads to no contradiction: If people do not invariably have a right to threaten to do or not do the things they are at liberty to do or not do, then blackmail's illegality is perfectly consistent with the larger pattern. Hence the statement does not produce a paradox.

More important than the logical point is the fact that the second portion of the judge's statement *is* false. Even if one temporarily puts aside the complication of the blackmailer's monetary demand, people do *not* invariably have a right to threaten to do or not to do the things they are at liberty to do or not to do.¹⁶ Perhaps the mistaken opposite impression¹⁷ arises out of a belief that the liberty to do¹⁸ an act is inevitably greater than (and includes within itself) the liberty of threatening to do an act. But the right to do a greater thing does not always include the right to do the lesser; that is one of the lessons taught by the doctrine of unconstitutional conditions.¹⁹

¹⁴ If we assume that the judge's statement is true, then it must be true both that blackmail is illegal and that what a person is legally allowed to do, that person is also allowed to threaten to do unless paid. But if the second part of this statement were true, then blackmail would be legal, which contradicts the first part of the statement.

¹⁵ The statement can be read as having three components: (1) blackmail is unlawful; (2) persons lawfully can threaten to do or not do anything they lawfully may do or not do; and (3) the lawfulness of the threat does not alter if coupled with a demand for payment.

¹⁶ See George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1618-19 (1993) (making this point and providing examples of illegal threats of independently legal activity). I do not mean to say that the illegality of the threatened action in a given case is irrelevant; in some circumstances, it may be a crucial factor. My point is merely that the illegality of a threatened act is not always a necessary condition for the illegality of a threat. Cf. F.M. Kamm, *Non-consequentialism, the Person as an End-in-Itself, and the Significance of Status*, 21 PHIL. & PUB. AFF. 354, 370-71 (1992) (stating that factors that make moral differences only some of the time can nevertheless suffice to support a moral distinction).

¹⁷ See, e.g., Epstein, *supra* note 13, at 561 ("The general proposition that a party may threaten that which he may do makes blackmail an anomalous exception to the general pattern of both criminal and civil responsibility.")

¹⁸ In usages such as this, "doing" should be read as "doing or not doing"; to repeat the language each time would be cumbersome.

¹⁹ The doctrine of unconstitutional conditions holds that even though the government may withhold a benefit entirely, it can nevertheless be prohibited from offering the benefit on the condition that the recipient forgo a constitutional right. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415

In addition, threatening cannot be "included" in doing because threatening possesses elements that doing does not. Most notably, threatening to disclose induces action in a way that disclosure does not,²⁰ so that doing and threatening can have quite different effects. This occurs in part because the two acts affect different parties: any threat the blackmailer makes will be directed to the person with the embarrassing secret, but any disclosure will be to third parties. In Hohfeldian terms, a privilege²¹ to do would be distinct from a privilege to threaten since each regulates different relations between different people.

Further, the blackmailer does more than merely threaten: He threatens to disclose unless money is paid.²² Regardless of whether we have liberty to threaten, the law often forbids us to commodify our liberties by selling them. Our liberties to make sexual use of our bodies cannot be bartered for cash in most states; our right to vote can neither be transferred gratuitously nor sold. The growing literature on inalienability²³ makes clear that doing and selling are quite different issues.

None of this should be surprising. In fact, much of the blackmail commentary can be organized around these simple points concerning the differences between doing and threatening. The Lindgren thesis, for example, is that blackmail is wrongful because the victim and blackmailer are playing with "someone else's . . . chips."²⁴ This utilizes the point that doing and threatening affect

(1989). The doctrine thus rejects "the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt." *Id.*

²⁰ For the distinction between assertions of fact on the one hand, and, on the other, "situation-altering" utterances and "action-inducing" utterances, see Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1091-94 (1983).

²¹ For Hohfeld, a "privilege" is a liberty from governmental interference. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-36 (1913).

²² A demand for money is only the paradigmatic case. The proscription against blackmail may also include prohibition of nonmonetary demands (such as for sexual compliance), which usually, but not inevitably, implicate additional concerns of commodification.

²³ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

²⁴ Lindgren, *supra* note 10, at 702. The notion is that the information subjected to bargaining may properly belong, at least in part, to third parties. For example, if an unfaithful husband pays hush money to conceal his infidelity, the blackmailer is receiving compensation while the affected wife receives neither information nor

different parties. The economic "waste" thesis, associated with Daly and Giertz,²⁵ Coase,²⁶ Ginsburg and Shechtman,²⁷ and Epstein,²⁸ argues that allowing blackmail threats will result in the expenditure of resources in allocatively-fruitless bargaining²⁹ and in "digging up dirt . . . and then reburying it."³⁰ This explanation incorporates the point that the dynamic effects of doing and threatening can be quite different. The arguments of those who draw upon the Bloustein thesis, that privacy should not be commodified against the will of the primary party,³¹ correspond with the point that law often makes liberties inalienable.³² With each explanation comes another refutation of the notion that criminalizing blackmail is contradictory. At this point, perhaps only a subset of libertarians believe that blackmail law conflicts with other proper patterns of the law.³³

Yet criminalizing blackmail still raises a number of questions. In the hope of both simplifying and advancing the blackmail debate,

compensation. *See id.* at 702-04.

The analysis I offer of central case blackmail does not need to posit such innovative rights in third parties, but instead uses traditional moral and legal categories to show that blackmail does a wrongful harm to the person threatened with release of his secret. *See infra* notes 80-148 and accompanying text.

²⁵ *See* George Daly & J. Fred Giertz, *Externalities, Extortion, and Efficiency*, 65 AM. ECON. REV. 997, 999-1001 (1975).

²⁶ *See* Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 671-74 (1988) (arguing that in a world with positive transaction costs, it is undesirable to devote resources to activities such as blackmail which produce nothing of value).

²⁷ *See* Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1865 (1993) (arguing that blackmail results in "an industry the output of which is nil, although resources are consumed in its operation").

²⁸ *See* Epstein, *supra* note 13, at 561-65 (arguing that legalizing blackmail will lead to the creation of industries which produce nothing of value).

²⁹ *See* Daly & Giertz, *supra* note 25, at 1000 ("With any positive level of bargaining costs, extortion will clearly lead to a reduction of social welfare since scarce resources are utilized in the process of negotiation while failing to improve the allocation of resources.").

³⁰ Ginsburg & Shechtman, *supra* note 27, at 1860.

³¹ *See* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 988 (1964) ("In a community at all sensitive to the commercialization of human values, it is degrading to thus make a man part of commerce against his will.").

³² *See, e.g.*, Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 205 (1965) (stating that "[t]he criminality of blackmail represents a social judgment that one may not manipulate as an income-producing asset knowledge about another person's past").

³³ *See infra* part IV.E (discussing the libertarian view).

I shall indicate what appears to be the central case of blackmail, and show why under either of the two normative views currently fighting for dominance in legal scholarship—economic wealth maximization and deontologic moral theory—central case blackmail should be condemned. Central case blackmail is both inefficient (the economic view) and wrongful (the deontologic view).³⁴

II. THE CENTRAL CASE OF BLACKMAIL

The “central case” which should inspire the most agreement is where the blackmailer acquires information³⁵ *for the sole purpose of obtaining money or other advantage from the victim, and where he has no intent or desire to publish the information, except as an instrument toward this purpose.* The blackmailer’s sole claim to this advantage rests on his possession of the information as leverage.³⁶

This central case appears in various guises. It describes, for example, Robert Nozick’s paradigm of “unproductive exchange.”³⁷ Nozick argues that an unproductive exchange has these characteristics: (1) the purchaser would be better off if the seller had nothing at all to do with her, (2) if the exchange were impossible, “one of the parties to the potential exchange would be no worse off” than if the exchange were possible,³⁸ and (3) that party does not deserve to have the other party harm her.³⁹ Clearly the victim of my central case meets all of these criteria: she would be better off if the seller of silence were out of her life, and if the money-for-silence exchange were impossible she would be no worse off because the blackmailer would then not have bothered either to acquire the information or to make a threat of disclosure.⁴⁰ (In fact, the victim would be better off if exchanges of money for

³⁴ Whether or not the blackmail act should be *criminalized* is a separate inquiry. See *infra* part V.

³⁵ Types of extortion other than blackmail involve leverage other than the threat to reveal information.

³⁶ My definition of central case blackmail does not include cases where the blackmail is motivated by a desire to reform the behavior of the threatened party.

³⁷ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 84-86 (1974).

³⁸ *Id.* at 85. For a discussion of the importance of this second condition, see *infra* note 140.

³⁹ This third characteristic is implied rather than directly stated. See NOZICK, *supra* note 37, at 84 (distinguishing the case where “I deserved to be harmed by you”) (emphasis omitted).

⁴⁰ Jeffrie Murphy essentially utilizes Nozick’s theory in defending the criminalization of such a case. See Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 *THE MONIST* 156, 163-66 (1980).

silence were impossible.) As for the third condition, there is nothing in the description of central case blackmail that suggests the victim has done something to the blackmailer that would give the blackmailer basis for a corrective justice claim against her;⁴¹ in central case blackmail the threatener knows of a victim's discreditable act *not* because the threatener was himself harmed by it, but rather because he sought out the information for purposes of financial leverage. So all of Nozick's three conditions are met.

Kent Greenawalt's definition of "manipulative threat" also captures the central case: manipulative threats are "threats of action when the actor would not suggest or engage in the action were it not for the threat itself and its linkage to a demand."⁴² In such instances, "the possibility of [disclosure] has come into existence *only* as a part of a plan to induce" the victim to act as the blackmailer desires.⁴³

The central case also plays a central role in the economic analyses. The entrepreneurs of Richard Epstein's "Blackmail, Inc." are by definition persons who go into the information business precisely to obtain material to use as leverage;⁴⁴ they have no independent interest in disclosure aside from maintaining the credibility of their threats. Instead they intend to bind themselves, via contract with the victim, into not using the very resources they have expended money to locate. Similarly, Coase⁴⁵ and Ginsburg

⁴¹ Although Nozick addresses the issue only obliquely, principles of corrective justice suggest that the issue is whether the victim deserves to be harmed in this particular way by this particular person, *not* whether the victim might deserve to be harmed in some way by someone. See Ernest Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 428-38, 444-50 (1987) (corrective justice necessarily requires a relationship between doer and sufferer); see also *infra* note 130.

⁴² Greenawalt, *supra* note 20, at 1099. Greenawalt's category has some divergences from central case blackmail that are not relevant for the instant discussion.

⁴³ *Id.* at 1098.

⁴⁴ See Epstein, *supra* note 13, at 561-66. The argument here is perhaps more properly attributed to Coase, Ginsburg and Shechtman, and Daly and Giertz. See generally Coase, *supra* note 26; George Daly & J. Fred Giertz, *Externalities, Extortion, and Efficiency: Reply*, 68 AM. ECON. REV. 736, 736 (1978); Ginsburg & Shechtman, *supra* note 27. Epstein's argument against blackmail focused on a different aspect, namely, the way a blackmailer assists the victim in defrauding the public. See Epstein, *supra* note 13, at 561-66. Nevertheless, Epstein's apt image of "Blackmail, Inc.," captures the imagination.

⁴⁵ See Coase, *supra* note 26, at 674 ("It would be better if this [blackmail] information were not collected and the resources were used to produce something of value.").

and Shechtman⁴⁶ worry about people expending resources in gathering information they have no intention of ever using except as a lever with which to extract an unproductive transfer payment. Daly and Giertz make a related point from a similar paradigmatic case: "The victim of extortion is forced to compensate the perpetrator to refrain from doing something which does not directly benefit anyone and would not be undertaken save for its bribe generating potential."⁴⁷ The reasons why the economists view such a central case as wasteful are fairly obvious, and are briefly spelled out in the next section.

III. A CONSEQUENTIALIST PERSPECTIVE

A. *The Economic Argument: Allocative and Nonallocative Effects*

The common law does not ordinarily allow persons to bring suit for recompense when they take actions that avert harm to others. Among other things, such suits would be difficult to implement,⁴⁸ would involve high administrative costs, and could, because of problems such as valuation, impose net harms on the supposed recipients of the harm-reducing activity.⁴⁹

Ordinarily, however, persons are permitted to bargain over the potentially harmful acts they are free to perform,⁵⁰ and by contract

⁴⁶ See Ginsburg & Shechtman, *supra* note 27, at 1859.

⁴⁷ Daly & Giertz, *supra* note 44, at 736; see also Daly & Giertz, *supra* note 25 (by implication).

⁴⁸ Consider, for example, the difficult question of how to determine the amount of monetary recovery a harm-avoider should receive. If the court were to use as a measure the amount of damage the claimant refrained from inflicting, it would not only introduce intractable evidentiary problems (how badly *would* the claimant have acted?), but could also encourage potential claimants to create a record of prior bad acts, to provide themselves with a plausible baseline for seeking reward. In addition, there are probably intractable problems of coordination in choosing the proper persons to encourage or reward; in some situations virtually the entire public is capable of claiming that they have refrained from inflicting harm. For an exploration of these and other implementation problems, see Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. LEGAL STUD. 449, 455-56 (1992); see also Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57, 62-64 (1984) (illustrating the difficulty of calculating money owed when one has a "situation of no damage" but rather the avoidance of harm).

⁴⁹ See Gordon, *supra* note 48, at 455-62. In addition, allowing restitutionary rights for harm-avoidance could generate incentives for extortion. See *id.* at 457-58.

⁵⁰ For example, a person who decides not to build a sun-blocking fence out of consideration for his sun-loving neighbor cannot sue to obtain a reward for his

can obtain recompense for refraining from those acts. Contract provides few implementation problems, low administrative costs, and less likelihood that a contracting party will suffer a net harm. Most importantly, the allocative effects of such contracts are positive, as is made clear by the Coasean rationale for allowing and enforcing such contracts. From an economic perspective, it is desirable to distribute both exclusive rights and nonexclusive privileges where they are most "highly valued" (that is, where they can be used most productively). But the law cannot make these allocations perfectly. If a person adversely affected by a liberty values freedom from its effects more than the liberty-holder values its exercise, the person affected should be free to purchase the liberty from the person who values it less, thus correcting the initial misallocation.

Unlike the standard transaction, central case blackmail ordinarily does not (and by definition is not intended to) trigger a reallocation of the contested resource. The blackmailer does not wish to disclose, but only to extract a transfer payment. If, as economists Daly and Giertz assume, the amount of money the victim would be willing to pay is solely a function of the blackmailer's ability to inflict injury to her reputation,⁵¹ and if the central case assumption holds that disclosure has no independent value to the seller/blackmailer, the purchaser will probably purchase silence if blackmail is legal.⁵² Admittedly, strategic behavior might sometimes interfere with the parties' attainment of this mutually beneficial result.⁵³ But as a general matter, allowing central case

forbearance. He can choose, however, to negotiate over the fence's height, and demand consideration from his neighbor in exchange for keeping the fence low.

As to those acts which the potential seller is *not* legally free to perform, the other party ordinarily can bring suit to restrain or obtain compensation for them. Of course, some willingness to pay for harm-avoidance may remain (due to the inadequacies of prospective legal restraint and after-the-fact compensation), but it is usually unlawful for a potential harm-causer to demand payment in exchange for refraining from unlawful acts.

⁵¹ See Daly & Giertz, *supra* note 25, at 998 & fig.1 (schedule DD) (graphing the correlation between victim payments and the blackmailer's ability to injure). Daly and Giertz recognize that the real motivations may be more complex. See *id.* at 998 n.2 (recognizing the possibility that the victim could suffer a greater loss than "the resources he gives up to the extortionist").

⁵² See *id.* at 998 (explaining the likelihood of "successful negotiations"). By contrast, if blackmail is not legal, the victim has leverage with which to refuse purchase. See *infra* part V.A.1.

⁵³ For example, the blackmailer may overestimate the price the victim would be willing to pay and "dig in" at an unrealistic demand level. If this happens, the

blackmail in a world of positive transaction costs would waste resources in bargaining or investigation without any allocative payoff.⁵⁴

B. *The Irrelevance of Lawful or Beneficial Nature
of the Threatened Action*

The initial "paradox" involved the fact that the blackmailer threatened to do an act that was itself lawful and, by implication, beneficial.⁵⁵ The foregoing discussion should make clear that the beneficial or harmful nature of the action threatened is irrelevant to the core economic argument against central case blackmail. In central case blackmail, the threatened action has no independent positive value for either party.⁵⁶ What motivates the bargain

exchange of money for silence will not occur, notwithstanding the fact that the blackmailer could have benefitted from selling his silence at a far lower figure.

⁵⁴ See Coase, *supra* note 26, at 671 (same); Daly & Giertz, *supra* note 25, at 1000 (stating that extortion consumes resources through costs of negotiation with no accompanying improvement in resource allocation, resulting in a net decrease in social welfare); Daly & Giertz, *supra* note 44, at 736 (same); Ginsburg & Shechtman, *supra* note 27, at 1863-64 (same).

Lindgren has characterized this argument as resting on the comparative magnitude of the transaction costs involved in a standard transaction as compared to a blackmail transaction. See Lindgren, *supra* note 10, at 695-97 (comparing transactions costs in "blackmail bargaining" and "legitimate bargaining"). He therefore argues that the argument cannot be advanced without empirical proof of how great the transaction costs in each type of interaction might be. See *id.* But comparison among absolute levels of transaction costs seems besides the point, at least as to central case blackmail occurring between economically motivated actors. In such a nonallocative transaction, any transaction cost is too much. When the time comes to integrate the ideal central case into a more realistic picture of costs and benefits, then Lindgren's point becomes more relevant.

For some of the noneconomic distinctions between standard and blackmail transactions, see *infra* part IV.E.

⁵⁵ Note that the discussion here addresses the beneficial nature of the threatened action and does not separately consider its lawfulness. That is because I am assuming that in assessing the "blackmail paradox," the lawfulness of disclosure would have meaning for the economist merely as an indirect indicator that disclosure yielded more benefits than costs.

The analysis would be more complex if we were to take into account the possibility that *any* criminalization of a threat to do a lawful act would itself have negative consequences. For example, such criminalization may cause confusion or erode respect for the law. I give no attention to these possibilities since I think that criminalizing central case blackmail has no such consequences, largely because the person on the street perceives blackmail to be a wrong; therefore, criminalization of the activity evokes no sense of inconsistency. See Epstein, *supra* note 13, at 553 (referring to the "popular sentiment" for criminalizing blackmail).

⁵⁶ The blackmailer may have some interest in disclosure in order to make the

instead is that the action will have a negative value to the person threatened which is greater than the null or negative⁵⁷ value it has for the threatener.⁵⁸ In such a context, it is in no one's interest for the threat of disclosure to be carried out, and therefore, if the parties are economically motivated,⁵⁹ making the threat will not direct resources toward carrying out the threatened act. The fact that the action will not take place renders unnecessary any assessment of the costs or benefits of the threatened act.⁶⁰

C. *Caveat: Dynamic Economic Effects of Legalizing
Central Case Blackmail*

The above argument suggested that because central case blackmailers will be paid to refrain from disclosure, their threats will not result in an ultimate change in the allocation of the contested information. Real-world effects will necessarily be more complex. For example, legalization could increase not only instances of central case blackmail, but also the number of cases where blackmailers have affirmative and independent motives to disclose.⁶¹

threat of further disclosure credible, but disclosure has leverage value to him only by virtue of the possibility of his contracting with the victim. See, e.g., Daly & Giertz, *supra* note 25, at 998 (including the "externality generating party" who receives no direct benefits as one of the explicit features of their model). This leverage value is thus not an independent positive value to the single-instance, central-case blackmailer.

⁵⁷ Carrying out the threat may be costly to the extortioner, in which case the threatened action is a net negative to both the victim and the blackmailer. See Daly & Giertz, *supra* note 25, at 998 & fig. 1 (depicting marginal benefits and damages).

⁵⁸ Strictly speaking, a blackmail bargain could occur even if disclosure were *more* costly to the blackmailer than to the victim, so long as the blackmailer could conceal this fact and "bluff" the other into paying for silence.

⁵⁹ By "economically motivated" I mean to indicate that the amount of money the victim would be willing to pay is solely a function of the injury to her reputation the blackmailer is in a position to inflict, and that the blackmailer's sole motives are minimizing his costs (of research and the like) and maximizing the payoff he receives from the victim. See *supra* note 51 and accompanying text.

If the parties are *not* economically motivated in this sense, then the analysis is more complex. Such a situation could occur if "honor" has an economic dimension that could dictate whether the victim rejects the blackmail deal. The standard economic case on the "waste" of blackmail depends on the assumption that the parties' demand structures will usually lead to a deal where silence is purchased.

⁶⁰ For example, the model of the Daly and Giertz paper was originally intended to address extortion by threat of violence. See Daly & Giertz, *supra* note 25, at 998 (discussing extortion). Though violence is action which is unlawful and whose consequences are negative, the Daly and Giertz model equally well describes the supply and demand structure of central case blackmail. See Daly & Giertz, *supra* note 44, at 736 n.2 ("It should be noted that the key feature of extortion is the use of a threat to elicit a payment, not whether the threatened action is legal or illegal.").

⁶¹ If blackmail were legalized, persons or corporations might develop a systematic

When disclosure has an independent positive value to blackmailers,⁶² disclosure in a particular case might be worth more to the blackmail entrepreneur than silence is worth to the victim. If so, blackmail efforts may be unsuccessful, and disclosure (reallocation of the information) might result. Such disclosure might sometimes be more socially valuable than silence would have been. For another example, Professor William Landes and Judge Richard Posner have suggested that successful blackmail may have a positive long-term allocative effect on resources other than information, in that fear of having to make blackmail payments may induce potential nonconformists to conform their behavior to majority standards.⁶³ This observation applies even to central case blackmail.

Of course, the fact that blackmail may result in some deterrence or disclosure is not fatal to the consequentialist case for its criminalization. Persons will engage in blackmail only if they expect the activity will yield a payoff in purchased silence—and all silence-yielding (nonallocative) transactions will impose transaction costs that could well outweigh any beneficial disclosure resulting from blackmail attempts that misfire. Further, the possible allocative effect resulting from occasional disclosure or deterrence is not guaranteed to be beneficial. Disclosure may have a social value that is positive (for example, disclosing to the electorate that a mayor has embezzled funds) or negative (for example, making public a secret

practice of blackmail, and they might need to establish a reputation for carrying out their threats. See Epstein, *supra* note 13, at 562 (predicting “an open and public market for a new set of social institution to exploit the gains” if blackmail were legalized).

⁶² When this happens, such blackmail is definitionally outside the “central case.” Unlike the “central case” blackmailer, the company seeking to convince the public of its power and ruthlessness has a reason to gather and disclose information that is independent from the threat to the individual subject of the information. See Coase, *supra* note 26, at 675. This does not mean one can exclude the credibility motive from discussion, however, since the two kinds of blackmail are likely to arise together.

From a deontological perspective, this kind of blackmail would be treated the same as central case blackmail. In central case blackmail, the threatener intends to injure the person who does not want the information disclosed. In credibility-motivated disclosure, this person is an object of the blackmailer’s harm, but so are third parties (prospective victims) whom the blackmailer intends to harm. Since the credibility-seeking blackmailer is disclosing only as a tool to aid him in unjustifiably hurting others, the deontologic argument against him remains strong. See *infra* part IV.

⁶³ See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 42-43 (1975). For background, see RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 231-58, 268-86 (1981).

of no public import that causes deep distress in the family concerned, such as the fact that when the mayor was a child he was sexually abused by a relative). It is similarly possible that blackmail-induced conformity might involve a net cost to society.⁶⁴ Also, Landes and Posner suggest that efficiency considerations of governmental versus private law enforcement may justify criminalization regardless of the extent to which blackmail could deter inefficient acts.⁶⁵

The waste inherent in central case blackmail should lie at the core of the economic analysis. Nevertheless, when an economic assessment of criminalization needs to be made, instances of central case blackmail should not be viewed in isolation, both because other kinds of blackmail will arise that may be difficult to distinguish from it, and because the dynamic effects of successful central case

⁶⁴ I suspect that institutions such as Blackmail, Inc. would primarily discourage harmless behavior that happens to be nonconforming (for example, same-gender sexual relations). Our society already makes harmless and nonconforming behavior too expensive. If so, legalization would then have negative long-term allocative effects, along with the previously discussed waste of transactional and investigative resources.

One might argue that this is a contestable value judgment, and that as an economic matter such costs are appropriately imposed on the nonconforming activity. For example, if the public disapproves of an act, it might be argued that the "disutility" caused the public by their knowledge of the act's occurrence should be imposed upon the actors as a sort of strict liability, much as the injuries that hazardous activities cause are imposed on the activities as a "cost of doing business." There are however several problems with such an argument.

First, determining "what is a cost of what" is not a simple factual judgment. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 133, 133-73 (1970). The cost to the public of knowing that persons are engaging in a disapproved activity is produced by a combination of the public's taste and the persons' behavior. It may be more appropriate to let the public bear the "cost" of its taste than to impose it on the persons whose behavior, when combined with the public taste, causes the offense. An economist would probably ask, "who is the cheapest cost avoider." See *id.* at 135. Since tastes about *others'* sexual behavior or orientation are easier to change than one's own behavior or orientation, I suspect the public is a cheaper cost avoider in this case. My rebuttal here is, of course, a two-penny version of a now-standard utilitarian defense of sheltering consensual adult sexual relations from legal regulation. See JOHN S. MILL, *ON LIBERTY* 91-103 (Currin V. Shields ed., 1956).

Second, so long as the harmless behavior is *not* disclosed (and in central case blackmail it would indeed remain secret), there are few if any costs to the public. Reducing or increasing the number of potentially offensive acts would not affect the costs to a public unaware of them.

⁶⁵ See Landes & Posner, *supra* note 63, at 42 (indicating that criminalizing blackmail may stem from "the decision to rely on a public monopoly" in criminal law enforcement).

blackmail may result in changing the behavior of persons who might fear blackmail in the future.

D. *Imperfect Knowledge*

Given the above complications, it might be argued that allowing blackmail data to be bought and sold is the best way to finesse the economic unknowns. After all, markets supposedly incorporate the decentralized knowledge of many parties to direct resources to their highest valued uses, even when those uses may be unknown to central decisionmakers.⁶⁶ The Coase theorem teaches that in a properly functioning market, absent transaction costs, people will trade a resource until it reaches its highest valued use regardless of where the government initially assigns its ownership.⁶⁷ If transaction costs are reasonably low and if the theorem holds, it might be argued that allowing blackmail transactions will simultaneously tell us whether disclosure or silence is optimal and move us to the optimal result.

However, in blackmail the transaction costs can be so high as to preclude all the affected parties from making their preferences known through the market, thus preventing transactions from reliably directing resources to their highest valued uses. For example, there may be a multitude of voters who would be willing to pay something to learn that their mayor has embezzled public funds. Yet a person who has this information cannot practicably contact this mass of possible buyers; even if he could, freerider strategic behavior could well forestall agreement,⁶⁸ particularly when coupled with the well-recognized difficulties that accompany any attempt to sell a secret to people ignorant of its content.⁶⁹ Because of these difficulties that are well known to affect markets in information and other intellectual products, most of the societal

⁶⁶ This classic argument is usually attributed to Hayek. See Friedrich A. Hayek, *The Use of Knowledge in Society* 35 AM. ECON. REV. 519, 524-25 (1945) (arguing that decentralized decisionmaking can often utilize knowledge better than centralized planning).

⁶⁷ See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); see also Herbert Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 CORNELL L. REV. 783, 783 (1990).

⁶⁸ Such problems might be avoided if there were a journalistic market that paid for "tips" an amount equivalent to what the citizens would pay in a competitive market.

⁶⁹ See Gordon, *supra* note 48, at 475-77 (examining the difficulties that would beset the seller of an intellectual product if he had no rights to prevent copying).

benefits that could flow from disclosure are likely to be kept *external* to the blackmailer's decision. If so, the outcome of dealings among blackmailer, victim, and other possible buyers will prove unreliable as a guide to societal economic welfare.

Even if the transaction cost and strategic behavior problems could be overcome, blackmail raises an additional problem for application of the Coase theorem. For certain fundamental resources, the location of the highest valued use can vary with the law's assignment of initial entitlements. These are the resources whose possession can affect our ability to enjoy all other goods. Plausible examples include life, sight, and one's standing in a community of peers. The fact that the valuation of these resources can depend on the law is a result of the "wealth effect" that ownership has on one's ability to express one's preferences in the market.⁷⁰ Ronald Coase himself realized that changes in the allocation of rights concerning fundamental resources (such as the abolition of slaveowners' rights over other human beings) could affect the final allocation of goods even in a world without transaction costs.⁷¹ Herbert Hovenkamp goes so far as to argue that the absence of wealth effects is one of the *premises* of the Coase theorem.⁷² Reputation may well be one of those fundamental resources with strong wealth effects.

The wealth effect phenomenon does not afflict central case blackmail because, regardless of initial allocations, both parties prefer nondisclosure and will negotiate to achieve it.⁷³ However,

⁷⁰ See *infra* note 84 (discussing the phenomenon of "wealth" or "income" effects).

⁷¹ See RONALD H. COASE, *Notes on the Problem of Social Cost*, in *THE FIRM, THE MARKET, AND THE LAW* 157, 173-74 (1988) (commenting, however, that wealth effects "will normally be so insignificant that they can safely be neglected").

⁷² See Hovenkamp, *supra* note 67, at 787. Hovenkamp also notes, however, that the Coase theorem can be interpreted as having two parts: an "efficiency thesis" which says that resources will end up in their highest valued uses regardless of how legal rights are allocated, and an "invariance thesis" which says that resources will also end up in the *same* uses regardless of how legal rights are allocated. See *id.* at 785. Wealth effects are technically relevant only to the invariance thesis. As for the first thesis, actors in a world without transaction costs will still reach efficient results even if strong wealth effects exist, although what constitutes efficient resource use may well be different when the allocation of legal rights shifts.

⁷³ Regardless of who starts out with rights over the information, in central case blackmail silence will be the end result of the transaction (that is, silence will be the highest valued use of the information as between blackmailer and victim) because the value of disclosure is not positive for either party. See *supra* notes 50-59 and accompanying text.

in the more analytically troubling cases where disclosure has some independent positive value to the blackmailer, the wealth effect makes the market an unreliable indicator of the location of the information's highest valued use.⁷⁴ In fact, for those fundamental resources which implicate strong wealth effects, one cannot speak of the highest valued use except in the context of a particular allocative starting point.⁷⁵

To illustrate how the highest valued use may vary with the allocation of legal rights, assume for example that a right of privacy shields a celebrity's disastrous secret⁷⁶ so that the celebrity has a kind of ownership in the information. If a neighbor learns the secret and wishes to make it into a docudrama to sell to the networks, and if she needs the celebrity's permission to do so, then the celebrity may be unwilling to give permission no matter how much money the neighbor offers. If so, the highest valued use of the information seems to be silence.

However, if we assume instead that the celebrity does not own the information—if, for example, the jurisdiction's right to privacy does not protect secrets of this type or does not extend to docudramas⁷⁷—the neighbor who learned the secret no longer needs to ask

Where the highest valued use is known, usual economic wisdom suggests the resource should be initially assigned to that use. Blackmail law produces an analogous result: though it does not assign the victim a right to silence (for when parties other than the blackmailer are concerned, disclosure might be the higher-valued use), it instead prohibits the central case blackmailer from selling the victim her liberty of disclosure. As between *those two* parties, the transaction is not allocatively effective, since the central case blackmailer will always sell and silence will always result.

⁷⁴ Assume that the value of disclosure is positive for the blackmailer (e.g., she has markets for the information in addition to the victim). If she has both the liberty to disclose and a power to sell that liberty to anyone she wants, she will have a minimum price beneath which she will not sell—and the person who is the subject of the information may not have enough money or borrowing power to meet that price. Such noncentral types of blackmail are thus potentially afflicted with strong wealth effects. These blackmail cases are more difficult to evaluate from an economic perspective, for these instances may produce disclosures that benefit third parties.

⁷⁵ To decide what is the best use for such resources, it is necessary to utilize a criterion (perhaps "utility") other than the usual economic criterion of "value" measured by willingness to pay.

⁷⁶ Wealth effects strong enough to cause variation in highest valued use will occur primarily with negative reputational information. Neutral or positive reputational information is likely to have a constant highest valued use regardless of initial allocation, except where the party concerned has a particularly strong desire for privacy.

⁷⁷ The docudrama issue remains unresolved within right of publicity doctrine. Such a suit was reportedly brought by Elizabeth Taylor. See Tamar Levin, *Whose Life*

permission. Instead, she may give the celebrity a choice between disclosure or paying the equivalent of what a network would pay for the story. Against this legal background, the celebrity is limited in his ability to protect his reputation by the amount of money he possesses or can borrow. If the celebrity does not have enough money to outbid the network, then the highest valued use of the information would now seem to be publication, even if all that has changed is the initial assignment of rights.

As I have argued elsewhere, an economist should not give the market her usual deference in situations where the allocative outcome of bargaining will depend on the initial assignment of ownership rights.⁷⁸ Of course, this argument suggests only that we should not rely on the market to inform us what the best use is for some kinds of resources; the argument does not itself tell us anything about what the best use should be. Outside the instance of central case blackmail, economists might well debate to whom the relevant rights should be assigned.⁷⁹ Nevertheless, to the extent that the market is unable to make determinate choices regarding the highest valued use of resources such as one's good reputation, we know that outlawing blackmail deprives us of relatively little in the way of meaningful information. The only determinate answer likely to be provided by the market is with respect to central case blackmail: whatever the initial allocation, the parties will likely opt for silence. As to that case, then, the market analysis provides useful economic information, and that information supports criminalization.

Is It, Anyway? Legally, It's Hard to Tell, N.Y. TIMES, Nov. 21, 1982, § 2, at 1 (discussing Taylor's suit and the confrontation between the right of publicity and First Amendment doctrine); see also Jane Hall, *When a Life Is Public, How Much Is Private?*, L.A. TIMES, Oct. 28, 1989, § F, at 1 (reporting that Taylor's suit did not go to trial and a planned docudrama was dropped "for creative reasons").

⁷⁸ See Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1042-43 (1990) (book review).

⁷⁹ For example, as between the news media and someone seeking to use his right of publicity or his copyright as an instrument of private censorship, it may be best to place the entitlement in the media. See *id.*

IV. A NONCONSEQUENTIALIST MORAL VIEW

A. *Background*

I suspect that policymakers prohibit blackmail less because of economic waste or inefficiency than because they perceive the act of blackmail to be wrong in itself. Yet the nonconsequential case for blackmail's wrongfulness has not yet been clearly stated. In one of the first and most interesting articles on modern blackmail theory, Jeffrie Murphy suggested that the deontological case against blackmail might have intractable difficulties.⁸⁰ Even Robert Nozick, usually thought of as a deontologic theorist, has grounded his blackmail argument on the idea of "unproductive exchanges,"⁸¹ a rationale that sounds in consequentialism and whose deontological rationale is opaque. A number of commentators have asked why it is wrong for an exchange to be "unproductive" in Nozick's sense,⁸² and the literature has provided no apparent answer.⁸³

Yet to me the deontologic case against blackmail seems clear. One person deliberately seeks to harm another to serve her own ends—to exact money or other advantage—and does so in a context where she has no conceivable justification for her act. Admittedly, the sum that the victim pays a blackmailer lacks *economic* significance because it is a "mere" transfer payment that has virtually no systematic allocative effect,⁸⁴ but from a deontologic perspective

⁸⁰ See Murphy, *supra* note 40, at 162-63.

⁸¹ See NOZICK, *supra* note 37, at 84-86.

⁸² See Murphy, *supra* note 40, at 158 ("It is not obvious on its face . . . that unproductive economic exchanges are *immoral*. Nozick gives no such argument and I am skeptical that one can be given."); cf. Lindgren, *supra* note 10, at 700 ("If blackmail is an unproductive exchange, it is certainly not unproductive in the sense Nozick intends.").

⁸³ Standing alone, Nozick's paradigm of "unproductive exchange" is an insufficient explanation of blackmail's wrongfulness. But when it is subjected to a few alterations, the "unproductive exchange" paradigm can provide a definition of "harm" useful for the blackmail context. See *infra* part IV.E.2. The notion of "harm," in turn, constitutes an essential link in this Article's argument that blackmail is wrongful because it constitutes an intentional unjustified harm to a justified holding.

⁸⁴ Transfers of income can have indirect allocative effects if the parties' respective demand for goods shifts due to their change in income. See, e.g., E.J. Mishan, *The Postwar Literature on Externalities: An Interpretive Essay*, 9 J. ECON. LITERATURE 1, 18-21 (1971) (illustrating the income or wealth effects that allocating rights has on the valuation of environmental spillovers). While a loss of reputation would likely have significant wealth effects, see discussion *supra* notes 70-78 and accompanying text, loss of money may not.

the transfer payment provides the key to the whole analysis. The nature of the weapon the blackmailer uses to obtain her payment—that her threat of disclosure is a threat to do something lawful—tends to obscure this from view. But the fact that the threat relates to the disclosure of information is no more than a red herring.⁸⁵ The blackmailer is concerned with the nature of the threat she employs only in the instrumental way that a butcher is concerned with what knife to use.⁸⁶

To demonstrate the irrelevance of the threatened act from a nonconsequentialist perspective of blackmail, I will employ the “doctrine of double effect.”⁸⁷ Once the nature of the blackmailer’s act is stripped clear with the analogical aid of that doctrine, blackmail can be seen simply as an unjustified intentional infliction of harm on another to benefit one’s self.

B. *Means and Ends*

Economics, act-utilitarianism, and other forms of consequentialist normative inquiry take an “impartial” or objective view of reality. Their norms are agent-neutral; the only question in such systems is what outcomes should obtain.⁸⁸ By contrast, there are duty-oriented or “deontological” perspectives that ask *how* outcomes are arrived at. The deontological perspective is sometimes said to be

The money paid by the blackmail victim is likely to have significant allocative “income effects” if, for example, the amount happens to constitute a very high percentage of the assets or the income stream of one of the parties. However, if the blackmail payment is not very large, its transfer will probably have no significant allocative results; if so, from an economic perspective, it would not matter who owns the money.

Even if the size of the payment is great enough to cause income effects, it will be difficult to analyze the allocative effects in any systematic way. (Would the victims of successful blackmail switch from Cadillacs to Tercels while successful blackmailers switched from Escorts to BMWs?) Even if such income effects exist, therefore, they would be hard to predict and thus not useful for an economic analysis of blackmail.

⁸⁵ Manipulative threats may not even be communications. Greenawalt has argued that such a threat is a type of action, and possesses a “situation-altering character [that] takes it outside the scope of expression,” at least for some purposes. Greenawalt, *supra* note 20, at 1099.

⁸⁶ The violent and unlawful nature of a threatened act may make the extortionist’s moral wrong more serious (“I will break your legs” as compared with “I will disclose your secret”), but a threat may constitute a moral wrong even if the threatened act is neither wrongful nor unlawful.

⁸⁷ See *infra* text accompanying notes 105-06.

⁸⁸ My discussion comparing objective and subjective perspectives on morality is much indebted to THOMAS NAGEL, *THE VIEW FROM NOWHERE* 165-88 (1986).

the perspective of the agent by whose acts the outcomes are achieved;⁸⁹ it is in that way subjective. To the actor, it matters not only that the ultimate outcome of an act may be good, but also whether she will in the process have to do an act that is wrong⁹⁰—and wrongness is not determined solely by reference to ultimate outcomes. Rather, the core of the dominant deontologic view holds that it is wrong to treat another as a means rather than as an end in himself, “to treat someone as if he existed for purposes he does not share.”⁹¹

To transfer unjustifiably another’s benefit to one’s self is particularly wrongful, for it denies the fundamental equality of persons so to prefer one’s self over another. But under the strict deontologic view, it is also wrongful to use another person to achieve a beneficial outcome for many. This principle almost certainly has some popular recognition; most of us would hesitate to do significant injury to an innocent even if the result were to give succor to an entire city.⁹² The duty not to harm the innocent is considered a binding side-constraint on an agent’s pursuit of good outcomes.⁹³

⁸⁹ Although some commentators consider rule utilitarianism a form of deontology, see, e.g., Robert G. Olson, *Deontological Ethics*, in 2 THE ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 12, at 343, the discussion here assumes a Kant-oriented deontological approach. Note also that the deontological perspective is only one of several types of agent-relativity. See NAGEL, *supra* note 88, at 165-67.

⁹⁰ Nagel states that “[d]eontological reasons have their full force against your doing something—not just against its happening.” NAGEL, *supra* note 88, at 177.

⁹¹ Warren S. Quinn, *Actions, Intention, and Consequences: The Doctrine of Double Effect*, in JOHN M. FISCHER & MARK RAVIZZA, *ETHICS: PROBLEMS AND PRINCIPLES* 179, 190 n.25 (1992) (applying a Kantian approach).

⁹² If this were not so, there would be little difficulty regarding Ivan Karamazov’s famous question:

Tell me yourself, I challenge you—answer. Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, but that it was essential and inevitable to torture to death only one tiny creature—that little child . . . and to found that edifice on its unavenged tears, would you consent to be the architect under those conditions? Tell me, and tell the truth.

FYODOR DOSTOEVSKI, *THE BROTHERS KARAMAZOV* 226 (Constance Garnett trans., 1976) (1880).

Admittedly, there are many ways to argue that the perception that we are morally constrained in such cases is false consciousness. Cf. NAGEL, *supra* note 88, at 186-87 (discussing whether any pursuit of objective ethics depends on false consciousness).

⁹³ See NOZICK, *supra* note 37, at 28-35.

From a deontologic perspective, blackmail is a harm that impugns the worth of the targeted individual,⁹⁴ using his welfare as a mere tool for another's advancement. Thomas Nagel observes:

The deontological constraint . . . expresses the direct appeal to the point of view of the agent from the point of view of the person on whom he is acting. *It operates through that relation.* The victim feels outrage when he is deliberately harmed . . . not simply because of the quantity of the harm but because of the assault on his value of having *my* actions guided by *his* evil.⁹⁵

Acts of unjustified intentional harm are thus the perversion of the personal. Blackmail is one such act,⁹⁶ and as such is forbidden by the central deontologic constraint.

C. *Intent, Consequences, and the Doctrine of Double Effect*

As mentioned, deontologic approaches usually stress the duties that exist independently of the consequences they cause. It is said, for example, that one person should never use another solely as a means,⁹⁷ which can be taken to imply that no unconsented harm should be done to another regardless of the good to be produced by the actor's overall goal. Some deontological philosophers, however, distinguish between direct and oblique intention,⁹⁸ between foreseen and intended effects,⁹⁹ or among effects that vary in their degree of "closeness" with the intended effect.¹⁰⁰

⁹⁴ Cf. Kamm, *supra* note 16 (exploring certain connections between moral duty and status).

⁹⁵ NAGEL, *supra* note 88, at 184 (emphasis added).

⁹⁶ George Fletcher argues that a crucial harm done in blackmail is the relation of dominance which the criminal forces on the victim. See Fletcher, *supra* note 16, at 1626-28. His presentation persuasively suggests that the deontological insult—the blackmailer's perversion of the relation that should exist between subjective agents, that each treat the other as an end and not a means—has a psychological dimension of great immediacy.

⁹⁷ For instance, Kant writes that one should "[a]ct in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end." IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 96 (H.J. Paton trans., Harper & Row, Publishers, Inc. 1964) (1948). Of course, Kant's views are open to many differing interpretations.

⁹⁸ See, e.g., Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in FISCHER & RAVIZZA, *supra* note 91, at 59, 61 (applying Bentham's distinction between direct and oblique intent to the doctrine of double effect).

⁹⁹ See Kamm, *supra* note 16, at 376-78.

¹⁰⁰ See, e.g., Foot, *supra* note 98, at 61-62 (discussing formulating a criterion of closeness); Quinn, *supra* note 91, at 182 (discussing Hart's critique of "closeness" and

Where a consequence is not directly intended,¹⁰¹ the deontological constraints may apply with less force.

The usefulness of the distinction can be illustrated by looking at the kind of puzzle that has long fascinated Guido Calabresi: Why is it that our society spends much more to save named individuals—spending a fortune to rescue a child who has fallen down a nearly-inaccessible well, for example, or a bridge worker caught under a fallen girder—than we do on safety precautions that would avoid the same amount of harm (or even more) to unknown but statistically certain individuals?¹⁰² The most obvious explanation of these phenomena is a deontological distinction between direct and indirect intention, between the certainty of a known event and the indefiniteness of the merely foreseeable: it is morally worse to turn one's back on a known person with real suffering than to ignore the odds that in a distant place an unknown person will die.¹⁰³

A key attraction of the deontologic perspective is its focus on the relation between the actor's intent and the personhood of the

the doctrine of double effect). The various distinctions mentioned (foreseen/intended, close/not close, and direct/oblique) are verbal attempts to capture similar concepts.

¹⁰¹ The philosophers are using "intent" as it appears in ordinary language, rather than as a torts lawyer would use the term. Under the Restatement (Second) of Torts, an actor "intends" all those results which he knows his actions are substantially certain to bring about. See RESTATEMENT (SECOND) OF TORTS § 8A (1964) ("The word 'intent' is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.") (emphasis added). For the philosophers, by contrast, mere knowledge that a bad result will follow does not suffice to constitute direct intention.

¹⁰² See, e.g., GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 6 (1985).

¹⁰³ The deontological view may also explain other puzzles. Jurors in tort cases charging corporations with dangerous product designs may be more likely to find liability and/or award large punitive damages against the corporation if its officers had engaged in explicit calculations of costs and benefits. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 361-62, 381-83 (1981) (describing the aggravating effect of Ford's explicit balancing of the cost of deaths from design features of the Ford Pinto against the minimal cost of increasing the car's safety); CALABRESI, *supra* note 102, at 184 n.322 (discussing jury's reaction to cost-benefit analysis in *Grimshaw*); Malcolm E. Wheeler, *The Public's Costly Mistrust of Cost-Benefit Safety Analysis*, NAT'L L.J., Oct. 13, 1980, at 26, 26 (discussing the paradigmatic Pinto prosecution "where persons from virtually all sectors expressed their antipathy for the use of cost-benefit analysis where safety is in issue"). This surprises many, for the tort system itself is widely viewed as implementing a cost/benefit calculus. See WILLIAM M. LANDES & RICHARD M. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987). One explanation may be that jurors share a deontologic value system: the more explicit the decision a corporation makes to take an act that causes injury, the more that decision constitutes a directly intended harm.

other. To let the child perish in the well is equivalent to telling a known person that she is worth less than the resources it would take to save her; to fail to put covers on all wells delivers no such message to any particular person. The former action is an affront to an individual in the way the latter is not.¹⁰⁴ We identify with the person who feels herself the victim of an intentional choice, even if the choice is an arguably good one (for instance, foregoing the rescue of one child in order to save the funds needed to avert peril to many more).

The rescue examples deal with aiding. Blackmail is a case of harming. The role of direct intent in assessing the deontological status of harmful acts is usefully addressed with the "doctrine of double effect."

Advocates of the doctrine of double effect (DDE) allow a departure from the strong constraints of deontologic theory. They argue that it can sometimes be morally permissible to do an act that has bad consequences if they are outweighed by the good,¹⁰⁵ so long as the harms are not directly intended.¹⁰⁶ To determine

¹⁰⁴ Person-directed choices afford the choosers the ability to discriminate for or against individuals, while random effects provide no such opportunity. Perhaps part of the grievance involved in "direct" choices is that the known victim feels singled out in a way that the random victim may not.

This consideration impacts on both equality and utility. Allowing person-directed discrimination creates the possibility of unequal treatment; this possibility may in turn lead to anger and revolt among those subjected to discrimination as well as personal demoralization.

Kamm offers another possible explanation of why it might be particularly important not to cause direct intentional harm, noting that "[i]f we are inviolable in a certain way, we are more important creatures than violable ones; such a higher status is itself a benefit to us." Kamm, *supra* note 16, at 386 (discussing the significance of inviolability).

¹⁰⁵ Sometimes the doctrine's effect is stated in an all-or-nothing manner. I find Quinn's approach more persuasive:

The DDE . . . discriminates against agency in which there is some kind of intending of an objectionable outcome as conducive to the agent's end, and it discriminates in favor of agency that involves only foreseeing, but not that kind of intending, of an objectionable outcome. That is, it favors and disfavors these forms of agency in allowing that, *ceteris paribus* [other things being equal], the pursuit of a great enough good might justify one but not the other.

Quinn, *supra* note 91, at 181.

¹⁰⁶ Nagel gives the principle the following interpretation:

The principle [of double effect] says that to violate deontological constraints one must maltreat someone else intentionally. The maltreatment must be something that one does or chooses, either as an end or as a means, rather than something one's actions merely cause or fail to prevent but that one

whether a harm is directly intended, DDE asks, "if the harm could somehow be averted, would the actor undertake the disputed action anyway?" "[A] man is said not strictly, or directly, to intend the foreseen consequences of his voluntary actions where these are neither the end at which he is aiming nor the means to this end."¹⁰⁷

A standard hypothetical illustrating DDE compares strategic bombing (done to win the war by destroying munitions factories) with terror bombing (done to win the war by demoralizing the enemy). It is assumed that the war is a "just war," that both bomber pilots know how many civilians they will kill, and that both kinds of bombing will each kill exactly the same number of civilians.

The killing of civilians does not motivate the strategic bomber's action and so is not his direct intent; we know this because if the civilians were somehow protected from injury, he would have bombed anyway. Under DDE, therefore, the strategic bomber in a just war does not necessarily violate deontological constraints. By contrast, the terror bomber would not bomb if civilians were protected, for then he could not accomplish his goal of demoralizing the enemy. Killing civilians is thus part of his "direct" intent. Therefore, even in a just war, terror bombing would be forbidden under DDE.

Though the doctrine and its application have their difficulties,¹⁰⁸ DDE serves as a useful tool for our purposes. The doctrine suggests that when one's direct intent is to do good, harmful side-effects do not constitute absolute constraints against the action. Conversely, in what one might call the "doctrine of single effect" (DSE), when one's direct intent is to do harm, beneficial side-effects

doesn't aim at.

NAGEL, *supra* note 88, at 179.

¹⁰⁷ Foot, *supra* note 98, at 61.

¹⁰⁸ It is difficult to distinguish between directly and obliquely intended effects; verbal acrobatics can turn virtually anything into an obliquely intended effect. See Kamm, *supra* note 16, at 376-78. Were that to happen, a strict application of DDE might cause deontology to collapse into consequentialism. For this reason, among others, not all deontological theorists subscribe to DDE. See, e.g., Foot, *supra* note 98, at 65 (suggesting that application of DDE may lead to incorrect results).

have little or no deontological significance.¹⁰⁹ DSE recapitulates, of course, the basic deontological position against using others.

With regard to blackmail, our task is to decide what deontological significance should be given to the fact that the blackmailer has a lawful liberty to do what he threatens to do. We are also interested in whether the deontological inquiry might (or must) take into account whatever beneficial effects could result from successful blackmail.¹¹⁰ Under DDE, one asks if the actor would change his behavior if the harmful effects were eliminated. Under my suggested correlative, DSE, one would ask if the actor would change his behavior if the *beneficial* effects were eliminated. Using that test, it appears that no significance should be given to either the lawful nature of the threatened disclosure or the potentially beneficial side-effects of blackmail. Were the disclosure unlawful or impossible but the victim still capable of being frightened into paying, the typical blackmailer would extract the money anyway. Similarly, were the supposed beneficial side-effects of blackmail somehow eliminated, that would make no difference to the blackmailer.

Under DSE, therefore, the blackmailer violates deontological constraints if he threatens disclosure in order to obtain money or other advantage because his intent is directed to the money, not to the disclosure or beneficial side-effects that might be produced. These latter factors are thus outside the intent of the blackmailer in the same way the killing of civilians is outside the intent of the strategic bomber: if blackmail's purported beneficial effects were eliminated or if civilians were protected, the actors would go forward.

¹⁰⁹ If an actor's end does not violate the deontologic constraints, then under the doctrine of double effect the existence of bad side-effects does not necessarily bar his activity. This may help to distinguish blackmail from a boycott or an act of civil disobedience. In such cases it may be that the end is good, perhaps because the persons being pressured may be receiving their "just deserts." Cf. Fletcher, *supra* note 96, at 1635 (suggesting that it may be just to counteract the domination of one party by reducing him to the position of those he has dominated). If so, these activities may be distinguishable from blackmail because they may have a permissible or just end, while the blackmailer's end is to do an unjustified harm. *But see* Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 273, 281-83 (1982) (arguing that blackmail is similar to boycotts and that neither should be criminalized).

Haksar distinguishes civil disobedience from coercive threats according to the morality of the course of conduct the threatener will engage in if his threat is not carried out. *See* Vinit Haksar, *Coercive Proposals [Rawls and Ghandi]*, 4 POL. THEORY 65, 67-68 (1976). My argument, by contrast, is that a threat with an immoral end can be condemned as coercive without reference to the nature of the threatened action.

¹¹⁰ *See supra* text accompanying note 63.

Since the blackmailer's end is harm, the act is not redeemable by the possibility that some component of the means he uses might be lawful or beneficial.¹¹¹ Like the terror bomber, the direct intent of the blackmailer is to do unjustified harm, and as with terror bombing, such intentional harm is impermissible regardless of the benefits that might also flow from it.

D. *The "Property Right" Objection*

One problem some observers have with blackmail law is the absence of any "property right" that the blackmailer has violated.¹¹² Property rights are usually understood as a particular subset of rights characterized by their transferability and exclusivity.¹¹³ American law gives only very limited transferable and exclusive rights in reputation. These are the "rights of publicity," which are effective against use of one's name or likeness in trade.¹¹⁴ Admittedly, these transferable and exclusive rights in reputation do not apply to the kind of disclosure a blackmailer ordinarily contemplates. But nothing limits actionable "harm" to such a narrowly defined subset of rights. All that is needed is a

¹¹¹ One can argue that if an "end" is intentional harming, deontologic constraints will be violated even if a directly intended "means" is not itself harmful. For example, a person who perversely enjoys harming those he has benefitted may give candy to a child in the hope that the child will both enjoy the candy today and get cavities later. Whether or not the child is later afflicted with dental caries, it can be argued that the malevolent act still violates deontological constraints. One need not go so far in order to condemn a blackmailer's acts, however, for his means indeed do harm to his victim.

¹¹² Cf. Mack, *supra* note 109, at 276 (discussing the tension between rights-based and policy-oriented justifications for criminalizing blackmail).

¹¹³ See BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 99-100 & 100 n.11 (1977); A.M. HONORÉ, OWNERSHIP IN PROPERTY: CASES, CONCEPTS, CRITIQUES 78 (L.C. Becker & K. Kipnis eds., 1984); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 746-47 (1917).

¹¹⁴ In most states, the liberty to use one's name or depiction is "property" because exclusive rights to it can be conveyed to another. The turning point in the propertization of this liberty is the case of *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953). The court held that a baseball player could make a binding assignment of a "right to publicity" encompassing the use of his photograph on baseball cards. Once such an assignment was made, it was binding even against other persons whom the player later wished to license and (presumably) against the baseball player himself.

justified holding or a justified liberty.¹¹⁵ If it is intentionally harmed, some justification must be shown.¹¹⁶

This is hardly a novel suggestion. In 1887 Sir Frederick Pollock "asserted it to be 'a general proposition of English law that it is a wrong to do wilful harm to one's neighbor without lawful justification or excuse.'"¹¹⁷ The common law is full of examples where judges protect nonproperty interests against malice.¹¹⁸ The tort of interference with prospective advantage,¹¹⁹ and New York's prima facie tort,¹²⁰ provide particularly striking examples of judicial protection of nonproperty interests against activity where the only purpose is to cause harm.¹²¹ Even where malice is

¹¹⁵ See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 166-96 (1992) (discussing corrective justice as a substantive basis for property rights). American law has even premised property on quite inchoate rights, such as the liberty of using one's labor. See *id.* at 152-53.

¹¹⁶ What I suggest here does not enshrine the status quo, both because of the wide range of justifications that exist (giving rise to privileges to harm) and because nonholders have many rights, too. The theory I discuss here is conservative only if joined to the notion that rights must be negative, "freedom-from" rights. See ISAIAS BERLIN, *TWO CONCEPTS OF LIBERTY* 7-16 (discussing liberty as a "minimum area of personal freedom" within which there can be no interference). But deontologic rights can also be positive; consider, for example, Locke's obligation of charity, which "gives every Man a Title to so much out of another's Plenty, as will keep him from extrem want, where he has no means to subsist otherwise." JOHN LOCKE, *First Treatise, in TWO TREATISES OF GOVERNMENT* § 42, at 170 (Peter Laslett ed., 1960) (2d ed. 1967) (1690).

¹¹⁷ Philip Halpern, *Intentional Torts and the Restatement: A Petition for Rehearing*, 7 BUFF. L. REV. 7 n.6 (1957) (quoting POLLOCK, *LAW OF TORTS* 21 (1st ed. 1887)). Halpern's article is a general defense of the prima facie tort approach, which makes tortious any unjustified intentional causing of harm.

¹¹⁸ One need not have a malicious feeling (spite, envy, etc.) in order to do a legally malicious act. Today "malice" (under that name or under the name "prima facie tort") is sometimes even used to refer to the causing of unjustified injury. Cf. Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 345-46 (1980) (discussing the disappearance of an original malice requirement and the uncertainty involved in the application of prima facie tort law).

On the possible role of intent-to-injure in malice, see *supra* text accompanying notes 105-06 discussing the doctrine of double effect).

¹¹⁹ A leading case here is *Tuttle v. Buck*, 119 N.W. 946 (Minn. 1909) (finding a cause of action where barber alleged that another barber was set up in a competing shop solely to harm plaintiff's business).

¹²⁰ The leading case here is *Advance Music Corp. v. American Tobacco Co.*, 70 N.E.2d 401 (N.Y. 1946) (finding a sufficient allegation of a prima facie tort where plaintiff music publisher claimed injury from defendant radio show sponsor's unscientific ranking of song popularity). For a more general discussion, see Halpern, *supra* note 117; see also Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7-9 (1894) (discussing policymaking components in the judicial recognition of a privilege to inflict harm, especially in economic contexts).

¹²¹ Perhaps the most vivid example, however, is provided by the classic case of

absent, non-property interests receive some legal protection. For example, no one considers mental well-being a "property" interest, yet probably all states recognize a tort of assault, which requires intentionally placing another in fear or apprehension of contact,¹²² and many states now recognize a tort of intentional infliction of emotional distress.¹²³ Some states even recognize a tort of negligent infliction of emotional distress.¹²⁴ We have many conditional rights in aspects of our well-being which are functionally or by law nontransferable. Some of those conditional rights protect nonproperty interests even against the malicious use of property privileges that are otherwise well-established.¹²⁵ So it should not be surprising if blackmail law protected a nonproperty interest.

In fact, to demand a property right as a premise for giving protection against harm is topsy-turvy. Many theorists have *premised* property on a deontological right against harm. For example, such a right is part of the foundation for John Locke's theory of property.¹²⁶

Keeble v. Hickeringill, 103 Eng. Rep. 1127 (Q.B. 1707). The plaintiff had been in the habit of capturing ducks who came to decoys he deployed on the water. The defendant began shooting his gun to scare the ducks away. Since the plaintiff had no possession of the escaping ducks, he had no title in them, and so the question arose whether the plaintiff had a sufficient interest in the prospective ducks to bring suit against someone who seemed to have no reason but malice for depriving him of that prospective advantage. Plaintiff's nonproperty interest was held sufficient to give him a right of action against unjustified harm. *See id.* at 1127-29.

¹²² *See* RESTATEMENT (SECOND) OF TORTS § 21 (1965).

¹²³ *See, e.g.*, *George v. Jordan Marsh Co.*, 268 N.E.2d 915, 921 (Mass. 1971) (finding a cause of action where plaintiff suffered two heart attacks following harassment by a collection agency); *see also* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

¹²⁴ *See, e.g.*, *Dillon v. Legg*, 441 P.2d 912, 914-25 (Cal. 1968) (en banc) (allowing recovery for emotional distress to a mother who saw her child struck and killed by an automobile). *But see* RESTATEMENT (SECOND) OF TORTS § 436A (1965) (finding no liability for negligent infliction of emotional disturbance absent physical harm).

¹²⁵ Consider, for example, the spite fence cases. There the court protects a neighbor's nonproperty interest in, e.g., an unobstructed view, against a neighbor's malicious attempt to block it off. Were the fence builder to have a reason to build other than causing injury, then the court would not give the neighbor's view any protection. *See, e.g.*, *Roper v. Durham*, 353 S.E.2d 476, 478 (Ga. 1987) (finding that possible malicious intent was insufficient to justify removal of a fence when the fence was also installed to mark the property's boundary).

¹²⁶ *See Second Treatise* §§ 25-51, in LOCKE, *supra* note 116. For a discussion arguing that Lockean property concepts are dependent upon an underlying right against harm, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540-49 (1993). For discussion of a similar connection from the perspective of corrective justice, see Gordon, *supra* note 115, at 180-96, 207-10, 238-48.

Something like the "property rights" objection is sometimes attributed to Jeffrie Murphy,¹²⁷ but Professor Murphy has a more subtle difficulty with the liberal defense of blackmail law: he cannot see that the victim has had *any* rights violated. In particular, Murphy writes, a person who has done something discreditable has no right to a good reputation, so he has no ground for complaint if a blackmailer threatens to make discreditable but true disclosures.¹²⁸ Using the language of corrective justice, Murphy seems to think that a deontological case cannot be made against blackmail because the victim's reputation is not a justified holding.

But the question of whether one has a "right to a good reputation" is irrelevant with regard to central case blackmail, for the deontological point is whether the victim has a right to be free from the harm that the other party intended and imposed. The harm intended and imposed in central case blackmail is not harm to reputation; it is harm to the victim's pocketbook or to her liberty.

The central case blackmailer does not seek to place the victim's reputation at its "proper" level,¹²⁹ nor is that the usual effect of his actions.¹³⁰ Rather, he seeks to extract something from the victim that is properly the victim's, usually money, or to make the victim do something (for example, sleep with him) that is ordinarily a behavior that the victim is at liberty not to engage in. The missing "rights" that Murphy seeks are therefore present and fairly noncontroversial: the rights not to have one's goods intentionally taken, or have one's liberty intentionally infringed, without justification.

It is irrelevant whether or not it would be proper for the blackmailer to disclose the information, and thus destroy something

¹²⁷ See Mack, *supra* note 109, at 274-75 (criticizing the Murphy position).

¹²⁸ See Murphy, *supra* note 40, at 162 ("It is unclear to me how you can have a right to the reputation of being a person of type X if in fact you have performed acts of type Y where Y acts are inconsistent with being an X person."); see also Lindgren, *supra* note 10, at 699-700.

¹²⁹ See Murphy, *supra* note 40, at 162.

¹³⁰ Further, whether the victim deserves to have *this person* harm him is a different question from whether the victim deserves the harm *in general*. Considerations of corrective justice suggest that wrongful gains should be disgorged only to the individuals to whom redress is due, see Weinrib, *supra* note 41, at 429-50, or perhaps to the state. "Thus if A negligently injures X and B negligently injures Y, X cannot recover from B nor Y from A even if both injuries are identically quantifiable." *Id.* at 429. But see Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits: Part II*, 2 LAW & PHIL. 5, 12-14 (1983) (suggesting that corrective justice does not require that an actor's unjust gains be disgorged to the particular person whom the actor harmed).

the victim may value at a price even higher than the goods demanded in the blackmail transaction. For no disclosure is intended and none occurs. Whatever justification might support disclosure, none supports a threat whose only motive and effect is to extract money or compliance.¹³¹

E. *Comparing Blackmail with the Ordinary Commercial Transaction*

Libertarians who recommend the legalization of blackmail sometimes claim that there is no way to distinguish blackmail from an ordinary commercial transaction.¹³² Yet the earlier discussion made clear there is an economic distinction: the central case blackmail transaction is nonallocative while the ordinary commercial exchange is allocative.¹³³ I here suggest two additional distinctions, each keyed to the deontological inquiry: first, that the blackmailer intends to harm; and second, that regardless of intent, the buyer of silence in an extortion transaction suffers a net harm, while the buyer in an ordinary commercial transaction is benefited.¹³⁴

1. Intent to Harm

The libertarian might argue that the ordinary buyer and seller have the same intent as the blackmailer does: that an ordinary buyer would be delighted to obtain goods without paying, and an ordinary seller would be delighted to obtain money without giving up goods. If so, the parties to the commercial transaction have the "real" or direct intent of extracting money or other advantage—just like the blackmailer.

Most buyers and sellers, however, would in the long run prefer not to be exploitative. Perhaps on occasion people might enjoy

¹³¹ Some liberties are permitted because they are good in themselves, and some for other reasons. When a liberty becomes disassociated from the reasons that justified it, it can be prohibited. Cf. ARTHUR L. GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 179 (1931) (distinguishing between "liberties which the law recognizes and approves" and "liberties which the law recognizes but disapproves"). Thus disclosure is usually thought permissible because of the public interest in learning the relevant facts, and other related First Amendment concerns. These reasons are not available to justify nondisclosure.

¹³² See 1 MURRAY N. ROTHBARD, *MAN, ECONOMY AND STATE: A TREATISE ON ECONOMIC PRINCIPLES* 443 n.49 (1962); Murphy, *supra* note 40, at 23-25.

¹³³ See *supra* text accompanying note 54.

¹³⁴ See *infra* parts IV.E.1-E.2. The discussion in part IV.E.2 also defends a particular conception of harm.

getting something for nothing, but most persons' sense of self respect is probably dependent on at least some degree of reciprocity in the bulk of their relations.¹³⁵ If this is true (and I believe it is), then engaging in an ongoing activity that extracts something for nothing would be less desirable for most of us than engaging in commercial activity that involves exchanges.

The converse-DDE approach would test this assertion by asking if it would make a difference to the parties' actions if reciprocity were eliminated. I believe that for most of us it *would* make a difference if one took away the element in exchange that gives benefits to others. For example, if all young people were given a choice of engaging in a career involving mutual exchange or in a career of exploitation, most would probably choose the former even if success were guaranteed in both. Take away the component of the buyer or seller's activity that benefits others, and she will find the activity less attractive; if so, then under the DSE test, part of the "real" or direct intent is to exchange and not to extract.

Motive is a notoriously difficult basis on which to build fundamental legal distinctions.¹³⁶ This point leads to the second distinction between blackmail and ordinary commercial transactions: the ordinary commercial party offers another party a benefit (regardless of motive), but the blackmailer imposes a harm. Nothing bars lawgivers from taking less note of motives than moralists might; it is perfectly acceptable for the law to permit Mr. Scrooge to engage in badly motivated acts that give others benefits, and simultaneously to prohibit badly motivated and directly harmful acts such as blackmail.

2. Harm and Benefit

Defining what should constitute a "harm" or "benefit" is particularly difficult when an entire transaction is at issue, for the parties will be differently situated at different times. For example, it would be futile to define as a benefit the return of something that the other party stole only a moment before. In order to capture the meaning of "harm" for an entire transaction, I suggest (building on

¹³⁵ See generally LAWRENCE C. BECKER, *RECIPROCITY* 73 (1986) ("Ethnographers, social anthropologists, historians and sociologists report in unison that people do 'feel' . . . [involuntary] obligations. In particular, they feel them toward benefactors."). See also *id.* at 73-172 (arguing that reciprocity is a fundamental moral virtue which should guide the design of social structures).

¹³⁶ I am indebted to Dan Dobbs here.

the work of Nozick¹³⁷ and Fried¹³⁸) that a transaction is "harmful" if the following three conditions are satisfied: (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 resources¹³⁹ did not exist, (2) the buyer/victim would be better off if the transaction were impossible¹⁴⁰ 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.¹⁴¹

¹³⁷ This is an adaptation of the conditions Nozick states for an "unproductive" exchange. See *supra* text accompanying notes 37-38, 39. It is not fully clear whether Nozick means his conditions to state part of a deontologic argument (as I interpret them) or whether he intended them as an economic argument as Lindgren suggests. See Lindgren, *supra* note 10, at 699-70. In any event, I have adapted them to the deontological framework.

¹³⁸ See CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 95-99 (1981).

¹³⁹ Among other changes, I have altered Nozick's first condition (that the victim/purchaser would be better off in the absence of the seller) in several ways. Most importantly, in its new form, the first condition requires that the purchaser would be better off in the absence of the seller *or his resources*. Without this amendment one runs afoul of cases in which, for example, a landowner decides to cut off access to a distant portion of his estate solely to extract entrance fees from the frequent trespassers who use it as a shortcut. Cf. FRIED, *supra* note 138, at 95-99 (discussing such cases). With the amended first condition, it is clear that the trespassers are not "extorted" or harmed when they have to pay for access privileges, for they would not be better off in the absence of the landowner and his land. Without them, they would have no shortcut.

Arguably a substitute for the added "resources" language is Nozick's implicit third condition that the seller/victim is harmed only if she does not deserve to have the other inflict on her the threatened harm. See NOZICK, *supra* note 37, at 84 (implying that the buyer/victim who purchases freedom from harm cannot be said to have gained nothing if she deserved to be harmed by the seller).

¹⁴⁰ The importance of the second condition can be illustrated by considering one of Lindgren's objections to Nozick. Lindgren interprets Nozick's position as resting solely on his first condition. See Lindgren, *supra* note 10, at 699. (This may be a legitimate interpretation; Nozick's presentation is far from pellucid.) Lindgren then poses a standard claim-of-right case: "[A]ssume a tree on your land falls into a highway, striking a passerby. He threatens to sue you unless you pay him money." *Id.* Presumably, you would prefer to settle rather than to be sued.

Lindgren correctly notes that Nozick's first condition cannot explain why this is not blackmail: since the person being sued may wish the other party had not existed, the first condition for an unproductive exchange is satisfied. See *id.* But the case does not satisfy Nozick's *second* condition. The landowner would be worse off if settling lawsuits were impossible. Therefore Lindgren's claim-of-right case is not central case blackmail, and the injured passerby is not harming the landowner if he extracts money in settlement or suit.

¹⁴¹ See NOZICK, *supra* note 37, at 84; see also *supra* notes 38, 39, 139.

As was suggested in an earlier section of this Article, these three conditions all appear to be met in cases of central-case blackmail.¹⁴² The third characteristic is present because the central-case victim has not harmed the blackmailer. The second harm-defining characteristic is present because if exchanges of silence for money were known to be impossible, the victim would be better off because the blackmailer would not bother with the transaction. The first characteristic appears to be satisfied because the victim/buyer would be better off if the blackmailer and the piece of information suddenly vanished.

However, part of the first condition concerned the seller's resources, and I might be challenged to address whether the information the blackmailer wants to disclose is "his" resource. James Lindgren argues that blackmail is wrongful because the information belongs to third parties,¹⁴³ others have argued that blackmail is wrongful because, under a privacy analysis, the information belongs to the victim;¹⁴⁴ some libertarians think that blackmail is *not* wrongful because the information belongs to the blackmailer.¹⁴⁵

My response is simple: it does not matter whose resource the information is. If the information belongs to third parties or to the victim, the blackmailer is not selling something he owns, and the blackmail transaction can be condemned on that ground. But even if, as libertarians contend, the blackmailer "owns" the information, it is clear that the purchaser/victim is worse off in a world where the blackmailer and that resource exist. The blackmailer is therefore using that information in a way that harms the victim.¹⁴⁶ In the ordinary commercial transaction, Seller (S) offers

¹⁴² See *supra* text accompanying notes 37-41.

¹⁴³ See Lindgren, *supra* note 10, at 702-05.

¹⁴⁴ See, e.g., Murphy, *supra* note 40, at 159 (framing, though later criticizing, the argument that a blackmailer violates a victim's rights "by making into a commodity and trying to sell back to the victim something which is really his already (his life)").

¹⁴⁵ See, e.g., ROTHBARD, *supra* note 132, at 157 (stating that "a man has no such objective property as 'reputation'").

¹⁴⁶ Notice that my baseline for distinguishing harm from benefit is similar to that used in the standard tort case. "Harm" to a plaintiff in the usual tort context is determined by looking to the plaintiff's condition "in the absence of any interaction with the other party." Susan Rose-Ackerman, *I'd Rather Be Liable Than You: A Note on Property Rules and Liability Rules*, 6 INT'L REV. L. & ECON. 255, 258 (1986). The controversial but still dominant "but for" test of causation exemplifies this approach.

Of course, "interaction" requires definition. For example, a tort plaintiff does not lack actionable harm simply because the defendant had previously done the

Purchaser (*P*) some product or service that *P* wants that *P* could not have without paying *S* (or a supplier similar to *S*). If *S* (or a supplier similar to *S*) did not exist, *P* would have to do without the desired thing. *P* wants *S* to exist and make the offer. Conversely, *P* offers *S* money that *S* could not have without *P* (or a buyer similar to *P*). *S* wants *P* to exist and make the offer. *S* would be worse off if it were impossible for her to transact with *P*.

In paradigmatic blackmail, by contrast, the individual selling silence (*SS*) is selling the plagued purchaser (*PP*) an unaffected reputation, something that *PP* would have had but for *SS*'s actions. *SS* creates a threat, then offers to remove the threat. If *SS* (or a supplier similar to *SS*) did not exist, *PP* would have the desired thing. In the language of traditional explanations of blackmail law,¹⁴⁷ *SS* is parasitic upon his victim. In deontologic terms, there is nothing in *SS*'s actions that bespeaks a concern for *PP*'s welfare or for *PP*'s goals. To the contrary: *SS* is treating *PP* merely as a means, in a way he would prefer not to be treated.¹⁴⁸ *SS* is violating the "impermissibility of self-preference" that lies at the center of Kantian morality.¹⁴⁹

The distinction between central case blackmail and the ordinary commercial transaction thus seems fairly secure, on both economic

plaintiff a great service in some unrelated incident. It is necessary to define the component of the other party's existence that is relevant. I have defined the scope of the relevant interaction by reference to the very resource whose allocation is at issue.

¹⁴⁷ Hepworth's sociological examination of the British history of blackmail reveals parasitism or vampirism as a common image associated with blackmail. See MIKE HEPWORTH, *BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE* 25 (1975) (describing blackmail as a "social evil—a parasitical growth on the otherwise healthy body of society, sapping its strength and undermining its constitution").

¹⁴⁸ A response might be that sometimes the blackmailer has a benign motive and his offer is indeed welcome to the victim. For example, take a journalist who comes across some information that would be painful to a given individual if disclosed. The information is, perhaps, of no substantive public import, yet "juicy" enough to give a small boost to the newspaper's circulation. Moved by concern for the individual, the reporter wishes not to publish; constrained by a fiduciary obligation to his newspaper, he is unwilling to benefit the individual at the expense of the newspaper. The reporter may offer to keep the item out of the newspaper provided the individual monetarily compensates the newspaper for the foregone circulation-boost. Such blackmail may be unlawful, but it is not condemned by the deontologic principle described above. Nozick argues such blackmail should be lawful, at least so long as the price for silence is no greater than what the journalist forgoes by his silence. See NOZICK, *supra* note 37, at 85-86. I take no position on this or other instances outside the domain of central case blackmail.

¹⁴⁹ Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 *LAW & PHILOS.* 37, 49-50 (1983).

and deontological grounds. Therefore, the primary libertarian argument against the wrongfulness of blackmail fails.

V. CRIMINALIZATION

The question still remains whether blackmail is the kind of act that should be criminalized. The deontological discussion above should have made clear that central case blackmail is a harmful act that, being unjustified and directly intended, is wrongful.¹⁵⁰ As a wrongful harm, its criminalization is consistent with the liberal view that only the presence of harm toward others justifies criminal prohibition.¹⁵¹ It is also fairly clear that central case blackmail is economically wasteful because it invites expenditures that fail to make any significant change in the allocation of the contested information.¹⁵² Therefore, criminalizing central case blackmail is probably also consistent with Jeffrie Murphy's view that "immorality plus disutility is a reasonable basis for criminalization."¹⁵³

Although central case blackmail therefore appears eligible for potential criminalization, the question of whether blackmail should in fact be criminalized requires further analysis. For example, if one took an economic approach to criminalization, one would want to investigate factors such as the extent of the harm caused by blackmail (either by the blackmailer or by the victim's use of self-help), the extent to which criminalizing blackmail would decrease these harms, and whether the decrease in harm is likely to outweigh attendant enforcement costs. Though economics is not the whole of the matter, it will be useful to discuss some of these issues.

¹⁵⁰ See *supra* text accompanying notes 80-87.

¹⁵¹ The liberal view that only the presence of harm toward others justifies criminal prohibition is associated historically with John Stuart Mill and more recently with Joel Feinberg. See MILL, *supra* note 64, at 91-92; see also JOEL FEINBERG, 4 THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 238 (1990) (exploring whether outlawing blackmail "satisfies the requirements of the harm principle").

¹⁵² See *supra* text accompanying notes 48-53.

¹⁵³ Murphy, *supra* note 40, at 163 (emphasis omitted). Admittedly, the utilitarian and economic inquiries are not identical, but I suspect the utilitarian case against blackmail is even stronger than the economic one.

A. *The Effects of Blackmail Law on Victim Behavior
and Perceptions*

The effects that blackmail law might have on the behavior of potential defendants has been much discussed.¹⁵⁴ It is important to note that criminalization also has an impact on blackmail victims, providing them with two tools to encourage and assist them in resisting the blackmailer's demands.¹⁵⁵ The first tool the law provides is counter-leverage. The second is anger.

1. Counter-leverage

One imagines that were blackmail a tort, the victim would be unlikely to sue because of a fear that any trial of her suit would entail release of the embarrassing information which the victim wishes to keep secret. Unless *in camera* proceedings were easily available and enforceable, the information would come out; this disincentive to bringing suit would seem to provide one of the reasons why criminalization rather than a simple tort right is necessary if the law is to deter blackmail. Yet it is also commonly thought that when blackmail is criminal, victims are unlikely to report the crime out of a similar fear that prosecution would entail release of the embarrassing information.¹⁵⁶ Nevertheless, anecdotal evidence seems to be available suggesting that persons threatened with blackmail may have some hope of maintaining confidentiality even if they report the crime.¹⁵⁷

¹⁵⁴ Prohibiting blackmail may deter directly or may encourage character-formation that discourages bad acts. By contrast, legalization might not only increase the threat-related use of information already possessed, but might also increase the expenditures made on acquiring new information. Thus, criminalizing blackmail has an obvious goal of discouraging potential blackmailers from undertaking blackmail and blackmail attempts. Therefore, although blackmail law may fail to serve an individual who has the unfortunate luck to be the chosen prey of one of the few undeterred bad actors, the number of bad acts—and thus the number of victims—may be reduced by such law.

¹⁵⁵ These tools are available whenever blackmail is unlawful, including instances beyond the central case of blackmail; whether the tools *should* be available is part of the question which needs to be answered whenever a type of blackmail is made unlawful.

¹⁵⁶ See HEPWORTH, *supra* note 147, at 22 (by implication). The specific constitutional right to "public" trials in criminal matters, *see* U.S. CONST. amend. VI, would make secrecy of the proceedings even more unlikely than in the civil context.

¹⁵⁷ See HEPWORTH, *supra* note 147, at 22-24 (noting that authorities in England are often willing to preserve confidentiality). One can question the empirical assumption that victims would in fact be as fearful of initiating a criminal prosecution as of bringing a civil suit. For example, the prevalence of plea bargaining in the criminal

But determining how large a percentage of blackmail attempts are reported to the police is largely beside the point. The ability to threaten to go to the police may be more important than actually going to them. By threatening to go to the authorities *if and only if disclosure is made*, victims can discourage blackmailers from disclosing the contested information.¹⁵⁸ This is what Joel Feinberg terms “counterblackmail.”¹⁵⁹ The presence of counterblackmail makes criminalization important even if victims prior to disclosure are unwilling to seek the authorities’ aid.

The law that criminalizes blackmail itself supplies to all victims a chip needed to engage in such counterblackmail: the law transforms the fact that the blackmail attempt has been made into information that could, if disclosed, subject the blackmailer to criminal prosecution. Essentially, the victim may tell the blackmailer that he will be reported unless he withdraws his unlawful threat.

Unlike the blackmailer, who uses the threat of disclosure to force the victim to give up something (for example, money) to which the blackmailer has no right, the victim engaging in counterblackmail is using her threat to enforce her rights—to force the blackmailer to cease his wrongful behavior towards her. Since this is the victim’s “own chip,”¹⁶⁰ and the use of the chip as leverage is neither “unproductive” nor an “unjustified harming,”¹⁶¹ the victim should be permitted to make this counter-threat. Further, whether or not a state allows counterblackmail, it is hard to believe that a prosecutor would use her discretion to prosecute a victim who used counterblackmail to block continuing threats.

Given the criminalization of blackmail, then, the blackmailer and the assertive victim appear to be at a standoff: the blackmailer

area might obviate the need for a public trial, and police could then keep the delicate information confidential.

¹⁵⁸ This point is also made by Posner and Shavell, though they differ with regard to its significance. See Richard A. Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1837 (1993) (arguing that “[A] blackmailer cannot easily conceal his identity from the blackmail victim Once the victim knows who the blackmailer is, he has as potent a secret as the blackmailer”); Steven Shavell, *An Economic Analysis of Threats and their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877, 1890 (1993) (noting that “it is frequently difficult to obtain evidence that a blackmailer made a threat”).

¹⁵⁹ FEINBERG, *supra* note 151, at 268.

¹⁶⁰ Lindgren, *supra* note 10, at 707.

¹⁶¹ It is also not central case blackmail. Among other things, the victim did not acquire the information for the purpose of extracting an advantage from the threatener.

threatens to disclose unless money is paid, and the victim threatens to disclose unless the blackmailer abandons his threat. The victim's threat to disclose the blackmailer's threat may prevail as most credible,¹⁶² for the blackmailer knows that if he discloses the victim will have nothing to lose. What would in fact occur case-by-case probably depends, inter alia, on the participants' strength of will, and on the level of the various positive and negative pay-offs.¹⁶³ But it seems clear that the criminalization of blackmail can serve as a tool to foil blackmail attempts in at least some instances.

Counter-leverage has another virtue as well. The possibility that offended persons will resort to violent self-help has always been part of the rationale for instituting legal rights,¹⁶⁴ and it has been suggested that blackmail should be made criminal lest victims have no choice but to employ violence and other undesirable self-help efforts against those who threaten them. The availability of counterblackmail not only tends to remove the occasion for self-help by potentially discouraging some blackmail attempts before they begin, but also gives the victim an alternative self-help weapon to protect herself, one that is much less destructive and disruptive to society as a whole than violence.

2. Anger

As Judge Posner has suggested, only sophisticated victims may be able to take advantage of the leverage that counterblackmail can provide.¹⁶⁵ But criminalization of blackmail has another function that is useful even for the unsophisticated victim. It reinforces her sense that she has a "right" to be free of such threats, and thus

¹⁶² Tape recording a blackmail threat may provide the victim strong evidence. However, whether a victim can lawfully tape a blackmailer's telephoned threats may depend, inter alia, on whether counterblackmail is lawful. See, e.g., 18 U.S.C. §§ 2510(4), 2511(2)(d) (1988) (a party to a communication may make "aural acquisition" of it except "for the purpose of committing any criminal or tortious act").

¹⁶³ Examples of possible payoff variables include, among others, the degree of the victim's fear of disclosure, the amount of money demanded by the blackmailer, and the degree of the blackmailer's fear of disclosure (which will in turn be affected by how much evidence the victim has). For a useful discussion of strategic variables in the blackmail context, see Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787 (1993); Shavell, *supra* note 158.

¹⁶⁴ See, e.g., *Martin v. Reynolds Metals Co.*, 342 P.2d 790, 796 (Or. 1959), *cert. denied*, 362 U.S. 918 (1960) (arguing that the trespass tort was historically seen "partly at least as a means of discouraging disruptive influences in the community").

¹⁶⁵ See Posner, *supra* note 158, at 1836-37.

reinforces her willingness to angrily refuse the blackmailer's demands. Since a central case blackmailer has no incentive of his own to disclose, little may be required to dissuade him from disclosing; even unreasoned resistance may suffice.¹⁶⁶

Many commentators have noted that the legal prohibition of blackmail does not serve the interest of the victim who, in instances where the prohibition fails to deter, would prefer payment to disclosure.¹⁶⁷ That is true. The image on which the blackmail prohibition rests is a quite different type of victim, one who is put into mental pain and fear by blackmail threats,¹⁶⁸ but who will nevertheless have no truck with dishonor. The image suggests a person should not be so ashamed of her past or so unwilling to face the truth that she would give in to ignoble manipulation.¹⁶⁹

"Honor" can be given a utilitarian construction: it is behavior that helps the collective even if it hurts the immediate actor.¹⁷⁰

¹⁶⁶ If his threat fails, and if he is not in the business of making future threats credible, he has no reason to disclose; in fact, blackmail's unlawfulness gives him a good reason to lay low. *Cf. supra* part V.A.1 (discussing counter-leverage). A thoughtful blackmailer may recognize that the probability that a victim will go to the police may increase dramatically after disclosure is made, even in cases where the victim was not originally aware of the option.

¹⁶⁷ *See, e.g.,* Lindgren, *supra* note 10, at 680-97 (discussing several commentators' theories of when a victim pays for information).

¹⁶⁸ *See* HEPWORTH, *supra* note 147, at 19 (noting a judge's view of blackmail as "slow death" (quoting THE TIMES (LONDON), Apr. 2, 1924 (Justice McCardle))); *id.* at 21 (characterizing blackmail as "moral murder"); *id.* at 22 (stating that the blackmailer's "ennervating [sic] and relentless pressure allegedly produced a state of suicidal despair").

¹⁶⁹ This may seem to contradict the stereotypical victim's almost mortal weakness described by Hepworth's researches. *See supra* note 168. But Hepworth recognizes that "by going to the police it was possible to stave off the appalling effects of moral murder." *Id.* at 23.

Hepworth quotes an aphorism stating that "Blackmail is possible only when individuals are discreditable." *Id.* at 7 (quoting LAUD HUMPHREYS, *OUT OF THE CLOSETS* (1972)). This apparently assumes that the discreditable behavior necessary for a successful blackmail is the behavior that occurred some time in the past—the behavior the blackmailer has uncovered and now threatens to reveal. My argument is that blackmail is possible only when individuals exhibit discreditable behavior *at the time of the blackmail threat* because the honorable course of action at that time is to resist.

This notion of resistance appears occasionally in Hepworth's historical accounts of blackmail incidents. A news report of a nineteenth century blackmail trial stated: "It was not everyone who had the courage to come into court and show the absolute falsehood of the accusation made [by the blackmailer]; but Earl Carrington had done that, and he had performed a great service to the public in so doing." HEPWORTH, *supra* note 147, at 26 (quoting THE TIMES, Nov. 13, 1897). (It is not entirely clear whether the quoted language is that of the Times reporter or of the trial judge.)

¹⁷⁰ I am indebted to Warren Schwartz for this argument. *See* Warren Schwartz et

If one assumes that acts of blackmail impose net costs on society,¹⁷¹ then the socially beneficial response to a blackmailer is to resist in order to convince potential blackmailers that blackmail never succeeds, and thus to silence their threats.¹⁷² Upholding the image of an honorable and resistant victim may be worth the cost to those occasional victims who are not convinced by the image and want to give in.

The law may not only provide the honorable resister with counterblackmail as a means to resist blackmailers, but may also give her the psychological energy to resist. Sometimes we legislate against something in order to keep our sense of outrage alive.¹⁷³ Blackmail law may fall into this category. If the law permitted blackmail transactions, blackmail's perceived moral status might be transformed: gradually it might come to seem acceptable to us as observers, blackmailers, or victims, that a victim should pay. If so, persons who are blackmailed might become less effective in fighting back. The law may have an effect not only on potential criminals,

al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321, 331 (1984).

Recall that most economists assume that allowing blackmail will result in "digging up dirt only to rebury it again." See *supra* notes 25-30 and accompanying text. This in turn assumes that the only factor that will matter to victims is a comparison of the price the blackmailer is demanding with the reputational cost of disclosure. That is, the primary economic analysis of blackmail assumes that victims will act with a particular and narrow set of self-interested economic motives. A victim with utilitarian or deontologic motives, by contrast, might act in a way that furthers the interest of society without furthering his own economically defined self-interest.

¹⁷¹ One might argue, however, that blackmail is beneficial in the information it reveals, but this would not apply to the central case which usually results in the purchase of silence. One might also argue blackmail is a useful tool for "keeping people honest" and increasing the social costs of bad action; this point might be relevant in assessing the costs and benefits of outlawing central case blackmail. See *supra* notes 63-65 and accompanying text.

¹⁷² From a deontologic perspective, resistance to evil is a fundamental virtue. See BECKER, *supra* note 135, at 74-76, 97-101, 146-50. The victim who accedes to tyranny today exposes other victims to vulnerability tomorrow. Furthermore, buying silence is an evil in a way that being silent may not be. Passively hiding awkward facts—for example, choosing to live a creditable life in a new town after serving a criminal sentence—does not "use" others in the way that a deliberate decision to conceal may do. Finally, in buying silence, one also shows insufficient respect for one's self. To pay to hide something about one's self may be a shaming act inconsistent with human flourishing. Cf. Radin, *supra* note 23, at 1906 (arguing that understanding integral aspects of our personal lives as "monetizable or completely detachable from the person . . . is to do violence to our deepest understanding of what it is to be human").

¹⁷³ Cf. CALABRESI, *supra* note 102, at 16 (exploring "what it does to the state and to all of us" to have the state making explicit tradeoffs between life and other values).

but also on potential victims and on their sense of what their own best behavior should be.

If blackmail is criminalized, by contrast, it helps maintain a sense of outrage as a weapon against blackmail. As in any bilateral monopoly situation, it is the person who “won’t budge,” and can credibly convince the other that she won’t in fact budge, who wins. Several commentators have suggested the blackmail bargain is often irrational—a last gasp effort to stave off nearly inevitable catastrophe, in which the victim will almost always be the long-term loser.¹⁷⁴ If so, anger may be the best antidote to panic. Anger is a passionate emotion, yet, ironically, in this context it may be the best preserver of rationality.

The following discussion, though tentative, will suggest some reasons why this may be the case. The blackmailer brings up something embarrassing or private. It is a *shaming* experience to have such facts brought up by a hostile party. (Raised by a friend, the same issues’ exposure can lead to increased intimacy rather than shame.) Shame can inhibit both justified anger and the self-confidence necessary for self-protection.¹⁷⁵ Yet, as the Sabini and Silver analysis¹⁷⁶ of the Milgram experiments¹⁷⁷ showed, sometimes one needs confidence in one’s self—willfulness, unwillingness to go along—in order to do right under pressure. The potential

¹⁷⁴ See David Owens, *Should Blackmail Be Banned?*, 63 PHIL. 501, 511-13 (1988) (arguing that a victim of blackmail is forced to choose between two losing options); see also Murphy, *supra* note 40, at 166 (“Blackmail and the privacy invasions it invites tend to lead to harassment that is *unending* in nature.”).

¹⁷⁵ Shame tends to encourage conformity. The hostile stranger’s revelation can thus increase both the intensity of the victim’s psychological need to please the community and with it her desperation to avoid further disclosures that would make the community cast her out. Further, if the information regards moral or other weakness, then the blackmailed person may feel less entitled to fight on her own behalf.

¹⁷⁶ JOHN SABINI & MAURY SILVER, *MORALITIES OF EVERYDAY LIFE* 55-87 (1982).

¹⁷⁷ Extrapolating from the cruelty inflicted by World War II’s concentration camps, Stanley Milgram tested the extent to which the ordinary person would be willing to “follow orders” even if following orders meant inflicting pain. Experimental subjects were told to administer electric shocks of increasing intensity on other people (supposedly fellow experimental subjects, but in actuality colleagues of the experimenter), supposedly as part of a psychology experiment investigating the impact that pain has on learning. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* 13-26 (1974). On the experimenter’s orders, a surprisingly high number of persons—up to 65% of the experimental subjects, see *id.* at 35 (table 2)—pushed the levers that supposedly inflicted pain (marked “Danger: Severe Shock” and “XXX”), even after the “subject” had begun to scream, pled to be let go, or feigned unconsciousness. See *id.* at 22.

victim needs her sense of outrage to fight off the wound to self-esteem inflicted by the blackmailer, a wound that itself might impair her overall capacity for moral action.

Sabini and Silver suggest, quite rightly, that an actor's ability to act morally is often undermined by her inability to trust herself.¹⁷⁸ The tale of one's own unpleasant past deeds might surely undermine self-trust. It also may undermine one's sense of one's own self-interest. The knowledge that the blackmailer is acting unlawfully may bolster the victim's sense of outraged pride and self-worth when she most needs such psychological assistance.

Legal commentary that questions the utility of blackmail law may underestimate the value of pride. Our society as a whole may underestimate its value as well. Compare for example the Christian ethos with Aristotle's. Christian doctrine says turn the other cheek;¹⁷⁹ Aristotle said that one who takes a blow without returning it is a slave.¹⁸⁰ The prideful victim is one who will resist others' bad acts.¹⁸¹

¹⁷⁸ Sabini and Silver suggest essentially that immoral acts can result when we identify morality with an externally-imposed constraint on our desires, and identify sin with what we desire to do. See SABINI & SILVER, *supra* note 176, at 67-69. When this happens, our "crossed wires" may leave us virtually helpless when confronted by a situation where the moral impulse is internal ("I don't *want* to hurt these people") and the immorality is coming from the external authority (the experimenter giving orders to the experimental subjects, or the concentration-camp commandant giving orders to new guards). See *id.* In such situations, every moral impulse comes in the guise of temptation, and every immoral order comes in the guise of duty, so it can be hard to tell them apart. See *id.* In these situations, following one's internal impulses would lead to more moral action than obeying the unpleasant order, but that requires a degree of self-trust.

¹⁷⁹ See *Matthew* 5:39-40 (The New English Bible, 2d ed. 1970) ("But what I tell you is this: Do not set yourself against the man who wrongs you. If someone slaps you on the right cheek, turn and offer him your left.")

¹⁸⁰ See ARISTOTLE, *NICOMACHEAN ETHICS* § 15, at 124 (Martin Oswald trans., 1962) ("People seek either to requite evil with evil—for otherwise their relation is regarded as that of slaves—or good with good, for otherwise there is no mutual contribution.") Actually, it may be that the Christian ethos also does not invariably demand forgiving nonresistance. See *Luke* 17:3 (The New English Bible, 2d ed. 1970) ("If your brother wrongs, *reprove him; and if he repents, forgive him.*") (emphasis added). It takes both pride and courage to reprove the powerful.

¹⁸¹ See BECKER, *supra* note 135, at 74-76, 97-101, 146-50 (arguing that resistance to evil is a virtue).

B. *Implications for Enforcement Costs*

The two tools provided by blackmail laws—counter-leverage and anger—involve a fairly inexpensive form of self-help. When successfully employed, they can foil blackmail attempts without violence, intensive private investment, or the use of police or courts. To the extent that criminalization makes possible the effective use of counter-leverage and anger, enforcement costs will be reduced. The lower the costs of enforcement, the more desirable (other things being equal) the criminalization of blackmail.

CONCLUSION: A COMMENT ON INTERRELATIONSHIPS

Would victims' resistance—sparked perhaps by anger, a sense of honor,¹⁸² a moral preference,¹⁸³ or pride—undermine the “waste” argument of Coase, Ginsburg and Shechtman, Daly and Giertz, and Epstein?¹⁸⁴ The waste argument was premised on the assumption that blackmail would not cause any allocative effects because the victim would always buy silence, while the instant discussion suggests that honorable and angry persons would *not* buy silence. An economist wants the most accurate measure of the demand function available; the motivation of the demand is less important than the result.

Blackmail attempts are likely to have few allocative effects on the distribution of information even in the presence of a sense of honor, *so long as* blackmail is unlawful. This is because the counter-leverage provided by the legal prohibition makes it risky for the blackmailer to reveal it.

If blackmail is lawful, however, counter-blackmail disappears as an option. If in a significant number of victims the sense of honor

¹⁸² It may still be possible for an economic analysis to fully take into account the notion of honor. For interesting explorations of the interplay that can exist between instrumentalist and deontologic beliefs, see CALABRESI, *supra* note 102; GUIDO CALABRESI & PHILLIP BOBBITT, *TRAGIC CHOICES* (1978); Schwartz et al., *supra* note 170.

¹⁸³ By the victim's “moral” preference, then, I mean to indicate a demand structure in which resistance-plus-disclosure has a positive value for the victim, even in circumstances where the blackmailer is willing to accept an amount of money less than the amount of damage the disclosure will do to the victim's reputation. Conceivably, even an economically self-interested agent might possess such a preference pattern. But at least at this juncture, what we think of as nondeontic moral beliefs seem a more likely basis for explaining why persons in such circumstances might prefer disclosure to buying silence.

¹⁸⁴ See *supra* notes 51-54 and accompanying text (discussing the waste argument).

and anger survives the erosion that legalization might initiate, then that partially undoes the assumption on which the arguments of Daly & Giertz et alia are premised.¹⁸⁵ The victim's willingness to pay would no longer be a function solely of the damage disclosure could do; she might be unwilling to pay despite significant destructive potential. In such an event, blackmail attempts could spark allocative changes in the distribution of information.

To the extent that criminalizing blackmail would deprive third parties of information that would be disclosed if blackmail were lawful, the costs and benefits of such foregone disclosure would have to be assessed and incorporated into the economists' analysis of blackmail law. The economic analysis would become more complex.

From a deontological perspective, however, it would not matter whether or not blackmail attempts would sometimes result in beneficial disclosures of information. The doctrine of double effect indicates that a person making extorsive threats cannot escape moral condemnation by pointing to unintended beneficial side-effects of her behavior. Thus, to the extent that the desire to resist blackmail is a fact of human psychology, the accounts of central case blackmail provided by economic and deontologic theorists might diverge.

Perhaps we finally have, if not a paradox, an irony. When victims act as deontological moral agents, they resist, and a government applying a deontological approach would aid their resistance by deciding that blackmail is wrongful and should be discouraged. When victims act as narrowly-defined economic agents (motivated by the Daly-Giertz demand structure), a government applying economic logic would recognize that blackmail is wasteful and similarly decide that it should be discouraged. Thus, a nation that is ruled by the same single-gauge principles as its people would outlaw blackmail. But when the motives of a significant portion of the victim population are moral rather than economic, and the government applies an economic logic in ordering legal relations, it is then that the deontological and consequential logics may lead to diverging recommendations. It may be that the two accounts are

¹⁸⁵ See *supra* text accompanying note 51 (discussing the assumption by Daly and Giertz that the victim's willingness to pay for silence is solely a function of the reputational damage the blackmailer is capable of inflicting).

most likely to converge, ironically, when the economic account fails to take account of the other's effects.

Postscript

Ironies aside, I want to acknowledge that the sharp distinctions made in this paper between consequentialism and deontology are merely a mode of facilitating discourse. The final judgment on blackmail law (or any law) should depend neither on consequentialism nor on deontologic morality, but on some as yet unstated combination of the two. A primary task for normative theory is to provide a satisfactory integration of the objective and subjective viewpoints¹⁸⁶ that, together, appeal to us as constitutive of morality.

¹⁸⁶ See NAGEL, *supra* note 88, at 185-88.

