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# BLACKMAIL AND OTHER FORMS OF ARM-TWISTING

LEO KATZ†

*What's robbing a bank compared with founding a bank? What's  
murdering a man compared with employing a man?*

— Bertolt Brecht, *The Threepenny Opera*

## I. CASES AND MATERIALS

“Poetry is indispensable,” Jean Cocteau once said, “if only I knew what for.”<sup>1</sup> Nearly everyone seems to agree that blackmail is an indispensable part of a well-developed criminal code, but no one is sure what for.

The canonical blackmail problem is quickly stated. Busybody says to Philanderer: “Pay me \$10,000, or I’ll reveal your affairs to your wife.” Busybody is guilty of blackmail. What is strange, however, is that if Busybody had actually revealed Philanderer’s affairs, or if he had threatened Philanderer with doing so but not mentioned the money, or if he had asked for the money but not mentioned what he was going to do if he didn’t get it—if he had done any one of these things, he would not be guilty of any crime whatsoever. Yet when he combines these various innocent actions, a crime results—blackmail. How odd; how mysterious; how come?

It is easy, but wrong, to think that blackmail is essentially a crime of information, that it invariably involves the threat to disclose an embarrassing fact about the victim: “Pay me \$10,000, or I’ll call on my men to strike”; “Pay me \$10,000, or I’ll flunk you on this exam”; “Pay me \$10,000, or I’ll cause some really bad blood at the next faculty meeting”—all of these pretty easily qualify as blackmail, though none of them involves the threatened disclosure of embarrassing facts. Quite possibly (though more controversially) blackmail even includes cases like the following: “Pay me \$10,000,

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† Professor of Law, University of Pennsylvania. Thanks are due not only to my fellow symposiasts but to Northwestern University and the University of Virginia at whose Legal Theory workshops I got to present drafts of this piece, and to Jim Lindgren and Jeffrie Murphy whose work first awakened my fascination with this topic.

<sup>1</sup> ERNST FISCHER, *THE NECESSITY OF ART: A MARXIST APPROACH* 7 (Anna Bostock trans., Penguin Books 1963) (1959).

or I will seduce your fiancé"; "Pay me \$10,000, or I will persuade your son that it is his patriotic duty to volunteer for combat in Vietnam"; "Pay me \$10,000, or I will give your high-spirited, risk-addicted 19-year-old daughter a motorcycle for Christmas"; "Pay me \$10,000, or I will hasten our ailing father's death by leaving the Catholic church." Again none of these involves the threatened disclosure of embarrassing facts. Yet all of the foregoing cases present the canonical blackmail problem, as squarely as the more typical, informational kind of case: It may be perfectly legal for me to call a strike, to flunk you on your exam, to cause bad blood at the next faculty meeting, to seduce your fiancé, to give a motorcycle to your daughter, to talk your son into enlisting, or to abandon the Catholic church. It is also legal for me to threaten any of these things (so long as I don't ask for, or insinuate I want, money). And it is legal for me to ask you for money, so long as I don't tell you what unpleasant things I plan to do unless you oblige me. Yet it isn't legal for me to ask you for money in exchange for not doing those unpleasant things to you. In short, whether the blackmailer's threat is one of disclosure or of something more exotic, the puzzle remains the same.

It is also easy, but also wrong, to think that blackmail is essentially a property crime. If Busybody had said to Philanderer, "Let me make love to you or I will reveal your affairs to your wife," it would be blackmail just as much as if Busybody had asked for \$10,000. To be sure, some legal systems—notably the German one—call it blackmail if one asks for money but call it coercion if one asks for something else. Similarly, the Model Penal Code calls it "gross sexual imposition," a sort of quasi-rape, if one asks for sex rather than money.<sup>2</sup> But the history, decisional law, and scholarly commentary about those alternative labels leave little doubt that (the nature of the request aside) all of these labels refer to the same underlying moral phenomenon, which I will consistently here call blackmail.<sup>3</sup>

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<sup>2</sup> See MODEL PENAL CODE § 213.1(2) (1974).

<sup>3</sup> Consulting some typical blackmail provisions and their annotations should quickly corroborate this—to the extent that any mere statute can corroborate a proposition like this. See, e.g., MODEL PENAL CODE §§ 223.4, 212.5, 213.1(2) (1974) (covering theft by extortion, criminal coercion, and gross sexual imposition, respectively); see also, e.g., STRAFGESETZBUCH [StGB] §§ 240, 253 (1974) (F.R.G.) (detailing provisions in the German Penal Code covering coercion (Nötigung) and extortion/blackmail (Erpressung), respectively).

The canonical problem is a tough nut to crack, and most of this essay will be devoted to cracking it. But there are other nuts in the same bowl, which, oddly enough, few have bothered to reach for, though they seem well worth the effort. Perhaps it is thought that if the canonical problem cannot be cracked, it's no use trying the others. Or, perhaps the contrary is true: The canonical problem is so enticing that these collateral problems seem like mere . . . well, peanuts. Either way, one is missing out on a considerable part of blackmail's fascination. I do not in this essay mean to take up each of these collateral problems—I intend to complete that task elsewhere—but I will take up quite a few of them and make headway on others.

What collateral problems do I have in mind? Here is a list of the principal ones:

#### A. *Warnings*

Mildred and Abigail are both aspiring actresses. They are the same age, look vaguely alike, and often find themselves competing for the same part. Alas, Abigail tends to be much the more successful of the two. Many a part that was almost Mildred's ultimately eluded her when Abigail appeared to audition and was found to be "just like Mildred, only better." Mildred is, understandably, jealous of Abigail. One day a truly attractive part is being offered. Mildred is convinced that if she gets it, it will make her career. She is also convinced that she will only get it if Abigail stays away from the audition, but Abigail has no intention to staying away. Mildred is determined to keep Abigail away from the audition, at any cost. It so happens that Mildred knows about some of Abigail's marital infidelities, and she decides to put that knowledge to good use.

Consider now two possible conclusions to my story.

Variation I: Mildred calls Abigail and tells her that unless she stays away from the audition scheduled for the next Wednesday between nine and twelve in the morning, she will tell her husband about those affairs. Abigail acquiesces, and Mildred gets her part. There is no doubt that Mildred is guilty of blackmail.

Variation II: Mildred considers pursuing Variation I, but decides against it. That would be straight-out blackmail, she realizes, and therefore too risky. Instead she mails a letter to Abigail's husband the day before the audition, detailing all of Abigail's infidelities. She then calls Abigail to tell her the letter is

in the mail, is due to arrive the next day, sometime between nine and twelve. "You can draw your own conclusions," she tells her. As expected, Abigail then stays home to get a hold of the letter before her husband can see it, and thus is prevented from attending the audition.

Question: In Variation II, is Mildred guilty of blackmail? She has committed what in substance seems like blackmail, but what in form is just a warning. Does that make a difference?<sup>4</sup>

### B. Omissions

In the archetypical case, the blackmailer threatens an unpleasant act unless paid off. What of the atypical case in which a person threatens an unpleasant *omission* unless paid off? That begins to sound very much like an ordinary bargain and therefore seems outside the ambit of blackmail: Isn't this what happens in every contract negotiation—one party threatens to omit performing some beneficial deed unless suitably "paid off"? To avoid collapsing all bargains into the blackmail category, mustn't we insist that blackmail only include threatened acts, not threatened omissions? Then again, does it really make sense to so insist? What about the potential employer who offers an applicant a secretarial job if she will sleep with him? What of the American who offers to marry a foreign heiress, unable to secure citizenship, if in exchange she will fund some of his financial ventures? Or, the outgoing governor who offers to endorse his aspiring replacement in exchange for a financial token of gratitude? Couldn't these count as blackmail, even though they involve threatened omissions? And, if you wouldn't call them blackmail, is that really because blackmail necessarily involves a threatened act rather than omission?<sup>5</sup>

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<sup>4</sup> This is a much embellished version of a passing suggestion made by Günther Jakobs. See Günther Jakobs, *Nötigung Durch Drohung als Freiheitsdelikt*, in EINHEIT UND VIelfALT DES STRAFRECHTS: FESTSCHRIFT FÜR KARL PETERS 69 (Jürgen Baumann & Klaus Tiedemann eds., 1974).

<sup>5</sup> Some have argued that such cases qualify as blackmail; some have objected. See, e.g., HANS-HEINRICH JESCHECK ET AL., STRAFGESETZBUCH (1989); 2 STRAFGESETZBUCH: LEIPZIGER KOMMENTAR § 240, ¶ 81i (1974).

### C. Manipulative Crimes

Oscar implores Alonzo not to go on a concert tour to the Soviet Union, in protest against the Afghan war. Alonzo is unrelenting. Oscar threatens to destroy the one and only violin on which the eccentric Alonzo is willing to play, unless he promises not to go. Alonzo just laughs. Eventually Oscar sets fire to Alonzo's violin, and Alonzo has to cancel his tour. Oscar's acts were not, of course, spurred by the sheer joy of torching Alonzo's violin. No doubt he is guilty of the comparatively minor offense of maliciously destroying someone else's property. But given the purpose of his actions, is he not also guilty of blackmail? After all, had his threat succeeded in dissuading Alonzo from taking the trip, he clearly would be guilty of blackmail. How can making good on that threat improve Oscar's moral, and legal, position—especially when it secures for him the very advantage which the threat was originally meant to secure?<sup>6</sup>

### D. Buybacks

Anatole steals a Rembrandt from the Metropolitan Museum. He sends a letter to the museum which reads: "Pay me \$10,000, or you'll never see that Rembrandt again." The museum buys back its painting for \$10,000. Anatole clearly is guilty of theft for taking the Rembrandt. But what about the second transaction? Is it a simple sale (as one German court held) or blackmail? ("Pay me \$10,000, or else . . ." certainly sounds like blackmail.) More generally, is Anatole morally better or worse for not having held on to that painting, but instead having sold it back for a fraction of its market price?<sup>7</sup>

### E. Self-sacrifice

Matilda sits down in front of a train and refuses to move until the railroad administration promises to provide better facilities for the disabled. Leopold threatens to jump out the window if his wife makes good on her plans to leave him. Genoveve threatens to kill

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<sup>6</sup> See Ulrich Sommer, *Lücken im Strafrechtsschutz des § 240 StGB? Zum Verhältnis von Gewalt und Drohung bei der Nötigung*, 38 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 769-72 (1985).

<sup>7</sup> This example is based upon a German case. See Judgment of May 18, 1976, BGH Gr. Sen. St., 26 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 346 (F.R.G.).

herself unless her boyfriend pays off her gambling debts. Ferdinand goes on a hunger-strike and demands that the state reverse his “unjust conviction and lets me out of jail.” Are Matilda, Leopold, Genoveve, and Ferdinand guilty of blackmail?

Angelica, a pedestrian, wants to reserve a parking space for her friend who is due to arrive imminently. Boniface has his eyes on the same spot. As he tries to drive his car into the empty space, Angelica plants herself squarely in front of him and announces: “Over my dead body.”

“You’re kidding,” replies Boniface, “you are threatening to die for the sake of a parking space?”

“Exactly.”

“Well, I won’t be blackmailed. I’m going to park here anyway.”

“You mean you are threatening to run me over with your car unless I move?”

“Exactly.”

“Well, I won’t be blackmailed. I’m staying.”

Thereupon Boniface drives in, and Angelica jumps aside at the last minute.

Is Boniface guilty of blackmail? Is Angelica guilty of attempted blackmail? (“Attempted” because she didn’t get what she wanted.)

If the examples in this category seem altogether too contrived, let me assure you that they are not. Each corresponds to a line of cases that has regularly plagued German criminal courts—though admittedly much more rarely American ones. Indeed the problem they illustrate has a very venerable lineage, going back all the way to Homer, namely the story of how Odysseus was persuaded to join the Trojan War:

Now, Odysseus had been warned by an oracle: “If you go to Troy, you will not return until the twentieth year, and then alone and destitute.” He therefore feigned madness, and Agamemnon, Menelaus, and Palamedes found him wearing a peasant’s felt cap shaped like a half-egg, ploughing with an ass and ox yoked together, and flinging salt over his shoulder as he went. When he pretended not to recognize his distinguished guests, Palamedes snatched the infant Telemachus from Penelope’s arms and set him on the ground before the advancing team. Odysseus hastily reined them in to avoid killing his only son and, his sanity having thus been established, was obliged to join the expedition.<sup>8</sup>

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<sup>8</sup> 2 ROBERT GRAVES, GREEK MYTHS 279 (1955).

What's more, Odysseus subsequently uses a similar ruse to persuade Achilles to join the expedition. Achilles' mother, Thetis, had been foretold

that her son would never return from Troy if he joined the expedition, since he was fated either to gain glory there and die early, or to live a long but inglorious life at home. She disguised him as a girl, and entrusted him to Lycomedes, king of Scyros . . . . Odysseus, Nestor and Ajax were sent to fetch Achilles from Scyros, where he was rumored to be hidden. Lycomedes let them search the palace, and they might never have detected Achilles, had not Odysseus laid a pile of gifts—for the most part jewels, girdles, embroidered dresses and such—in the hall, and asked the court-ladies to take their choice. Then Odysseus ordered a sudden trumpet-blast and clash of arms to sound outside the palace and, sure enough, one of the girls stripped herself to the waist and seized the shield and spear which he had included among the gifts. It was Achilles, who now promised to lead his Myrmidons to Troy.<sup>9</sup>

Did Palamedes not blackmail Odysseus into reining in his team? For that matter, did he not blackmail him into coming to Troy? Did not Odysseus, in turn, blackmail Achilles into revealing his identity and into coming to Troy?

#### *F. Brutal Honesty*

Hortense knows that Thaddeus has been unfaithful to his wife and corrupt in his management of a trust, both of which she firmly plans to reveal unless Thaddeus pays her off. When she first demands money from Thaddeus she only mentions the infidelity, although she is determined to tell everything she knows if Thaddeus is not cooperative. When Thaddeus won't budge, she decides to tell him a bit more of what she knows and is willing to reveal. By this last move, has Hortense made things better or worse? Has her greater honesty improved her moral position, or has her increased threat only aggravated it?<sup>10</sup>

Given the intricacy of my subject, it pays to be absolutely clear about the order of business: In the next section I shall spell out how blackmail is different from other kinds of coercion and what

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<sup>9</sup> *Id.* at 280-81.

<sup>10</sup> See Woody Allen's *CRIMES AND MISDEMEANORS*.



problems attempts to reduce it to more traditional kinds of coercion have run into.

In the third and fourth sections, really the centerpiece, I introduce and solve a puzzle about punishment, which I believe holds the key to cracking blackmail. In the fifth section, I apply the punishment puzzle's lessons to blackmail proper, and in the sixth and seventh sections answer some possible objections to my analysis. In the eighth section, I sketch out some implications my analysis might have outside the blackmail context—for the distinction between tort and criminal law, for the problem of unconstitutional conditions, and for “nuclear blackmail.” Finally, in the ninth section, I put my solution into a slightly broader perspective.

## II. BLACKMAIL IN RELATION TO “PLAIN VANILLA” COERCION

Blackmail is only one kind of coercion; the law recognizes many other kinds. But those other kinds are far easier to understand than blackmail and it is important to see why.

The easiest kind is exemplified by “Your money or your life”—the coercion exerted in a straightforward robbery. For the sake of clarity, it is worth asking even of this trivial kind of coercion, why we call it “coercion.” Why do we not view the transaction between robber and victim as just another bargain, one in which the chance to continue living is exchanged for cash? In other words, what is the difference between a threat—which is deemed coercive—and an offer which is not? The answer is that offers enlarge your opportunity set whereas threats shrink it. The threat permits you to choose which of many things you are entitled to you will give up. The offer permits you to choose which of many things you are entitled you will, if you want to, exchange for something else which you are not entitled to. The robber coerces because he offers to sell you back what he has first unlawfully taken from you—the chance to go on living.<sup>11</sup>

As Alan Wertheimer has shown with such extraordinary clarity in his book *Coercion*, many seemingly harder cases are really just the robbery case in disguise.<sup>12</sup> Ask yourself whether (and why) we should reject the assumption of risk defense in this tort case:

<sup>11</sup> A classic source in which the distinction between offers and threats is explored is Robert Nozick, *Coercion in PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440 (Sidney Morgenbesser et al. eds., 1969).

<sup>12</sup> See generally ALAN WERTHEIMER, *COERCION* (1987).

A illegally blocks the public sidewalk, so that pedestrians can pass only by walking in the street. In order to pass, *B* walks in the street, knowing that there is substantial danger of being struck by passing traffic. He is struck and injured by a negligently driven automobile.<sup>13</sup>

Did *B* assume the risk of injury and is he therefore barred from recovering from *A*? Keeping in mind the robbery analogy, one soon sees why the answer should be no. *A* illegally narrowed *B*'s choices, much as the robber narrowed those of his victim. *A* forced *B* to buy back—by exposing himself to the risk of being hit by a car—something that was already his, namely the right to walk down the street.

Ask yourself whether (and why) we should accept a duress defense in the following contracts case. Caterer agrees to cater hostess's party. An hour before the guests are to arrive, caterer raises his price by fifty per cent and refuses to start preparing until the hostess consents. Hostess reluctantly yields. Thereafter she refuses to pay, arguing that the contract modification was coerced. Again, keeping in mind the robbery analogy, the answer is within easy reach. The caterer forced the hostess to buy back what was already hers—the right to have the party catered at the original price. (Note that this problem would not disappear if the caterer had thrown in some token consideration in exchange for the higher price. It doesn't exonerate the robber any that he offered to exchange his empty wallet for the victim's full one.)<sup>14</sup>

Ask yourself next whether the following case involves an illegal search and seizure. The police stop a traveller at an airport because he resembles the Drug Enforcement Agency's courier profile. Stops on the basis of such profiles have been ruled unconstitutional. Notwithstanding this ruling, the police tell the traveller that unless he consents to be searched they will detain him until they have obtained a search warrant. The traveller consents. The robbery analogy makes clear why his consent will be found coerced, and hence invalid. The traveller was being asked to buy back (through his consent to the search) what was already his: the right not to be detained.

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<sup>13</sup> RESTATEMENT (SECOND) OF TORTS § 496E, illus. 5 (1965).

<sup>14</sup> WERTHEIMER, *supra* note 12, at 95-103 (1987). Wertheimer's book shows with great vigor and clarity how the underlying logical structure of the Restatement and of cases dealing with coercive contracts, illegal searches, and plea bargains is in fact identical. My illustrations in the first half of this section, and my interpretation of those illustrations, borrow heavily from Wertheimer's book.

Lastly, ask yourself whether the following plea bargain is valid or coerced. The prosecutor has inadmissible but conclusive evidence demonstrating that the defendant is guilty of murder. He also has admissible but flimsy evidence implicating him in a rape. The prosecutor does not believe the defendant committed the rape. Nonetheless, desperate to put someone he knows to be a murderer in jail, he threatens the defendant with a rape prosecution unless he pleads guilty to some lesser charge (let's say, the aggravated battery of the fellow he murdered). The fearful defendant consents. But his consent is no more valid than the robbery victim's. The defendant is being asked to buy back (by pleading guilty to aggravated battery) relief from a trial, which the prosecutor is not entitled to launch anyway (given the frivolousness of the rape charge).

Fundamentally, then, the foregoing cases of coercion are quite straightforward. To be sure, they can give rise to greater conceptual difficulties than I have let on so far. Not everyone who is pressured into accepting a contract modification can claim duress—we don't always find the robbery analogy compelling—but it's not quite clear who can and who cannot. Generally speaking, though, there is little doubt about what is coercive and immoral in the standard cases of coercion. The standard cases all involve impermissible boundary-crossings. They involve easily discernible invasions of that line surrounding each individual—Nozick calls it a hyper-plane<sup>15</sup>—which harbors his possessions, entitlements, and rights. Blackmail isn't like that. Admittedly, blackmail superficially resembles robbery, but only superficially. For the robber's wrong—his boundary-crossing—is easy to pinpoint. He sells back what he doesn't own, the victim's life and limb. Not so the blackmailer threatening to disclose the victim's infidelity. The victim doesn't own the right to control the blackmailer's communications with his wife; the blackmailer does. The blackmailer, unlike the robber, is selling something he owns. Or so it seems.

But if blackmail isn't like standard cases of coercion, if it doesn't involve boundary-crossings, what's wrong with it? A number of scholars have offered ingenious suggestions seeking to supply the missing link between standard cases of coercion and blackmail. I will take a look at a small sample of those just to give a sense of the sort of difficulties such approaches run into.<sup>16</sup> In an essay called

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<sup>15</sup> ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 57 (1974).

<sup>16</sup> What follows is not intended as an exhaustive presentation of all extant or all

*Blackmail, Inc.*, Richard Epstein suggests that what is wrong with blackmail is that in various indirect ways it facilitates coercion and other kinds of boundary-crossings, like fraud, embezzlement, theft, and worse.<sup>17</sup> If blackmail were legal, he points out:

there would then be an open and public market for a new set of social institutions to exploit the gains from this new form of legal activity. Blackmail, Inc. could with impunity place advertisements in the newspaper offering to acquire for top dollar any information with the capacity to degrade or humiliate persons . . . or business associates. Thereafter, Blackmail, Inc., as a commercial organization, could negotiate contracts with its sources to suppress the information acquired.<sup>18</sup>

And that would only be the first step.

[The victim] may not have the money to satisfy [Blackmail, Inc.'s monetary demands]. What then is to prevent Blackmail, Inc. from hinting, ever so slightly, that it thinks strenuous efforts to obtain the necessary cash should be undertaken? Do we believe that [the victim] would never resort to fraud or theft given this kind of pressure, when the very nature of the transaction cuts off his access to the usual financial sources, such as banks or friends, who would want to know the purpose of the loan? ("To pay Blackmail, Inc.," he would say in a burst of candor.) Moreover, suppose Blackmail, Inc. recognizes that its ability to extract future payments from [the victim] depends upon [the third party, the wife, the business associates, etc.] being kept in the dark. As it is a full-service firm, it can do more than collect moneys from [the victim]. It can instruct him in the proper way to arrange his affairs in order to keep the disclosures from being made, as there are mutual gains from trade—greater wealth for Blackmail, Inc. . . . and greater serenity and peace of mind for [the victim]. What Blackmail, Inc. can do is participate in the very fraud that [the victim] is necessarily engaged in against [a third party].<sup>19</sup>

In short, blackmail is wrong because it promotes standard forms of coercion and boundary-crossing in two different ways. First, it facilitates fraud against the person from whom the blackmail victim

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notable theories of blackmail, but only a smattering of those that try to assimilate it to traditional notions of coercion. For a superb discussion of most of the competing approaches—I say "most" because the Germans have invented a few more variations—see James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 680-701 (1984).

<sup>17</sup> See Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 565 (1983).

<sup>18</sup> *Id.* at 562-63.

<sup>19</sup> *Id.* at 564.

is trying to keep some embarrassing fact secret; and second, like drug addiction, it induces crimes necessary to support the "fraud habit," the crimes necessary to pay the blackmailer.

In his prediction that legalizing blackmail would usher forth organizations like Blackmail, Inc., Epstein has clearly been proven right. When the blackmail prohibition is only laxly enforced, organizations like this have indeed made their appearance. In fin-de-siècle Paris, someone did form a limited-subscription newspaper called *The Independent* whose exclusive purpose was to sniff out scandalous facts about wealthy targets and make them buy the newspaper's silence.<sup>20</sup>

But Epstein's analysis nonetheless has serious problems. One such problem is that the analysis is so specifically tailored to informational blackmail and cannot easily be extended to the noninformational examples cited in the last section—the threat to call a strike, to cause bad blood at the faculty meeting, to give the blackmail victim's daughter a motorcycle, or to persuade his son to enlist.

A second problem with Epstein's account is its assumption that whenever a victim tries to hide an embarrassing fact about himself, this amounts to a form of fraud and should be prevented. Is the reason we are upset with the blackmailer who promises not to reveal a fellow employee's homosexuality (for a fee) that we would in fact like him to tell the employer what he knows?

A third problem is that Epstein's account makes the blackmail prohibition dependent on certain (admittedly very plausible) empirical assumptions about blackmail's second-order effects on the crime rate: More people will embezzle their employers, defraud their customers, cheat the IRS, in order to pay off Blackmail, Inc. But those effects seem to have nothing to do with our instinctive revulsion at the practice: Even if we imagine that those second-order effects are going to be trivial-to-nil, our aversion to blackmail doesn't seem to wane one bit.

In *Anarchy, State and Utopia*, Robert Nozick finds a different kind of link between blackmail and the standard forms of coercion.<sup>21</sup> "If I buy a good or service from you, I benefit from your activity; I am better off due to it, better off than if your activity wasn't done or you didn't exist at all."<sup>22</sup> On the other hand, "if I pay you for

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<sup>20</sup> See HANS VON HENTIG, *DIE ERPRESSUNG* 197-98 (1959).

<sup>21</sup> See NOZICK, *supra* note 15, at 84.

<sup>22</sup> *Id.*

not harming me, I gain nothing from you that I wouldn't possess if either you didn't exist at all or existed without having anything to do with me."<sup>23</sup> Roughly speaking, then, Nozick sees the critical line between ordinary bargains and coercive kinds of bargains (i.e., your-money-or-your-life kinds of bargains) as lying in the answer to the question whether the alleged victim would be better off if the defendant weren't around. By that test, blackmail starts to look like standard forms of coercion. Like victims of your-money-or-your-life transactions, and unlike a party to a regular contract, the blackmail victim, it seems, would be better off if the defendant didn't exist.<sup>24</sup>

Nozick's theory of blackmail, however, is both overinclusive and underinclusive. It sweeps into the blackmail category a lot of perfectly innocent conduct: The silver medalist at the Olympics would be better off if the gold medalist didn't exist. A more serious shortcoming is his theory's underinclusiveness. It covers only the kind of blackmail in which the blackmailer promises to *omit* an act in return for a payoff; it does not cover the kind of blackmail in which the blackmailer promises to perform some beneficial *act* in return for the payoff. (Only in promised-omission cases will it be true that the victim would be better off if the blackmailer didn't exist.) Although the most commonly thought of kinds of blackmail cases do involve omissions, this—as I hinted in the last section and will demonstrate in the pages to come—does not hold for *all* blackmail cases.

In the course of his magisterial four-volume exploration of *The Moral Limits of the Criminal Law*, Joel Feinberg tries to forge yet a different sort of link between blackmail and standard forms of coercion.<sup>25</sup> Reduced to its bare essence—which is hard, because he develops his theory with admirable detail—Feinberg's approach amounts to this: All cases of blackmail can be divided up into two categories, cases in which the blackmailer *threatens* to do something which only an immoral (even if not criminal) person would do ("Pay me \$10,000, or I will let everyone know about your homosexuality") and cases in which he *promises* to do something which only an immoral (even if not criminal) person would do ("Pay me \$10,000, and I won't tell the police that you are the one who has been sending arson threats to the new neighbor on the block").<sup>26</sup> The

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<sup>23</sup> *Id.*

<sup>24</sup> *See id.* at 85.

<sup>25</sup> *See* JOEL FEINBERG, HARMLESS WRONGDOING 238-74 (1988).

<sup>26</sup> *Id.* This is only one of two theories of blackmail Feinberg advances. The other

blackmailer is thus the pale version of either a robber or a criminal accomplice. Either he is asking the victim to buy back what the victim, morally speaking, already owns, like the right to keep his homosexuality secret, or he is offering the victim his assistance in keeping his misdeeds secret, like the torching of the new neighbor's house.

Like Nozick's, Feinberg's account seems both overinclusive and underinclusive. How is it overinclusive? Take the case of a contract killer. He is promising to do something immoral in return for a fee. Feinberg's account would brand him a blackmailer. But that seems hardly the right label. How is Feinberg's account underinclusive? Just take the canonical case—"Pay me \$10,000 or I'll reveal your affairs to your wife." Feinberg argues that because revealing the husband's affairs to his spouse is only the mildest kind of wrong, he would tend to exclude it from the blackmail category. Yet that kind of scenario is viewed by many as the quintessential blackmail case.

In *Unraveling the Paradox of Blackmail*, James Lindgren tries to assimilate blackmail into standard forms of coercion by expanding the category of personal property that an outsider is not permitted to infringe upon.<sup>27</sup> His theory is best illustrated by informational blackmail:

Here the blackmailer threatens to tell others damaging information about the blackmail victim unless the victim heeds the blackmailer's request, usually a request for money. The blackmailer obtains what he wants by using extra leverage. But that leverage belongs more to a third person than to the blackmailer. The blackmail victim pays the blackmailer to avoid involving third parties; he pays to avoid being harmed by *persons other than the blackmailer*. When the reputation of a person is damaged, he is punished by all those who change their opinion of him. They may "punish" him by treating him differently or he may be punished merely by the knowledge that others no longer respect him.

Thus when a blackmailer threatens to turn in a criminal unless paid money, the blackmailer is bargaining with the state's chip. The blackmail victim pays to avoid the harm that the state would inflict; he pays because he believes that he can thereby suppress the state's potential criminal claim. . . . Likewise, when a blackmailer threatens to expose damaging but noncriminal behavior unless paid money, he is also turning third-party leverage to his own benefit. What makes his conduct blackmail is that he

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is based on exploitation. *See id.* at 240.

<sup>27</sup> *See* Lindgren, *supra* note 16, at 672-73.

interposes himself parasitically in an actual or potential dispute in which he lacks a sufficiently direct interest. What rights has he to make money by settling other people's claims?

At the heart of blackmail, then, is the triangular nature of the transaction, and particularly this disjunction between the blackmailer's personal benefit and the interests of the third parties whose leverage he uses. In effect, the blackmailer attempts to gain an advantage in return for suppressing someone else's actual or potential interest. The blackmailer is negotiating for his own gain with someone else's leverage or bargaining chips.<sup>28</sup>

Lindgren's theory pretty closely matches our intuitions at the descriptive level, although it seems perhaps a bit underinclusive. It does not, for instance, account for several cases which many would agree clearly reek of blackmail: Pay me \$10,000—or I will cause bad blood at our club, seduce your fiance, persuade your son to enlist, give your daughter a motorcycle, or leave the Catholic Church. In none of these cases is it easy to see in what sense the perpetrator is playing with somebody else's bargaining chips. Even if it is plausible to say that the blackmailer who threatens to reveal the victim's infidelities is somehow misappropriating compensation that is really due the injured wife, it is not plausible to say about my other cases that the blackmailer is misappropriating compensation that is really due the annoyed club members, the jilted fiance, the patriotic son, the risk-loving daughter, or the sick father.

A more bothersome aspect of Lindgren's theory is its lack of normative moorings. The bargaining chips which he finds the blackmailer guilty of misappropriating seem like a very unreal sort of commodity, made of the most diaphanous of tissues. It is hard to see the principle that elevates this very metaphorical kind of misappropriation to the level of a robbery.

I don't want to make too much of these criticisms. Above all I don't want to make too much of the counterexamples. Counterexamples generally sound worse than they are. Just about every important mathematical theorem when first set forth is vulnerable to them, being too general or too simple in its initial formulation. (Littlewood once defined the great mathematician as the creator of defective—because original and important—theorems). In time, it is revised, honed, hedged, and qualified in a process the philosopher Imre Lakatos has aptly named "monster-barring." The initial

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<sup>28</sup> *Id.* at 702.



theorem is eventually revealed to have been all wrong but basically sound.

Indeed I believe none of the above theories to be just plain wrong. There is much that is right about every single one of them. Despite the problems that afflict them, they cater to some very strong intuitions, and they retain that intuitive appeal, even after the problems have been pointed out. Most likely, each captures some important aspect, some special case, of *the* solution to the blackmail puzzle, and it would be a distinct virtue of any new account if it managed to reveal that to be so: It is pretty clear that a good theory of blackmail should, for example, explain why the typical blackmail case involves information and promises of omission, why either the behavior that is threatened or the behavior that is promised will typically be immoral, and why the typical blackmailer appears to be playing with somebody else's bargaining chips. I will try in this essay to provide such an account. Like previous accounts, I don't expect this one to take us to the nirvana of a *complete* and incontestable solution, but levels of contentment short of that are also worth achieving.

### III. A PUZZLE ABOUT PUNISHMENT

One night, Smithy, the burglar, breaks into the house of Bartleby. He finds very little of value. As he is about to leave, he discovers a safe, which he is unable, however, to open. Wielding a club, he wakes up Bartleby and asks him for the combination. But Bartleby refuses to tell him. "Look here," says the exasperated Smithy, "unless you tell me the combination, I am going to beat you to a pulp." But Bartleby is adamant. "What's in that safe really isn't very valuable. Just some cheap family jewelry. But it has enormous sentimental value for me, having been passed through the generations for ages. I simply cannot give it up." But Smithy persists: "Tell me the combination, or I'll make you regret it." Bartleby quite sincerely replies: "Much as I fear physical violence, I'd rather you give me a savage beating than give up what's inside that safe." "As you wish," says Smithy, and proceeds to administer a fairly severe pummeling.

Another night, another burglar, let's call him Louie, breaks into Bartleby's house. Like Smithy, he finds very little of value. As he is about to leave, he too discovers Bartleby's safe, which he too is unable to open. Wielding a club, he wakes up Bartleby and asks him for the combination, but Bartleby refuses to tell him. "Look

here," says the exasperated Louie, "unless you tell me the combination, I am going to beat you to a pulp." But Bartleby is adamant. "What's in that safe really isn't very valuable. Just some cheap family jewelry. But it has enormous sentimental value for me, having been passed through the generations for ages. I simply cannot give it up." But Louie persists: "Tell me the combination, or I swear I'll make you regret it." Bartleby quite sincerely replies, "Much as I fear physical violence, I'd rather you give me a savage beating than give up what's inside that safe." "As you wish," says Louie, and is about to launch into the beating, when his eyes fall on a slip of paper lying at Bartleby's bedside. He takes a closer look and realizes that this is the combination to the safe. He is about to open the safe when Bartleby implores him, "Please, it's just like I said, I am really attached to those trinkets inside the safe and would rather you beat me to a pulp than strip me of those trinkets." Louie remains unmoved, opens the safe, takes what he finds inside and makes off.

Both Smithy and Louie are caught. You are the judge. Which of them should you punish more harshly?

What the law would do is reasonably clear—punish Smithy, the batterer, worse than Louie, the thief. The batterer would probably be found guilty of aggravated robbery, the thief of simple robbery. But that could vary. What is unlikely to vary is the significantly graver treatment of batterers than thieves. But does that make sense?

Informal polling among my law school colleagues, as well as at a party of economists, suggests that it does not. What strikes most as the most plausible solution is the following. Ordinarily, someone who commits a serious battery is worse morally than someone who commits a theft, especially a relatively modest one. But that's because most victims prefer being stolen from to being battered. Not so in this bizarre case. This defendant, for very idiosyncratic reasons, preferred being battered to being robbed. Smithy did what the victim preferred; Louie did not. Hence Smithy, the thief, is worse morally than Louie, the batterer. There's a lot that could be said to fortify this argument. For instance, one could point to tort law and note that in a perfectly-run tort system, seeking to obtain the most accurate possible measure of someone's loss, Bartleby should be entitled to more compensation from Louie than from Smithy. Although the tort system is a little wary of recognizing excessively idiosyncratic tastes, it tries, by and large, to avoid discriminating against the eccentric, the thin skull, or—as Calabresi

shows in his essay on the “reasonable” tort victim—the devoutly religious:<sup>29</sup> A Christian Scientist woman whose pelvis has been shattered in an auto accident delays seeking medical care and renders her injury irreparable;<sup>30</sup> a Catholic woman refuses to use contraception after a similarly serious injury to her pelvis and enters into a life-threatening pregnancy;<sup>31</sup> a Jewish woman is stalled on a ski-lift, sitting next to a man, on Sabbath, and seeks to escape her predicament by taking a disastrous leap to the ground.<sup>32</sup> We deem all of these victims entitled to a full tort recovery, even though their idiosyncratic beliefs greatly exacerbated their injuries. Given all that, it would seem churlish to treat Bartleby’s strong attachment to his heirlooms any differently.

The recent tendency to consult victim-impact statements when deciding on the death penalty further supports this conclusion.<sup>33</sup> Granted, victim-impact statements are controversial inasmuch as they arguably ignore the most important victim, the deceased, and give a disproportionate role to collateral victims, his family. But the basic idea that victims need to be consulted in assessing harm and meting out suitable punishment seems intuitively sound—as well as consistent with the decision to punish the thief more harshly than the batterer.

But the most important point in favor of the preference-based view is probably this one: Harm is in the eye of the victim. The very conduct that constitutes a crime or tort if done against the victim’s wishes is neither if done with his consent. If consented to, the taking isn’t theft, the intercourse isn’t rape, the tackling isn’t battery, even the killing may not be murder. The absence of consent seems like a crucial—a defining—attribute of harm. Excepting odd cases like prostitution and drugs, what a victim wants cannot count as an injury. It seems to follow almost inexorably that even among bona fide harms, those the victim likes least are most harmful, and those the victim can tolerate most are least harmful. At least it *seems* that way.

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<sup>29</sup> See Guido Calabresi, *The Beliefs of a Reasonable Person*, in IDEALS, BELIEFS, ATTITUDES AND THE LAW 45 (1988).

<sup>30</sup> See *id.* at 46-48.

<sup>31</sup> See *id.* at 48-49.

<sup>32</sup> See *id.* at 51-52.

<sup>33</sup> See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597, 2609 (1991) (holding that the Eighth Amendment did not erect a per se bar prohibiting a capital sentencing jury from considering victim impact evidence).

But consider some of the more oddball consequences of the preference-based view:

(1) A man is about to rape a woman. As he holds the knife to her throat, the woman declares, "I would rather die than be violated." Thereupon the man kills her. Or: Defendant kidnaps victim, intending to hold him for ransom. Victim insists: "I would rather die than be used for ransom against my family." At trial the defense attorneys argue: "Ordinarily murder is a more heinous offense than rape or kidnapping; indeed, it is the only one that qualifies for the death penalty. In these cases, however, the victims preferred murder to rape or kidnapping. The defendants, heinous though their conduct was, did their victims a favor inasmuch as they killed rather than raped or kidnapped them. Therefore their penalty should be no more severe than would have been the case had they committed rape or kidnapping."

I take it the argument would not persuade.

It might be objected, though, that this example proves very little. We simply do not ordinarily take people's preferences for death into account. But my hunch is that it is not *this* circumstance that makes us resistant to the defense attorney's argument. Even if death cannot ordinarily be consented to, it does tend to diminish the guilt of the killer—assisting suicide or committing euthanasia seem less heinous to us than outright murder.

(2) Assume the same facts as above, but suppose that the rapist and the kidnapper, instead of killing their victims, proceed with the rape and the kidnapping. At trial, the prosecutor argues: "Ordinarily, the death penalty cannot be imposed in cases of rape or kidnapping. But *this* rape and *this* kidnapping, as far as *these* victims are concerned, were *worse than murder*, and the defendants knew this. Therefore, they should be treated with the same severity as a murderer."

I take it this argument would not persuade either.

(3) Suppose Louie had not broken into Bartleby's house, but rather into Bartholomea's. All other facts remain the same. Bartholomea, like Bartleby, declares she would rather be beaten than give up the family heirlooms inside her safe. Louie, seeing the combination to the safe on her night table, manages to open the safe and to make off with the jewelry without ever laying a hand on Bartholomea. Louie presumably should be treated just as he would be if he had broken into Bartleby's house. Yet by punishing Louie more severely than Smithy we are now asserting that the theft from Bartholomea was worse than the battery of Bartleby. But the only

thing of which we can be at all confident is that both Bartleby and Bartholomea judge thefts of family jewelry to be worse than batteries. We have no basis for thinking that the battery of Bartleby is less painful to him than the theft from Bartholomea is painful to her. For that sort of interpersonal comparison we have no data.

(4) Suppose Smithy had never been given a choice between battery and theft. Upon not finding any valuables in Bartleby's house, he simply bursts into his bedroom and administers the beating. It is clear, however, that if he had noticed the safe, Bartleby would have pleaded with him to beat him rather than steal the contents of the safe. If this comes out during the trial, the preference-based view suggests that we let the defense attorney argue that since the victim in fact preferred what the defendant did to something we would count as a lesser crime, the defendant should only be punished at the level of that lesser crime. Indeed it doesn't really seem to matter whether Bartleby's house actually has such a safe in it. The mere fact that the defense attorney is able to envision circumstances under which the victim would have preferred what the defendant did to something else which would have rated a lesser penalty should entitle the defendant to be punished no more harshly than for that lesser crime. All this is suggested by the preference-based view and it seems absurd.

If the preference-based approach generates such absurd-sounding consequences, it must contain some logical flaw. But what is that flaw? Before proceeding to lay bare the source of the problem, I need to clear a preliminary difficulty out of the way.

From the very outset of this section, I have been pressing the question, "Who deserves to be punished more harshly?" At more than one point readers might have been inclined to say, "How should I know unless you first tell me how one makes judgments about deserts, whether one follows a retributivist, a utilitarian, or a mixed agenda, or something else altogether?" I have implicitly assumed retributivism to be the key objective of punishment, but this is probably only a helpful, not a crucial assumption: Does it make sense to seek such help? Does retributivism have any plausibility? Yes, and a great deal of it, more, in fact, than any of its best-known alternatives. It is, most familiarly, superior to a simple utilitarian account of punishment, which would permit the punishment of mere innocents for the sake of some utilitarian goal. But it is also superior to the so called "mixed" account favored by H.L.A. Hart, which permits punishment only when both retributivist

and utilitarian goals are furthered thereby.<sup>34</sup> Michael Moore offers a simple, but compelling, hypothetical to show the inadequacy of the mixed account.<sup>35</sup> He asks us to imagine a robber-rapist who has inherited a fortune, and had an accident that makes it impossible for him ever again to feel any sexual impulse.<sup>36</sup> Put differently, Moore creates a situation involving a heinous criminal whose punishment would serve none of the usual (or even the not-so-usual) utilitarian purposes—deterrence, rehabilitation, incapacitation, and the like. (He deals with the problem of general deterrence by arranging for a ruse by which the judge would only pretend to punish. Agreement here is well-nigh universal that the defendant should be punished nonetheless, revealing us all to be what Moore calls “closet retributivists.”)<sup>37</sup>

Even if Moore’s hypothetical has convinced you of retributivism’s attractions, you may wonder how much solid content the theory really has. Does it mean anything to say that a criminal should receive the punishment he deserves, if we cannot tell how much he deserves? Sure, we know that one week, two weeks, or even three weeks is not enough for the robber-rapist, but whether two and a half years is required, or five, or maybe seven and a half, we have a hard time telling. Where should we look to find out what is deserved? By contrast, utilitarianism superficially looks like it offers an easy recipe for figuring out the right measure of punishment: Choose the punishment that maximizes whatever the utilitarian happens to value, whether it be deterrence, or rehabilitation, or maybe something else altogether. (Why that is just superficial is nicely explained by Robert Nozick.)<sup>38</sup> Admittedly, the executioners of past centuries had a pretty clear-cut sense of what punishment each crime deserved: an execution that imitated the crime. The robber who killed his victim by hitting him twice with an iron spade was himself hit twice with that very spade, before being garrotted. The servant girl who torched her victim’s house had her face scorched. The woman who cut her victim to pieces was liquidated in similarly piecemeal fashion—first her throat was cut,

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<sup>34</sup> See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 231-37 (1968).

<sup>35</sup> See MICHAEL S. MOORE, LAW AND PSYCHIATRY 241-43 (1984); see also Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987).

<sup>36</sup> See MOORE, LAW AND PSYCHIATRY, *supra* note 35, at 241-42.

<sup>37</sup> *Id.* at 241-43; Moore, *The Moral Worth of Retribution*, *supra* note 35, at 179-217.

<sup>38</sup> NOZICK, *supra* note 15, at 61-62.

then her head lopped off, then her limbs wrenched out.<sup>39</sup> The aptly named Grimm fairy tales teem with such punishments. But is this the only way to give concrete content to retributivism?

Psychologists have shown in an elegant series of experiments, initiated by Thomas Sellin and Marvin Wolfgang's landmark study *The Measurement of Delinquency*, that our intuitions about penal desert are a lot more precise than our intuitions about those intuitions suggest.<sup>40</sup> In other words, we know more than we think we know. Wolfgang, Sellin, and those who came after them asked their subjects to rate the seriousness of various offenses by a variety of means. Sometimes they just asked them to rate the offenses on a scale of one to eleven.<sup>41</sup> Sometimes they asked them to compare every offense to some standard offense and state whether it was twice, ten times, or perhaps only one-sixth as serious as that standard.<sup>42</sup> Sometimes they asked them to press a "dynamometer" with the degree of intensity that best expressed how strongly they felt.<sup>43</sup> The initial results were reassuring although not completely surprising: Subjects almost invariably rated as more serious those offenses which we in fact punish more severely.<sup>44</sup> But there was a fly in the ointment. If subjects deemed one offense two and a half times as serious as another, the sentence the law gave the former would rarely be exactly two and a half times as long as the latter.<sup>45</sup> Some psychologists worried: "Does the systematic deviation from a linear relationship imply that, in our judicial system, punishments do not fit the crime?" Having asked this question, they began to realize that the analysis was missing a step.<sup>46</sup> We have been comparing the seriousness of crimes with the length of the sentence meted out. We should instead be comparing the seriousness of the crime with the *seriousness* of the sentence meted out. We should use the very techniques we used to rate the seriousness of punishment to then rate the seriousness of crimes, and see what we get. We should ask subjects how they would score a three-year sentence on

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<sup>39</sup> See PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING* 73-74 (1984).

<sup>40</sup> See THORSTEN SELLIN & MARVIN E. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* 268 (1964); see also GEORGE A. GESCHEIDER, *PSYCHOPHYSICS* 227-67 (1985).

<sup>41</sup> See SELLIN & WOLFGANG, *supra* note 40, at 248.

<sup>42</sup> See *id.*

<sup>43</sup> See GESCHEIDER, *supra* note 40, at 229.

<sup>44</sup> See SELLIN & WOLFGANG, *supra* note 40, at 262.

<sup>45</sup> See GESCHEIDER, *supra* note 40, at 254.

<sup>46</sup> See *id.*

a scale of one to eleven and we should again have them press the dynamometer with the appropriate level of intensity. All this was done, and with great success.<sup>47</sup> It turns out that if one offense is judged two and a half times as serious as another, chances are the more serious of the two will carry a penalty that has been rated two and a half times as serious as the penalty of the less serious.<sup>48</sup> Punishments fit their crime like a glove—admittedly, though, a store-bought glove, not a tailor-made one.<sup>49</sup> How dependent is my analysis on the rightness of retributivism? Although a retributivist view greatly facilitates it, most of what I say can probably be adapted to alternative views. That is most obvious if you subscribe to a certain version of the mixed view. For instance, suppose that you think that punishment serves both deterrent and retributive purposes, but that most punishments are as low as they are because retributivism keeps them down. (We do not impose the death penalty for drunk driving because retributivism forbids it, *not* because it would not have a huge deterrent impact nor save more lives than it would cost). Your view is then really equivalent to retributivism within the relevant punishment range. But I am convinced that even if you are an unreconstructed utilitarian, the analysis I offer can readily be carried over.

#### IV. THE PUNISHMENT PUZZLE RESOLVED

So who should be punished more harshly, the batterer or the thief? I have already made it clear that I think the preference-based approach is wrong, that the batterer is indeed worse than the thief notwithstanding Bartleby's weird preferences. But why?

Suppose you had the choice of living in either of two towns. Town *A* harbors exactly one negligent person who happens to be running a chemical factory. Given his habits and the consequent odds of an accident, twenty people are expected to die as a result of his negligence over the next decade. Town *B* harbors exactly one vicious torturer-murderer. Over the next decade he will kidnap, torture, and kill exactly one person—someone he comes to consider his mortal enemy. Which of the two towns would you rather live in? If you're at all like me, you prefer town *B*—the chances of dying

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<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.* at 251-55; George A. Gescheider et al., *Psychophysical Measurement of the Judged Seriousness of Crimes and Severity of Punishments*, 82 BULL. PSYCHONOMIC SOC'Y 275, 275 (1982).



seem substantially slimmer there. Which of the two criminals—the highly negligent chemical plant operator, or the vicious torturer-murderer—deserves the more severe punishment? Presumably, the vicious torturer-murderer. (Indeed the parallel to the case of *Bartleby* can be made even greater. Just imagine a defendant who puts his victim to the choice: “I can either act the part of the negligent chemical plant operator and thus cause some calamity over the next few years or I can act as a vicious torturer-murderer and kill exactly one person. Which would you rather have?”)

This example makes clear a good part of what is amiss with the preference-based approach: The victim’s decision as to whom he would rather be victimized by need bear absolutely no relationship to the culpability of the perpetrator. The victim cares about only one dimension of the perpetrator’s activities—the expected harm. In contrast, the judge—the criminal law—cares about harm only as one among several criteria of culpability. Let me spell that out just a bit more. An omission may produce as much harm as an act. The victim certainly doesn’t care much whether he was done in by an act or an omission. The judge must: He will generally deem the omission innocent and the act culpable. An intentional, a knowing, a reckless, a negligent act—they all can result in the identical injury, indeed they may result in the same probability of injury. (Remember that in my two-town example a negligently inflicted injury is more probable than an intentional injury.) The victim couldn’t care less how it’s done. The judge, however, must: He will punish the former more harshly than the latter. A remotely caused injury can be just as severe as a proximately caused one. The victim won’t care about anything other than severity. The judge, nevertheless, must: Only if the injury is proximately caused can he convict. The participation of an accomplice in a group crime may make no difference to the outcome, because the group was already formidable enough to accomplish the task on its own. The victim won’t care whether the defendant added his mite to the effort. Yet again, the judge must: He will punish the defendant’s complicity even if his efforts were perfectly redundant (and known by the defendant to be redundant!).

Are we now in a position to solve the punishment puzzle? Not quite yet. We may be confident that by and large—regardless of the victim’s preferences—intentional wrongs are worse than negligent ones, act-produced wrongs are worse than omission-produced wrongs, proximately caused wrongs are worse than remotely caused wrongs, but do we have grounds for equal confidence that battery-

inflicted wrongs are worse than theft-inflicted wrongs? In my two-town example it seems perfectly clear why the victim's attitudes are not to be trusted: He takes no account of dimensions of wrongdoing other than harm. But where in the comparison of a battery and a theft are there dimensions of wrong-doing that a judge should take into account but a victim might not? What about the case is analogous to the act/omission distinction or the proximate causation/remote causation distinction?

A somewhat farfetched example will help us to find the analogy. I have a diseased kidney and would like it replaced with a healthy one. I am thinking about "stealing" one of two kidneys that have recently become available for transplantation. I learn that the first of those kidneys has just been implanted in a healthy recipient who only had one kidney and wanted a full complement just to be on the safe side. (Let's assume my own needs weren't known yet when the kidney was given to him!) The second kidney has not been implanted yet, but has been committed to another recipient with at least as great a need for it as I. I am contemplating two courses of action:

(1) Stealing the "redundant" kidney that has already been implanted in Recipient 1. Let us assume that removing the kidney could be accomplished through a completely risk-free and painless procedure.

(2) Stealing the yet-to-be-implanted kidney out of the refrigerator in which it is being stored.

Which course of action would be worse? Quite clearly (1) would be the more heinous act. It is worse *even though* the victim of my action in (1) suffers far fewer ill effects than the victim in (2). Why is it worse? Because it is more invasive! But not because invasiveness entails greater risk or greater pain. What makes the difference, rather, is that the rightful owner's claim on the kidney in (1) is far stronger than the rightful owner's claim in (2). The claim is stronger simply because it has passed into the owner's body.

Not everyone may be convinced yet. How do I know that one's claim to things inside one's body (even recently implanted things) is stronger than one's claim to things outside one's body, assuming they are both important to one's well-being? Well, for one there is the law of self-defense. You are entitled to defend your body in ways you are not entitled to defend your property—even if the attack on your property will affect your well-being far more than the attack on your body. Note that this has nothing to do with paternalism. It is not that we believe that you are silly to value something outside your body more than your body itself.

The prohibition of torture as a means of punishment bears me out further. What exactly is wrong with torture as a means of punishment? There is no doubt that many prisoners would prefer or deem equivalent certain forms of torture to moderately lengthy jail terms. After all, many of us would submit to a fairly painful medical procedure just to avoid being bedridden for an extended portion of our lives. If torture is wrong, it must have to do with the high degree of invasiveness associated with it. We all—criminals included<sup>50</sup>—have such an extraordinary claim to the integrity of our bodies that it cannot generally be invaded (except, say, for medical treatment) even where other, more painful means of punishment are appropriate.

The law of search and seizure is a natural extension of these ideas. You have more of a claim to the things in your immediate vicinity than to those further away, and thus are more entitled to keep them immune from frivolous rifling.<sup>51</sup> That's not because you in fact would mind it more if things in your immediate vicinity were rifled through. It might very well be the reverse: You might mind it far more if things outside your domain of privacy are being touched. Nor is it the case that we respect your private things more out of convenience, say, because it would be too hard to learn what you most feared having idly rifled through and so we have a flat rule. After all, even if you tell us what your preferences are we don't abide by them. What counts is that your claim to non-interference is far greater as to things immediately around you than to other things, *regardless of your preferences*.

My point is worth elaborating in yet a different way. Suppose a friend calls you up to tell you of a painful, but not especially disabling, ailment which might be much alleviated with an experimental procedure that would cost her \$2000. She doesn't have the money; you do. You immediately offer to help her out, even though she will never be able to repay you. An hour after talking, she calls you back, thanks you for the offer, and says she would rather just put the money in the bank or use it for a vacation, and go on living with the pain. You ask her whether that means that the pain in fact

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<sup>50</sup> See, e.g., *Rochin v. California*, 342 U.S. 165 (1952) (holding that a drug conviction cannot stand given that the evidence was gained through forced extraction of the drugs from the individual's body by use of a stomach pumping procedure).

<sup>51</sup> See, e.g., *Oliver v. United States*, 466 U.S. 170, 178 (1984) (holding that the Fourth Amendment "may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home").

isn't so bad, but she assures you that it certainly is. She just happens to be the greedy sort: She would rather have the money; or else she says she is the sybaritic sort: She would rather have the vacation. Will you still give her the money? I suspect not. But why not? You don't doubt that the pain is severe enough to be worth spending \$2000 to alleviate. You don't doubt that she gets more utility out of putting the money in the bank or spending it on a vacation. She is your friend and you want to see her happy. Nevertheless, you will think her claim upon you much greater when it comes to health than wealth or vacation.

My example has a straightforward analogy in governmental assistance for the poor. Many of us would rather grant aid-in-kind than in cash. Not because we don't believe that the poor wouldn't be happier with money, which they could, after all, spend on the very things that aid-in-kind would otherwise give them. Not because we are necessarily paternalistic and think we know better what is good for the poor than do they. But rather because we believe that they only have a claim on our providing them the particular things usually granted *as* aid-in-kind: medical care, food stamps, and the like.

Our tax system suggests a further analogy. It is often said that the progressive tax system aims to equalize incomes, and that this is a just aim. It is not usually said that the tax system aims to equalize utility, or that that would be a just aim. Is this perhaps an oversight? Are we really trying to get at utility by way of income? If we were, then we should want to tax Mother Teresa, Richard Feynman, or Robert Penn Warren as heavily as some much-better-heeled but much-less-happy corporate executive. Without stopping to explore why, I will take it as given that we would not want that.

Our approach to sentencing criminals offers me a final analogy. It is often said that justice requires us to equalize the punishment of those who are equally culpable. But that could mean either of two slightly different things: It could mean equalizing their actual sentences (jail time served) or equalizing their suffering. Since the purpose of punishment is to inflict suffering, it may seem as though equality of suffering is what we must ultimately be aiming for. But if we were, presumably we would want to punish the happy-go-lucky person, who tends to make his peace with his surroundings and to find happiness wherever he is, more harshly than the melancholic person who is miserable no matter *where* he is. Again, without stopping to explore why, I will take it as given that we would not want that.

Let me remind you what these examples are meant to corroborate: Certain kinds of harms are to be objectively rather than subjectively judged! Economists will find this very alien, although a few philosophers and an occasional economist have made some quite related points. Their focus, however, has usually been the objectivity of benefits rather than harms. "The fact that someone would be willing to forego a decent diet in order to build a monument to his god does not mean that his claim on others for aid in his project has the same strength as a claim for aid in obtaining enough to eat," writes Thomas Scanlon.<sup>52</sup> And Ronald Dworkin argues in a classic essay on equality that it is resources and not welfare that the egalitarian should seek to equalize.<sup>53</sup>

Even if you are by now persuaded of the fallacy of the preference-based view, you may be troubled by an example, like this: Smithy breaks into Bartleby's house and finds two vases. He cannot carry both of them off, and therefore plans to steal only one of them. He is about to choose the vase he finds more attractive when Bartleby, who has been witnessing the entire break-in starts to plead with him: "Please do not take *that* vase. It's far less expensive than the other one, but I happen to be much more attached to it."

Consider again two possible sequels to my story.

Variation I: Smithy says, "I don't care. I don't really want to sell the vase, and I happen to like this one better. So, whether or not it is the cheaper one, that's the one I'm going to take."

Variation II: Smithy says, "Fine. Although I would much prefer to take this one, and exhibit it in my living room, as a small concession to you I will take the other one and sell it."

Suppose that there are two theft statutes. One covering thefts of small value, the other covering thefts of greater value. Should the Smithy in Variation I really be punished less harshly than the Smithy in Variation II? Our previous analysis with its objective assessment of harm suggests as much. But can that really be?

I do indeed think it is so. The way to convince oneself is to imagine that a week earlier Smithy broke into Bartholomea's house and stole an expensive vase from her. Presumably he should be punished as severely for the theft of *her* expensive vase as for the theft of Bartleby's expensive vase, since we have no reason for

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<sup>52</sup> Thomas Scanlon, *Preference and Urgency*, 7 J. OF PHIL. 655, 659-60 (1975).

<sup>53</sup> See Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); see also THOMAS NAGEL, *THE VIEW FROM NOWHERE* 171 n.1 (1986).

thinking that she values her expensive vase any less than Bartleby values his. It is true that Bartleby values his cheap vase more than his expensive vase. But that doesn't mean that he values his expensive vase any less than do ordinary folk like Bartholomea. To put the same point more broadly: If we took the position that what we are really after in assessing the wickedness of the theft is the victim's subjective sense of loss, then presumably the theft of a thousand dollars from a millionaire is a less serious affair than the theft of the same amount from someone less wealthy. And that would certainly seem odd.

#### V. BLACKMAIL PROPER

How does any of this help us with blackmail?

At first glance little. The punishment puzzle appears to be quite different from the blackmail puzzle. The burglar puts his victim to the choice of tolerating either one of two criminal wrongs. By contrast, the blackmailer puts his victim to a choice of tolerating either one of two things neither of which appears to be a wrong: The payment of some money or the occurrence of something unpleasant but perfectly legal. Nevertheless, the punishment puzzle and the blackmail puzzle share this crucial attribute: In both puzzles the defendant's accommodation of the victim's preferences aggravates rather than improves his moral position. In both puzzles the defendant is considered worse, not better, for having gone along with the victim's choice. We now have a pretty complete explanation of why that occurs in the case of the punishment puzzle: Culpability, and therefore deserved punishment, is only in small part a function of harm, whereas the victim's choice between two modes of defendant misconduct is exclusively a function of harm, and therefore often at variance with deserved punishment. But can that explanation somehow be generalized so as to account for blackmail as well?

I think it can, and a small step is all that it takes. Consider the buyback problem I posed earlier in this essay. Let me reproduce it here:

Anatole steals a Rembrandt from the Metropolitan Museum. He sends a letter to the museum which reads: "Pay me \$10,000 or you will never see that Rembrandt again." The museum buys back its painting for \$10,000. Anatole clearly is guilty of theft for taking the Rembrandt. But what about the second transaction? Is

it a simple sale (as one German court held) or blackmail? ("Pay me \$10,000 or else . . . "certainly sounds like blackmail.")<sup>54</sup>

Morally and legally, has the defendant made things better or worse, or has he pretty much left them the same by selling back the painting? The German court decided on the last option, and viewed the transaction as just a sale that pretty much left the defendant's level of culpability where it was to begin with.<sup>55</sup> Many people's intuition, however, is likely to be that the defendant improved things at least a little, because the victim (the museum) was certainly made happier being offered the painting for a buyback than having the defendant remain in permanent possession of it.

The punishment puzzle suggests another way of looking at the buyback. Anatole is basically in the position of our burglar. He is putting the victim in the position of our homeowner. That is, he is putting the victim to the choice of tolerating one of two immoral courses of action: Anatole's continued possession of the stolen paintings or the theft of some money—the money the museum is being asked to pay for the buyback. The museum prefers the theft. The punishment puzzle taught us that this does not settle the question of moral culpability. Just because the museum prefers the second course does not mean the second course is less worthy of condemnation and punishment than the first course. Indeed we usually treat continued possession of a stolen good as not much of an aggravation of the original offense, and we don't even give all that much credit for the thief's return of the goods he stole. The continuing possession seems to lack the moral culpability of an additional theft. But an additional theft is what Anatole is in fact committing in his deal with the museum. Thus his sale makes things morally worse for him (much like the burglar's decision to batter rather than steal). The treatment he merits, having completed the buyback deal, is that of a two-time thief, the first theft being that of the painting, the second being that of the money he got in exchange for it.

Let me put the matter a bit differently. It seems at first that the buyback problem and the punishment puzzle are worlds apart. Unlike the burglar, Anatole is putting the museum to the choice between accepting Anatole's continuing noncriminal possession of the painting or paying him \$10,000. But with only a little effort one

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<sup>54</sup> See Judgment of May 18, 1976, BGH Gr. Sen. St., 26 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 346 (F.R.G.).

<sup>55</sup> See *id.*

can make that choice resemble the punishment puzzle. In essence, Anatole is saying to the museum: "Allow me to commit a further theft of \$10,000 from the museum's treasury or else accept the noncriminal wrong of my sitting forever on that Rembrandt." The only detail that distinguishes Anatole's offer from that of the burglar is that one of the threatened wrongs, the continued possession of the stolen painting, is not, or may not be, criminal. But since it still is a wrong, albeit a noncriminal one, the conclusion derived from the punishment puzzle seems to still apply: When a wrongdoer puts his victim to the choice between two wrongs, the degree of blameworthiness is not much affected by the preferences of the victim. Hence even though the threatened wrong is noncriminal, the level of blameworthiness is no less than it would be if the threatened wrong were a criminal one—the level of blameworthiness is determined by the wrong committed, not the wrong threatened. Nothing about the fact that the threatened wrong is not criminal seems to affect the logic of my argument!

The broader significance of this point is that when a wrongdoer threatens a victim with two wrongs and then carries out the greater wrong, the degree of blameworthiness will not diminish as the wrongdoer starts to diminish the threat. To be sure, there comes a point when the wrong threatened is so minor that it no longer counts. At that point the balance tips and the transaction between wrongdoer and victim turns into a regular bargain with a level of blameworthiness of zero. If for instance Anatole's threat to the museum had not been to sit on the Rembrandt forever but merely to be surly with the museum director, that threat too would involve a wrong, but altogether too minor a one to turn the transaction into blackmail. (Even if we assumed the museum director to be so supersensitive that he might actually pay \$10,000 to avoid being insulted by Anatole!) (Does buying off surliness with money sound like an absolutely preposterous example? Consider your motives for giving money to a panhandler or a hotel concierge.)

We can now see the central problem with blackmail in a different light: The blackmailer puts the victim to a choice between a theft (or some other criminal encroachment) and some other, minor wrong. The execution of the theft then carries with it the level of blameworthiness of a theft. To be sure, the wrong must not be *too* minor. The mere threat to be nasty or unpleasant won't suffice; the immorality has to be more substantial than that. But it need not—and this is the crucial point—be an immorality that comes anywhere close to being criminal.



A lot of otherwise puzzling things about blackmail now fall into place.

### A. *The Canonical Problem*

Let's see how my account explains the canonical problem of Busybody, who extracts \$10,000 from Philanderer by threatening to reveal his infidelities to his wife. Busybody is putting Philanderer to a choice between two wrongs. Busybody will either commit the theft—the unconsented-to taking of \$10,000—or the revelation of Philanderer's infidelities. Why is the payment of \$10,000 unconsented-to, given that Philanderer is paying voluntarily? It is unconsented-to because it is made with the threat of something wrongful, the revelation. But how is the revelation wrongful when it is not in fact prohibited by the criminal law? It is wrongful because it is immoral, even though not criminal or even tortious. To be sure, it is not a major immorality by any means, but simply, "swinishness." Indeed it wouldn't even be immoral if it had been made out of friendship with the cheated wife. It is immoral only because, if it were to be done, it would be done for purely retaliatory reasons—retaliation for Philanderer's refusal to pay. But now comes the most formidable objection: *If revealing the infidelities is only a minor immorality, then how can the taking of money which the victim prefers to that minor immorality be anything more than a minor immorality itself?* That's where our solution to the punishment puzzle comes in. The lesson of the punishment puzzle was that *when the defendant has the victim choose between either of two immoralities which he must endure, the gravity of the defendant's wrongdoing is to be judged by what he actually did (or sought to achieve), not by what he threatened to do.*<sup>56</sup>

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<sup>56</sup> Robert Nozick and Jeffrie Murphy have wondered whether it would really constitute blackmail for a newspaper to suppress an embarrassing story if the victim promises to reimburse them for the lost profits. Although traditional blackmail law would probably count this as blackmail, many people's intuitions are with Nozick and Murphy in discounting this as blackmail. The explanation for our ambivalence would appear to be that running the story non-retaliatorily does not seem like a wrong. Hence, to make money out of its suppression is not to make money out of a threatened wrong. On the other hand, some would view even the printing of such a story on a nonretaliatory basis as wrong—especially if it constitutes an invasion of privacy—and so would want to deem the exchange of money for its suppression as blackmail.

### B. *Blackmail and "Plain Vanilla" Coercion*

The relationship between blackmail and more ordinary forms of coercion like robbery now becomes clear. Blackmail is a form of robbery in which the threatened action is itself noncriminal, indeed often perfectly legal, but still immoral. Because we tend to think—prior to thinking through the punishment puzzle—that the unconsented-to taking of another's property can morally be no worse than the threatened action would have been, we think that blackmail is unlike a straight robbery. Now that we know that the defendant's moral status is determined not by what he threatened to do but by what he actually did or sought to achieve (i.e., take money without the owner's consent) we know that he is as culpable as a robber.

Well, perhaps not quite. There is this difference: The sincere robber stood ready to commit a worse act than the sincere blackmailer. The robber, in addition to being guilty of a theft, is also guilty of something akin to an attempted assault (or even murder). The blackmailer, in addition to being guilty of a theft, is guilty only of an attempted noncriminal immorality. And that makes him altogether better. Marginally.

### C. *Omissions*

I asked at the outset of this essay whether blackmail required the threat of an act or whether it might also be based on the threat of an omission. We can now see why it generally involves the threat of an act but need not invariably do so. Since it requires the threat of at least mildly wrongful conduct, and since even mildly wrongful conduct usually entails an act, blackmail will generally involve the threat of an act. On the other hand, there are omissions that are at least mildly immoral: Not throwing the drowning stranger a life vest is at least mildly immoral, though generally not criminal. Hence, not surprisingly, it sounds like blackmail for the defendant to say to the drowning victim: "Pay me \$10,000 or I won't throw you that life vest." In at least some jurisdictions, such requests have in fact been criminalized—under statutory provisions that the drafters usually recognize to be variations of blackmail. An example is the German criminal code's provision on "Wucher" (literally, "Usury") which covers defendants who "exploit[] the distress,

inexperience, . . . or the pronounced weakness of will of another" for material advantage.<sup>57</sup>

#### D. *Sexual Favors*

What about the employer who offers an applicant a secretarial job if she will sleep with him? Most commentators tend not to regard this as blackmail (as solicitation of prostitution, perhaps, but not blackmail), but some would. What is being threatened in case of noncompliance is a retaliatory non-hiring. Everyone would regard such retaliatory non-hiring as being in extremely bad taste, and a significant number would view it as downright immoral, even if not criminal. Analyzing the matter in the now familiar style, we could then say that the employer is putting the victim to a choice between two moral wrongs—a retaliatory non-hiring or nonconsensual sex. If the retaliatory non-hiring is deemed sufficiently immoral, then the sex itself will rightly be viewed as nonconsensual in the same sense that Victor's giving up of his heirlooms is nonconsensual. Thus if the sex occurs, it ranks in blameworthiness somewhere near rape (which is indeed how some criminal codes would classify it). But, to repeat, this presupposes that the immorality of the retaliatory non-hiring exceeds some *de minimis* threshold (without however being criminal or even tortious!). Our uncertainty on this last point explains our uncertainty about whether to treat such sex as blackmail.

#### E. *Suicide*

We are ambivalent on the question of whether the prisoner who goes on hunger strike in support of some demand or other, or the husband who threatens to commit suicide if his wife leaves him ought to qualify as blackmailers. We are ambivalent because we are ambivalent on whether the threatened wrong represents any wrong whatsoever.

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<sup>57</sup> STRAFGESETZBUCH [StGB] § 302a (1974) (F.R.G.).

### F. *Brutal Honesty*

At the outset I posed the following problem, which I called "Brutal Honesty":

Hortense knows that Thaddeus has been unfaithful to his wife and corrupt in his management of a trust, both of which she firmly plans to reveal unless Thaddeus pays her off. When she first demands money from Thaddeus she only mentions the infidelity, although she is determined to tell everything she knows if Thaddeus is not cooperative. When Thaddeus will not budge, she decides to tell him a bit more of what she knows and is willing to reveal. By this last move, has Hortense made things better or worse? Has her greater honesty improved her moral position or only aggravated it?<sup>58</sup>

The answer I now propose to give to that last question is that her greater honesty generally leaves the level of blameworthiness unaltered, except to the extent that it increases the likelihood of success. We now know that the blameworthiness of blackmail is largely determined by the demanded advantage and not the threat.

### G. *Prior Theories*

#### 1. Lindgren

We can now better understand both the appeal and the shortcomings of Lindgren's theory of blackmail: the argument that blackmail involves playing with someone else's bargaining chips.<sup>59</sup> For Busybody to actually reveal Philanderer's infidelity to his wife to settle a score with Philanderer is swinish; it uses the wife's feelings as a mere tool to get back at her husband for not paying up. Leveraging that threat to engage in such swinishness into a substantial gain is as blameworthy as the flat-out misappropriation of that gain. What is usually described as playing with someone else's bargaining chips will invariably turn out to involve the threat to commit some such swinishness unless one is paid off, and that sort of leveraging we know to be wrong for the now familiar reasons. It is thus that anything that passes Lindgren's bargaining chip test will turn out to be blackmail. Which explains why Lindgren's test, unlike so many of the others, is not overinclusive.

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<sup>58</sup> See *supra* note 10 and accompanying text.

<sup>59</sup> See Lindgren, *supra* note 16, at 702.

On the other hand, not all threats to commit some kind of swinishness pass the bargaining chip test. Threatening to encourage someone's son to volunteer for combat duty in Vietnam is an example of one that doesn't. Using that threat for leverage we now know to be blackmail. Which explains why Lindgren's test is sometimes underinclusive.

## 2. Feinberg

The virtues and defects of Feinberg's theory also become clearer now. To the extent that Feinberg declares proposals that are rooted in the threat of noncriminally wrongful conduct to be blackmail,<sup>60</sup> we are now able to account for that as a straightforward consequence of the fact that blameworthiness is only partially a function of harm. To the extent that Feinberg declares proposals that are rooted in the promise of noncriminally wrongful conduct to be blackmail,<sup>61</sup> we are now able to see where he is correct and where he is not. He is correct about such cases as the proposal to carry out a killing-for-hire, because the threatened defendant "misconduct", the "retaliatory non-killing," is not really any kind of misconduct at all. Feinberg is incorrect about such cases as the proposal to withhold damaging information from the IRS, because a retaliatory reporting of such information to the IRS, (i.e., the reporting of such information not to help the government, but to settle a score) strikes us as quite immoral, not immoral at the level of criminality or tortiousness, but immoral all the same. Leveraging such immoral conduct into a substantial gain then becomes blameworthy at the level of theft.

## 3. Nozick

We can now see why Nozick's test for distinguishing blackmail from other contracts works somewhat but not quite. His test was to ask whether the victim would be better off if the defendant did not exist.<sup>62</sup> In the case of an ordinary contract, the victim would be sorry not to have the defendant around for a mutually beneficial exchange. In the case of blackmail, he would wish for the defendant not to be around. Nozick's "existence" test is really a test for whether the defendant is threatening to engage in an act or an

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<sup>60</sup> See FEINBERG, *supra* note 25, at 245-49.

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

<sup>62</sup> See Nozick, *supra* note 11, at 84-86.

omission. The test for distinguishing acts from omissions is this very one—would the victim have fared any differently if the defendant did not exist. Because most contracts involve the threat of an omission (“I won’t sell you X, if you don’t pay me Y”) and most immoral conduct involves acts, a test simply distinguishing acts from omissions is a pretty good proxy for figuring out whether we are dealing with blackmail or not.

#### 4. Epstein

Epstein’s theory deems it crucial that blackmail involves the disclosure of damaging information.<sup>63</sup> Clearly most blackmail, the archetypical kind of blackmail, does involve the threat of embarrassing disclosures. We can now see why. Most immoral misconduct at the noncriminal level is of an informational nature. If the misconduct is more tangible than that, it probably is a crime. If it is less tangible than that, it falls below the threshold of serious immorality.

### VI. AN OBJECTION

My analysis of Anatole’s Rembrandt theft is apt to leave a lingering sense of unease.<sup>64</sup> Some of that unease is illustrated by the following hypothetical: Suppose that what Anatole had stolen were not a painting from a museum but a sack of money from a bank, containing \$100,000. Suppose further that after sitting on the money for a while and thinking about spending it, he has second thoughts. He sends the bank a note which reads: Promise to pay me a reward of ten percent for the money I shall be returning, or else you will see none of it ever again. The bank is only too happy to agree. Anatole turns the bag of money over to them, and they in turn give him a bag with \$10,000. Under my analysis, he would now be guilty of the blackmail of \$10,000, in addition to the theft of the \$100,000. The reason that is apt to seem strange is this: Imagine that rather than asking for a ten percent commission, Anatole had simply removed \$10,000 from the bag, and returned \$90,000 to the bank. Now he would be guilty only of the theft, and quite possibly would have his guilt mitigated by the partial return of the money. The fact that he got \$10,000 out of it would not be considered to

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<sup>63</sup> See Epstein, *supra* note 17, at 558.

<sup>64</sup> I am indebted to Anthony D’Amato for helping to put this objection into focus for me. I deal with problems of form and substance at some length in a book I hope to have done soon, tentatively titled *Ill-Gotten Gains: The Paradoxes of Theft*.

aggravate his guilt. How can the result be different if he returns the money in exchange for \$10,000, when in the end it really comes to the same thing?

The question is an important and deep one. So important and so deep, I do not have the space to answer it completely right here. (I do provide an answer elsewhere).<sup>65</sup> I can, however, explain the essence of why it in fact makes perfect sense to treat Anatole differently depending on which route he chooses for returning the money! The problem is really very much like that of Mildred and Abigail. Here too we have someone—Mildred—committing blackmail by different means, and the question arises whether it is just as bad, regardless of the means chosen. My ultimate conclusion is that Mildred is in fact *not* guilty of blackmail when she “commits” blackmail by devious means—just as Anatole is not guilty of blackmail if he simply takes \$10,000 out of the bag and returns \$90,000 to the bank. The question is: How can form make that much of a difference?

As I said, I cannot provide the full answer here, but I can provide a sense of where the full answer lies. It is best conveyed by thinking briefly about two cases made famous by the philosopher Judith Jarvis Thomson, the “trolley case” and the “surgeon case.” The trolley of the trolley case is heading down a downhill track. As the trolley is approaching a junction, the driver discovers some unpleasant facts: (a) there are people on both of the tracks emanating from the junction, and (b) his brakes won’t work. The driver now has two choices. He can let the trolley run, in which case it will proceed down the track it currently is on and kill five people. Or he can turn it onto the other track once he reaches the junction (the steering wheel, unlike the brakes, still works) and run over the one and only person who happens to be occupying that track. Suppose he turns the trolley, kills the one, and thereby saves the five. Has he acted legally? Opinions are nearly unanimous that he has. Is that because he effectuated a net saving of lives? Not quite, as the next case, the surgeon case, is meant to demonstrate.

The surgeon in the surgeon case has five patients all of whom are at death’s door. They will die unless provided with some transplant organs. Two of them need new kidneys; two need new lungs; one needs a new heart. There is no donor far and wide—except for a perfectly healthy patient who walks into the doctor’s

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<sup>65</sup> See generally *Ill-Gotten Gains*, *supra* note 64.

office for his annual checkup. On seeing him, the surgeon realizes that he is a walking reservoir of useful spare parts which, if judiciously redeployed, could accomplish a great deal more good than they currently are. The surgeon thereupon quickly euthanizes his patient and harvests the man's organs for the benefit of his five other patients. He has saved five lives at the cost of one. Has he acted legally? Opinions are nearly unanimous that he has not.

So much for the preliminaries. Let's now consider a hypothetical that combines elements from both of the foregoing cases. Think again of the unstoppable trolley. Imagine that the driver can't make up his mind about what to do, and thus ends up running over the five, rather than the one. Miraculously, he doesn't kill them, but only hurts them badly. Nevertheless, they are certain to die from their injuries *unless* furnished with certain transplant organs, namely—2 kidneys, 2 lungs, and 1 heart. Suppose now the driver deeply regrets not having turned the trolley, and announces: "It would have been all right had I turned the trolley and thereby killed the one for the sake of the five. I hesitated because I wanted to give the matter more thought. Upon reflection, I have decided it would indeed have been better to have killed the one to save the five, and I want to make up for my earlier omission. The victim really isn't entitled to protest: He is giving up nothing other than what I would have been entitled to take from him anyway."

This is *not* a persuasive argument. There is no going back on the decision to run over the five instead of the one. The mere fact that by killing the one we would simply bring about a state of affairs we were entitled to bring about minutes earlier does not entitle us to do so now.

What this case is meant to demonstrate is that a lot can turn on form. Doing the same thing in a slightly different way can have major moral repercussions. It does so in my version of the trolley case. It should now seem less shocking that it does so in the case of Mildred and Abigail and in the Anatole variation with which I began this section. That's not yet a full argument, but it rather broadly hints at the nature of that argument.

## VII. A FURTHER OBJECTION

One feature of my account of blackmail is bound to seem very disturbing. As I describe it, the blackmailer puts his victim to a choice between a taking and some other minor wrong. The taking is then considered unconsented and carries a corresponding level



of blameworthiness—that of a theft (if what was taken involves property); that of a rape (if what was taken involves sex); that of a kidnapping (if what was taken was the freedom to move about). The threatened wrong, I kept emphasizing, need not itself be a crime (hence the paradox of blackmail), need not even be a tort, indeed need not be anything more than a sufficiently grave piece of obnoxiousness, which by itself would not merit legal intervention. To be sure, I also kept emphasizing that this does not endow blackmail with as sweeping a scope as first appears, because threats of nothing more than garden-variety meanness wouldn't qualify. On the other hand, although the threat has to be of something more serious than garden-variety meanness, it does not have to be *that* much more serious. And that makes for a very odd kind of offense: As the defendant's threat edges up on, but stays shy of, some ill-specified magical threshold, he is merely considered a crafty, nasty, unsavory, slightly immoral negotiator. Once he passes that threshold, his blameworthiness suddenly soars into the stratosphere—soars, that is, to the level of a regular blackmailer. That sort of radical discontinuity must seem both alarming and implausible!

We expect the path between moral and immoral conduct to be a pretty continuous one: As the defendant's conduct slightly changes, we expect his moral status to only change slightly as well. We don't expect a slight modification in someone's behavior to result in a radical shift in his moral status.

The problem with sharp boundaries in ethics is well captured by the joke about the Jewish boy who had a pathological fear of a dish called *kreplach*, an envelope made of dough with meat inside. To cure him of his fear, his mother had him watch her prepare a piece. After she had flattened a slab of dough and shaped it into a square, she asked him whether he was afraid. He said no. After she had inserted the meat and folded over one of the four corners of the *kreplach-to-be*, she again asked him whether he was afraid. He said no. After she had folded over the second and third corners of the nearly done *kreplach*, she asked him yet again if he was afraid. He still said no. But when she folded over the last corner, the peaceable expression on the boy's face suddenly changed to one of horror. "*Kreplach!*" he shouted and ran off panic-stricken.<sup>66</sup> My theory of blackmail seems to put us in a similar position vis-a-vis the

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<sup>66</sup> I owe this joke, like 90% of my Jewish jokes, to the late Hans Zeisel. For an inventory of the punchlines to the best of Hans's jokes see Harry Kalven, *Hans*, 41 U. CHI. L. REV. 209, 211-12 (1974).

tough negotiator. As he gradually increases the immorality of the threats by which he seeks to pressure the other side, we keep telling him that his moral status is only getting marginally worse. Then, as he passes some boundary, we yell "Blackmailer!" By a single step, we seem to be saying, the person has turned from a cad into a thug. And that seems perverse.

To be sure, the law exhibits such patterns not infrequently: One step shy of some critical line and you're safe; one step over that line and you're jailbait. But we don't think that mirrors the underlying moral reality. We think it simply results from the need to have clear rules. Indeed the long-standing debate about the relative advantages of rules and standards is built on the premise that the moral ideas and policies that motivate certain rules have tapered boundaries and that the needs of fair notice cause these tapered boundaries to be transmuted into sharp edges when laws get formulated. My theory of blackmail, however, is itself a moral theory. If it gives the prohibition against blackmail a sharp edge, that has nothing to do with considerations of clarity or fair notice. Indeed, since I have not been able to spell out exactly where that sharp edge is located, the definition of blackmail that results from my theory manages to be sharp-edged without being clear! Hardly a virtue.

We are right to be surprised when we find discontinuity in the world around us, whether that be the moral, the social, or the natural world; but we are not right to be astonished. We are entitled to expect small causes to have small effects. But we are not entitled to count on it. The philosopher Roy Sorensen aptly made this point about the natural world:

An extremely tiny change in the velocity of an object can make the crucial difference as to whether it achieves escape velocity and travels far out into space, or fails to escape and crashes to earth . . . . A difference of one proton, one neutron, and one electron is responsible for the dramatic difference in the chemical properties of fluorine and neon. The question of whether the universe will expand endlessly or contract in on itself turns on the issue of whether the neutrino has appreciable mass. . . . A banana peel can elicit spectacular acrobatics from a lumbering pedestrian, . . . and one vote amongst millions can determine the outcome of a presidential election.<sup>67</sup>

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<sup>67</sup> ROY A. SORENSEN, *BLINDSPOTS* 251-52 (1988).

In the same spirit, the physicist Emilio Segrè is quoted in the epigraph to Richard Rhodes's *The Making of the Atomic Bomb* as saying: "All the committees, the politicking and the plans would have come to naught if a few unpredictable nuclear cross sections had been different from what they are by a factor of two."<sup>68</sup>

Indeed at least one kind of natural phenomenon is notorious for such discontinuities—human perception. Think of those legendary experiments in Gestalt psychology, in which subjects swing from seeing something as a duck to seeing it as a rabbit, from seeing someone as a young woman to seeing her as an old hag, from seeing the Necker cube bulge in to seeing it bulge out, from seeing two dark faces against a white background to seeing a white wine glass against a dark background, from hearing only one strain in a musical canon to hearing only another, or (to borrow a quip from Richard Posner) from thinking law and economics obviously false to thinking it obvious.

Not just human perception, human learning more generally is said to abound with discontinuities. The computer scientist Marvin Minsky explains why:

[N]othing so complex as a human mind can grow, except in separate steps. One reason is that it is always dangerous to change a system that already works. Suppose you discover a new idea or way to think that seems useful enough to justify building more skills that depend on it. What happens if, later, it should turn out that this idea has a serious flaw? . . . .

[One strategy would be] never to let a new stage take control of actual behavior until there is evidence that it can outperform its predecessor. What would an outside observer see if a child employed this strategy? One would observe only "plateaus," during which there were few apparent changes in behavior, followed by "spurts of growth" in which new capacities emerge suddenly.<sup>69</sup>

Social scientists have started to accumulate examples of such discontinuities in the social world. The anthropologist Michael Thomson offers an especially striking one—the process by which one generation's rubbish becomes another generation's valued antique.<sup>70</sup> Commodities will gradually obsolesce into a state of

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<sup>68</sup> RICHARD RHODES, *THE MAKING OF THE ATOMIC BOMB* 8 (1986) (quoting Emilio Segrè).

<sup>69</sup> MARVIN MINSKY, *THE SOCIETY OF MIND* 178 (1985).

<sup>70</sup> See MICHAEL THOMPSON, *RUBBISH THEORY: THE CREATION AND DESTRUCTION*

rubbishhood, where most of them in fact remain. But a few formerly discarded items will suddenly regain value. They won't do so gradually. Rather after a brief period of hovering in a limbo of indeterminate value they positively soar out of the junk heap, their price leaping from less than zero (because it costs something to dispose of them) to Sotheby-levels.

I am inclined to offer the iterated prisoners' dilemma paradox as another illustration. We know that although it is rational to defect in a regular prisoners' dilemma, it will frequently no longer be rational to defect if the game is meant to be iterated an indefinite number of times—there now being future gains to be had from cooperating. The paradox arises because it seems that if the game is slated to be played an exact number of times, say one thousand, it now again becomes rational to defect. (It will be rational to defect on the last game. Hence it will be rational to defect on the next-to-last game; hence it will be rational to defect on the next-to-the-next-to-last game and so on to the very first game.) That makes for a striking discontinuity between long-lasting games of indefinite and definite length. Game theory is said to be full of such discontinuities. If it captures even a fraction of the amount of social reality game theorists claim it does, discontinuity is really the order of the day.

My most potent argument, however, against those who are skeptical about such discontinuities in the moral world is to point out that we already know it to exist at the moral heart of the criminal law, the doctrines of *mens rea*. Take a look at the notion of negligence. The most natural interpretation of negligence is the "Learned Hand" formula: One is acting negligently if the costs of one's actions discounted by their probability exceed the benefits discounted by their probability. But if one does behave negligently, blameworthiness will be measured by either the expected or the actual harm, not by the difference between the expected harm and the expected benefit! In other words, if a speeding driver runs someone over and he is just one scintilla short of being negligent—because the expected costs of his speeding are exactly one scintilla short of the expected benefits—his conduct is morally beyond reproach. But if the speeding driver is just one scintilla past the point of negligence—because the expected costs of his speeding are exactly one scintilla greater than the expected benefits—he is guilty

of manslaughter. So the definition of negligence has a very sharp edge indeed.

Consider next the mens rea of knowledge. To harm knowingly is deemed appreciably worse than to harm recklessly or negligently. Yet the transition between recklessly and knowingly bringing about harm lies at some fairly precise point somewhere on top of ninety percent, dubbed "virtual certainty." So again there is no gradual shading of bad to worse, but rather a sudden jump from bad to terrible.

There is a second kind of discontinuity involving the mens rea of knowledge. Suppose someone falls well short of recklessness because the appreciable harm he risks is outweighed by the appreciable benefits he can expect. As the probability of the harm rises past the threshold of virtual certainty the benefits suddenly cease to count and blameworthiness soars from zero to a level measured by the harm knowingly brought about. That is, the defendant who takes a forty-five percent chance of losing a life in exchange for the certain rescue of two other lives has not killed recklessly if someone should die. But the defendant who takes a ninety percent (i.e., two times forty five percent) chance of losing a life in exchange for the certain rescue of four (i.e., two times two) other lives has committed a murder for the sake of saving four other lives, something that we usually do not permit.

Consider, finally, intention. If the defendant intends to kill someone by an act that has an extremely small probability of succeeding (such as giving his victim an airplane ticket in the hope that the plane he takes will crash), he is not guilty of murder even if his victim dies.<sup>71</sup> But as the probability rises, while still staying well short of the substantial level required for negligence (not to mention recklessness or knowledge) it will reach a point where, combined with the hope of death, it makes for an intentional killing. Thus the defendant's culpability rather suddenly jumps from zero to murder, without ever traversing the intermediate levels of a negligent or reckless killing.

Once one starts looking for them, the moral world seems to abound with such discontinuities. Our attitudes towards death seem to display them. We know the passage into death to be a fairly continuous process involving a gradual cessation of a variety of life-sustaining functions. The dying person becomes increasingly less

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<sup>71</sup> See LEO KATZ, *BAD ACTS AND GUILTY MINDS* 292 (1987).

life-like and increasingly more corpse-like. But the dying person's rights do not change so continuously. Very little in the way of bodily invasion can be committed against someone just at death's door; however, nearly everything can be done to him just past that point.

One final example. Think about the sort of loyalty alumni feel vis-a-vis their alma mater. Imagine that a part of the University of Pennsylvania were to break off, migrate to Valley Forge and call itself Valley Forge University. Valley Forge University would command next to none of the old Penn alumni's loyalty and financial support. But suppose we gradually increase the number of faculty who migrate from the University of Pennsylvania to Valley Forge University and, in fact, start to move some crucial parts of the physical plant—the Ben Franklin sculpture, the portal to the law school, the Palestra. There surely would come a point where Valley Forge University would come to be viewed as the proper continuation of the University of Pennsylvania. Moreover, it would be pretty much a *point*, not an interval. Relatively suddenly nearly all alumni would shift their allegiances from the place in Philadelphia to the place in Valley Forge. It would not be the case that as the place in Philadelphia started to look less and less like the old Penn and the place in Valley Forge started to look more and more like the old Penn allegiances would gradually drift. The change would be a discontinuous one.

What this survey is meant to show is that discontinuities of the kind exhibited by my account of blackmail are unusual enough to be interesting but not so unusual as to be incredible.

### VIII. IMPLICATIONS, RAMIFICATIONS, SPECULATIONS

What follows is a loose and unsystematic list of areas outside the blackmail context in which my analysis may have implications.

#### A. *Crimes Versus Torts*

Criminal law is often described as a tort law for the poor defendant, a means of controlling the conduct of the judgment-proof sinner. Criminal punishment is viewed as the analogue to damages. Occasionally it is noted that criminal law systematically covers some forms of conduct that the tort law systematically slights—such as mere attempts. Our analysis of blackmail—especially of the preference-based fallacy that preceded it—allows us to make out a more fundamental difference. In tort, unlike criminal law,

Smithy, the batterer, should pay less than Louie, the thief, since Bartleby presumably lost less from the battery than from the theft. In tort, unlike criminal law, the vicious torturer-murderer should pay less than the negligent factory operator, since he killed many fewer people. What this dramatizes is that although the same conduct will often trigger both tort and criminal liability, the severity of the two forms of liability need not be commensurate. Although both tort and criminal law care about fault, tort law only uses it to determine whether the defendant is liable, not how heavy that liability should be. The heaviness of tort liability is governed by just one criterion, the seriousness of the harm, the damage done. Criminal law, by contrast, uses fault not merely to determine *whether*, but also to determine *how severely*, to punish. Harm still plays a role, but it has to share the limelight with fault. (Of course, when the gap between penal and tort desert gets too large, we become queasy. That's when punitive damages most seem in order.)

We are now, incidentally, better able to see what it means to criminalize an area of misconduct. It means not so much replacing private suits with public ones and damage awards with the assessment of fines, as it means keying the penalty structure to fault: to make it sensitive to the presence of intention as opposed to mere recklessness; to make it encompass not just completed offenses but also attempts; and to make it distinguish between degrees of complicity, between being a principal and being an accessory.

### B. *Unconstitutional Conditions*

The greater-includes-the-lesser is one of the most familiar of legal arguments and one of the most suspect. It is especially suspect in constitutional law and sharp constraints are put on its deployment by the doctrine of unconstitutional conditions. More concretely: The government frequently imposes special burdens and restrictions on those who receive some governmental benefit (a subsidy, a job), burdens which the constitution bars it from imposing on just anyone. Those who object meet with the-greater-includes-the-lesser argument: The government is not obligated to give you this job at all. *A fortiori* it can give you that job subject to certain conditions. The doctrine of unconstitutional conditions says that sometimes that argument is unacceptable. Unfortunately no one has clearly articulated when and why.

Under my approach, one would say this about the government's position: The government is threatening the applicant with a

retaliatory firing or withholding of a benefit and, in the alternative, is asking that he permit the government to prevent him from airing his political convictions. The prevention is a clear-cut wrong rising to constitutional levels. The retaliatory withholding of the benefit or firing is offensive conduct, probably not rising to a constitutional level. But the threat of a firing unless one lets the government prevent one from speaking one's political mind carries with it a level of blameworthiness equal to the actual prevention and not to the firing. Hence the threat does in fact rise to a constitutional level.

### C. *Nuclear Deterrence*

If it is immoral to do X, is it also immoral to intend to do X? It certainly seems that way. But a number of cases have arisen to suggest that this is doubtful. The nation that deters nuclear attacks by adopting a policy of automatic retaliation is intending the immoral: It is intending to launch a nuclear strike when little more than the killing of many innocents in the enemy camp is thereby accomplished. Some have indeed argued that because it involves this immoral intention, such a policy would in fact be immoral. (But they have found it very difficult to sustain this argument—if the policy really does what it purports to do, deter nuclear war.)

The criminal law's version of this problem is a variation of the typical spring gun case. Property owner installs a spring gun to protect some uninhabited piece of property. Should anyone try to enter the property, he will be mowed down by the spring gun. A large sign announces to the outside world what's in store for intruders. If someone enters nonetheless, and is killed by the gun, the property owner will probably be found guilty of murder or manslaughter. In other words, he is not entitled to defend property by the use of deadly force. Suppose however that a burglar, who is about to enter the property, notices the sign and reports it to the local prosecutor, who brings charges against the property owner for *attempted* murder. He argues that since it would be murder if someone got killed upon entry, an arrangement that would accomplish this if an entry were to happen is an attempted murder. Would he be right? The nuclear deterrence analogy suggests that he would not.

This somewhat paradoxical feature of intent (and attempt) is a twin of the blackmail paradox. The blackmail paradox consists in the fact that the defendant's announcement of a conditional intent to do X if Y occurs (to reveal embarrassing secrets if he isn't paid



some money) is *illegal* even though the doing of X unless Y occurs would be *legal*. The nuclear deterrence paradox consists in the fact that the defendant's announcement of an intent to do X if Y occurs is *legal* even though the doing of X if Y occurs would be *illegal*.

Our solution to the blackmail paradox also seems to solve the nuclear deterrence/spring gun paradox. The installation of the spring gun or of a nuclear doomsday machine is not wrongful, even though it would be wrongful if they actually went off, because the *successfully demanded*, not the threatened contingency, determines the level of blameworthiness of the defendant's conduct. The *successfully demanded* behavior in this case is the non-attack of one's country and the non-intrusion onto one's property, neither of which is blameworthy by itself.

#### IX. THE LOGIC OF THE ARGUMENT

I was once told a story about a question Bertrand Russell was supposedly asked at his post-Nobel Prize news conference. A journalist wanted to know what logicians mean when they say that from a logical falsehood anything follows. For example, if we were to assume that two plus two equals five, would it follow that Bertrand Russell was the Pope? Russell, unfazed, is said to have answered: "Yes, indeed. Let us suppose that two plus two is five. Now subtract three from both sides and you get one equals two. The Pope and I are two; therefore we are one; therefore I am the Pope." I am not sure whether the illustration really makes the point Russell wanted to make. It does, however, seem a nice illustration of the strange ripple effects odd assumptions in one area can have in an entirely different area if one is only determined to pursue them.

Many of the proofs and arguments making up the theory of social choice are like that. We might be asked to assume (as in Kenneth Arrow's original "Impossibility" Theorem) that a certain voter in a community has complete discretion to determine the relative ranking of some particular pair of alternatives. In addition, we will be asked to make some utterly innocuous background assumptions. Then, before we know it, we are shown how the "mini-dictator" has turned into a Mussolini who controls every relative ranking of every pair of alternatives. Having started out with a minor oddity, we have ended up with something utterly amazing.

Something like that I claim to be at work with blackmail. The minor oddity is the fact that the blameworthiness of an action is not totally determined by how much the victim hates what's being done to him. That minor oddity then leads to the major oddity of blackmail—a crime which consists of a bargain which both parties want to strike and which has no adverse effects on any third parties. The way in which the minor oddity leads to the major oddity is in fact quite parallel to the “minidictator” argument in the theory of social choice. Once we assume that the ranking of certain alternatives is fixed independently of the victim's wishes, we have also indirectly taken the ranking of other alternatives away from him. And that means, in effect, that we have taken the right to strike certain Pareto-optimal bargains out of his hands.

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Were I to put my argument in the tiniest of nutshells, it would go like this: The essence of blackmail resides in a strange, anomalous-looking fact. The defendant manages to leverage the threat of a mild wrong into a substantial advantage and this leveraging is deemed by us a very major wrong. The so-called punishment puzzle—involving an eccentric homeowner who prefers taking a beating to losing a valuable heirloom—shows why this fact is not so strange and anomalous after all. It is a natural, but somewhat counterintuitive, consequence of the fact that blameworthiness is a function not merely of how much the victim hates the wrong being done to him, but is also a function of other attributes of the wrong, such as *mens rea*, *actus reus* and so on. The fact that blameworthiness depends on these other attributes implies that situations will arise in which the victim will prefer to be subjected to a greater rather than a lesser wrong; which, in turn, implies that the victim's judgment cannot be trusted to rank wrongs; which, in turn, implies that a defendant who persuades his victim to accept a bigger wrong in lieu of a smaller wrong, should in fact be deemed guilty of the bigger wrong. This is exactly what the blackmail doctrine does.

