Truth and Consequences:

The Force of Blackmail's Central Case

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Fred's cases
"leave me alone or I'll ..

TRUTH AND CONSEQUENCES

I. Introduction

Blackmail commentary continues to multiply. The purpose of this paper is to show what we agree on. Its primary tool will be to define what I call the "central case" of the blackmail literature, and to supply the connecting links that will allow us to see how the various theories converge where central-case blackmail is involved. Among other things, I will show how the deontological and consequentialist (economic) approaches converge in condemning central-case blackmail, and I will defend the criminalization of such blackmail.

Admittedly, the law criminalizes more than my central case. But once we recognize that the central case is neither puzzling nor paradoxical, it may be easier to handle the border cases that arise.

II. The nonexistent paradox

At the core of blackmail law there supposedly lies a paradox: that it is criminal for someone to demand money in exchange for not doing something-- disclosing information-- that it is lawful for him to do or not do. But there is, strictly speaking, no paradox.

A paradox is "[a] statement whose truth leads to a contradiction and the truth of whose denial leads to a contradiction."[1] A judge would be uttering a paradox were she to

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[1] Boruch A. Brody, *Logical Terms, Glossary Of*, in 5 The Encyclopedia of Philosophy at 70 (Paul Edwards, Ed., MacMillan Pub. NY 1967). More colloquially, a paradox is surprising conjunction-- "a statement that goes against generally

state both that blackmail is unlawful, and that "where a person has the right to do a certain act... he has the right to threaten to do that act."[2] But it would be an error for any judge to so state; the second proposition (though believed by some) is simply false. People do not invariably have a right to threaten to do or not do the things they are at liberty to do or not do.

Perhaps it is thought that the liberty of doing and not doing something is inevitably greater than (and includes within itself) the liberty of threatening to do or not do. But the right to do a greater thing does not always include the right to do the lesser; that is one of the lessons taught by the doctrine of unconstitutional conditions. Further, threatening cannot be "included" in doing because threatening possesses elements that doing does not; most notably, threatening to disclose induces action in a way that disclosure does not.[3]

In policy terms, doing[4] and threatening can have quite different effects, particularly in a dynamic system. Partly this is because the two acts affect different parties: any threat the blackmailer makes will be directed to the person with the embarrassing secret, but if the blackmailer discloses it will be to

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accepted opinion". John Van Heijenhoort, *Logical Paradoxes,* in Id. at 45. Blackmail is admittedly paradoxical in this looser sense.

[2]Richard Epstein, *Blackmail, Inc.*, 50 U. Chi. L. Rev. 553 at 557 (1983).

[3]For the distinction between "situation-altering utterances" and "action-inducing utterances," see Kent Greenawalt, *Criminal Coercion and Freedom of Speech,* 78 Nw. U. L. Rev. 1081 at 1091-93 (1983).

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

third parties. Difference in effect is also partly due to the action-inducing nature of threatening as compared with disclosing. In Hohfeldian terms, a privilege to do would be distinct from a privilege to threaten since each regulates distinctly different relations between different people.[5]

Further, threatening is not the only thing a blackmailer does. He threatens to disclose *unless money is paid*[6]. Regardless of whether we have liberty to threaten, the law often forbids us to sell our liberties. We have a right to vote that can be neither transferred gratuitously nor sold; we have liberties to make sexual use of our bodies that in most states cannot bartered for cash. The growing literature on inalienability* makes clear that quite different issues can distinguish doing and selling.

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None of this should be surprising. In fact, much of the blackmail commentary can be organized around these simple logical points. The Lindgren thesis, for example, argues that blackmail is wrongful because the victim and blackmailer are playing with

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[5]For Hohfeld, a "privilege" is a liberty from governmental interference. Were blackmail lawful, it would be permissible to threaten to disclose unless paid, and such activity would be privileged; the victim would have no rights against it. See e.g., Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L J 16, 30-35 (1913.) On the question of whether realms of privilege or liberty are types of regulation, see Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 Hofstra L. Rev. 711, 751-58 (1980).

[6]A demand for money is the paradigmatic case. Other forms of advantage can be demanded and still the blackmailer's conduct will be proscribed. When a non-monetary advantage (such as sexual compliance) is traded for the blackmailer's silence, the concerns of commodification are usually but not inevitably implicated.

"somebody else's chips";[7] this corresponds to the point that doing and threatening affect different parties. For another example, the economic "waste" thesis, associated with Daly & Giertz,[8] Coase,[9] Epstein,[10] and Ginsburg,[11] argues that allowing blackmail threats will encourage investment in allocatively-fruitless bargaining[12] and in resources "to dig up dirt only to rebury it again."[13] This corresponds with the logical point that the dynamic effects of doing and threatening can be quite different. The arguments of those who draw upon the Bloustein thesis,[14] that privacy should not

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[7]The notion is that third parties may have a right to the information being bartered over; for example, if an unfaithful husband pays hush money to conceal his infidelity, the blackmailer is receiving compensation while the affected wife received neither information nor compensation. James Lindgren, *Unraveling the Paradox of Blackmail,* 84 Colum. L. Rev. 670 (1984).

The analysis I offer of central-case blackmail does not need to posit such hard-to-defend rights in third parties, but instead uses traditional moral and legal categories to ~~explicate the~~ wrongful harm ~~done~~ to the person who is threatened with release of his secret. See text accompanying note 44 and following.

[8] George Daly and J. Fred Giertz, *Externalities, Extortion, and Efficiency,* 65 Am Econ Rev 997 (1975).

[9]Ronald Coase, *The 1987 McCorkle Lecture,* 74 Va. L. Rev. 655 (1988).

[10]See Epstein, supra note 2.

[11]Douglas Ginsburg, *Blackmail, An Economic Analysis* [1979 draft; final version to be a paper in this symposium].

[12]Daly & Giertz, supra note 8 at 100. ("With any positive level of bargaining costs, extortion will clearly lead to a reduction of social welfare since scarce resources are utilized in the process of negotiation while failing to improve the allocation of resources.")

[13]Ginsburg, supra note 11 [quotation language and page to be adapted to the final form of his article.]

[14]See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 NYU L Rev. 962, 988 (1964).

be commodified against the will of the primary party,[15] correspond with the point about inalienability. And so on. With each explanation comes another refutation of the notion that blackmail is truly paradoxical. At this point perhaps only a subset of libertarians believe that blackmail contradicts the other proper patterns of the law. (Of their views, more later[16]).

Although it is not paradoxical, it *is* interesting whenever the law prohibits someone from threatening to do what he is free to do. There are a multitude of reasons that can explain such a phenomenon, but the question is which reasons apply here. In the hope of both simplifying and advancing the blackmail debate, I shall indicate what appears to be the central case of blackmail, and show why under either of the normative views currently dominant in legal scholarship-- economic wealth-maximization and deontologic moral theory -- central-case blackmail should be condemned. It is both inefficient (the economic view) and wrongful (the deontologic view).[17] As with indicating the non-paradoxical nature of the paradox, I am attempting less to surprise than to indicate how the various views extant in the literature in fact converge.

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

[16]See infra at ?.

[17]Whether or not the blackmail act should be *criminalized* is separate inquiry, pursued at text accompanying note 75 and following.

III. The central case of blackmail

The central case about which all should agree is the case where the blackmailer acquires the information *for the sole purpose of obtaining money or other advantage from the victim*, and *where he has no intent or desire to publish the information except as an instrument toward this purpose*. His threats are made solely to extract money or other advantage.

This central case appears in various guises. It describes, for example, Robert Nozick's paradigm of "unproductive exchange."[18] He tells us that an unproductive exchange has these characteristics: (1) the purchaser would be better off if the blackmailer had nothing at all to do with him, and (2) if the exchange were impossible, "one of the parties to the potential exchange would be no worse off"[19] than if the exchange were possible. Clearly the victim of my central case (1) would be better off ~~without~~ if the blackmail ~~threat~~ were out of this life, and (2) if it were impossible for the money-for-silence exchange to be accomplished, the blackmailer would have bothered neither to acquire the information nor to make a threat of disclosure. I can(1) The victim ~~would clearly~~ no worse off. (In fact he would be better off if exchanges of money for silence were impossible.) Building on Nozick, Jeffrie Murphy defends the

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[18]ROBERT NOZICK, ANARCHY, STATE AND UTOPIA, at 84-86 (Basic Books, NY, 1974). That is not to say Nozick is pellucid. What I present here is less what I am sure Nozick meant, as what his language probably means given the underlying logic that seems to animate his discussion.

[19]Id. at 85.

criminalization essentially of such a case.[20]

Kent Greenawalt's definition of "manipulative threat" also captures the central case: manipulative threats are "threats of action when the actor would not suggest or engage in the action were it not for the threat itself and its linkage to a demand."[21] In such instances, "The possibility of [disclosure] has come into existence *only* as part of a plan to induce" the victim to act as the blackmailer desires.[22]

Among economic analyses, the entrepreneurs of Richard Epstein's "Blackmail, Inc." are by definition persons who are going into the information business precisely to obtain material to use as leverage;[23] they have no interest in disclosure (though they might do some in order to maintain the credibility of their threats). Instead they intend to bind themselves, via contract with the victim, not to use the very resources they have expended money to locate. Similarly Coase[24] and Ginsburg[25] are worried about people expending resources in gathering information they have no intent of ever using except as a lever with which to extract an unproductive transfer payment. The simple but telling model of Daly

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[20]Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 The Monist 156 at 163-66 (1980).

[21]Greenawalt, supra note 3, at 1099 (arguing that such threats are not "expression" within the protective ambit of the first amendment).

[22]Id. at 1099.

[23]See Epstein, supra note 2.

[24]See Coase, supra note 9.

[25]See Ginsburg, supra note 11.

& Giertz makes a similar point from a similar starting case: "The victim of extortion is forced to compensate the perpetrator to refrain from doing something which does not directly benefit anyone and would not be undertaken save for its bribe generating potential."[26]

The reasons are fairly obvious why the economists would view such a central case as being wasteful. I spell them out briefly in the section immediately following. Then the article turns to the reasons why a nonconsequentialist moral theorist would condemn the central-case activity. The nonconsequentialist moral view best captures, I believe, the primary reasons why courts and legislatures have in fact made blackmail unlawful.

IV. ~~The~~ Consequentialist perspective

A. Allocative and nonallocative effects

The common law does not ordinarily allow persons to bring suit for recompense when they take actions that avert harm to others.[27] Among other things, such suits would be difficult to implement, would involve high administrative costs, and could, because of valuation problems, impose net harms on the supposed

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[26]George Daly and J. Fred Giertz, *Externalities, Extortion, and Efficiency: Reply*, 68 Am Econ Rev 736, at 736 (1978). Also see Daly & Giertz, supra note 8.

[27]Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 21 J. Legal Stud. 449, 455-462 (1992). ~~(explaining the common-law pattern in this regard, and exploring certain exceptions as conforming to the underlying policies).~~

recipients of the harm-reducing activity.[28]

Ordinarily, however, persons are permitted to bargain over the potentially harmful acts they are free to perform,[29] and by contract can obtain recompense for refraining from those acts. With contract there is little implementation problem, low administrative costs, and virtually no danger that a contracting party will suffer a net harm. Most importantly, the allocative effects of such contracts are positive.

The Posnerian rationale for allowing and enforcing such contracts is straightforward: ordinarily both exclusive rights and nonexclusive privileges are distributed where they are most highly valued. But the law cannot make these allocations perfectly. Where in a particular case a harmful liberty is misallocated, the person adversely affected by the liberty should be free to purchase it. ~~In the contract of purchase~~, the seller will contractually impose a duty on himself to refrain from the contested act. As a result the resource that was used by the former liberty-holder will no longer be used by him; it will instead serve the purposes of the purchaser, for whom it holds a higher value.

What makes central-case blackmail different, is that ~~it~~ ordinarily does not (and by definition is not intended to) trigger a reallocation of the contested resource. The blackmailer does not

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[28]Id. In addition, restitutionary rights for harm-avoidance could generate incentives for central-case extortion. Id. at 457-58.

[29]Those acts which the potential seller is *not* free to perform, the other party can bring suit to restrain, or ~~can bring suit~~ to obtain compensation for them; the potential buyer thus has no need to pay for harm-avoidance where the harm violates his private legal rights.

wish to disclose, but only to extract a transfer payment. Given the positive value of nondisclosure to the victim/purchaser, and the null value of disclosure to the seller/blackmailer,[30] if blackmail is legal the purchaser will probably purchase silence.[31] To allow such blackmail in a world of positive transaction costs would be to waste resources in bargaining without any allocative payoff.[32] There is further waste to the extent that potential blackmailers would engage in research that they then would bind themselves not to use.[33]

A utilitarian defense of blackmail law would follow the same general pattern: allowing central-case blackmail causes pain to the victim and expense to all concerned, without any compensating benefits. The utilitarian analysis would of course have several areas of difference, one element of which is worth highlighting here. For the economist, the transfer of money from victim to blackmailer is a transfer payment, with virtually no allocative effect[34] and thus of virtually no economic import in itself. From

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[30]Recall that the central-case blackmailer has no reason of his own (including anger or spite) to disclose; his motives are to obtain an advantage [whether commercial or otherwise] *through* disclosure.

[31]See Daly & Giertz, supra note 8. By contrast, if blackmail is not legal, the victim has leverage with which to refuse purchase. See text accompanying note 75 and following, infra.

[32]See Giertz & Daly, supra note 8, and their *Reply*, supra note 26.

[33]Coase, supra note 9; Ginsburg, supra note 11; Epstein, supra note 2.

[34]Transfers of income can have indirect allocative effects if the parties' respective demand for goods changes with the change in income. See, for example, E.J. Mishan, *The Postwar Literature on Externalities: An Interpretive Essay*, 9 J Econ Lit 1, 18-21 (1971) ("income" or "welfare" effects illustrated arithmetically).

a utilitarian perspective, the transfer itself is likely to be a net negative: given the context in which the transfer is made, it is probable the victim experiences more discomfort than the blackmailer receives by way of pleasure. Central-case blackmail is thus even more easily condemned by a utilitarian than by an economic perspective.

B. The lawful or beneficial nature of the threatened action is irrelevant

Whether utilitarian or economic, the consequentialist argument against central-case blackmail does not depend on the nature of the threatened action. The threatened action can be economically beneficial or it may be wasteful; in either event, permitting manipulative threats among economically-motivated actors will have net negative consequences.[35]

Central-case blackmail is a subtype of extortive threat: threats made solely to extract an advantage from one who does not want the threatened action carried out, where the threatened action has no independent positive value for either party.[36] (In these

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

The analysis would be more complex if we were to take into account the possibility that any criminalization of a threat to do a lawful act would itself have negative consequences. (For example, perhaps such criminalization causes confusion or erodes respect for the law.) I give no attention to this latter set of possibilities since I think that criminalizing central-case blackmail has no such consequences, largely because its deontic status as a wrong is obvious to the person on the street. (For discussion of blackmail's deontic status, see the next section, infra.)

[36]Some disclosure may be in the blackmailer's interest in order to make the threat of further disclosure credible, but disclosure has leverage value to him only by virtue of the possibility of his contracting with the victim. See, e.g.,

cases the action will have a negative value to the person threatened which is greater than the null or negative[37] value it has for the threatener). In such a context, it is in no one's interest for the threat to be carried out. Therefore, if the parties are economically motivated[38], making the threat will not direct resources to the carrying out of the threatened act. Since the action will not take place, the costs or benefits of the threatened act do not need to be assessed.[39]

C. Caveat: Positive economic effects of ~~allowing~~ legalizing C-Case blackmail

Although I think the consequentialist case condemning blackmail as ~~inefficient~~ wasteful is fairly clear, one caveat should be noted. ~~Even where the~~ The weight of any suggested that blackmail effort ~~does not result in disclosure, so that there is no~~ will not result in as much change in the allocation of the information, however, the arguments of William Landes and Judge Posner suggest that successful blackmail can have a long-term allocative

alloc small here it intuitively use it

Nozick, note 18 (this is one of the characteristics of "unproductive" exchanges) and Daly & Giertz, note 8 (this is one of the explicit features of their model.) This leverage value is thus not an independent positive value to the blackmailer.

[37]Carrying out the threat may be costly to the extortioner, in which case the threatened action is a net negative to both the victim and the blackmailer. See Daly & Giertz, supra note 8.

[38]If they are *not* economically motivated, or if "honor" has an economic dimension which could dictate the victim reject the blackmail deal, then the analysis is more complex. The standard economic case on the "waste" of blackmail depends on the assumption that the parties' demand structures will usually lead to a deal where silence is purchased.

[39]For example, the model of the Daly and Giertz paper was originally intended to address extortion by threat of violence; though violence is action which is unlawful and whose consequences are negative, the Daly & Giertz model equally well describes the supply and demand structure of central-case blackmail. Daly & Giertz, supra note 8 and note 26. {CHECK D & G}

effect on *other* resources.[40] Fear of having to make blackmail payments may induce potential deviants to conform their behavior to majority standards and, Landes and Posner argue, this can encourage efficient behavior.

But one can doubt that most of the induced conformity would in fact be efficient. I suspect that allowing Blackmail, Inc., to evolve would primarily discourage harmless behavior that happens to be nonconforming (for example, ~~certain unconventional forms of sexual relations~~ same-gender sexual relations), and in my view our society already makes harmless and nonconforming behavior too expensive. If I am correct in thinking that legalizing central-case blackmail would place inappropriate costs[41] on harmless activities, legalization would have negative long-term allocative effects, along with causing a

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[40]William Landes & Richard Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1 at 42-43 (1975); also see Richard Posner, THE ECONOMICS OF JUSTICE 231-258, 268-86 (Harvard U Press, Cambridge, 1983) and Judge Posner's article for this symposium, *Blackmail, Privacy and Freedom of Contract*.

[41]The reader might try to argue that such costs are appropriately imposed on the activity. For example, if the public disapproves of an act, it might be argued that the "disutility" caused the public by the act's occurrence should be imposed upon the actors as a sort of strict liability, much as the injuries that hazardous activities cause are imposed on the activities as a "cost of doing business". There are however several problems with such an argument.

First, determining "what is a cost of what" is not a simple factual judgment. See GUIDO CALABRESI, THE COSTS OF ACCIDENTS at 133-34, 135-73 (Yale U Press, New Haven 1970). The cost to the public of knowing that persons are engaging in a disapproved activity is a cost caused by the conjunction of two things: the public's taste as well as the persons' behavior. Both are causes. It may be more appropriate to let the public bear the "cost" of its taste than to impose it on the persons whose behavior, when combined with the public taste, caused offense. An economist would probably ask, "who is the cheapest cost avoider"; see Calabresi, id. Since tastes about *others'* sexual behavior or orientation are easier to change than one's own behavior or orientation, I suspect the public is a cheaper cost avoider in this case. (My rebuttal here is, of course, a twopenny version of J.S. Mill's utilitarian defense of providing legal shelter for sexual privacy.)

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

waste of transactional and investigative resources.

Nevertheless, one should admit the consequences for the analysis in the (unlikely) event that Judge Posner is correct in thinking that blackmail could discourage inefficient actions by potential blackmail victims. If such were true, prohibiting central-case blackmail would come at the expense of foregoing such beneficial incentive effects. But, as Posner notes, considerations of governmental versus private law enforcement make the decision to criminalize sensible even if blackmail could discourage inefficient acts.[42] More importantly for most of us, the notion of deterrence being achieved through payment of hush money is repellent. The last thing our society needs is institutionalized hypocrisy.[43]

V. The nonconsequentialist moral view

A. Background

In one of the first and most interesting articles on blackmail theory, Jeffrie Murphy argued that a deontological case against blackmail probably could not be made.[44] Robert Nozick, usually thought of as a deontologic theorist, has argued that the law could prohibit "unproductive exchanges" (as we have seen, these are equivalent to our central-case blackmail), but Nozick's rationale

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[42]Posner (prior article, and article for this symposium)

[43][NOTE TO SELF: "Hypocrisy" is not the best word. I need a word to describe the shame-inducing and nonvirtuous act of taking affirmative steps to hide true things about one's self. This phenomenon is discussed later in the paper; need an easy way to refer to it here.]

[44]Murphy, supra note 20.

is opaque. A number of commentators have asked "why is it wrong for an exchange to be 'unproductive' in Nozick's sense" and the literature has yielded no apparent answer.[45]

Yet the deontologic case against blackmail seems to me clear. One person ~~(B)~~ is deliberately seeking to harm another to serve ~~his~~ her own ends, and is doing so in a context where ~~B~~ she has no conceivable justification for ~~his~~ her act. One factor that seems to obscure this simple point from view is the nature of the weapon the blackmailer uses: ~~his~~ her threat of disclosure is a threat to do something lawful. But this is no more than a red herring. The blackmailer is concerned with the nature of the threat she employs only in the instrumental way a butcher is concerned with what knife to use.[46]

To demonstrate that the nature of the threat should be disregarded in assessing the blackmailer's act from a nonconsequentialist perspective, I will employ the "doctrine of double effect"[47]. Though the doctrine is afflicted with its own difficulties, in the instant context it will prove a useful analogy. ~~Once the~~ To strip clear the nature of the blackmailer's act is thus stripped clear, it will be seen simply as an unjustified intentional doing of harm to another to benefit one's self. In that guise, the usually troubling ambiguities that attend the harm-benefit and

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[45]Cites. A useful supplement to Nozick's approach can be found in CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (Harvard U Press, Cambridge, 1981) at 95-109.

[46][NOTE TO SELF: discuss here levels of threat, comparing e.g., "I will disclose your secret" with "I will break your legs."]

[47]See text accompanying notes 50, and following, infra.

consent-coercion distinctions resolve themselves, and those distinctions in turn can be employed to distinguish central-case blackmail from the ordinary commercial transaction.

B. Means and ends

The core of the dominant deontic view is that it is wrong "to treat someone as if he existed for purposes he does not share."[48] This precisely what is done by blackmail and other intentional causings of harm.

Thomas Nagel has argued that economics, utilitarianism, and other forms of consequential normative inquiry take an "impartial" or objective view of reality. The only question in such systems is what outcomes should obtain. The deontologic perspective, by contrast, asks *how* outcomes are arrived at. This perspective is that of the agent by whose acts the outcomes are to be achieved; it is in that way subjective. To the actor, it matters not only that the ultimate outcome of an act may be good, but it also matters if in the process she will have to do harm. Though this may be a matter merely of psychology, I agree with Nagel that there is something more, something distinctively moral, in operation.

Nagel observes:

> The deontological constraint... expresses the direct appeal to the point of view of the agent from the point

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[48]*Warren S. Quinn,* Actions, Intention, and Consequences: The Doctrine of Double Effect, in JOHN MARTIN FISCHER & MARK RAVIZZA, ETHICS: PROBLEMS AND PRINCIPLE, Harcourt Brace Jovanovich, Fort Worth, 1991) 178 AT 190 n 25. (This is Quinn's Kantian rationale for the Doctrine of Double Effect, discussed further infra at text accompanying note 50 and following).

of view of the person on whom he is acting. *It operates through that relation.* The victim feels outrage when he is deliberately harmed... not simply because of the quantity of the harm but because of the assault on his value of having my actions guided by his evil.[49]

To ~~use~~ another harmfully to benefit one's self—~~Blackmail and other~~ All forms of intentional harming are thus the perversion of the personal.

C. The doctrine of double effect

Deontic approaches usually stress the duties that exist independent of the consequences they cause. It is usually said, for example, that one person should never harmfully use another as a means, which implies that no harm can be done to another regardless of the ~~importance~~ good to be prod by the actor's overall goal. (So, for example, one could not ~~twist~~ innocent ~~A's arm to save B's~~ life.) The doctrine of double effect, ~~accepted~~ by many (but by no means all) deontic ~~philosophers,~~ and where this doctrine operates it opens up the possibility of taking consequences into account.

The doctrine of double effect [DDE] acknowledges that acts can have good and bad consequences, and that sometimes it can be morally permissible to do an act that has bad consequences if they are outweighed by the good.[50] But the only harmful acts that are

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[49]THOMAS NAGEL, THE VIEW FROM NOWHERE, at 184 (Oxford, NY, 1986) (emphasis added). [The Nagel material is also available in the Fischer & Ravizza book, cited in note 48, starting at 165.]

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

> The Doctrine of Double Effect ... discriminates against agency in which there is some kind of intending of a objectionable outcome as

capable of being permitted under a consequentialist calculus are acts that are not directly intended.[51] Thus, the doctrine is variously said to make a distinction between direct and oblique intention,[52] between foreseen and intended effects,[53] or between effects that have a certain "closeness" with the intended effect and those that do not.[54]

An example can make this clearer. Consider the difference that might exist, even in an assumedly just war, between strategic bombing (done to destroy munitions factories) and terror bombing (done to demoralize the enemy). Assume that both kill the same number of civilians. Under DDE, the strategic bomber in a just war does not violate deontic constraints if he happens to kill civilians because, inter alia, were the civilians to be protected

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

Quinn, supra note 48, at 181.

[51]Cf., NAGEL, supra note 49, at 179:

> The principle of double effect... says that to violate deontological constraints one must maltreat someone else intentionally. The maltreatment must be something that one does or chooses, either as an end or as a means, rather than something one's actions merely cause or fail to prevent but that one doesn't aim at.

Of course, the word "intent" here has a different meaning than it does in tort law, where a sufficient basis for "intent" is the mere knowledge that an effect is substantially certain to follow from one's act. Restatement (second) of Torts.

[52]Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in FISCHER & RAVIZZA, supra note 48, 59 at 61 (discussing Bentham's distinction between direct and oblique intent.)

[53]Frances Myrna Kamm, Philos. & Pub. Aff. (1993) at __.

[54]Quinn, supra note 48, at 182 (discussing Hart's critique of "closeness");Foot, supra note 52, at 62.

from injury he would bomb anyway. Their death is not a motivating cause of his action, and not within his direct intent. By contrast, the terror bomber would not bomb if civilians were protected, for then his goal of demoralizing the enemy could not be accomplished; killing civilians is part of his "direct" intent. Terror bombing is thus forbidden by deontic constraints, even in a just war.

Though the doctrine has its difficulties,[55] it is a useful analogy for our purposes. The doctrine suggests that when one's sole direct intent is to do good, harmful side-effects do not constitute absolute constraints against the action. Conversely, in what one might call the "doctrine of single effect" [DSE], when one's sole direct intent is to do harm, useful side-effects have little or no deontic significance. The DSE recapitulates, of course, the basic deontic position against using others.

In blackmail law our task is to decide what deontic significance should be given to the fact that the blackmailer has a lawful liberty to do what he threatens to do. We are also interested in whether the deontic inquiry might (or must) take into account whatever beneficial effects could result from successful

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[55]It is difficult to distinguish between directly and obliquely intended effects; verbal acrobatics can turn virtually anything into an obliquely intended effect. Were that to happen, taking DDE seriously might cause deontology to collapse into consequentialisem. For this reason, among others, not all deontic theorists subscribe to DDE.

{NOTE TO SELF: Perhaps discuss Quinn's revision of DDE and Kamm's attack on it, concluding with the "you know it when you see it" argument}

blackmail.[56] The doctrine of double effect (DDE) and my correlative doctrine of single effect (DSE) suggest that no significance should be given to either the lawful nature of the threat or the potentially beneficial side-effects of blackmail.[57] Under DSE, the blackmailer does violate deontic constraints if he threatens disclosure in an intent to obtain money or other advantage because, inter alia, were he to have alternative threats available he would threaten anyway. The nature of the threat is irrelevant to the blackmailer in the same way the killing of civilians is irrelevant to the strategic bomber.[58] Like the terror bomber, the direct intent of the blackmailer is to do harm, and as with terror bombing, such intentional harm is impermissible regardless of its beneficial side-effects.

D. The "property right" objection

One problem some observers have with the liberal defense of blackmail law is the absence of any "property right" that the blackmailer has violated.[59] Property rights are usually understood to be a subset of rights characterized by being transferable and exclusive. Admittedly, American law gives only very limited

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[56]See the discussion of the Posner and Landes position at note 40 and following.

[57]Admittedly, the DDE analogy works best to handle the Posnerian side-effects than to handle the lawful nature of the threat, for the latter is potentially more than a consequentialist phenomemon. If it is lawful to threaten disclosure, then the victim has no "rights against disclosure"; this has troubled Murphy, among others. This issue is discussed below at note 59 at following.

[58]This is not full irrelevance. {Explain}

[59]Cf. Eric Mack, *In Defense of Blackmail*, 41 Philosophical Studies 273 (1982) at 276 (assuming rights are exclusive and unitary).

transferable and exclusive rights in reputation. (These are the "rights of publicity", which are good against use of one's name or likeness in trade,[60] but which do not apply to the kind of disclosure a blackmailer ordinarily contemplates.) But nothing limits actionable "harm" to injury to such a narrowly defined subset of rights. All that is needed is a justified holding[61] or a justified liberty. If it is intentionally harmed, some justification must be shown.[62]

In 1887 Sir Frederick Pollock "asserted it to be 'a general proposition of English law that it is wrong to do wilful harm to

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[60]The liberty to so use one's name is "property" in that it can be conveyed away to another in most states. See the germinal case of Haelan Laboratories v. Topps Chewing Gum, 202 F. 2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953) (baseball player could not only waive his right to object to another placing his photo on baseball cards, but he could also make a binding assignment of the liberty to so use his photograph; once such an assignment was made, it was binding even against other persons whom the player later wishes to license and (presumably) against the baseball player himself.) Even rights of publicity are not full property rights, however, for they may not be descendible. See Wendy Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 Stan.L.Rev. 1343 at 1376 & n. 160 (1989).

[61]See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 Va. L. Rev. 149, 166-196 (1992) and sources cited therein (discussion of corrective justice as a substantive basis for rights). American law has even premised propoerty on far more incohate rights, such as the liberty of using one's labor. See id.; also see Gordon, *A Property Right in Self-Expression*, Yale L. J. (1993, forthcoming).

[62] What I suggest here does not enshrine the status quo, both because of the wide range of justifications that exist [privileges] and because non-holders have many rights, too. The theory I discuss here is conservative only if joined to the notion that rights must be negative, "freedom-from" in Isaiah Berlin's terms. See his *Two Concepts of Liberty*. For a strong positive right based on deontic principles, see my *Property Right in Self-Expression, Equality and Individualism in the Lockean Proviso*, Yale L. J. (1993, forthcoming).

one's neighbor without lawful justification or excuse."[63] The common law is full of examples where judges protect non-property interests against malice.[64] For example, no one considers mental well-being a "property" interest; it is disturbed regularly by a host of people and events against whom no right of action lies. But all states recognize a tort of assault (whose gravamen is intentionally putting another in fear or apprehension of contact) and most states now recognize a tort of intentional infliction of emotional distress. Some states even recognize a tort of negligent infliction of emotional distress. We have many conditional rights in aspects of our well-being which are functionally or by law nontransferable. Some of those conditional rights even protect non-property interests even against the malicious use of property.[65]

The tort of interference with prospective advantage,[66] and

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[63]Philip Halpern, *Intentional Torts and the Restatement: A Petition for Rehearing*, 7 Buff. L. Rev. 7 at n. 3 (1957), quoting POLLOCK, LAW OF TORTS 21 (1st ed. 1887). Halpern's article is a general defense of the prima facie tort approach, which makes tortious any unjustified intentional causing of harm.

[64]One need not have a malicious feeling (spite, envy, etc.) in order to do a legally malicious act. Today "malice" (by its own name or by the name "prima facie tort") refers to the causing of unjustified injury. cf., Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 Ark. L. Rev. 335 at 345 (1980)

On the possible role of intent-to-injure in malice, see the discussion of the doctrine of double effect, infra at 50.

[65]These are the spite fence cases, in which the court protects a neighbor's non-property interest in, e.g., an unobstructed view, against a neighbor's malicious attempt to block it off. Were the fence-builder to have a reason to build his fence *other than* causing injury, then the court would not give the neighbor's obstructed view any protection.

[66]A leading case here is Tuttle v. Buck, 107 Minn. 145, 119 NW 946 (1909).

New York's prima facie tort,[67] provide particularly striking examples of judicial protection of non-property interests against activity whose only purpose is to cause harm. Perhaps the most vivid example, however, is provided by the classic case of *Keeble v. Hickeringill*[68]. There the plaintiff had been in the habit of capturing ducks who came to decoys he deployed on the water. Defendant began shooting his gun to scare the ducks away. Since the plaintiff had no possession of the escaping ducks, he had no property in them (as we know from another classic property case, *Pierson v. Post*)[69], so the question arose if the plaintiff had a sufficient interest in the prospective ducks to bring suit against someone who seemed to have no reason but malice for depriving him of that prospective advantage. Plaintiff's non-property interest was held sufficient.

The "property rights" query is sometimes attributed to Jeffrie Murphy, [70] but Professor Murphy has a subtler difficulty with the liberal defense of blackmail law. He cannot see that the victim

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[67]The leading case here is Advance Music Corporation v. American Tobacco Co., 296 N.Y. 79, 70 NE2d 401 (1946). For a more general discussion, see Halpern, *supra* note 63.

[68]111 East 574; sub nom Keeble v. Hickeringall, Cas. t. Holt 14, 17, 19; sub. nom. Keeble v. Hickringill, 11 Mod. 130; sub nom. Keeble v Hickeringhall, 2 Salk. 9 (K.B. 1707)(also available in most basic property casebooks, such as Casner & Leach.)

[69]Peirson v. Post, 3 Cai. R. 175 (NY Sup Ct 1805) is, admittedly, an American case, and the early English rule may have been different. John Locke, for example, seems to have believed that chasing an animal gave one an interest in it. See SECOND TREATISE ON GOVERNMENT, ch. 5. However, the *Keeble* opinion (so far as one can make it out through the varying reports) makes no reference to any property interest plaintiff might have had in the ducks.

[70]See Mack, supra note 59.

has *any* rights that are violated. In particular, Murphy writes, a person who has done something discreditable has no right to a good reputation; using the language of corrective justice, that person's reputation is not a justified holding.

However, whether or not one has a "right to a good reputation" is irrelevant when central-case blackmail is at issue, for the deontological point is whether the victim has a right to be free from the harm that was intended and imposed. The harm intended and imposed in central-case blackmail is not harm to reputation. The harm intended and imposed is harm to the victim's pocketbook or liberty.

That is, the central-case blackmailer does not seek to place the victim's reputation at its "proper" level,[71] nor is that the usual effect of his actions. Rather, he seeks to extract something from the victim that is properly the victim's, usually money, or to make the victim do something (e.g., sleep with him) that is ordinarily a behavior that the victim is at liberty not to engage in. The missing "rights" that Murphy seeks are therefore present and fairly uncontroversial: the rights not to have one's goods intentionally taken, or have one's liberty intentionally infringed, without justification. It is irrelevant whether or not it would be proper for the blackmailer to disclose the information, and thus destroy something the victim may value at a price even higher than

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[71]Murphy, supra note 20, at 162 ("It is unclear to me how you can have a right to the reputation of being a person of type X if in fact you have performed acts of type Y where Y acts are inconsistent with being an X person")(footnote omitted).

the goods demanded in the blackmail transaction. For no disclosure is intended and none occurs. Whatever justification might append to disclosure, none appends to a threat whose only motive and effect is to extract money or compliance.[72]

E. The libertarian doubt: comparing blackmail and the ordinary commercial transaction

[Discussion of coercion/consent and harm/benefit. To be supplied.] [73]

VIII. Criminalization

A. Eligibility for criminalization

Given the deontological discussion above, it is clear that central-case blackmail is an intentionally harmful act.[74] As such,

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

To use a fanciful arithmetic example, assume that allowing disclosure causes harm of 20 utils but produces informational and free-speech benefits of 30 utils; it would therefore be justifiable to disclose in a utilitarian framework. Successful blackmail produces a different balance of harms and benefits. If successful blackmail caused even a harm of a mere 5 utils, it is unjustified because it is probably unaccompanied by any corresponding benefits at all. (For discussion of the contrary possibility that successful blackmail has benefits in terms of inducing conformity to social norms, see the discussion at note 40 and following, supra.)

[73][NOTE TO PENN CITE CHECKERS: Virtually all the sources I'll be using in this section are cited elsewhere in this paper, but you will also need Alan Wertheimer's book, COERCION.]

[74]See text accompanying notes 44 and following.

criminalizing it is consistent with the liberal view that only the presence of harm justifies criminalization[75] (an approach associated historically with John Stuart Mill[76] and more recently with Joel Feinberg).[77]

It is also fairly clear that central-case blackmail is economically wasteful because it invites expenditures on both research and transaction costs that fail to make any significant change in the allocation of the contested information, and is a producer of net disutility.[78] To criminalize central-case blackmail is thus also consistent with, inter alia, Jeffrie Murphy's view that "immorality plus disutility is a reasonable basis for criminalization."[79]

B. Desirability of criminalization

It is thus clear that central-case blackmail is eligible for potential criminalization. To decide if in fact blackmail should

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[75]Recall that my analysis defined "harming" to mean making someone worse off than he is entitled to be. Any unjustified harming is thus also a wrongful act. There may also be harmless wrongs, such as attempting to harm someone. The liberal view apparently assimilates attempts to the harms attempted, and treating both as properly subject to criminal sanction.

[76]John Stuart Mill, ON LIBERTY.

[77]Although Feinberg treats blackmail in his book on *harmless* wrongdoing, it is clear he concludes blackmail is in fact harmful. See Joel Feinberg, 4 THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING, at, e.g., 238 (Oxford U Press, NY, 1988).

[78]See text accompanying note 27, supra, and following.

[79]Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 The Monist 156 at 163 (1980) (emphasis deleted). Of course, Murphy believed it was difficult or impossible "to rely [in the blackmail area] on the kind of deontological moral principles of which [he is] fond," (Id. at 162) while by contrast it is the burden of the instant paper to suggest that indeed deontological principles *can* be relied upon in criminalizing central-case blackmail.

be criminalized, further inquiries would need to be engaged in, such as: how extensive is the harm caused by blackmail (either harm done by the blackmailer, or by the victim using self-help); to what extent would criminalizing blackmail decrease these harms; and whether the decrease in harms is likely to be sufficient to outweigh the attendant enforcement costs. The following discussion addresses an aspect of each of these issues.

1. The severity of the harm done by blackmail

In the discussion above I have defined the harm done primarily by making reference to the transfer of resources from victim to blackmailer.[80] This is significant harm, and shows the parallelism between blackmail and ordinary theft (ordinary theft being, of course, criminal). But obviously a blackmailer does much harm of a different kind as well. For example, the blackmail attempt subjects the victim to intense anxiety.[81] The blackmailer does not "capture" this anxiety, so it is not only a harm but also a net loss to society.

Also, and of particular note for my overall argument, George Fletcher suggests that a crucial harm done in blackmail is the relation of dominance which the criminal forces on the victim.[82] His presentation convincingly suggests that the deontological

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[80]See text accompanying note ? and following.

[81]See, e.g., Coase, supra note 9, at __.

[82]George Fletcher, *Blackmail: The Paradigmatic Crime* [paper for this symposium].

insult-- the blackmailer's perversion of the relation that should exist between subjective agents[83]- has a psychological dimension of great immediacy.

2. The effects of blackmail law on blackmailer and victim behavior

Blackmail law's effects on the behavior of potential defendants has been much discussed. Making blackmail unlawful may directly deter, or may encourage character-formation that discourages bad acts. By contrast, legalization might not only increase the threat-related use of information already possessed, but might also increase the expenditures made on acquiring new discreditable information.[84] Thus making blackmail criminal has an obvious goal of discouraging potential blackmailers from undertaking blackmail and blackmail attempts.

It is important also to note that criminalization has an additional set of effects: an impact on blackmail victims. Some blackmail attempts will survive the law's attempt to deter, and as

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[83]I am drawing on Nagel's analysis of "subjective" and "objective" morality here. The subjective, deontological view inquires into the actor's perspective; the "objective" view (such as utilitarianism or economic wealth-maximization) is agent-neutral. An intentional causing of harm is condemned on the deontological view as a perversion of the relation that should exist between subjective agents, namely, that each treat the other as an end and not a means. See note 49 and accompanying text.

[84]One result of legalization might be that persons who might otherwise not stoop to blackmail might stop viewing blackmail with distaste, and engage in the practice. Linked to this is, of course, Richard Epstein's point that without laws prohibiting blackmail, normal commercial incentives will encourage more blackmail to occur. An increased amount of our society's resources might be unproductively drawn into unsavory research as "Blackmail, Inc." entrepreneurs swung into business, uncovering dirt with which to make profitable threats. See Epstein, supra note 2, Coase, supra note 9. Thus, although blackmail law may fail to serve an individual who has the unfortunate luck to be the chosen prey of one of the few un-deterred bad actors and who wishes to "pay him off", the number of bad acts-- and thus the number of victims -- may be reduced by such law.

to them criminalization provides two tools to assist victims in their resistance.[85] The first tool the law provides is counter-leverage. The second is anger.

Counter-leverage. It is commonly observed that were blackmail a tort, the victim would be unlikely to sue because of a fear that any trial of his suit would entail release of the embarrassing information which the victim wishes to keep secret. Unless *in camera* proceedings were easily available and enforceable,[86] this observation would seem to be correct,[87] and would seem to provide one of the reasons why criminalization rather than a simple tort right is necessary if the law is to deter blackmail. Yet it is also commonly observed that when blackmail is criminal, victims are unlikely to report the crime out of a similar fear that prosecution would entail release of the embarrassing information. The specific constitutional right to "public" trials in criminal matters[88] would make secrecy of the proceedings even more unlikely than in the

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

[86]Jury trials are customarily open, and even where a court orders records sealed, clerks' offices are reportedly fairly ineffective in guarding confidentiality.

[87]Some states have accepted a privacy tort which makes actionable the disclosure of embarrassing private facts of no public interest. That such suits are sometimes brought does not refute the guess that blackmailers would rarely be sued in tort. The usual target of privacy suits are not blackmailers but the media. Media have their own motives to publish; once publication is made, plaintiffs having nothing more to fear from disclosure, and will sue. Or if injunctions are available (a prior restraint issue), the process of obtaining an injunction will be less information-disseminating than will allowing the publication to go forward.

[88]U.S. Const., Amendment VI.

civil context. If victims were equally fearful of bringing suit and reporting to the police, then, except for the increased penalties the criminal law is equipped to inflict, criminalization would seem to have little advantage over a tort regime.

Empirically one can question whether victims would in fact be as fearful of initiating a criminal prosecution as of bringing a civil suit. Given the prevalence of plea bargaining in the criminal area, a public trial may be avoided; police may keep the delicate information confidential;[89] further, the blackmailer may be unlikely to disclose after he is apprehended if judges are inclined to increase sentences, or if parole boards are likely to delay parole, upon learning a blackmailer has disclosed the contested information in retaliation for the victim calling the police.[90] Given all this, the risks for a victim of going to the police may be fairly low.

But even if the victims of blackmail attempts are unlikely to go to the police so long as their secrets are still unrevealed, blackmail law serves the victims' interests. It may be more important that blackmail law gives victims the ability to *threaten*

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[89]See MIKE HEPWORTH, BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE (Routledge & Kegan Paul; London and Boston, 1975) at 22-24 (authorities in England often willing to preserve confidentiality).

[90]Whether this is the practice of sentencing courts and parole boards, and if so whether the practice would be known to criminals once apprehended, I do not know. Note another problem with my suggestion: because of double jeopardy, once a blackmailer's sentence was completed he would have no incentive to continue keeping the victim's secret (except, of course, if it is one of the rare types of secrets protected against disclosure by the tort of invasion of privacy.) Nevertheless, the prospect of disclosure many years in the future may not be frightening enough to dissuade victims facing immediate blackmail threats from calling the police.

to go to the police, than that they actually go. By so threatening, victims can discourage blackmailers from disclosing the contested information.[91] If the disclosure is not made, the victim need not call the police; if the disclosure is made, the victim has nothing to lose by calling. Because the victim has nothing to fear after disclosure, the victim's threat (to go to the police if and only if disclosure is made) is credible.[92]

Feinberg notes that sometimes a victim has some discreditable information about the person doing the blackmail and threatens, "If you release X about me, I will release Y about you."[93] The law that criminalizes blackmail itself supplies all victims with the "Y" needed to engage in such "counterblackmail":[94] the law makes a fact in the victim's possession-- the fact that the blackmail attempt has been made--[95] information that the blackmailer will not want disclosed because it could subject him to criminal prosecution.

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[91]This point is also made (though its significance is differently evaluated) by the Posner and Shavell articles in this symposium. See Steven Shavell, *An Economic Analysis of Threats and their Illegality: Blackmail, Extortion, and Robbery* [draft for this symposium] at 6, 10-11 (noting that "it is frequently difficult to obtain evidence that a blackmailer made a threat"); Posner, supra note 40, at [11/7/92 draft for this symposium] at 21-24 (arguing " [A] blackmailer cannot easiily conceal his identity from the blackmail victim....Once the victim knows who the blackmailer is, he has as potent a secret as the blackmailer." Id. at 22).

[92]In saying this I am assuming the victim's counter-threat would not itself be unlawful.

[93]See Feinberg, supra note 77, at 268.

[94]The term is Feinberg's. Id. at 268.

[95]Whether the victim can prove this fact is another matter; see Shavell at --.

If the victim says, "If you disclose X about me, I'll tell the police you tried to blackmail me," it is probably lawful.[96] Feinberg argues that counterblackmail is something the law should permit.[97] The victim is essentially telling the blackmailer that he will be reported unless he withdraws his unlawful threat. Since this is the victim's "own chip",[98] and not "unproductive" in the sense of our central case,[99] there would seem to be little question but that the victim should be permitted to make this counter-threat.

Given the criminalization of blackmail, then, the blackmailer and the sophisticated[100] victim are at a standoff: the blackmailer threatens to disclose unless money is paid, and the victim threatens to disclose unless the blackmailer backs off his threat. What would in fact occur case-by-case probably depends, inter alia, on the participants' strength of will, and on the level of the various positive and negative payoffs.[101] I leave the details to game theorists.[102] But it does seem clear that in at least some

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[96]Cite needed.

[97]See Feinberg, supra note 77, at 268.

[98]Lindgren, supra note 7, at __.

[99]Among other things, the victim did not set out to gather the fact that the other was a blackmailer in order to force the other to do or give him anything.

[100]Posner, supra note 91 at __.

[101]Examples of possible payoff variables include: how much does the victim fear disclosure; how much money is being demanded by the blackmailer; how much does the blackmailer fear disclosure [which will in turn be affected by how much evidence the victim has]; and so on.

[102]The Hardin paper [this symposium] usefully explores some rational choice models, but does not include this mutual-threat scenario among them.

instances, the criminalization of blackmail can serve as a tool to foil blackmail attempts.

Counter-leverage has another virtue as well. The possibility that offended persons will resort to violent self-help has always been part of the rationale for instituting legal rights,[103] and it has been argued that blackmail should be made criminal lest victims have no choice but to employ violence and other undesirable self-help efforts against those who threaten them.[104] The counter-leverage threat not only tends to remove the occasion for self-help (by discouraging blackmail attempts from beginning), but also gives the victim an alternative self-help weapon to protect himself, one that is much less destructive and disruptive to society as a whole than violence.

Anger. As Judge Posner has suggested, the counter-threat leverage may only be useful to a sophisticated victim.[105] But criminalization of blackmail has another function that is useful for even the unsophisticated victim. It reinforces her sense that she has a "right" to be free of such threats, and thus reinforces her willingness to angrily refuse the demands made. Resistance per se may be useful, for a central-case blackmailer has no incentive of his own to disclose. If his threat fails, and if he is not in

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[103]See, e.g., Martin v. Reynolds Metals Co., 221 Or. 86, 342 P. 2d 790, cert. denied 362 US 918 (1960)(arguing that the trespass tort was historically seen "partly at least as a means of discouraging disruptive influences in the community").

[104]This point was made by one of the symposium participants. [Cite]

[105]See Posner, supra note 40 [article for this symposium, at 11/7/92 draft page 24].

the business of making future threats credible, he has no reason to disclose; in fact, blackmail's being unlawful gives him a good reason to lay low. So encouraging even unreasoned resistance by victims might be enough to foil blackmail.

Sometimes we legislate against something in order to keep our sense of outrage alive.[106] Blackmail law may thus be one such case. If the law permitted blackmail transactions, enforcing contracts for silence might become an ordinary commercial image we contemplate analytically, without distress. And gradually it may come to seem acceptable to us (as observers, blackmailers or victims) that a victim should pay. If so, persons who are blackmailed might become less effective in fighting back. For the law may have an effect not only on potential criminals, but also on potential victims, and on their sense of what their own best behavior should be.

Many commentators have noticed that blackmail law does not serve the interest of the victim who would prefer payment to disclosure. That is true. The image on which the blackmail prohibition rests is a victim who is put into mental pain and fear by blackmail threats[107]-- but who will nevertheless have no truck with dishonor. It suggests one should not be so ashamed of one's past, or so unwilling to face the truth, that one would give in to

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[106]See Calabresi, IDEALS, BELIEFS, ATTITUDES AND THE LAW, at __.

[107]See HEPWORTH, supra note 89, at e.g. 19 (blackmail seen as "'slow death'"); id. at 21 (it is "moral murder"); id. at 22 ("[the blackmailer's] ennervating (sic) and relentless pressure allegedly produced a state of suicidal despair...").

ignoble manipulation.[108] Upholding this image and its resultant effect on character may be worth the cost to those victims who are not convinced by the image and want to give in.

One can give a utilitarian construction to "honor": it is that behavior that helps the collective even if it hurts the immediate actor.[109] If one assumes that acts of blackmail impose net costs on society,[110] then the socially-beneficial thing to do when threatened with blackmail is to resist so that potential blackmailers will come to believe that blackmail never succeeds, and cease their threats.

From a deontologic perspective, resistance to evil is a

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[108]This may seem to contradict the stereotypical victim's almost mortal weakness described by Hepworth's researches (see immediately preceding note.) But Hepworth recognizes that "by going to the police it was possible to stave off the appalling effects of moral murder." Id. at 23.

Hepworth quotes an aphorism to the effect that, "Blackmail is possible only when individuals are discreditable." Id. at 7, quoting Laird Humphreys, *Out of the Closets* (1972). The usual assumption would be that the discreditable behavior necessary to blackmail's success is the behavior that occurred some time in the past -- the behavior the blackmailer has uncovered and now threatens to reveal. My argument is that blackmail is possible only when individuals exhibit discreditable behavior *at the time of the blackmail threat*, for the honorable course of action at that time is to resist.

This notion of resistance appears occasionally in the histories Hepworth reports. Thus he quotes from a news report of a nineteenth century blackmail trial:

> "It was not everyone who had the courage to come into court and show the absolute falsehood of the accusation made [by the blackmailer]; but Earl Carrington had done that, and he had performed a great service to the public in so doing."

HEPWORTH, supra note 89, at 26, quoting The Times of November 13, 1897. (It is not clear if the quoted language is that of the Times reporter, or of the justice at the trial being reported on.)

[109]I am indebted for this argument to Warren Schwartz; see his article *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. Legal Stud. 213, 331 (1984).

[110]One might, however, conceivably argue that blackmail is beneficial in the information it reveals; this would not apply to the central case, where silence will probably be purchased. One might also argue blackmail is a useful tool for "keeping people honest" and increasing the social costs of bad action; this might be relevant to assessing the costs and benefits of outlawing central-case blackmail. See the discussion at note 40 and following.

fundamental virtue;[111] further, it is not honorable to pay to hide something about one's self. Passive hiding of awkward facts-- for example, after a criminal sentence choosing to live a creditable life in a new town -- does not "use" others in the way that a deliberate decision to conceal may do so. Paying to conceal is itself an evil, and increases the sense of shame.

The law serves the interest of the honorable resister by giving him a means by which to resist: calling the police or threatening to do so. It also may give him psychological energy with which to resist.

Blackmail law encourages the victim to have a sense of outrage, which may be a good weapon against blackmail. As in any bilateral monopoly situation, it is the person who "won't budge," and can give a credible reason capable of convincing the other that he won't in fact budge, who wins. Several commentators have suggested the blackmail bargain is often irrational-- a last gasp effort to stave off nearly inevitable catastrophe, in which the victim will almost always be the long-term loser.[112] If so, anger may be the best antidote to panic; anger is a passionate emotion, yet ironically it may be the best preserver of rationality.

The blackmailer brings up something embarrassing or private. It is a *shaming* experience to have such facts brought up by a

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[111]Lawrence Becker argues persuasively that "resisting evil" is a fundamental deontic virtue. See LAWRENCE BECKER, RECIPROCITY 74-76, 97-101, 147 (Routledge & Kegan Paul, London 1986).

[112]See, e.g., Murphy, supra note 20, at 166.

hostile party. (Raised by a friend, the same issues' exposure can lead to increased intimacy rather than shame.) Shame can inhibit justified anger, and inhibit self-protection. The very revelation by a nasty person makes the contested information even more distasteful and frightening.

Shame also encourages conformity. The hostile stranger's revelation increases the intensity of the victim's psychological need to please the community, and his desperation to avoid revelations that would make the community cast him out.

The blackmailed person feels vulnerable, especially if the information is regarding proof of weakness (whether moral or otherwise). As the Sabini & Silver analysis[113] of the Milgrim experiments[114] showed, sometimes one needs confidence in one's self-- willfulness, unwillingness to go along-- in order to do right. The potential victim needs his sense of outrage to fight off the wound to self-esteem inflicted by the blackmailer revealing the information to him, a wound which might be more destructive than the revelation of the contested fact to others. Sabini and Silver suggest, quite rightly, that it is often an actor's inability to trust himself that undermines his ability to act morally. The tale

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[113]Sabini & Silver, MORALITIES OF EVERYDAY LIFE.

[114]In the wake of World War Two's concentration camps, Stanley Milgrim tested the extent to which the ordinary person would be willing to "follow orders" even if it meant being willing to inflict pain. Experimental subjects were told to inflict electric shocks on other people (supposedly fellow experimental subjects, but in actuality colleagues of the experimenter), supposedly as part of a psychology experiment investigating the impact that pain has on learning. On the experimenter's orders, a shockingly high number of persons (no pun intended) pushed the lever that supposedly inflicted pain -- even after the other party had begun to scream, pled to be let go, or feigned unconsciousness.

of one's own unpleasant past deeds might surely undermine self-trust. It also may undermine one's sense of one's own self-interest.

Legal commentary that questions the utility of blackmail law may understate the value of pride. Our society as a whole may understate its value as well. Compare for example the Christian ethos with Aristotle's. Christ said turn the other cheek; Aristotle said that one who takes a blow without returning it is a slave.[115]

3. Implications for enforcement costs

The two tools that blackmail law provides-- counter-leverage and anger-- involve a fairly inexpensive form of self-help. When successfully employed they can foil blackmail attempts without violence, intensive private investment, or the use of police or courts. To the extent that criminalization makes it possible for these tools to be effective, therefore, enforcement costs will be reduced. The lower the costs of enforcement, the more desirable (ceterus paribus) is the criminalization of blackmail.

VII. Conclusion: a comment on interrelationships

If people had a sense of honor, anger or other motives capable

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[115]Aristotle, Nicom. Ethics. Actually, it may be that the Christian ethos, too, does not demand unconditional forgiveness of wrongdoers. See Luke, Chapter 17: "If your brother wrongs you, *reprove him, and if he repents*, forgive him." THE NEW ENGLISH BIBLE, NEW TESTAMENT at 131 (2d. ed. Oxford/Cambridge 1970).

of provoking resistance to blackmail,[116] would it undermine the "waste" argument of Coase, Epstein, Daly & Geirtz and Ginsburg?[117] That argument was premised on the assumption that blackmail would not cause any allocative effects (because the victim would always "buy silence"), while the instant discussion has suggested that honorable and angry persons would not buy silence. An economist wants the most accurate measures of demand function available; for him, what motivates the demand is less important that its result.

If blackmail is criminalized, resistance is unlikely to provoke an unsuccessful blackmailer to disclose the contested information, precisely because the counter-leverage such law provides makes it risky for the blackmailer to do so. Blackmail attempts are therefore likely to have no allocative effects on the distribution of information even in the presence of a sense of honor, so long as blackmail is unlawful.

If blackmail is lawful, however, and if in a significant number of victims the sense of honor and anger survives the erosion that legalization might initiate, then that partially undoes the assumption on which the arguments of Daly & Giertz et alia are

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[116]There may yet be presented a full economic account of the notion of honor; I do not mean to foreclose such a possibility. For an interesting exploration in that direction, see Schwartz, supra note 109.

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

[117]The waste argument was discussed above in section IV.

premised. In such event blackmail attempts could spark allocative changes. ~~In such event,~~ consequently the economic analysis becomes more complex, for criminalizing blackmail would deprive third parties of information that would be disclosed in a realm where blackmail were lawful. The costs and benefits of such foregone disclosure would have to be assessed and incorporated into the economists' analysis of blackmail law.

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

Perhaps we finally have, if not a paradox, an irony. When victims act as deontic moral agents, a government applying deontic logic would decide that blackmail is wrongful and should be discouraged. When victims act as narrowly-defined economic agents (motivated by the Daly-Giertz demand structure)[118], a government applying economic logic would similarly decide that blackmail is wasteful and should be discouraged. Thus a nation that is ruled by the same principles as its people would outlaw blackmail. However,

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[118]See Daly & Giertz, supra note 8.

when the motives of a significant portion of the victim population is moral rather than economic, yet the government applies an economic logic in ordering their relations, it is then that the deontic and consequential logics may lead to diverging recommendations. It may be that the two accounts are most likely to converge, ironically, when one account fails to take account of the other's effects.

Post Script

Ironies aside, I want to acknowledge that the sharp distinctions made in this paper between consequentialism and deontology are merely a mode of faciliting discourse. The final judgment on blackmail law (or any law) should depend neither on consequentialism nor on deontic morality, but on some as yet unstated combination of the two. A primary task for normative theory is to provide a satisfactory integration of the objective and subjective viewpoints[119] that, together, appeal to us as constitutive of morality.

[119]See Nagel, supra note 49.