

# BLACKMAILING FOR MUTUAL GOOD

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## INTRODUCTION

In one of its original uses, “blackmail” meant the tribute paid by English dwellers along the Scottish border to Scottish chieftains to secure immunity from border raids.<sup>1</sup> “Mail” was then a wallet or traveling bag and, by association, what was carried in such a bag, such as what we now call mail.<sup>2</sup> “White rent” was tendered in silver coin (“white money”); blackmail was payment in kind, for example, in cattle or labor.<sup>3</sup> If the protection the chieftains sold was protection against other marauders, they offered merely an ordinary exchange of services for services. In that case, their offer, while perhaps too good to refuse, was not like modern blackmail or extortion. If their protection was from their own depredations, the chieftains were like the modern mafia. Their offer of a deal was extortion. Such an offer is also unlike modern blackmail. Blackmail typically lies somewhere between these two possibilities. As in both of these offers, there is an exchange that would leave both parties better off by comparison to some alternative. But unlike mafia extortion, some classes of blackmail do not entail costs to both parties if the blackmail offer is refused.

To judge the morality of such variant problems, we must start from a moral theory. For the past couple of centuries, the argument of choice in legal justification has been essentially utilitarian. In recent decades, the utilitarian urge has been revised to handle ordinal benefits without interpersonal comparison. It has belatedly followed the developments in value theory in economics by ceasing to inquire into aggregate, additive welfare and its maximization. Instead, it is driven by concern with optimal arrangements that can be characterized as mutually advantageous. Much of contemporary law and economics is utilitarian in this sense, despite the sometime disclaimers of scholars of law and economics. The core moral

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<sup>1</sup> See BLACK'S LAW DICTIONARY 170 (6th ed. 1990).

<sup>2</sup> See 9 OXFORD ENGLISH DICTIONARY 212-13 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

<sup>3</sup> See *id.* at 250.

assumption in this body of law and economics is mutual advantage.<sup>4</sup>

Mutual advantage arguments have been applied to blackmail. I wish to apply them to only certain instances of blackmail, namely those instances that could be characterized as blackmail for mutual advantage. Other types of blackmail would require additional analysis and the conclusions on them might vary considerably.<sup>5</sup> One might suspect up front that the application of a general theory of mutual advantage to blackmail cases that could be called mutual advantage blackmail should generally permit such blackmail. This does not follow, however, because what would be mutually advantageous to the relevant parties case by case might not be mutually advantageous to the larger society or to the potentially relevant parties *ex ante*. Nevertheless, it seems likely that the most acceptable case for blackmail would be for mutual advantage blackmail. Hence, careful attention to mutual advantage blackmail is necessary for a resolution of the justification of a general legal rule on blackmail.

There are three general issues in the moral analysis of law that bear heavily on the analysis of blackmail. First, rightness or goodness cannot be read directly from the facts of a case at hand. To get a value conclusion for a set of facts requires the introduction of a value premise. Second, we cannot analyze rightness or goodness at the case level. We must go to the larger institutional level to grasp the full implications of a rule of law for the general incentives it produces and other effects it may have. Third, blackmail, as is true of many apparent actions governed by law, is strategically complex and cannot be understood as a simple action. It involves interaction with choices or actions of others, and takes quite varied strategic forms.

After briefly canvassing these three issues, I will discuss the strategic structures of three possible regimes of mutual advantage blackmail. If strategic structure determines what should count as blackmail, then blackmail pervades our lives and our social order. Then I will turn to the moral analysis of a regime of legal regulation

<sup>4</sup> See Russell Hardin, *The Morality of Law and Economics*, 11 L. & PHIL. 331, 331-84 (1992).

<sup>5</sup> Richard Posner refers briefly to the mutual advantage class of blackmail, and notes that it is an exception to his general thesis that, for economic reasons, blackmail should be legally suppressed. See Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1839-39 (1993).

for such blackmail and of the peculiar problem of blackmailing in the public interest.

### I. FACTS AND VALUES

Perhaps the central problem in understanding blackmail is keeping normative and positive or conceptual claims separate. There is a common tendency to read moral conclusions from mere facts. As David Hume argued more than two centuries ago, we cannot do this; instead, we must start with some moral principle or theory and then read moral conclusions strictly with respect to this principle or theory.<sup>6</sup> Different moral principles may yield different moral conclusions about a particular set of facts.

The movement of legal positivism was a child of the realization that facts alone do not imply moral conclusions. In the positivist tradition we may say that an action is illegal without saying anything about whether it is immoral by any moral theory. To determine whether it is illegal, we look to the law and not to some moral theory or moral intuition.<sup>7</sup> Only if the law says that a particular moral principle or theory should inform legal statutes or judicial decisions does the inference from morality to law follow. Then, of course, it follows for the positive reason that the particular morality has been positively sanctioned.

The problem with blackmail in the law is that virtually identical actions can be blackmail in one instance and not in the other. We cannot simply read from the facts of the cases that one was wrong and the other right. Yet, "blackmail" is like "bribery" in that it is a normative term in common parlance. To say on the street, at the dinner table, or in the newspaper that some action is blackmail is generally to say it is wrong. Because the law is too crude an instrument for correcting some wrongs, not every wrong act should be illegal. But the law of blackmail is largely defended as law restricting actions or outcomes that are wrong or bad.

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<sup>6</sup> See DAVID HUME, *A TREATISE OF HUMAN NATURE* 468-70 (L.A. Selby-Bigge & P.H. Nidditch eds., 2d ed. 1978) (1739-40).

<sup>7</sup> See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 4-6 (1963) (condemning the use of law as an enforcement of morality); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 621-24 (1958) (same). For contrary views, see PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 124-39 (1965); LON L. FULLER, *THE MORALITY OF LAW* 33-152 (2d ed. 1969); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 *passim* (1958).

Consider a legal interaction that has the structure of blackmail. In many kinds of cases, it has become the conventional practice to strike bargains with those accused of crimes. Charges are dropped or reduced on condition that the accused do some kind of community service or that the accused leave the job in which she has done some wrong, such as molesting school children. In plea bargaining, charges are reduced in return for the accused's acceptance of a penalty for the lesser crime.<sup>8</sup> In the United States, prosecutors have no affirmative duty to prosecute, even when the evidence would justify prosecution.<sup>9</sup> In all cases of bargained resolution we might think that the ends of punishment and remedial action are both served. True, the punishments may not be those prescribed in the law and the remedial action is seemingly prospective rather than retrospective. But such deals have been openly countenanced by the courts and they are generally negotiated quite openly.

It is entirely plausible that we could make plea bargaining illegal, with prosecutors subject to prosecution for making deals on criminal charges. Or courts might simply refuse to accept the deals prosecutors make. Many legal scholars and participants in the American criminal justice system think it wrong to allow plea bargaining.<sup>10</sup> One might support its use for pragmatic reasons and yet have grave misgivings about it. Some scholars think the analogous settlement process in civil suits subverts the purpose of determining good legal rules for relevant behavior; settlement forestalls a formal judgment, allows the parties to resolve their dispute in private and off the record with no oversight by the public

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<sup>8</sup> Often the penalty is time served from arrest to trial plus, of course, conviction on the lesser charge.

<sup>9</sup> See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 13.1, at 622 (2d ed. 1992) ("Even when it is clear that there exists evidence which is more than sufficient to show guilt beyond a reasonable doubt, the prosecutor might nonetheless decide not to charge a particular individual with a criminal offense.").

<sup>10</sup> See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 (1981) ("[P]lea bargaining remains an inherently unfair and irrational process, one that turns major treatment consequences upon a single tactical decision irrelevant to any proper objective of criminal proceedings."); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (1979) (noting that plea bargaining "did not occur with any frequency until well into the nineteenth century"); Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253, 262 (1989) (discussing evidence that the plea bargaining process results in harsher results for those unable to afford a private lawyer); Joan L. McGregor, *The Market Model of Plea Bargaining*, 6 PUB. AFF. Q. 385, 386 (1992) (suggesting that "there are serious moral problems with plea bargaining").

eye, and may yield no precedents to guide the actions of others.<sup>11</sup> Plea bargaining may produce similarly perverse misguidance for others. Those who might commit certain types of crimes may infer that they risk the bargain penalty, not the potentially much harsher and perhaps more effectively deterrent penalty written into the law.

To decide whether plea bargaining is good under some moral theory or principle requires assessment of its general effects, especially its broad systemic effects. We cannot decide the issue simply from consideration of a particular case, in which plea bargaining is not inherently either right or wrong. But it is now legally accepted in many jurisdictions. The difference between plea bargaining when it is legal and when it is illegal is conventional. Illegal plea bargaining might count as blackmail. Legal plea bargaining would not.

Perhaps the most striking way to make the point that we cannot read values exclusively from facts is to put legal interactions into game theoretic strategic form. This representation abstracts from the substantive content of the interaction and focuses only on how the parties rank the varied outcomes. Many interactions that seem radically different morally are strategically identical. For example, mutual advantage blackmail and ordinary exchange have the same prisoner's dilemma structure.<sup>12</sup> Some moral theories (libertarianism, utilitarianism, communitarianism, deontological and rationalist rights theories) give very heavy moral weight to what people want; virtually all give some weight despite occasional disclaimers. If we bring this value into consideration, we may often find a clearly moral resolution for certain abstract forms of interaction. Yet, again, this runs against the apparent moral reading of the more fully described cases.

James Lindgren has proposed a compelling claim for why we should think the threats involved in plea bargaining and many other contexts are not immoral, while those in ordinary blackmail cases are.<sup>13</sup> In the ordinary case, Lindgren argues that if I threaten to

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<sup>11</sup> See Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 116-17 (1986) (stating the concern of some writers that "the policy of encouraging settlements results in the underproduction of opinions and precedents"); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("A settlement will . . . deprive a court of the occasion, and perhaps even the ability, to render an interpretation.").

<sup>12</sup> See *infra* part IV.

<sup>13</sup> See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 717 (1984).

reveal embarrassing information about you in order to exact payment from you, I am using your chip, or the chip of the person against whom you have committed adultery or some other blackmailable act, for my gain.<sup>14</sup> In contrast, when the officers of the court offer me a plea bargain, they are bargaining, as they should be, with the public chip for the public good. The chief weakness in Lindgren's claim is that he simply posits the chip argument as inherently moral. Perhaps it is. But the argument lacks demonstration in some moral theory. From the mere fact that blackmail cases fall into two categories, nothing follows for the rightness or wrongness of either of those categories.

## II. INSTITUTIONAL-LEVEL ANALYSIS

Much of the discussion of blackmail is about whether there is something inherently wrong in it, as though we could infer what the law should be from looking at the characteristics of a particular case. For an institutionalist, this approach is wrong; instead, we should determine what overall result would be better and then design the law to achieve that result. For example, in the law we would not pretend to assess whether there was fault in an interaction simply by analyzing the interaction (although many philosophers do just this). Rather, we would want to create legal institutions for handling the broad class of cases in which this interaction fits. We might want quite different institutions, with different evidentiary requirements and different kinds of sanction, for criminal, tort, ordinary commercial contract, and family relations. To say that a particular party to our interaction is wrong would then, either explicitly or implicitly, be to say that our institutional structure is right and that our legal institutions, properly applied, produce a judgment that the relevant party is in the wrong.<sup>15</sup>

To argue coherently, legal philosophers must be institutionalist. Alternatively, they must defer wholly to judicial discretion in each

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<sup>14</sup> See *id.* at 702. Michael Gorr characterizes blackmail in the adultery-type case as theft by the blackmailer from the party injured by the adultery. See Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFF. 43, 54 (1992). But the money comes from the adulterer and there may be no sense in which the money is owed to the party injured by the adultery. Labeling one party the victim of the blackmail in such cases can be confusing.

<sup>15</sup> For a more extensive discussion of the institutionalist approach, especially in utilitarian theory, see RUSSELL HARDIN, *MORALITY WITHIN THE LIMITS OF REASON* 115-207 (1988); Hardin, *supra* note 4, at 349-58; Russell Hardin, *The Artificial Duties of Contemporary Professionals*, 64 SOC. SERV. REV. 528-41 (1990).

and every case. But then they have nothing more to say and they may coherently remain silent. Many moral philosophers argue that some action, X, is right *tout court*. But in an institutionalist account, the rightness of action X will depend on how it interacts with other actions.

Return to the example of plea bargaining. The arguments for and against it are finally contingent. The question we must answer is not whether a plea bargain is inherently right or wrong but whether the justice system with plea bargaining is better than that without, or vice versa. A utilitarian or rights theorist might conclude either way. The utilitarian conclusion would depend on the facts of how the different systems work out. For example, the utilitarian might suppose that plea bargaining makes the justice system work much more effectively, or she might suppose that plea bargaining involves perverse changes in the incentives an accused faces. Just because ninety-five percent of those accused in my category of crime cop pleas, I may face much more vindictive and rigorous treatment if I do not cop, even though I know, but cannot easily prove to a court, that I am innocent.<sup>16</sup>

Any claim to outlaw blackmail might seem weak if at the same time the sale of embarrassing information on another to the press remains legal. But the claim of mutual advantage from exchange blackmail may be entirely upset by the instability of contractual regulation of such blackmail. Consider a particular type of blackmail case, exposure of homosexuality, which may be a modal case in actual blackmail experience. The public wants to know and will pay enough (as shown by willingness to buy more copies of newspapers in which such an exposure is reported) to get the paper to pay well for the relevant information. Suppose the target would also pay well to block publication. We might stipulate that such personal knowledge is protected against blackmail: I could not cease to have such knowledge of you, but I would be prohibited from passing it on to others. For this to be a credible and effective protection of your privacy, the law might have to apply not only to

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<sup>16</sup> A common tale from the plea bargaining world is of the judge who has to preside over the trial of an accused who has refused to cop a plea. Upon the guilty verdict, the judge sentences the miscreant to the maximum term in prison, a far longer term than what the unfortunate man would have received under the plea bargain. The judge's explanation? "You take a little of my time, I take a little of yours." There may be a genuine source for this tale, but I have heard it told of particular judges in several parts of the country. It seems to be too good a line not to be universally true.

individuals who have private information on others but also to the press. Unfortunately, the spillover effect of concern for the political freedom of the press may be to block controls on press coverage of facts that motivate blackmail and that might reasonably be presumed to be politically relevant. If freedom of the press trumps privacy in certain cases, such as in the lives of public officials, and if we cannot block payment for relevant information, then outlawing blackmail penalizes the target by making it impossible for the target to regain control of the information.

More generally, results that are not mutually advantageous can follow from rules or regimes that are *ex ante* mutually advantageous. We might therefore outlaw every offer to sell information to someone likely to take offense or be harmed by its publication even though the occasional offer might be mutually advantageous. We could do so on the presumption that the errors involved in sorting out the cases would be worse than the misfortune of penalizing non-extortionate cases.

A common alternative to elevating argument to the institutional or legal-rule level is the device followed in much of moral theory historically, but especially during the vacuous heyday of intuitionism during the first half of this century.<sup>17</sup> That device merely requires intuiting whether the rule applied to a case produces the right or the wrong result morally.<sup>18</sup> Intuitionism constantly threatens to undermine legal argument.

In legal argument, one might simply take the case law as somehow representative of moral truth, as though courts and judges were struggling to find the objective truth and could be trusted to come increasingly close to it over many trials. It is true that case law can inform theory by displaying varied possibilities that no theorist alone could expect to invent. But no theory can simply treat extant case law as a body of facts to be taken as morally or even legally correct. Case law is not even consistent; it changes over time, and many laws are arguably conventional, not moral resolu-

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<sup>17</sup> Intuitionism, which nearly destroyed moral theory, is roughly equivalent to former President George Bush's pandering remark, as chief officer of the Constitution, that desecration of the American flag was a gutlevel thing with him. See George Will, *The Flag Dispute: Individualism Redux*, NEWSDAY, July 3, 1989, at 43 ("President George Bush says he feels 'viscerally' about flag-burning.").

<sup>18</sup> In a typical move, Gorr says of one of his intuitions that, although it is clear that the intuition is correct, it is hard to explain why. See Gorr, *supra* note 14, at 46 n.8.



tions or legally deducible resolutions (as in the slow adoption of plea bargaining).

The tendency to test legal and moral principles against the case law may be exacerbated by the urge to find a moral account that explains the actual law. In both legal and moral argument, one might take one's own instant conclusions as right and then find a theory that fits the supposed truth. As theorists have plausibly done from time immemorial, one who has a reasonably rich moral theory might let intuitions and theory fight it out (although there is some problem of identifying the referee) to find truth somewhere between them. This ages-long struggle is lately often attributed to John Rawls with his "reflective equilibrium" as his contribution to so-called moral methodology.<sup>19</sup>

While we may not be able to escape intuitions entirely, we cannot give a compelling account that stands very heavily on piecemeal intuitions about the substantive rightness or goodness of particular actions or results. If we cannot back our piecemeal intuitions with theory or principle, the time has come to tend to theory.

### III. THE COMPLEX NATURE OF INTERACTION

The so-called paradox of blackmail is that people can do particular things which are legal but which add up to an illegal result. In a twist on an old conundrum, in the law two rights can make a wrong:<sup>20</sup> the law makes wrong what is not *prima facie* wrong.

On a superficial level, similar paradoxes seemingly pervade the law. It may be perfectly legal to own a firearm and even to fire it. It may nevertheless be illegal to kill you with it. My actions of acquiring and then firing a gun were both legitimate. How can it be illegitimate that you happen to be dead as a result? Surely there is not really a paradox here. The law is concerned not merely with specific kinds of actions but, far more significantly, with the

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<sup>19</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 48-51 (1971); see also John Rawls, *The Independence of Moral Theory*, in 48 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 5-22 (1975) (discussing reflective equilibrium and moral theory).

<sup>20</sup> Joel Feinberg holds that blackmail is usually wrong and ought to be illegal, but also claims that it can be right in cases in which the target has done a wrong that is not illegal. See JOEL FEINBERG, 4 *HARMLESS WRONGDOING* 245-49 (1988). Two wrongs may not make a right, but evidently they can block a charge of illegality. Moral logic in this area is apparently a mess.

consequences of various actions. Indeed, an action theorist might spell out my actions in inordinate detail, while a court of law might simply strive to determine whether I committed murder. Without the murder, there would be no case at law. The notion of murder seems to have both deontological (action) and consequentialist (outcome) connotations. It predates the intellectual distinction between these two by millennia.

There is a further general reason for why, in the law, we cannot meaningfully think of actions in the piecemeal way that lies behind the notion of the paradox of blackmail. The paradoxical result is typical of consequential analyses of actions in interactive contexts. In such contexts, it is misleading to say I choose an action. Rather, I choose a strategy. In casual talk, choosing an action often tends to imply choosing an outcome. For example, by your action of flipping a light switch, you produce light. But when I choose a strategy, I choose one array of possible outcomes over other arrays of perhaps quite different outcomes. If I am sensible, I will generally choose my strategy in light of what strategies I think you and relevant others will choose.<sup>21</sup>

Choosing a strategy is often risky in the sense that one strategy may include in its range of possible outcomes both better and worse outcomes than those included in the range of an alternative strategy. It is not inherently wrong to gamble on getting better outcomes while risking the chance of worse ones. We do it repeatedly every day we are not comatose. But the law may be used to restrict the range of possible strategy choices in order to produce results that are better by some moral or practical criterion. It may then be legally wrong to make certain strategy choices, even though it is not inherently wrong to do so in principle. Arguments that are exclusively about kinds of action are therefore likely to provide wrongheaded reasons for justifying laws.

Strong moral claims about piecemeal actions in interactive contexts are more generally problematic. One response to arguments against outlawing blackmail is to ask why one cannot threaten to do what one has the full legal right to do (such as pass relevant information to the press).<sup>22</sup> In some moral arguments it is even plausible to claim one can be in the right to threaten something, which if carried out, would be wrong. In the moral criticism

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<sup>21</sup> See HARDIN, *supra* note 15, at 68-70.

<sup>22</sup> See James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597, 598 (1989).

of nuclear deterrence, it is often asserted that it is wrong to threaten what it would be wrong to do (to immolate cities full of innocents, including young children).<sup>23</sup> This is often asserted axiomatically, as though it were a basic or directly intuited moral principle. But in actual practice, one cannot separate the threat and what makes it credible from the end to be achieved. What makes it credible is compelling evidence that it would be carried out with some significant probability. If such threatening produces massively good results, it is hard, even lunatic, to say that the threatening is wrong. Perhaps nuclear deterrence has never produced massively good results, but this is an empirical matter whose resolution cannot rescue the moral axiom. Splitting the threat from its larger end, even given the possibility of a worse outcome if the threat fails to deter and retaliation follows, is conceptually, and therefore morally, perverse.<sup>24</sup>

In sum, we cannot know morality in the law when we see it unless we have a lot of theory and legal knowledge to bring to bear. In particular, we cannot know of many forms of interaction that they are wrong in themselves. They can be wrong only as an implication of a theory and of certain conventional resolutions in the law.

#### IV. STRATEGIC STRUCTURE OF EXCHANGE BLACKMAIL

What is the structure of the blackmail interaction? Unfortunately, there may be many structures. One can blackmail another not to do something, one can blackmail in the public interest, one can blackmail in one's own interest. We may represent the interactions game theoretically with payoff structures that abstract from the specific content of any particular instance of blackmail. The specific content of the outcomes can vary enormously while the structure of preferences remains the same. But even the structure of preferences can vary, as it does in the matrices represented below.

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<sup>23</sup> A wrongful intentions principle is assumed by ANTHONY KENNY, *THE LOGIC OF DETERRENCE* 45-52 (1985), and by JOHN FINNIS ET AL., *NUCLEAR DETERRENCE, MORALITY AND REALISM* 77-86 (1987). See generally GREGORY S. KAVKA, *MORAL PARADOXES OF NUCLEAR DETERRENCE* (1987); Thomas Donaldson, *Nuclear Deterrence and Self-Defense*, 95 *ETHICS* 537 (1985); Steven Lee, *The Morality of Nuclear Deterrence: Hostage Holding and Consequences*, 95 *ETHICS* 549 (1985).

<sup>24</sup> See Russell Hardin, *Deterrence and Moral Theory*, in *NUCLEAR WEAPONS, DETERRENCE, AND DISARMAMENT* 161, 161-63 (Canadian Journal of Philosophy, Supp. Vol. 12, David Copp ed., 1986).

Consider two possible blackmail games in which the potential blackmailer has information that another person would rather have suppressed. In order to avoid the air of persuasive moral definition, I will refer to the person blackmailed not as the victim but as the target of the blackmail. In both games, the blackmailer has legal right to possess and disseminate the information, for example, to the press. In the first game, the blackmailer can suppress information that would be given publicity if the press were to receive it; however, the press will not pay for the information. The target would be sorely embarrassed or even harmed by such publicity and would willingly pay to get the blackmailer not to release it. The blackmailer has, however, nothing to gain from carrying out her threat of exposure if the target does not pay, since the press will not pay either.

In the second game, the press would pay for the information and the target would pay as much as the press plus a bit more. This game could be played with or without an enforceable contract that insures against dissemination of the information after the target has paid blackmail. Default by the blackmailer might entail a penalty that would exceed the sum of the blackmail payment and any benefit gained by further release of the information. With contractual enforcement, the law allows blackmail but it also protects the interests of the target in keeping the blackmailer's information suppressed. This mirrors standard legal protection of contracts more generally.<sup>25</sup>

These two games are represented in game matrices I and II below. The payoffs in these games are strictly ordinal, with 1 as the best outcome for the relevant player and 4 as the worst. The left payoff in each cell goes to the row player, the blackmailer; the right payoff goes to the target. We might tentatively refer to the lower left cell in each matrix as the status quo ante: The blackmailer has the information but the target has made no payment.

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<sup>25</sup> Even some contracts, comparable to blackmail contracts, for suppressing information are protected. See Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox of Blackmail*, 141 U. PA. L. REV. 1663, 1665-68 (1993) (discussing the economics of secrets and the contracts that control them.)

GAME I  
BLACKMAIL WITH NO PAYMENT FOR PUBLICATION

		Target	
		Not Pay	Pay
Blackmailer	Give Info to Press	2,3	1,4
	Suppress Info	2,1	1,2

GAME II  
BLACKMAIL WITH PAYMENT FOR PUBLICATION

		Target	
		Not Pay	Pay
Blackmailer	Give Info to Press	3,3	1,4
	Suppress Info	4,1	2,2

Let us consider what narrowly rational or self-interested players would do in these games. Without contract enforcement the games pose severe commitment problems. How can the target be sure the blackmailer will not release the information even after blackmail is paid? Indeed, in the first game, how can the target even be sure the blackmailer *will* release the information if blackmail is *not* paid? There is no incentive for the blackmailer to do so once the blackmail gambit has failed. The only incentive the blackmailer has with respect to releasing the information in these games is that it gives the blackmailer a very nearly costless threat in the sense that it is almost costless to carry out. Hence, without contract enforcement, these two games are very unstable. Neither party has clear incentives.

In the second game, with contract enforcement, the incentives are quite clear. Negotiation with an enforceable contract gives the blackmailer a very clear incentive to suppress the information if paid blackmail, and the prospect of payment from the press gives her very clear incentive to sell to the press if payment is not made. Note that Game II represents the standard ordinal prisoner's dilemma.

Law can enter to stabilize the blackmail interaction in at least two ways. It can be used to criminalize or fine the act of blackmail in order to induce a potential blackmailer to weigh only the benefits of releasing information without the benefit of negotiating with the potential target. Alternatively, it can be used to enforce any deals the blackmailer and the target make, thereby permitting them to secure a mutually beneficial outcome. The blackmailer can unilaterally force the outcome 3,3 in Game II, but the target has incentive to enter a contract that secures the 2,2 outcome.

Why is blackmail wrong? It cannot be wrong because it is somehow wrong for the target to pay to protect her reputation against the truth or even a falsehood. It seems to be broadly permissible for individuals and firms to expend resources on their reputations, even on puffery and false claims for reliability. Perhaps blackmail is wrong primarily because we have de facto chosen not to back it with enforcement of contracts for blackmail. In general, making particular kinds of contractual agreements unenforceable is an effective device for blocking those transactions. If such contracts are not enforceable, the interaction is woefully unstable and subject to a double-cross extortion. Even if such contracts are enforceable, the target might still view the general situation as radically unstable, because one blackmailer might soon be followed by others, each fully in the legal right. The payoff to one blackmailer would then be a sunk cost when the second blackmailer's offer is considered. Perhaps this grievous instability in the blackmail system, even when it is restricted to exchange blackmail, makes it ex ante desirable to have the law prohibit blackmail. But we could want to outlaw exchange blackmail for this reason even if we do not think such blackmail is morally wrong.

Perhaps there is disagreement on the rightness of keeping certain information private. Many of us firmly believe individuals should have legal protection of their privacy in some realm while many just as firmly believe no one should have legal protection of privacy in that realm.<sup>26</sup> The law is ambivalent. It does not protect privacy, but it criminalizes blackmail. Michael Gorr argues that such

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<sup>26</sup> Compare Ira Glasser, *Supreme Court No Longer Protects Privacy*, N.Y. TIMES, Jan. 24, 1993, § 4, at 16 (letter to the editor from Executive Director of the American Civil Liberties Union arguing for a restoration of the constitutional right to privacy) with John H. Awerdick, *A Free Speech Issue*, N.Y. TIMES, Jan. 24, 1993, § 4, at 16 (letter to the editor from an attorney arguing that privacy rights should trump free speech rights only when disclosure would result in physical or economic harm).

inconsistency in the case of blackmail is merely pragmatic: we would (and should) outlaw the selling of information on others if we could only do so without severe costs.<sup>27</sup> Hence, the paradox of blackmail is only apparent. It is only pragmatic considerations that stand in the way of a fully consistent general law of blackmail.

But Gorr appears to be mistaken. In some cases there cannot be anything wrong in informing the public of otherwise private information. For example, if voters think candidates for public office should be judged in part on their loyalty to their spouses or on actions in their youth that might provide information on their character, then those voters have at least political grounds to know these things. Suppose a candidate does not report the relevant facts but that a former lover or distant associate offers to sell the information to the press. We could suppose constitutional protections of the press apply in such political cases.<sup>28</sup> What might constitute tortious slander or libel against a private citizen without any public role beyond being a voter would not be tortious action against a politician. This is not merely a matter of the costs of regulating cases of exposure of politicians; it is also a matter of the functional value of such exposure. The exposure is arguably right, not wrong.

To say it is right to expose politicians to the (perhaps petty) scrutiny of the press might be taken to imply that it is right for the relevant information to become public and wrong for it to be suppressed. If this were true, then candidates for public office might be thought to have an affirmative duty to tell us what the press might otherwise have to pay to find out for us. Should then-President George Bush have told the American electorate the details of his reputed affair?<sup>29</sup> Should then-Governor Bill Clinton have "come clean with the American people," as his opponents insisted?<sup>30</sup> To say it was legally wrong for certain information to be suppressed seems to imply that Bush, Clinton, and relevant others

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<sup>27</sup> See Gorr, *supra* note 14, at 44.

<sup>28</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that a state cannot award damages to a public official in a libel action unless the plaintiff can show that the defamatory statement "was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

<sup>29</sup> See *Bush Angrily Denies a Report of an Affair*, N.Y. TIMES, Aug. 12, 1992, at A14 (discussing generally the then-President's alleged relationship with Jennifer Fitzgerald).

<sup>30</sup> Robert G. Beckel, *Is Clinton Getting a Free Press Ride? Give Me a Break*, L.A. TIMES, Sept. 6, 1992, at M2 (quoting Vice President Dan Quayle).

were legally wrong to suppress it. Perhaps one would accept this conclusion while supposing it too difficult to enforce a law mandating exposure. But it seems plausible that we would actually prefer legal rules permitting exposure and payment for relevant information, but not requiring self-revelation. We might think this the legal system that would work best, the system that we would agree to *ex ante*, because it would be mutually advantageous.

For certain other categories of revelation, similar arguments prevail: one can permissibly do things that one is not required to do. This readily follows as a possibility in a mutual advantage theory. It can happen, at least in principle, that a legal rule either blocking an act or requiring the same act would be too unenforceable or too costly to be justified by what it would achieve. But in a mutual advantage theory, once we have reached this ambivalent conclusion, we have no further ground on which to declare it either legally wrong for you to do it or legally right for you to be required to do it. In a law and economics theory grounded in mutual advantage, any argument that supposedly hinges on the immediate rightness or wrongness of blackmail in a particular class of cases is beside the point. Outside such law and economics theories and outside any other general moral theory, arguments about the immediate rightness or wrongness of blackmail have no point. Their bottom-line conclusions may be consistent with some moral theory, but arguments for them are of no interest unless they can be related to a compelling general theory.

To complete this discussion, note that the general moral theory must be brought to bear at the institutional level, as legal philosophy must also be.<sup>31</sup> It cannot be immediately obvious that the law should take a position on whose chip a particular bit of information is; this assertion would have to be inferred from more general principles. Presumably, most of us do not want to say that private information on candidates for public office is, no matter what its content, the public's chip. But we may also not want to block the public or the press from using such information. Mutual advantage theorists could be ambivalent on what the law should be for the empirical reason that they do not know which system is *ex ante* better. Rights theorists might be ambivalent because they do not yet have good arguments for why the right should fall one way rather than the other. They cannot instantly identify the right that

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<sup>31</sup> See *supra* part II.



trumps. Kantians presumably face the usual difficulty of deducing a practical imperative from their very general categorical imperative.<sup>32</sup> In these theories, the question at issue is some variant of the following: When do considerations of privacy trump various needs, rights, or reasons to know?

#### V. BLACKMAIL FOR MUTUAL ADVANTAGE

As noted earlier, most of law and economics is grounded in an explicit or implicit moral principle of mutual advantage. At first consideration, this principle might seem to allow exchange blackmail because such blackmail is to the mutual advantage of the parties to it. Against this quick conclusion, however, one might conclude that the legalization of such blackmail would, *ex ante*, make people generally worse off even though it would, in a particular application, make the two parties to it better off. The external and incentive effects of having such blackmail as a legal possibility might override the apparent benefits to its immediate parties. Let us suppose, however, that the legal possibility of exchange blackmail would not have overriding external or incentive effects. It follows that, under the principle of mutual advantage, exchange blackmail is acceptable.

To see whether blackmail genuinely fits a mutual advantage account, one might put the outcomes in Game II in a Paretian space. If 4,1 is the status quo ante, then movement to 2,2 is not Pareto efficient,<sup>33</sup> because that move reduces the welfare of the target. This might seem to yield an economic argument against allowing blackmail. But the status quo ante might be thought to include certain resource values, including the blackmailer's resource of information. Is it somehow naturally right to block the use of the blackmailer's resource?

Suppose we block it only to the extent that the blackmailer cannot threaten the target with exposure, although she can still legitimately sell her information to the press or to the target. The correct view of the status quo ante between the blackmailer and the

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<sup>32</sup> Kant's categorical imperative states that "I ought never to act except in such a way that I can also will that my maxim should become a universal law." IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 70 (H.J. Paton trans., 1964) (1948).

<sup>33</sup> An outcome is Pareto efficient if there is no other feasible outcome at which all members are at least as well off and at least one is strictly better off. See B. Lockwood, *Pareto Efficiency*, in *THE NEW PALGRAVE* 811-13 (John Eatwell et al. eds., 1987).

target seems now to be the status quo of the blackmailer's potentially selling the information to the press, which leaves the target very badly off in her third preference. Putting this status quo at the origin in a Paretian space yields only one move that is Pareto efficient, namely to the outcome 2,2 in which there is a successful blackmail. From the status quo of 3,3, neither player would be willing to switch strategies unilaterally. Yet the status quo is Pareto dominated by the 2,2 outcome, which can be reached only if both players switch strategies together.

Game theoretically, however, we need not even be concerned with the nominal status quo ante. All that matters is the strategic opportunities available to the players. Because play is spread over time and coordinated, the 4,1 outcome is virtually blocked—the blackmailer is likely to release the information eventually. Because of contractual enforcement, the 1,4 outcome is virtually blocked. Hence, the players face only the choice between 2,2 and 3,3. From this reduced set, 2,2 is the mutual advantage choice.

Against the apparent conclusion of this argument that blackmail is mutually beneficial and therefore acceptable, Lindgren argues that the blackmailer illegitimately uses and profits from the wrong party's chip in this deal.<sup>34</sup> This argument sounds relatively persuasive when it is addressed to the use of official power to extort payments from people. Officials of the criminal justice system should not enrich themselves by using the public's authority to threaten you with criminal sanction so that you will pay them or otherwise reward them to avoid the sanction. In addition, it is widely believed that organized crime in the United States has long depended on police connivance, at least at the local level.<sup>35</sup> Allowing potential criminals and actual miscreants to pay their way out of harsher punishments probably does not effectively deter these actors from criminal acts. The standard argument for police protection is mutual advantage, as in Hobbes's account.<sup>36</sup> Allow-

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<sup>34</sup> See Lindgren, *supra* note 13, at 702.

<sup>35</sup> See, e.g., *State v. Hess*, 464 U.S. 995 (1983) (involving a police chief convicted of corruption for selling confidential information to a reputed organized crime figure); *United States v. Spilotro*, 680 F.2d 612, 614 (9th Cir. 1982) (involving an organized crime operation that had been assisted by the control of members of the sheriff's organized crime unit); Edwin J. Delatre, *Character and Cops: Ethics in Policing*, 88 MICH. L. REV. 1698, 1705 (1990) ("Historically, police corruption has been closely related to . . . organized crime enterprises . . .").

<sup>36</sup> See THOMAS HOBBS, *LEVIATHAN* (1651) (ch. 13-15) (suggesting that civil laws enforced by governments are enacted to protect people from the evils associated with living in a "state of nature").

ing distortion of the system in order to enrich some of its officers is unlikely to serve mutual advantage, and should therefore be blocked.<sup>37</sup>

But whose chip does the blackmailer use in an exchange blackmail? She has full legal right to the information she has obtained, and she has full legal right to sell it to the press. The potential blackmailer in an exchange blackmail, oddly, seems to be on the same footing as an arbitrage agent or a retail seller of someone else's products. Suppose that I know very much about *A* and very much about *B*. In particular, I know that they would have great interest in making a deal. But neither of them knows enough about the other to know to deal. I can make a great profit for myself by getting them to deal through me as an intermediary, perhaps even while keeping *A* and *B* ignorant of each other. A large fraction of business transactions and the overwhelming majority of consumer purchases must follow this pattern. In Lindgren's vocabulary, I profit from the use of *A*'s and *B*'s chips. In the cases of the threatened use of official power, the Lindgren rule may be compelling—I should not use the threatened power of the criminal legal system to get you to pay me for keeping quiet about your activities. But in the world of preferences and consumptions, there is nothing wrong with my use of *A*'s and *B*'s resources to make a profit if it is mutually advantageous. Or, rather, one should say that we ought not make it legally wrong because doing so would prevent mutually beneficial transactions, some of which are enormously advantageous to us. In my retailing goods from *A* to *B*, my chip is information, and in the law it may be fully and rightly mine so that I have legal right to what I can produce from it.

Unlike a threat of pure harm that does not directly benefit the person causing the harm, blackmail may be a genuine case of exchange. The blackmailer may have the prospect of a significant reward for revealing her information to the press. She merely offers to sell it to someone who values keeping the information private more than the press values its publication, and who therefore might pay more for it than the press would.

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<sup>37</sup> One might retort that having a police system that works well is not to the mutual advantage because it does not benefit organized (or disorganized) crime. At the institutional stage of judging whether to have a good police and criminal justice system, however, we might all agree with Hobbes that, without strong order, we will not prosper. If we do not prosper, neither will those in organized crime.

One might wish to outlaw blackmail on efficiency grounds, as some scholars in law and economics have argued, because it gives incentives to do perversely unproductive things.<sup>38</sup> This argument does not so clearly apply to exchange blackmail. A newspaper that pays a reporter to dig up newsworthy material on someone likely does so in order to increase circulation and advertising revenue. One might object to what the newspaper produces but it would be silly to say it is unproductive. By analogy, a blackmailer is essentially a free agent who sells the same material to that newspaper, and so also is productive. Both the reporter and the free agent help produce something consumers want; indeed, they may be better at this than General Motors. Nevertheless, overall efficiency reasons might dictate a law prohibiting blackmail that covered cases of mutual advantage or exchange blackmail. Such a law might make efficient sense if evidential or strategic considerations made it very difficult to identify exchange blackmail and to exempt it from coverage. But this argument, to be validated, requires a substantial empirical study—it does not simply follow a priori. And if it holds, it does not turn on the moral nature of exchange blackmail, which could readily be acknowledged as morally acceptable even though not legally exempt from penalty.

Richard Posner says blackmail of the exchange variety has no social product and should therefore be criminalized.<sup>39</sup> This is a very odd conclusion. Much of what I do has no social product (for instance, I consume, I waste time), but surely it should not be criminalized. Perhaps Posner means that it has net social costs. If so, we might be better off, considered *ex ante*, with prohibiting even exchange blackmail. But this would be true only if the losses from blackmail outweigh the likely costs of enforcing a law against it.

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<sup>38</sup> See Ronald H. Coase, *Blackmail*, 74 VA. L. REV. 655, 671 (1988) (noting that when transaction costs are considered, even purely redistributive blackmail is unproductive); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1849-50 (1993) (stating that while blackmail laws were not enacted to further a specific economic rationale, the laws in fact enhance efficiency); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 42-43 (1975) (suggesting that blackmail is illegal as a result of society's decision to grant a public monopoly in the enforcement of criminal law).

<sup>39</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 601 (4th ed. 1992). Most of his discussion concerns blackmailing a person who would be legally incriminated by the evidence one might reveal. See *id.* at 600-02. This class of blackmail problems easily fits Lindgren's rule.

We could conceivably outlaw certain kinds of arbitrage or retail trade for reasons having to do with their effects on the larger society. Medieval philosophers rated trade as an occupation of little respect because it is supposedly not productive. Anyone with a sense of the beneficial role of information in the economic life of modern societies must think trade quite productive—without it there could hardly be much production of any other kind. Hence, it would be preposterous to suppose there is something inherently wrong with the strategic structure of retail sales or arbitrage that makes all such activity wrong or not worthy of legal support. If we are to make mutually beneficial blackmail illegal on the ground of its immorality in some sense, we will have to make the case on something other than the strategic structure of the relationship. Blackmail of the type in Game II involves merely the strategic structure of exchange, in which the action of choosing the cooperative exchange strategy cannot plausibly be seen as inherently wrong.

Why does Lindgren's principle seem to apply in one context (the use of institutional position to extort personal benefit from blackmail) and not in another (my use of your productivity to make a profit for me)? A mutual advantage theorist can give a relatively simple answer for why these contexts yield different moral injunctions. A system of justice or a labor union may work best for the benefit of all relevant persons if it is not put to extraneous use for personal gain. Hence, the regime of "no such extraneous use" is the mutual advantage regime. The generalized use of others' productivity for one's own personal profit, however, may well be mutually beneficial for everyone. Hence, the regime of such profiteering may be good.

Some instances involving trade secrets can also be fit into a mutual advantage theory. Suppose I know how you succeed so remarkably at marketing some product, and suppose I can give this legally unprotected knowledge to a competitive firm. I make an offer to you that sounds like blackmail. You put me on a generous retainer as an "adviser" and give me attractive stock options in your firm, and I keep my knowledge secret. If your competitor adopts your technique, you are immediately to fire me as adviser and, without action at all on your part, my stock options become far less attractive as your firm loses market share.

In this trade-secret case, we might think there is nothing wrong with my actions. I have the legal right to go to your competitor and to negotiate favorable terms with her. All I do is give you a chance to salvage your interests by matching or topping the likely price

your competitor would pay. The fact that there is nothing illegal about my actions might be the ground for thinking there is nothing wrong with them. This would be the view of a Hobbesian or other positive law theorist.

Some legal theorists, however, might suppose there is nothing illegal about my actions in large part because there is nothing wrong with them. The view that the right or the good determines the law might often yield a correct historical account of how a particular law came to be what it is. But unless the principle of rightness or goodness is very broadly conceived, this view is conspicuously false to the historical facts of many laws. Consider what may be an especially provocative case, the law of murder. We may say murder is inherently wrong and therefore it is illegal (or is likely to be illegal). But this claim is a circular cheat. Most who think murder is inherently wrong do not think killing is inherently wrong. To characterize certain killings as murder and others as not requires a relatively detailed moral theory or principle. Today the law in many jurisdictions counts killing in a duel as murder,<sup>40</sup> whereas not long ago such killing was a matter of honor. Morality may have both led and followed the law in this transformation. When Cardinal Richelieu enforced the ban against dueling in France (renewed in a severe edict in early 1626), his concern was evidently with the generally harmful effects of the system of personal honor that burdened the aristocratic class, not with the directly inferred wrongness of killing in particular duels. Indeed, he used execution, of the comte de Bouteville and his second, in June 1627, a mere five weeks after the comte's duel.<sup>41</sup>

Part of the problem of supposing that the right or the good determines the law is that conceptions of the right and the good change over time. For example, medieval jurists thought charging interest on loans was wrong and called it usury.<sup>42</sup> Jurists today

<sup>40</sup> See, e.g., MISS. CODE ANN. § 97-3-23 (1991) (stating that the death of a person within the state resulting from an out-of-state duel imposes liability for murder upon the other participant); *State v. Tally*, 33 A. 181, 182 (Del. Oyer & Terminer 1886) (stating that if one party is killed in a duel, the other party is guilty of murder). But see *People ex rel. Terry v. Bartlett*, 14 Cal. 651, 653 (1860) (holding that a fatal duel is not murder within California statutes, but rather a special offense).

<sup>41</sup> See VICTOR-L. TAPIÉ, *FRANCE IN THE AGE OF LOUIS XIII AND RICHELIEU* 163-65 (D. McN. Lockie trans., Macmillan Press 1974) (1952). On Tapié's reading of Richelieu's memoirs, Richelieu was gravely troubled by this episode, but still thought his action necessary for the good of France (presumably meaning the good of the king).

<sup>42</sup> See Robert H. Nelson, *Private Rights to Government Actions: How Modern Property*

generally do not think charging interest is wrong and do not call it usury, although some jurisdictions place upper limits on the interest rates that may be charged.<sup>43</sup> Part of the reason for the change is a better causal understanding of the effects of allowing interest. And part of it is the rejection of supposed scriptural warrants for calling interest wrong.<sup>44</sup>

The changed view of dueling may very well be a change not merely in causal understanding but more significantly in causal capacities. The state has become capable of handling certain offenses and has, in Lindgren's term, taken the chip of enforcement out of the hands of individuals. But many of the offenses that led to duels, such as the frivolous duel of Eugene Onegin,<sup>45</sup> are now virtually ignored by many states. If there is enforcement, it is still at the individual level, but it is now presumably far less grievous in its exactions. Richelieu's view that the duel was disruptive to the general good is in part implicitly a view that the conventional evaluation of the seriousness of the offenses that gave rise to duels was radically too severe. Changing the law may have changed the conventional valuations as well.

## VI. BLACKMAIL IN THE PUBLIC INTEREST

One might also allow blackmail in cases concerning the public interest. Consider the experience of former Vice President Spiro Agnew. Agnew reputedly had taken large bribes from contractors in Maryland while he was governor, some of which continued to be paid on an installment plan while he was Vice President.<sup>46</sup> Federal prosecutors had damning evidence.<sup>47</sup> Unfortunately, a trial would

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*Rights Evolve*, 1986 U. ILL. L. REV., 361, 384.

<sup>43</sup> See, e.g., ARK. CONST. art. 19, § 13 (limiting the interest rate on any contract to 5% per year, but allowing a seventeen percent rate for consumer loans and credit sales); ALA. CODE § 8-8-1 (1992) (limiting the interest rate on money loans to 6% per year, or 8% if the loan is through a written contract); .

<sup>44</sup> See *Ezekiel* 18:8; *Luke* 6:34-35.

<sup>45</sup> See ALEXANDER PUSHKIN, *EUGENE ONEGIN* (1833) (ch. 6).

<sup>46</sup> See RICHARD M. COHEN & JULES WITCOVER, *A HEARTBEAT AWAY: THE INVESTIGATION AND RESIGNATION OF VICE PRESIDENT SPIRO T. AGNEW* 349 (1974) (quoting Agnew's acknowledgement of the existence, and his denial of the veracity, of allegations that he and his agents "received payments from consulting engineers doing business with the state of Maryland during the period [he] was governor").

<sup>47</sup> See *id.* at 346 (stating that the government had evidence of payments to Agnew by two engineering firms from the early 1960s through 1972, and that the government's witnesses were prepared to testify that they made direct payments to Agnew).

have taken a long time, and many feared that President Richard Nixon would soon be impeached by the House and perhaps removed by the Senate to make Agnew, a reputed criminal, president. An alternative consequence of taking Agnew to trial, also arguably very bad, was the possibility of much greater reluctance in the Senate to remove Nixon if Agnew would then become president. The Justice Department prosecutors evidently concluded that they should blackmail Agnew out of concern for the national interest, and they offered to guarantee not to bring his case to trial in return for his resignation as Vice President.<sup>48</sup>

The tough aspect of the Agnew case is to decide how it counts. One might conclude that it was blackmail but nevertheless a morally correct action, even though of dubious legal validity. Indeed, it makes sense to say that it was arguably moral even if it was literally illegal. Fairly broad prosecutorial discretion is generally legal.<sup>49</sup> What would it mean to make the Agnew prosecutors' action a matter of illegal blackmail? It is difficult to imagine who could have prosecuted the Justice Department prosecutors; their acts may have fallen only under their own department's jurisdiction, and the department must have countenanced their own agent's behavior. Congress could have intervened against them, but Congress might readily be expected to pass on the opportunity to uphold the law even while striving to impeach a president for not upholding it.

Was it blackmail? Were the prosecutors not simply acting in the public interest, or playing the public's chip on behalf of the public? Yes, but. The law may define the ways in which prosecutors should act in the public interest. It need not leave this definition up to its agents. The whole strategy of law is to place intermediate institutions between individual judgment and whatever purposes are to be served by law. Perhaps Agnew's potential prosecutors were utilitarians who simply thought the world with Agnew out of office was better than the world with him in office and facing trial. But the law does not generally require one to follow a particular moral theory or broad assessment. Rather it prescribes certain acts and proscribes others. The law may be much more precise and detailed than its background purposes, but it may also be less exact in some contexts, especially in situations involving unanticipated problems such as Agnew's.<sup>50</sup>

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<sup>48</sup> See *id.* at 236-37, 342-43.

<sup>49</sup> See *supra* note 9 and accompanying text.

<sup>50</sup> See Russell Hardin, *My University's Yacht: Morality and the Rule of Law*, in



Agnew's case is reputedly not unusual—public officials may often be blackmailed in similar fashion. Consider the more recent case of Sol Wachtler who, as Chief Judge of the Court of Appeals, was the highest judge of the State of New York (and so a distant successor to Benjamin Cardozo). Wachtler was involved in an ugly attempt at blackmail coupled with threats of kidnaping.<sup>51</sup> The U.S. attorneys handling his case considered confronting him with their then-circumstantial evidence to make him resign as judge.<sup>52</sup> They feared that surveillance would eventually lead the judge to halt his actions before hard evidence was generated, “and then you'd end up with a secret nut running the court system of New York.”<sup>53</sup> In the end, of course, they trapped and charged Wachtler, and he subsequently resigned.<sup>54</sup> Perhaps there was pleasing irony in the potential use of blackmail to punish a blackmailer. But the public whose chip is played in such cases might rightly wonder whether its interests are well served by the promise of special treatment for felonious public officials, which allows such officials, but not the rest of us, to escape more severe punishment merely by resigning their offices.

## VII. CAVEATS AND OTHER MORALITIES

It is often said or implied that law and economics is grounded in a moralized view of what kinds of action count as acceptable.<sup>55</sup> By ruling out certain kinds of action, scholars of law and economics reach conclusions that may seem not to depend on any criterion but efficiency or some relative. If I aim missiles with high explosives at my neighbor's home, our bargaining positions change, for I can now extort a larger share of the total profit from our joint endeavors. We still may agree to use our combined properties in the most profitable ways as we would in a normal Coasian bargain over

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NOMOS 36: THE RULE OF LAW (Randy E. Barnett & Ian Shapiro eds., forthcoming 1993) (manuscript at 3, on file with author) (noting that “although the legal system may have capacities for discovering facts . . . it may also face constraints on gathering and using information”).

<sup>51</sup> See Lucinda Franks, *To Catch a Judge: How the F.B.I. Tracked Sol Wachtler*, NEW YORKER, Dec. 21, 1992, at 58, 58-60.

<sup>52</sup> See *id.* at 61.

<sup>53</sup> *Id.*

<sup>54</sup> See *id.* at 66.

<sup>55</sup> See, e.g., Richard A. Posner, *Law and Economics is Moral*, 24 VAL. U. L. REV. 163, 166 (1990) (asserting that moral concerns may legitimately underlie a general wealth maximization approach).

property rights, but, with my missiles in place, I get more of the profit.

Yet our production might still be affected by the introduction of the threatened harm. Some of our joint resources go into producing the weapons that are then used not to increase production but only to shift distribution of profits. Hence, we are likely to produce less for the market but to allocate more of the total profits to me. Finally, I may even use my capacity to deliver harm to extort more from our joint production than merely the maximal amount of profits; for instance, I may force you to give me resources. At this point, the Coasian system has broken down. We are no longer in a world of consensual exchange and production—we are in the world of the mafia and of international military relations. Ronald Coase himself seemingly grants that the possibility of non-productive harmful conduct undercuts his analysis of social cost.<sup>56</sup>

An actor threatening a harm who derives no direct benefit from its imposition subverts social cost analysis because the Coasian framework is grounded in voluntarist assumptions. But if we back off from the explicit argument of Coase, we may suppose his principle is the voluntarist principle of mutual advantage.<sup>57</sup> The use of blackmail, which involves the threat of a harm, can violate this principle, although it need not and does not in exchange blackmail. Coase could, consistently with his general argument, allow state intervention to block the use of harms that are not mutually advantageous. Indeed, such a move is necessary to enable people to reach mutually advantageous outcomes and to avoid falling into a mutually destructive Hobbesian state of nature.<sup>58</sup> His whole analysis of the problem of social cost takes place, after all, in the context of a given set of rights assignments that are presumably backed by adequate state power to secure them. To pull the possibility of bombing my neighbor out of my hat at the moment of our Coasian negotiation over the use of our properties is illicit, because that issue, whether we allow use of destructive threats, has already been settled before we bargain and only therefore do we have reason to bargain.

From the sanguine world of Coasian bargaining, turn to the grim world of threats backed by nuclear weapons. In that world

<sup>56</sup> See Coase, *supra* note 38, at 656-57.

<sup>57</sup> See Russell Hardin, *Magic on the Frontier: Hobbes, Coase, and Others* 8-11 (Sept. 6, 1992) (unpublished manuscript, on file with author).

<sup>58</sup> See *id.* at 4-5.

there is no prior resolution on the use of violent extortion, in part because there is no overarching international government.<sup>59</sup> The term nuclear blackmail has been used chiefly to describe cases in which nuclear superiority is, or potentially is, used to extort some kind of concession.<sup>60</sup> It is typically not applied to mutual deterrence by two relatively matched nuclear powers, as in the state of mutual assured destruction (MAD) of the nuclear standoff between the Soviet Union and the United States.<sup>61</sup> Perhaps the distinction between mutual deterrence and nuclear blackmail fits Lindgren's rule that the wrong chip is being used in the latter kind of interaction. But the relevant moral insight may be much simpler: Violence or the threat of violence is out of order except when used to oppose violence or its threat. Why? Because, as in the argument above, it cannot be mutually advantageous in general to have the recourse to violence to settle other issues.

If we are to rule for or against blackmail, as we rule against extortion with explosives, we must similarly do so before we come to an instant case. I do not know whether the mutual advantage principle recommends that exchange blackmail be outlawed or legally supported. The issue turns on causal analyses. Yet the literature on blackmail turns almost entirely on normative claims.<sup>62</sup>

Despite its apparent consistency and power, the mutual advantage theory has a serious weakness that is easily seen in piecemeal contexts but that may be less evident in arguments at the level of institutional structures or rules. At some point, even if I get a very slight benefit from an activity that brings you great harm, it seems that our interaction will provoke interpersonal comparisons that permit us to say I should suffer the minor loss in order to protect you against the major loss. We might build such considerations into institutional arrangements and legal rules, for example by holding that some actions are legally wrong because they lead to "reckless endangerment."<sup>63</sup> Such an arrangement does not

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<sup>59</sup> See Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2279 (1991) (describing international law as nothing more than "a matter of diplomacy and the power politics of state interests").

<sup>60</sup> See RICHARD K. BETTS, *NUCLEAR BLACKMAIL AND NUCLEAR BALANCE* 3-4 (1987).

<sup>61</sup> See *id.* at 15.

<sup>62</sup> But see Posner, *supra* note 5, at 1841-47 (surveying published judicial opinions in blackmail cases).

<sup>63</sup> After Lynne Guenther threatened to firebomb herself and her van on the United Nations Plaza, she was charged with reckless endangerment and coercion. See

necessarily imply that the ends of these actions are wrong; they might even be good, but their cost, weighed interpersonally against their gain, is too great. But we could not go very far with interpersonal comparisons without undermining the mutual advantage argument.

A moral elitist might insist paternalistically on violating claims of mutual advantage in blackmail on the ground that it is harmful to people to submit to blackmail, that it is better for them to face embarrassment with stoicism—even though many people might firmly disagree. A mutual advantage theory cannot be tricked out with such paternalistic claims without gutting its core. The only general argument against blackmail that can fit mutual advantage arguments must be in an institutional or ex ante form: ex ante each would prefer that blackmail be illegal because each would expect to be better off as a result. This is a hard empirical case to make, either pro or con, and little effort has been made to address it. Consider this more limited question. Suppose in our regime it is legal to sell suppression of what another (such as the press) would pay to publish. Ex ante, would we be better off in such a regime if it were backed by enforceable contracts or if it were not? Unstable expectations typically reduce the expected value of exchanges. Hence, if a regime of legal blackmail for mutual advantage (case by case) is itself mutually advantageous (institutionally and generally), then contractual protection of such blackmail seems likely also to be mutually advantageous. If blackmail for mutual advantage is legal, it should be protected with enforceable contracts.<sup>64</sup>

A motivating factor of the intellectual debate over blackmail may be not its supposedly paradoxical aspect but merely the perverse quality of much blackmail: one cannot go to law to block its use and potential effects because law is public. Using the law causes a harm for which the blackmail is only proximate cause. When Joy Silverman went to the F.B.I. about the blackmail threats she had received, she risked public exposure roughly equivalent to what the blackmailer threatened. When her blackmailer turned out to be Judge Wachtler, she was subjected to massive, embarrassing news coverage that has plausibly changed her life.<sup>65</sup> One can go to law

*Woman Pleads Guilty in U.N. Standoff Case*, N.Y. TIMES, Oct. 4, 1992, at 46. Many might think that the charge of coercion—a close cousin of blackmail—was trivial by comparison with the charge of endangerment.

<sup>64</sup> For instance, Agnew arguably had an enforceable tacit contract to block subsequent criminal action against him.

<sup>65</sup> Silverman's name might not have been included in early press coverage. But

to punish blackmail and thereby prospectively deter it, but one cannot use the law to denature it. This may be half the reason many want it criminalized rather than merely made a tort, since the threat of criminal sanction may finally deter many blackmailers. Of course, this is an institutionalist argument about the larger regime for handling blackmail, not solely a moral analysis of an instance of it.

Suppose we have concluded that blackmail is properly subject to legal sanction. Why should the sanction necessarily be criminal rather than tort? In the foregoing paragraph, it is implied that the losses from a blackmail might exceed the gains to the blackmailer. A general economic theory of criminal law could take this as the criterion for deciding what to criminalize and what to leave to civil suit.<sup>66</sup> Traffic accidents can be treated as matters for tort settlement because the general availability of driving and traveling by cars and buses brings sufficiently more gains than losses to allow taxation of motor vehicle users to cover the harms they cause.<sup>67</sup> When a tort suit cannot recoup my loss from a particular action by another, that other person has inadequate incentive to attend to my interests.<sup>68</sup> We can increase her incentive by adding a criminal sanction for her actions. If blackmail generally produces losses, as Coase, Ginsburg, Posner, and others suppose,<sup>69</sup> then we cannot adequately deal with it as a tort but must motivate behavior with the threat of criminal sanctions.

### CONCLUSION

The argument here has all been from the mutual advantage morality that underlies most of law and economics. This morality is an interpersonally noncomparable version of utilitarianism. Some other moral theory—for example, a rights, Kantian, virtue, or communitarian theory, or a utilitarian theory with interpersonal

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in order to catch Wachtler, she followed his instructions and ran an ad in the New York Times. A Times editor quickly identified the ad and found out from the Times business office who had placed it. See Josh Barbanel, *Chief Judge of New York State Is Arrested in Extortion Scheme*, N.Y. TIMES, Nov. 8, 1992, at 1, 49.

<sup>66</sup> See Hardin, *supra* note 4, at 370-77.

<sup>67</sup> For an outline of the efficiency aspects of tort law, see ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 340-71 (1988); POSNER, *supra* note 39, at 147-60.

<sup>68</sup> See, e.g., A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 67-74 & 69 n.40 (2d ed. 1989).

<sup>69</sup> See Coase, *supra* note 38, at 674-75; Ginsburg & Shechtman, *supra* note 38, at 1873; Landes & Posner, *supra* note 38, at 42-43.

comparison and aggregation of welfare—might reach conclusions on blackmail that differ from the conclusions of a mutual advantage theory.<sup>70</sup> But one theory's conclusions do not trump another's unless the first theory trumps the other theory. After two and a half millennia of moral theorizing, the number of theories in contention seems to be increasing rather than decreasing. (Unfortunately, the number of ad hoc and idiosyncratic intuitions seems also to be increasing.) There is little hope that any theory is soon going to trump all the others. Any moral argument that concludes that blackmail is right or wrong *tout court* is specious. Blackmail, like every other kind of action or result, is right or wrong, good or bad only as an implication of particular moral theories.

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<sup>70</sup> For this reason, Gorr's claim that I cannot be harmed by disclosure that I have done something morally required is wrong. See Gorr, *supra* note 14, at 51. Suppose, as a utilitarian, I have lied in order to bring about a good end. If my religious or Kantian friends, with their rule-bound morality, learn of my lie, they might well treat me differently, to my disadvantage. I did what I thought was morally required by violating what they think is morally required.