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BLACKMAILERS, BRIBE TAKERS, AND THE SECOND PARADOX

SIDNEY W. DELONG†

The criminalization of blackmail has been considered paradoxical because it would make unlawful a threat to do something the threatener has a legal right to do. The blackmailer threatens to disclose an embarrassing or harmful secret of the victim unless she¹ is paid for secrecy. She may lawfully disclose the victim's secret² and may lawfully make an unconditional threat to disclose it.³ The threat becomes unlawful only when coupled with an offer to keep the secret in return for payment.⁴ Yet, most victims of blackmail

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¹ As a stylistic convention, this paper will use feminine pronouns to refer to persons who are menaces, blackmailers, and bribe-takers and masculine pronouns to refer to persons who are blackmail victims and bribers. This arbitrary usage serves to clarify some otherwise ambiguous passages and is not intended to suggest any gender-based generalizations about real world perpetrators or victims of blackmail.

² I am assuming the absence of statutory, fiduciary, tort, or contractual obligations to the contrary. See, e.g., *Carpenter v. United States*, 484 U.S. 19, 28 (1987) (finding defendant guilty of insider trading due to a violation of his fiduciary duty to protect his employer's confidential information). Under some circumstances, disclosure of an embarrassing secret might constitute an invasion of privacy, outrageous conduct, or intentional infliction of emotional distress. See RESTATEMENT (SECOND) OF TORTS § 46 (1965) (describing liability for outrageous conduct causing severe emotional distress); RESTATEMENT (SECOND) OF TORTS § 652D (1977) (describing liability for invasion of privacy).

³ See *Landry v. Daley*, 280 F. Supp. 938, 962-63 (N.D. Ill. 1968), *rev'd on other grounds sub nom.*, *Boyle v. Landry*, 401 U.S. 77 (1971); Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 557 n.6, 558 (1983) (threats to do what one has a right to do are "essential to the preservation of any system of liberties, for if one person does not have the right to threaten actions that he may or may not do, he has to act without giving warning. This in turn will work to the disadvantage of the other party, who is now deprived of the choice that the threat would have otherwise given him.").

An unconditional threat must be distinguished from a conditional threat, or a threat coupled with an offer to refrain from the threatened action if the victim cooperates in some way. When Professor Gordon argues that it is not paradoxical to criminalize threats to do something that the threatener has a right to do, she seems to be referring to conditional threats. See Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741, 1742-46 (1993).

⁴ See MODEL PENAL CODE § 223.4(3) & cmt. 2(g) (1980) (theft by extortion) ("A person is guilty of theft if he purposely obtains property of another by threatening to . . . expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute . . .").

would presumably prefer such an offer to an unconditional threat: the offer cannot make the victim worse off than the unconditional threat and it might make him better off by giving him an opportunity to buy the menace's silence. Thus, it seems paradoxical to permit the unconditional threat and prohibit blackmail.

Existing theories attack the paradox by arguing that the blackmail exchange only appears to be mutually beneficial, but is in fact either wrongful or wasteful. They justify the law prohibiting blackmail as a way of preventing this exchange from taking place. But these theories ignore a second paradox of blackmail: it is not unlawful for one who knows another's secret to *accept* an offer of payment made by an unthreatened victim in return for a potential blackmailer's promise not to disclose the secret. What would otherwise be an unlawful blackmail exchange is a lawful sale of secrecy if it takes the form of a "bribe."⁵ Lawful bribery poses an obvious challenge to theories that are premised on either the wrongfulness or wastefulness of the blackmail exchange: both

⁵ Throughout this paper, the term "bribe" will be used to refer to the lawful purchase of a secrecy agreement by an unthreatened victim. Economists have used the term "bribery" nontechnically to refer to paying someone to refrain from taking some action that the person is entitled to take. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 150-52 (1970) (contending that in the absence of information suggesting which party can more cheaply avoid a risk, the law should allocate the costs of an accident to the "best briber," the one who can most cheaply enter into exchanges to reallocate the risk); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 600-02 (4th ed. 1992) (noting that to an economist, settlement of a legal claim is a form of "perfectly lawful bribery"); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 43 (1975) (arguing that because blackmail and bribery consist of payments in exchange for not enforcing the law, where there is no public monopoly, bribery will be permitted, such as when a case is settled out of court).

This article excludes unlawful or unenforceable confidentiality agreements, such as those that would constitute criminal bribery, obstruction of justice, or subornation of perjury. See *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850 (10th Cir. 1972) (refusing on public policy grounds to enforce oil well lessee's claim that defendant surveyor breached a contract forbidding disclosure of the results of a well directional survey that showed that lessee was tortiously obtaining oil from adjoining tract); Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants, and the Public Interest in Disclosure: Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109, 114-15 (1989) (describing a plaintiff's use of threats to disclose information obtained under a protective order if the defendant does not agree to settle a lawsuit). A Florida statute makes confidentiality agreements providing for nondisclosure of information about hazards that are dangerous to public health unlawful. See FLA. STAT. ch. 69.081 (Florida Sunshine in Litigation Act) (1991); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 465. On the relationship between blackmail and criminal bribery, see James Lindgren, *The Theory, History, and Practice of the Bribery Extortion Distinction*, 141 U. PA. L. REV. (1993) 1695, 1695-1704.

blackmailers and bribe-takers accept money for silence and the bribe transaction seems to entail the same economic costs as does blackmail.

An adequate theoretical justification for the prohibition of blackmail should explain both of its paradoxes. However, a review of contemporary theories of blackmail shows that they are able neither to explain why blackmail is criminalized nor to rationalize the different treatment of blackmail and bribery. This review suggests that the paradoxes of blackmail may not yield to rational analysis.

In contrast to deductive analyses premised on rights or economics, this paper offers an account of bribery and blackmail that is premised on their different social meanings. I suggest that the legal and moral treatment of bribery and blackmail spring from separate, unrelated societal prototypes or narratives that express ideas of community and solidarity, rather than economic rationality or individual rights. Abandoning the search for a unified instrumentalist theory, this account seeks instead to define the social meaning of bribery and blackmail.

I. A CRITIQUE OF SOME ECONOMIC THEORIES OF BLACKMAIL

A. *The Economics of Secrets*

Theorists of blackmail who utilize economic analyses seek to justify the prohibition of the blackmail threat on the basis of net social cost. These theorists argue that the blackmail transaction reduces social wealth, either by being wasteful in itself or by creating incentives for wasteful behavior. They justify criminal prohibition of blackmail threats as the most efficient means of reducing this social cost.⁶

In economic terms, both blackmail and noncriminal bribery are exchanges that internalize an externality.⁷ The risk of negative externalities arises whenever one person (a "menace") has the power to act in a way that would inflict harm on another person (a

⁶ Reduction of social costs is, at least to some theorists, an insufficient justification for criminalizing behavior. See, e.g., Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639, 1656-57 (1993).

⁷ Externalities are costs or benefits conferred by a market exchange on third parties without their consent. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 45-46 (1988); George Daley & J. Fred Giertz, *Externalities, Extortion, and Efficiency*, 65 AM. ECON. REV. 997, 997-99 (1975).

"victim") without violating any legal rule and without incurring legal liability to pay compensation for the harm. Because the law does not require the menace to take the victim's loss into account in deciding whether to act, the menace may act in ways that create net social costs. In more traditional terms of legal analysis, the menace possesses the power to harm a victim as an incident to the exercise of a legal right or privilege.⁸

Both bribery and blackmail exemplify a typical response to externalities: an exchange in which the menace agrees to forbear from causing harm in return for payment. Forbearance exchanges in which the victim purchases a property or contract right that prohibits the harmful act are common features of economic life.⁹ These exchanges alter the legal relations between the parties so as either to disable the menace from inflicting the harm or to obligate her to pay compensation if she inflicts it. The externality is thus internalized in the sense that the menace must take the victim's loss (and her own potential liability) into account in deciding whether to do the harmful act.¹⁰

A frequent subject of forbearance exchanges is secrecy: actual or potential menaces sell promises of secrecy to actual or potential victims. Examples include an attorney's promise not to disclose the confidences of a client, a departing employee's agreement not to disclose the trade secrets of an employer, a settling litigant's agreement not to disclose what she learned during civil discovery, or a blackmailer's agreement not to disclose the secret of her victim.

⁸ In Hohfeldian terms, a menace has a right to cause the harm if he can enforce the performance of a duty by the victim, including a duty of noninterference with the menace's action; the menace has a privilege to cause the harm if the victim has no right to prevent him from doing it, or to penalize him thereafter. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

⁹ Examples include a property owner's purchase of a negative easement from a neighbor, a devisee's purchase of a quitclaim deed from a potential adverse claimant, an employer's purchase from an employee of a covenant not to compete, and a corporation's repurchase of its shares held by corporate raiders.

¹⁰ In his classic study of the relation of legal rules to social cost, Ronald Coase repeatedly illustrated how such exchanges could lead to allocatively efficient results regardless of the initial allocation of legal entitlements to cause such harm. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-15 (1960). Half of the reallocative exchanges that he described were forbearance exchanges in which the party legally entitled to harm the other was paid to refrain from such harm. In the other half, the parties engaged in "permissive exchanges" by which the party entitled to be free from harm was paid to permit it. See *id.*

The market power of a seller of secrecy depends upon whether she knows the secret at the time of the sale. At the time of the fee agreement, for example, the attorney has not yet learned the client's secret. If she sells her services in a competitive market, she must bid against others who might also offer secrecy. The price she will charge for confidentiality—the portion of the fee necessary to compensate her for this promise—will be a function of her opportunity cost in forgoing the future ability to disclose the secret.¹¹ In the case of the attorney, it will usually be small.¹²

By contrast, the departing employee, the litigant, and the blackmailer have learned the secret before the sale. A menace who has learned her victim's secret is a monopolist because her disclosure alone is sufficient to harm the victim and she is the only person who can sell protection from that disclosure. The price she will charge usually tends to be a function of the harm that disclosure would cause the victim rather than a function of her opportunity cost in forgoing the disclosure.

Even though it may involve such monopoly power, however, a confidentiality agreement is presumptively beneficial to both parties. Any price the parties agreed upon would be less than the cost to the victim of suffering disclosure¹³ and more than the value to the menace of making disclosure.¹⁴ Therefore a confidentiality exchange, in the absence of other effects, would increase social utility, since each party would be better off after the exchange than

¹¹ See generally COOTER & ULEN, *supra* note 7, at 32-36 (discussing the tendency of price to approach the marginal cost of production in competitive markets).

¹² The cost of confidentiality is not zero, given both the occasional liability of an attorney for violating the privilege and the effect of such an obligation on an attorney's ability to represent other clients.

¹³ If the seller is a monopolist, however, as in the typical case of blackmail, then the price of confidentiality may capture almost all the utility that the victim would obtain from the exchange. Thus, in the typical situation in which the blackmailer "bleeds" the victim repeatedly, the exchange is only *slightly* beneficial from the victim's point of view.

¹⁴ This value represents the opportunity cost to the menace of forgoing the exercise of the privilege to disclose the secret. It includes not only the possibility of selling the information to another buyer but also the nonmonetary enjoyment the menace might experience in making the disclosure. This value is negative if disclosure would be more costly to the menace than nondisclosure. This might be the case, for example, if the secret involved an embarrassing event in which both the menace and the victim were participants. If the opportunity cost of disclosure is not positive, the menace will presumably not make the disclosure, regardless of whether a forbearance exchange has taken place.

before it. As the next section shows, however, there may be many such effects.

B. *Is Blackmail Really Inefficient?*

First, the confidentiality agreement may be allocatively inefficient because third parties would have valued disclosure of the secret more than the victim values secrecy. In a world of third parties, incomplete information, and transaction costs, a confidentiality exchange might be inefficient despite both parties' willingness to enter it. First, confidentiality may create its own externality by being more costly to third parties than beneficial to the two contracting parties. Second, the exchange might be wholly unnecessary because the menace would not have disclosed the secret in its absence.¹⁵ Third, the possibility of such an exchange might lead the parties to make strategic, nonproductive investments in bringing it about or preventing it. Finally, because the relationship between the menace and victim constitutes a bilateral monopoly, the exchange might be so costly to negotiate and enforce that the gains from the exchange would be exceeded by transaction costs.¹⁶ As will be discussed below, economic reasoning might rationalize laws against blackmail on grounds that blackmail entails more of these costs than do other forbearance exchanges.

Even if an argument based on social costs could justify outlawing blackmail, however, the economic rationale for the present configuration of the criminal law in this area would remain seriously incomplete if it did not address an additional anomaly. All the foregoing points about the possible inefficiency of legalized blackmail apply equally well to bribery. No less than a blackmail exchange, a bribe may involve monopolistic profit, may affect third

¹⁵ Such an exchange might take place if the menace makes a bluff threat. Because the menace would not have made good on her threat, the payment to her does not benefit the victim. Rather, it simply shifts some of the victim's wealth to the menace at some positive transaction cost.

¹⁶ Economists use the term "transaction costs" to refer to the costs the parties incur in engaging in exchange transactions. One commentator has noted that transaction costs "include the costs of identifying the parties with whom one has to bargain, the cost of getting together with them, the costs of the bargaining process itself, and the costs of enforcing any bargain reached." A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 12 (2d ed. 1989). In the usual bargain between a blackmailer and her victim, neither can deal with any other person. "If there are significant elements of bilateral monopoly in a two-party transaction, that is, if neither party has good alternatives to dealing with the other, transaction costs may be quite high." POSNER, *supra* note 5, at 62.

parties, may be unnecessary, may induce strategic investments, and may entail excessive transaction costs. Once the negotiations begin, the identity of the initiator is irrelevant to the economic efficiency of the ensuing transaction.

Yet the bribe-taker is not treated like the blackmailer. So long as an unthreatened victim first offers to pay the menace for silence, the resulting exchange subjects neither participant to criminal liability.¹⁷ If one were to take the position that blackmail is outlawed because it is inefficient, one must then either argue for the criminalization of bribery or explain why the law permits noncriminal bribes that accomplish the same result as blackmail. The following brief review of the economic arguments concerning blackmail suggests that scholars cannot explain the legal distinction between blackmail and bribery.

¹⁷ This assumes that the court does not construe the menace's behavior as creating a threatening atmosphere by communicating a threat implicitly. Courts have interpreted ambiguous communications as threats if they are made by menaces who otherwise demonstrate an intention to extort. See *People v. Oppenheimer*, 26 Cal. Rptr. 18, 24-25 (Cal. Ct. App. 1962) (finding that a letter asking "Are all windows insured?" constituted an implied threat to do property damage), *cert. denied*, 375 U.S. 975 (1964). The Model Penal Code similarly notes that "the threat need not be express." MODEL PENAL CODE § 223.4 cmt. 2(a) (1980).

Courts also use "frame manipulation" to manipulate the amount of context to be considered in evaluating the menace's action. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600-16 (1981). Expanding the frame permits a court facing an apparent victim-initiated exchange to include prior behavior by the menace that it can then characterize as the threat that initiated the exchange. See, e.g., *United States v. Hathaway*, 534 F.2d 386, 395 (1st Cir.) (upholding Hobbs act conviction for extortion although victim offered the payment because "[defendant's] exploitation of such a fear amounted to extortion notwithstanding [the contractor's] readiness and even eagerness to play the game"), *cert. denied*, 429 U.S. 819 (1976); *United States v. Addonizio*, 451 F.2d 49, 73 (3d Cir. 1971) ("[I]n a widespread and highly effective extortion conspiracy, potential victims would be aware of the illicit requirements placed upon contractors and would succumb in advance of the contracting to the pressure which they knew would be forthcoming."), *cert. denied*, 405 U.S. 936 (1972). Conversely, a charge of extortion is often met with a defense that the defendant merely accepted a bribe offered by the victim. See *United States v. Kubacki*, 237 F. Supp. 638, 640-43 (E.D. Pa. 1965) (holding defendants guilty of extortion in connection with a public contract and rejecting their claims of bribery). The distinction between extortion and bribery is frequently litigated. See, e.g., *Evans v. United States*, 112 S. Ct. 1881, 1889-90 & n.18 (1992) (discussing the interplay between extortion and bribery under the Hobbs Act); *Hathaway*, 534 F.2d at 393 (citing circuit court cases interpreting the Hobbs Act); *Addonizio*, 451 F.2d at 77 ("[T]he essence of the crime of bribery is voluntariness, while the essence of extortion is duress.").

1. "Lawful Blackmail Would Make Enforcement of Criminal Law Inefficient."

Some economic analysts assert that legalized blackmail would interfere with optimal law enforcement by increasing the total costs of law enforcement and by creating inefficient incentives for people contemplating the criminal and noncriminal acts for which they could be blackmailed. Thus, Richard Posner argues that legalized blackmail would lead to an inefficient overenforcement of criminal laws that would conflict with a "decision to rely on a public monopoly of law enforcement in some areas of enforcement."¹⁸ "Overenforcement" might lead to two different forms of inefficiency. First, Posner argues that private investments in enforcement, such as those made by blackmailers, would render the total social investment in crime control suboptimal. He argues that crime can be deterred at the least cost only if one entity (the government) controls all enforcement expenditures and can set optimal levels of criminal apprehension and punishment. But the costs of criminal law enforcement are themselves a subset of the total social cost of crime prevention, which includes all investments that raise the *ex ante* costs of crime to the potential criminal. The state can never have a monopoly on crime prevention expenditures, which include such diverse phenomena as neighborhood watch programs, surveillance cameras, burglar alarms, armored cars, and karate lessons.¹⁹ Many of these crime prevention efforts take effect after the crime takes place, as does blackmail. It seems arbitrary to classify blackmail as "enforcement" rather than "prevention."²⁰

¹⁸ POSNER, *supra* note 5, at 601; see also RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 283-85 (1984); Landes & Posner, *supra* note 5, at 42-43. Elsewhere, Judge Posner has suggested that blackmail laws reduce the price of the information to the police by "removing a competitor [the criminal] from the buying side of the market." Richard Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1200 (1985). But so long as bribery is lawful, and does not, for example, constitute obstruction of justice, the criminal may freely bid for secrecy in competition with the police. Laws against blackmail merely prevent the menace from making the first offer.

¹⁹ The levels of public and private spending on crime prevention may be reciprocally related. Posner may be arguing that absolute control of public enforcement is necessary to drive private spending, and therefore total social cost, to the optimal level. But prohibition of investments in private spending seems unnecessary to achieve this outcome.

²⁰ Indeed, historically, the law had a variety of procedural mechanisms which allowed private citizens to enforce the criminal law, including private prosecutors and *qui tam* actions. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 287, 581 (2d ed. 1985) (describing nineteenth century private prosecution and law enforce-

The case for outlawing blackmail to preserve the state's enforcement monopoly thus seems unconvincing.

"Overenforcement" might also refer to the inefficiency created by preventing appropriate levels of the illegal activity from taking place.²¹ Because criminal laws are inherently overinclusive, they prohibit some acts whose benefits outweigh their social costs. Ideally, prosecutors will refuse to bring charges in such instances. Posner may be contending that if potential law-breakers thought that they could be legally blackmailed, their expected cost of the activity would rise above the optimal level and the desirable level of law-breaking will not occur.

This argument, too, fails to justify the prohibition of blackmail, even granting the unprovable assumption that legalized blackmail would raise rather than lower the expected cost of proscribed activity. The exercise of prosecutorial discretion does not lead to optimal lawbreaking unless potential lawbreakers expect not to be prosecuted at the time they are deciding whether to commit the proscribed act. If they correctly anticipate that the prosecutor will not prosecute, then their expected costs will include the costs of neither prosecution nor blackmail and they will refuse to pay blackmail if it is demanded. Conversely, if they incorrectly anticipate that the prosecutor will prosecute, then their lawbreaking will be suboptimal because their expected costs will have included prosecution. In either case, legalized blackmail would seem to have no effect on optimal crime rates.²²

ment); John A.J. Ward, *Private Prosecution—The Entrenched Anomaly*, 50 N.C. L. REV. 1171, 1173-77 (1972); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341-45 (1989) (discussing the history of the *qui tam* enforcement framework).

²¹ See Landes & Posner, *supra* note 5, at 38-43.

²² Generally, any prediction of the incentive effects of legalized blackmail on its potential victims can be neither established nor refuted in the absence of data which we simply do not possess. The possibility of being blackmailed represents both a risk and an opportunity to a person calculating the expected costs of contemplated crime because the victim typically perceives that the blackmail payment will cost less than the cost of disclosure. If legalized blackmail did not increase the probability of detection, it might actually decrease the potential criminal's expected costs of crime because the criminal could anticipate that at least some menaces would sell silence rather than tell the police. See Jennifer G. Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1933, 1939-41 (1993).

Legalized blackmail might, however, have other effects that increase the expected costs of crime. Menaces who would have remained silent might choose to blackmail. Potential menaces who would not have known of the crime might increase their efforts at detection in order to sell their silence. The net effects of these responses on the expected cost of crime cannot be known in the absence of empirical data.

Finally, the victim-incentive theories of blackmail fail to address the bribery/blackmail dichotomy. The potential for paying and accepting bribes will alter both the expected costs of crime and the incentives to discover a victim's secrets. Posner's analysis suggests that legal bribes cause inefficient overenforcement of both types. His rationale for blackmail statutes would equally justify outlawing bribery, and so fails to account adequately for current law.

2. "Lawful Blackmail Would Lead to Wasteful Investments of Resources by Blackmailers and Their Victims."

Theories propounded by Ronald Coase, Douglas Ginsburg, and others justify the prohibition of blackmail as a way of saving the social cost of wasted behavior. If blackmail were legal, potential blackmailers would expend resources in seeking out secrets that they could then sell to potential victims. The expenses of the blackmailer in making the threat and of the victim in resisting it are also deadweight social losses that will be saved if the blackmail transaction is prohibited.²³ In a similar vein, Professor Richard Epstein argues that legalizing blackmail would lead to the creation of large enterprises whose entire productive resources would be given over to the pointless discovery and subsequent suppression of embarrassing facts.²⁴

Thus, one cannot determine whether legalized blackmail would increase or decrease the ex ante costs facing a potential criminal or social deviant.

²³ "Blackmail involves the expenditure of resources in the collection of information which, on payment of blackmail, will be suppressed. It would be better if this information were not collected and the resources were used to produce something of value." Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 674 (1988); see also Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1859-65 (1993); Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 163-65 (1980) (asserting that the combination of immorality and disutility form a reasonable basis for criminalization).

²⁴ See Epstein, *supra* note 3, at 564-65 (arguing that such enterprises would lead to secondary criminal activity by blackmail victims seeking to raise money to pay menaces). Although some blackmailers may not expend any costs in learning their victims' secrets, a rule outlawing all blackmail may be the most efficient in a world fraught with transaction costs. Where judicial determinations are costly and imperfect, a prohibition of all blackmail would be efficient whenever the cost of judicially discriminating between casually acquired information and intentionally acquired information exceeds the social value of the efficient blackmail suppressed. This cost would include not only the administrative costs of trying such issues but the significant error costs incurred when the process arrives at an inaccurate judgment.

One may for the sake of argument grant these assumptions about the incentive effects of legalized blackmail and still reject the conclusion that laws against blackmail are efficient. The waste reduction theory ignores the social cost of suppressing efficient blackmail exchanges. In all cases in which the menace would otherwise have disclosed the victim's secret, a blackmail exchange is at least presumptively efficient from the perspective of the menace and victim. The victim is able to purchase secrecy, a benefit to which he is otherwise unentitled and that would be unavailable in the absence of the exchange. Waste reduction theorists ignore this benefit by assuming that most blackmailers would not disclose the secret if they could not blackmail the victim.²⁵ Yet this assumption is quite doubtful. Given the very low costs of disclosure to most blackmailers, the social rewards of disclosure, and the blackmailer's typical disregard for the victim's feelings, it seems likely that many if not most people who would threaten blackmail would happily disclose their victim's secret if blackmail were prevented.

Conversely, it is likely that many who disclose secrets under the present legal system would consider blackmail if it were legal. Some victims of these disclosures would prefer to pay blackmail. In assessing the efficiency of the counterfactual world of legalized blackmail, one must balance the costs identified by the waste reduction theorists against the costs of harmful disclosures that occur under the current system and that would be prevented if blackmail were legal. The waste reduction theory fails to make its case in the absence of information about the relative magnitudes of these two types of cost.

But even granting its assumptions, the waste reduction theory also fails to account for the differentiation between bribery and blackmail. Both transactions simply transfer wealth from the victim to the menace at some transaction cost. Both lead to pointless deadweight losses and economically sterile exchanges. Both involve the costs of bilateral monopoly negotiations. No *economically*

²⁵ Most waste reduction theorists simply assume the contrary. See, e.g., POSNER, *supra* note 5, at 69-71 (stating that even though the threatener professes an intent to disclose the victim's secret, the threatener does not "really" want to carry out the threat but only obtain the victim's wealth). Some deontological theorists also make this assumption. See Gordon, *supra* note 3, at 1746 (acknowledging some blackmail threats to be genuine, but defining the "central case" of blackmail as one in which the menace "has no intent or desire to publish the information except as an instrument" toward the purpose of obtaining an advantage from the victim).

relevant distinction exists between a menace's saying "yes" to a victim's offer and a victim's saying "yes" to a menace's threat. Yet only blackmail is unlawful.

3. "Lawful Blackmail Would Lead to Costly Reallocative Exchanges."

Coase also sees the law of blackmail as assigning to the victim a "right not to be blackmailed," which is efficient because the victim is the party who is likely to value the right most highly.²⁶ The law of blackmail is thus argued to be efficient under the eponymous Coase Theorem, which holds that legal entitlements should, where possible, be assigned to the party who would bid the most for them, in order to save transaction costs of reallocative bargaining.²⁷ Prohibition of blackmail threats saves the transaction costs of the reallocative blackmail transaction. But Coase seems to have gotten it backwards. Laws against blackmail *prohibit* a reallocative bargain that is made necessary because the right to disclose the secret has been assigned to the menace. The effect of blackmail statutes is to disable the victim from buying confidentiality in any bargain that is initiated by the menace, even though threats by the menace might be the only way the victim can learn of his risk or of the opportunity to buy confidentiality. Thus, current law operates exactly opposite to Coase's prescription: it both assigns the entitlement to the wrong party and prohibits reallocative bargains necessary to correct the misassignment.

²⁶ He argues:

In a blackmailing scheme, the person who will pay the most for the right to stop the action threatened is normally the person being blackmailed. If the right to stop this action is denied to others, that is, blackmail is made illegal, transaction costs are reduced, factors of production are released for other purposes and the value of production is increased. This is an approach which comes quite naturally to an economist . . .

Coase, *supra* note 23, at 673.

This seems to be inaccurately expressed, since it is only the victim who wants the "right to stop the action," i.e., to prevent the threatened disclosure. If Coase means that the victim will always pay more for secrecy than the menace's reservation price for the right to disclose, then he must explain why the law allocates the disclosure entitlement to the menace, as argued in the text. If he means instead that the victim will always pay more for secrecy than third parties will pay for disclosure, then his assumption is unfounded, as argued in the following subsection.

²⁷ See *id.* at 673 ("[T]he value of production would be maximized if rights were deemed to be possessed by those to whom they were most valuable, thus eliminating the need for any transactions.").

No useful explanation of the bribery/blackmail distinction can be deduced from the Coase Theorem. Transaction cost analysis cannot differentiate between exchanges on the basis of the identity of the initiating party. Reallocative bargaining initiated by the menace is no more costly than that initiated by the victim.

4. "Market Price Blackmail Should be Lawful."

Some economic theorists have suggested that blackmail should be unlawful only in cases in which the blackmailer sells his secrecy to the victim at a price exceeding the value of the secret to an alternative purchaser.²⁸ This theory of "market price" blackmail views the blackmailer's promised secrecy as imposing an opportunity cost, representing the price he could obtain by disclosing the secret to a third party. The blackmail transaction permits the victim to outbid the third party, thus allocating the information or its secrecy to the highest valued use. Under this theory, the blackmailer would act illegally only by charging more than the third party's bid.

In order to put the market price theory into effect, however, the court must know the amount that would be bid for the information by third parties. The defense would appear to be available only in relatively rare cases in which the defendant is able to produce a bid from a willing buyer and show that the victim paid no more. Yet, in those rare cases and in the absence of dynamic effects or transaction costs, market price blackmail seems to be justifiable.

Nevertheless, there are likely to be dynamic effects and costs. A victim will often be unable to discern a true market price blackmailer (in which case the victim may be advised to pay her off) from a false market price blackmailer (in which case the victim might not only refuse to pay but might also threaten her with criminal liability). In most cases, the victim cannot confirm the third party's bid without risking disclosure of the secret. As a

²⁸ See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 84-86 (1974) (arguing that a blackmailer "could legitimately charge only for what he forgoes by silence"); Murphy, *supra* note 23, at 164-65 (arguing that the blackmailer "should be allowed to offer 'first refusal' to the victim"); cf. CHARLES FRIED, *CONTRACT AS PROMISE* 102 (1981) (noting that although we condemn blackmail generally so "that investments in the misery of others should not be lucrative," the law should permit recovery of opportunity costs by a journalist who acquired the secret he is offering without the intention of blackmail).

result, if market price blackmail were legal, a victim might never discover whether he was actually the victim of a crime.

The economic story of efficient blackmail²⁹ assumes that secrecy will not impose greater costs on third parties than its combined utility to the blackmailer and victim. A related, implicit rationale for legalizing market price blackmail is that to permit the victim to bid against the third party would foster allocative efficiency: a victim who offers more must value secrecy more than the third party values disclosure. Yet, when the third party is the general public, the well known free-rider problem and the cost of aggregating individual bids may prevent the public from offering the true total value of disclosure and lead to an inefficient secrecy agreement.

Even when the third party is an individual with whom the menace can easily negotiate, transaction costs peculiar to the sale of information may preclude allocative efficiency. Buyers of irregularly produced information, such as scandal, face higher costs in assessing its value to them than do buyers of other goods.³⁰ The subject matter of the sale, the secret itself, cannot be described to the buyer for purposes of valuation without disclosing the secret. One cannot ask a spouse what she would pay to learn that her husband was a philanderer without giving away most of what one is trying to sell. She is also unlikely to bid much simply to learn something of advantage to her. Even disclosing the name of the competing victim/bidder might give away too much information to the third party/bidder. A seller is not likely to be freely forthcoming with such information because inadvertent disclosure of the secret would cost her both possible buyers. In the absence of such information, however, the third party is unlikely to bid the true value of the secret.

Thus, even after an auction between victim and third party, one cannot conclude in general that the outcome, whether a blackmail exchange or disclosure, is allocatively efficient. The failure to legalize market price blackmail may represent a societal guess that disclosure of harmful secrets is generally more valuable than their

²⁹ See *supra* notes 13-14 and accompanying text.

³⁰ By contrast, merchant buyers of regularly produced information, such as oil exploration results or market surveys, are much better able to assess the personal value of the information before they learn the content. For a discussion on determining the proper price for information, see COOTER & ULEN, *supra* note 7, at 112-16.

concealment. A similar guess about the relative magnitudes of efficient blackmail transaction costs was seen to underlie the arguments for and against the waste reduction theories. The crucial role of such raw guesswork undermines the economist's rhetorical pose of scientific neutrality by exposing the moment at which he chooses which story he will tell, a choice that is not validated by economic rationality.

Even were the economic argument against market price blackmail persuasive, however, it would be equally applicable to noncriminal bribery. Bribers, like blackmail victims, must decide whether and how much to bid with incomplete information about the menace's intention. So far as third parties are concerned, a successful bribe creates the same externalities as the corresponding blackmail exchange. Potential bribe-takers might even invest in secret gathering, with the hope of inducing bribe offers. The defense of the status quo against the subversive market price blackmail theories leaves even fewer justifications for the legality of bribery.

In summary, although existing economic justifications for prohibiting blackmail offer plausible stories about its inefficiency, they cannot exclude equally plausible, yet contrary stories that legalized blackmail would be efficient. Moreover, none of the existing economic explanations justifies the radically different treatment accorded to substantively identical exchanges by the blackmail/bribery boundary.

C. Blackmail Is Not Economically Different from Bribery

The economic theories justifying the prohibition of blackmail are inconclusive because of the uncertain cost that outlawing blackmail entails. But assume that economic reasoning could somehow demonstrate that laws against blackmail are efficient. If so, could it also justify the legality of bribery?

As I have discussed above, most economic justifications for criminalizing all blackmail apply equally well to criminalizing all bribery. I can suggest only two potential economic reasons to differentiate blackmail from bribery. First, as waste reduction theorists contend, outlawing blackmail may reduce investments by potential menaces in discovering secrets and by potential victims in hiding them. By contrast, legalized bribery seems to entail a lower risk of such investments. A menace whose threats will be barred may be less likely to invest in discovering a secret because she

cannot depend on revealing her knowledge and selling forbearance. Investing in becoming a blackmailer seems more promising than investing in becoming a bribe-taker.

This justification seems weak, however, because a threat is not always necessary to induce an exchange. Without uttering a threat, menaces can often induce a bribe by openly gaining the power to harm the victim. For example, the civil plaintiff who has discovered a "smoking gun" document can confidently sit back and await a generous settlement offer. Similarly, a corporate raider hoping for greenmail makes her "threat" apparent by openly purchasing the target company's stock. The problem of interpretation makes the threat requirement too crude to distinguish blackmailers from bribe-takers. Thus, it may be feasible for a potential bribe-taker to invest in learning secrets.

The second possible justification for the distinction turns on the costs associated with bluffing that legalized blackmail might entail. In most forbearance exchange situations, the possibility of bluffing increases the transaction costs borne by both victims and menaces. Victims incur information costs in unmasking bluffs and certifying true threats. Victims also incur the costs of mistakes: an unnecessary exchange when they believe a threat that turns out to have been a bluff, a lost opportunity to exchange when what they believe to be a bluff turns out to have been a true threat. On the other side of the transaction, menaces incur the costs of masking bluffs and of making their true threats credible. They, too, will often suffer increased costs if their true threats are mistaken for bluffs because they will have to incur the increased cost of making good on their threat rather than incur the smaller costs of a forbearance exchange.

Because bluffs arise only when menaces make threats, not when victims make offers, one might explain the legality of bribery and the illegality of blackmail by the idea that victim-initiated exchanges are less likely than menace-initiated exchanges to be the product of a bluff. With the possibility of bluffing removed, bribes are statistically more likely to occur in situations in which the disclosure will occur in the absence of exchange.

While this justification might have some appeal in cases of other extortive forbearance exchanges in which a menace will incur significant costs in making good on her threat, it is unlikely that the cost of bluffing is significant in most blackmail transactions.³¹ The

³¹ A notable exception occurs when the menace is a coparticipant in crime or embarrassing activity that she threatens to disclose. Here she may face significant

simple disclosure of a secret will rarely cost the menace anything. Because the victim can never assure himself that the menace is bluffing, he will not incur the cost of ascertaining the sincerity of the menace's threat. Moreover, once a bribery negotiation begins, the menace's refusal to accept the victim's initial offers will lead to the same uncertainty and costly stratagems as occur when the menace makes the first move. A menace may "bluff" by refusing a bribe offer that exceeds her true reservation price.

In summary, even assuming that the blackmail transaction is inefficient, there seems to be no economic justification for the legality of bribery. At most, the rule discriminates among the relevant threat situations crudely and imposes costs of its own that are impossible to compare to its benefits.

II. A CRITIQUE OF LINDGREN'S RIGHTS THEORY OF BLACKMAIL

An account of the blackmail theory wars must give special consideration to their most prolific and persistent combatant, Professor James Lindgren. In a series of articles,³² Professor Lindgren has attacked all previously and subsequently articulated theories on grounds that each of them fails to account for at least some recognized cases of blackmail. In his phrase, he seeks to "unravel" the paradox of blackmail by creating a coherent theory that explains the variety of blackmail cases by a single principle. His project is unusual in seeking to provide both a descriptive and a normative account by use of a single principle.³³

costs of disclosure and the victim may be genuinely uncertain about whether she will fulfill her threat. An additional element of bluffing is always present after a blackmailer has made an illegal blackmail threat: if she discloses the secret, she frees the victim to accuse her of attempted blackmail. The victim may counter-threaten the menace in such circumstances and the menace's costs of disclosure may increase accordingly.

³² See James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597 (1989); James Lindgren, *In Defense of Keeping Blackmail a Crime: Responding to Block and Gordon*, 20 LOY. L.A. L. REV. 35 (1986) [hereinafter Lindgren, *Responding*]; James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984) [hereinafter Lindgren, *Unraveling*]; James Lindgren, *Blackmail and Extortion*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 115 (Sanford H. Kadish ed., 1983).

³³ I say "unusual" because of the improbability that a principle would perfectly replicate the operation of a legal rule without being simply a restatement of the rule in different language. A normative theory that purports to justify a rule and that does not conflict with at least some of the rule's applications is also likely just a restatement of the rule.

Lindgren begins by rejecting the naive notion that blackmail law is intended to protect the victims of blackmail from improper pressure. Instead, he focuses on the persons from whom victims want to keep their secrets, such as spouses, business associates, law enforcement agencies, and the curious public. The victim's fear of disclosure arises because such third parties have the power to harm the victim if they learn the truth, a power Lindgren refers to as "leverage."³⁴ Such leverage takes various forms, such as example the power to prosecute the victim for a crime, to sue the victim for damages or divorce, or to ridicule the victim. Lindgren argues that blackmail is prohibited in order to prevent the blackmailer from using the leverage of such third parties against the victim, or, as he puts it, "bargaining with . . . [their] chips."³⁵

The normative argument undergirding this theory is that the law should assign the exclusive power to enforce a right to the one who possesses the right.³⁶ Third parties, from whom the victim wishes to keep his secret, have the right to harm the victim if they learn of the secret. The blackmailer, an interloper, has no standing to enforce this right.³⁷ Lindgren thus unravels the paradox of blackmail by knitting one of his own: we outlaw blackmail in order to protect the exclusive power of third parties to harm the victims of blackmail.

This provocative thesis³⁸ is vulnerable to four types of objections: descriptive incompleteness, inadequate normative justification, normative overbreadth, and failure to account for the legality of bribery. Some time will be spent developing these critiques because some apply to other rights-based theories as well.

³⁴ See Lindgren, *Unraveling*, *supra* note 32, at 702.

³⁵ *Id.* He states elsewhere: "Whoever seeks a personal payoff by credibly wielding the power of a third party to harm the victim is a blackmailer." *Id.* at 703.

³⁶ See *id.* at 704 (arguing that "blackmail law is a manifestation of a core principle of our legal system, the assignment of enforcement rights to the victim").

³⁷ Lindgren argues that his thesis rationalizes the "claim of right" defense whereby threats that would otherwise be blackmail are permitted if the threatener is seeking restitution or damages arising out of the circumstances of the secret. See *id.* at 676-80, 713-16; see also MODEL PENAL CODE § 223.4 cmt. g (1980). But the threat to disclose a secret will always be to use the leverage of third parties to the extent that disclosure is different from merely pressing the claim. Thus, the third-party thesis does not explain the legality of a threatener using a claim of right defense to a charge that she threatened to disclose an embarrassing secret.

³⁸ The Lindgren thesis has been criticized by Block, Gordon, and Coase. See Walter Block & David Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37, 51-53 (1985); Coase, *supra* note 23, at 674.

A. *Descriptive Incompleteness*

Perhaps the least important objection against the thesis is that it fails to satisfy Lindgren's own comprehensiveness criterion and so is vulnerable to the criticism that he levels against all other blackmail theorists: it does not apply to all cases of blackmail. The theory omits many cases of blackmail in which the potential harm from the disclosure cannot be meaningfully said to represent a third party's leverage. Because his theory is unified, this descriptive inadequacy also undercuts his normative arguments against blackmail.

Consider the following hypothetical case: in order to protect his mother's feelings, a son pays a menace who threatens to expose his father's marital infidelity to his mother.³⁹ The victim, the son, is not exposed to any leverage by his mother, who cannot use the information in any way to harm him. Nor is the son acting as an agent on behalf of his father to protect him from his mother's leverage. His motive is solely to protect his mother from the pain of learning the secret, not to neutralize any leverage she may have against his father.

Lindgren's third-party thesis omits such cases. The blackmailer is exploiting the son's concern for the third party (the mother), not the mother's leverage over the son. If the blackmailer is using anyone's "chips," she is using only her own. Thus, not all blackmail involves the blackmailer's appropriation of the leverage of a third party.⁴⁰ Some blackmail simply exploits the victim's concern for the third party's feelings.

³⁹ The definition of blackmail in the Model Penal Code extends to threats to harm "any person" by exposure of the secret, not just the victim. See MODEL PENAL CODE § 223.4(3) (1980); see, e.g., *State v. McInnes*, 153 So. 2d 854, 855 (Fla. Dist. Ct. App. 1963) (finding that the victim was a corporate officer who was trying to avoid disclosure of a secret harmful to the corporation).

⁴⁰ Lindgren seems not to have considered that the blackmailer's disclosure may threaten harm not to the victim but to some third party.

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.

Lindgren, *Unraveling*, *supra* note 32, at 702. Third parties are always "involved" in a threat to disclose a secret, but they do not always "punish" the victim, even in the attenuated sense suggested by this quotation.

Intuition suggests that this is a serious omission. It is likely that much spousal blackmail is paid at least in part out of similar motives. A philanderer may pay hush money more to protect the feelings of the betrayed spouse than to protect himself from her reaction. Thus, in many garden-variety cases of blackmail, it is simply inaccurate to describe the blackmailer as usurping the leverage of a third party over the blackmail victim.

B. *Inadequate Normative Justification*

A more serious objection to the leverage thesis is that it neither explains the immorality of blackmail nor legitimizes its criminalization. Lindgren fails to establish that the per se protection of the exclusivity of third-party leverage over the victim warrants the law's protection. A third party's leverage over the victim of secrets' blackmail may be illegitimate and even criminal. One may blackmail a battered wife by a threat to tell her husband where she is hiding, or blackmail a person in a witness protection program by a threat to publicize his identity. The leverage the blackmailer uses in these cases is the threat by the husband or the gangsters to criminally injure the victim.⁴¹ What is wrongful about such blackmail is not that it misappropriates leverage from its rightful owner but that it may harm the victim.

Nor is this problem limited to the use of leverage which would be criminal if used directly. Blackmailers often use noncriminal leverage of questionable legitimacy, such as the risk of embarrassment posed to public figures by readers of scandal magazines. Lindgren's thesis forces him to maintain that such leverage merits protection by criminal sanctions even though it is not even protected by the law of property. A third party's illegitimate or prurient interest in learning the secret and harming the victim cannot justify criminalizing the blackmailer's attempt to "appropriate" it.⁴²

⁴¹ If the third party in such a case were directly to threaten to use his leverage to obtain property from the victim, he would commit the crime of extortion.

⁴² See Lindgren, *Unraveling*, *supra* note 32, at 706. Lindgren uses various similar terms to characterize the supposed effects of the blackmail exchange on the third party. Sometimes he speaks of "suppressing" the third party's claim, *see id.* at 702, 705-07, sometimes of "settling" it, *see id.* at 702, 706-07. These terms are equally inapposite.

C. *Normative Overbreadth*

The "misappropriation of leverage" thesis overlooks the conflict between its claim that the law protects third-party leverage and the fact that the same law encourages or permits many exchanges meant to reduce such leverage. For example, a person may quite lawfully engage in market exchanges that have as their sole purpose the preservation of the buyer's secrets from others.⁴³ In numerous lawful exchanges a potential menace receives compensation for promising not to disclose harmful secrets to third parties. Government employees, corporate employees, and professionals such as attorneys enter into binding confidentiality agreements at the beginning of their business or professional relationships whereby they accept compensation for agreeing not to disclose secrets to third parties who might exert leverage against their employers or their clients.⁴⁴ From the perspective of third parties, such sales of confidentiality neutralize third-party leverage over the client.

But these exchanges do not violate the principle that rights are enforceable only by those who possess them. Professional secret-keepers do not misappropriate the leverage of the nosy public, the business competitor, or the legal adversary when they sell a promise of confidentiality because those third parties have no property in or claim to the secret. Nor do blackmailers appropriate such leverage. Blackmail leaves the third party as fully empowered to harm the victim as he was before it. Third parties have no interest in the blackmail transaction, as is confirmed by the fact that the common law gives them no claim for compensation against either the blackmailer or the victim.

The leverage thesis also fails to explain why professional secret-keepers who are potential menaces may lawfully insist on payment for confidentiality agreements *before* they learn of the information

⁴³ The general topic of secret-keeping has received some theoretical attention, of which the most comprehensive is KIM L. SCHEPPELE, *LEGAL SECRETS* (1988); *see also* SISSELA BOK, *SECRETS* (1984); POSNER, *supra* note 18, at 231-347; Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978).

⁴⁴ Confidentiality is a mandatory term of the attorney-client contract by virtue of the rules of professional conduct. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1990); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101, EC 4-4 (1981); *see also* Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991) (enforcing reporter's promise of confidentiality given to informant); Snepp v. United States, 444 U.S. 507, 515-16 (1980) (enforcing CIA agent's employment contract prohibiting disclosure without official clearance required).

but may not lawfully make an identical demand *after* they learn of the information. Thus, an executive's demand for payment for her confidentiality made when she is hired is legal, while her demand for payment for keeping her employer's secret after she learns of it is blackmail.⁴⁵ Because of its exclusive focus on third-party leverage, Lindgren's theory cannot discriminate between these two cases.⁴⁶ In both cases, the victim pays the menace to prevent disclosure of information to third parties who could use the information to harm the victim. In both cases, the menace is bargaining with the chips of the third parties, from whose perspective both exchanges are equally destructive of leverage.

Although Lindgren's disregard of victims' interests prevents his theory from explaining the difference between *ex ante* and *ex post* agreements, the difference is easily explained from a victim's perspective. As noted above, the victim can obtain secrecy at a competitive price in the *ex ante* exchange but must pay a monopolistic price in the *ex post* exchange. In the *ex ante* exchange, the victim chooses to disclose his secret to the menace in order to gain from the professional or business relationship, whereas no such gain results from the *ex post* exchange.

The flaws in Lindgren's thesis arise because it ignores the interests of the blackmail victim.⁴⁷ Contrary to Lindgren's analysis, the law of blackmail seems to be indifferent to the interests of third parties in learning victims' secrets. The law freely permits all sorts of transactions, including forbearance exchanges, that frustrate these interests. The legality of these transactions strongly suggests that any attempt to explain the paradox of blackmail by shifting the focus away from the victim will be unsuccessful.

⁴⁵ See *State v. McInnes*, 153 So. 2d 854 (Fla. Dist. Ct. App. 1963) (holding that employee's threat to expose employer's tax fraud constituted extortion).

⁴⁶ Lindgren criticizes Epstein's theory because it would find such transactions to be blackmail because they involve money for concealment, but claims that his third-party thesis is not affected by the legality of such exchanges because no threat is used. See Lindgren, *Unraveling*, *supra* note 32, at 706. Yet, from the third party's perspective, the money is paid to defeat the third party's leverage over the victim and so the transaction should be offensive under Lindgren's theory whether or not a threat is made.

⁴⁷ In view of the novelty of his thesis, Lindgren can perhaps be forgiven for occasionally seeming to forget the radical change his thesis makes in diverting attention from the interests of the victim to those of the third party. For example, he charges theorists who support the legalization of blackmail secrets with ignoring the "lives ruined by persistent blackmailers." Lindgren, *Responding*, *supra* note 32, at 36. Are these not the lives of the blackmail victims rather than those of the third parties whose leverage was misappropriated?

D. Failure to Account for the Legality of Bribery

A final and critical inconsistency in Lindgren's third-party thesis is that it overlooks the legality of bribes that accomplish the same result as blackmail, from the third party's point of view. The law of blackmail prohibits the menace from initiating a forbearance exchange by a threat but does not criminalize her for accepting an exchange offered by a victim. Consider the following examples:

1A: An employee who is planning to retire has learned a secret harmful to her employer's business. After retirement, she will be able to disclose the secret without violating any legal duty that she owes to the employer. She threatens that she will expose the secret unless the employer pays her off. The employee thereby commits blackmail.⁴⁸

1B: Without being threatened, the same employer offers severance pay to the employee conditioned on her agreement not to expose its harmful secrets.⁴⁹ In accepting this payment on these terms, the employee is not guilty of blackmail.

2A: During discovery, a plaintiff in a products liability lawsuit obtains evidence of the defendant's liability for many similar claims. The plaintiff threatens to publicize the document unless the defendant agrees to pay a handsome settlement. The plaintiff is probably guilty of blackmail.⁵⁰

⁴⁸ See, e.g., *State v. McInnes*, 153 So. 2d 854 (Fla. Dist. Ct. App. 1963) (holding that employee's threat to expose employer's tax fraud constituted extortion); see also MODEL PENAL CODE § 223.4(7) & cmt. 2(k) (1980) (providing general prohibition against blackmail where the menace "inflict[s] any other harm which would not benefit the actor").

⁴⁹ Such agreements are now common. See N.R. Kleinfeld, *Silence is Golden*, N.Y. TIMES, Apr. 29, 1990, § 6 (Magazine) at 54, 54 ("[T]he fact is corporations are increasingly sealing the lips of employees with the corporate equivalent of a gag order.").

⁵⁰ Cf. *State v. Harrington*, 260 A.2d 692, 699 (Vt. 1969) (stating that threats to use secret information to obtain a favorable settlement in a divorce action constituted extortion); Joseph M. Livermore, *Lawyer Extortion*, 20 ARIZ. L. REV. 403, 407-08 (1978) (arguing that threatening to publicize embarrassing allegations in a proposed civil claim in order to procure settlement may amount to extortion).

On the rights of plaintiffs to profit by disclosure of discovery information to third parties, compare Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 819-27 (1990) (discussing plaintiffs' right to disseminate discovery materials to nonparties and noting the risk that litigation could be aimed primarily at discovery of information that can be sold to other litigants) with Brad N. Friedman, Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order*, 60 N.Y.U. L. REV. 1137, 1148 (1985) (proposing that selling or sharing discovery information

2B: During discovery, the plaintiff in a products liability lawsuit obtains evidence of the defendant's liability for many similar claims. Without being threatened, the defendant offers to pay the plaintiff a handsome settlement conditioned upon plaintiff's agreement not to disclose the evidence. The plaintiff is not guilty of blackmail and the agreement is enforceable.⁵¹

Lindgren's bargaining chips hypothesis fails to explain why such exchanges are legal if, but only if, the victim makes the first move. The consideration the victim offers in such exchanges will always reflect third-party leverage, yet the exchange is lawful so long as it does not result from the menace's threat. If the law's policy really were to protect the exclusivity of the leverage of third parties, it would be irrationally inconsistent to criminalize blackmail while ignoring this form of bribery. From the third party's perspective, bribery and blackmail are equally destructive of leverage. Thus, the attempt to resolve the paradox of blackmail by taking up the point of view of third parties must fail.

Something must be said about the more usual attempt to rationalize the law of blackmail as a violation of the rights of the victim. In what I have described as "efficient" blackmail, the menace intends to make the disclosure in the absence of an exchange and the disclosure would not violate any right of the victim. In such a case, the victim would certainly want the right to initiate the bargaining process and purchase confidentiality. But several theorists claim that the victim's rights are violated if the menace takes the first step. Thus, for example, Professors Fletcher and Gordon each argue that it is not at all "paradoxical" to outlaw a threat to do a lawful act.⁵² Concededly, it does not defy logic to

among similarly situated plaintiffs in products liability cases be permitted).

⁵¹ In order to protect themselves from other claims and from adverse publicity, defendants who settle claims often demand that plaintiffs return all copies of documents obtained in the lawsuit and keep confidential any harmful information that they have obtained during the course of discovery. See *Court Secrecy: Hearings Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (1990) (exploring data concerning the use of confidentiality in litigation); Irwin D. Miller, *Breaking the Written Code of Silence in Legal Malpractice Settlements*, 6 GEO. J. LEGAL ETHICS 187, 189-91 (1992) (criticizing the use of confidentiality agreements in the settlement of legal malpractice claims as interfering with the reporting necessary to attorney disciplinary bodies). In speaking of settlements in cases of sexual harassment against law firms, one attorney noted that "[t]he good cases settle for big bucks, and part of the deal is to keep your mouth shut." David Margolick, *Curbing Sexual Harassment in the Legal World*, N.Y. TIMES, Nov. 9, 1990, at B5 (quoting Boston lawyer S. Beville May).

⁵² See George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV.

permit an action (the disclosure) while prohibiting a communication about the action (the threat).

Even if "paradox" is too strong a term, it nevertheless seems more than merely "interesting" that the law should outlaw the communication of truthful information by one person only.⁵³ Assume, for example, that a menace prefers to disclose a victim's harmful secret but would be willing to accept no less than \$1000 for silence. A menace may lawfully act on such preferences, so long as she does not threaten the victim. That the menace holds these lawful preferences is a fact about the victim's world that affects the victim's interests. Now assume that a friend of the victim learns of these preferences and, without the menace's knowledge, communicates them to the victim, who then bribes the menace to keep the secret. In common parlance, the friend has "warned," not "threatened," the victim, and has committed no crime in communicating truthful information about the menace's lawful preferences. The victim is presumably grateful for such information, regardless of its source. Because the law seeks to suppress neither the preferences themselves nor their communication by persons other than the menace, it indeed seems paradoxical to criminalize the threat and not the warning.⁵⁴

Professor Gordon also argues that criminalizing blackmail gives the victim a resource with which to resist the blackmailer's pressure. A victim who refuses to pay can counter-threaten a blackmailer with criminal liability if the blackmailer exposes the secret.⁵⁵ Yet the victim's "counter-threat" to file a criminal charge if the blackmailer subsequently engages in lawful speech could itself be characterized as criminal coercion.⁵⁶ Professor Gordon refers to this as "coun-

1617, 1626-29 (1993) (arguing that blackmail is wrong and therefore punishable because it creates a relationship of dominance and subordination); Gordon, *supra* note 3, at 1742-46 (arguing that blackmail is not "paradoxical" in the strict sense of the word on theoretical, policy-oriented, and empirical grounds).

⁵³ See Gordon, *supra* note 3, at 1742.

⁵⁴ Because it would not be lawful for an extortionist to act on her preferences, this analysis does not apply to an extortionist's threat.

⁵⁵ See Gordon, *supra* note 3, at 1775-77. This point is also made by Judge Posner and Professors Shavell and Feinberg. See JOEL FEINBERG, 4 MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOINGS 268 (1988) (arguing that counterblackmail may be justifiable, but still illegal); Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1837-38 (1993) (arguing that by giving the victim proof of blackmail, a blackmailer may open herself to counterblackmail); Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877, 1883-84 (1993) (arguing that the economic incentive to blackmail is often outweighed by the threat of punishment).

⁵⁶ "A person is guilty of criminal coercion if, with purpose unlawfully to restrict

ter-blackmail" and argues that prosecutors should refuse to prosecute as a matter of policy. On her assumptions, such a policy seems reasonable. But what about a hypothetical politician who threatens an investigative journalist that if he published a story about her, she will (falsely) accuse the journalist of having tried to blackmail her? If the journalist files charges, the politician will claim to be a "counter-blackmailer" who should not be prosecuted. The example illustrates that blackmail statutes can themselves be used as instruments of new forms of blackmail or criminal coercion.⁵⁷

III. BRIBERY AND BLACKMAIL AS NARRATIVES OF COMMUNITY

"But who is he?"

"I'll tell you, Watson. He is the king of all the blackmailers. Heaven help the man, and still more the woman, whose secret and reputation come into the power of Milverton! With a smiling face and a heart of marble, he will squeeze and squeeze until he has drained them dry. . . . I have said that he is the worst man in London, and I would ask you how could one compare the ruffian, who in hot blood bludgeons his mate, with this man, who methodically and at his leisure tortures the soul and wrings the nerves in order to add to his already swollen money-bags?"

another's freedom of action to his detriment, he threatens to: . . . (b) accuse anyone of a criminal offense" MODEL PENAL CODE § 212.5 (1985). Professor Gordon argues that the victim here is justified because he is demanding that the menace merely withdraw her unlawful threat. *See* Gordon, *supra* note 3, at 1776-77. But, because the blackmailer's threat has failed, and the blackmailer retains the lawful right to disclose the secret, the victim's counter-threat cannot be justified by a claim-of-right defense to a charge of criminal coercion. The Model Penal Code provides in pertinent part:

It is an affirmative defense to prosecution . . . that the actor believed that accusation . . . to be true . . . and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, . . . as by desisting from further misbehavior, [or] making good a wrong done

MODEL PENAL CODE § 212.5. The victim has no honest claim of right to confidentiality either before or after the blackmail threat. The relevant difference is between the two lawful threats: (1) "If you steal from me, I will tell the police," and (2) "If you don't give back what you stole from me, I will tell the police," and the unlawful threat (3) "If you disclose my secret, I will tell the police you tried to steal from me." The latter threat constitutes criminal coercion because the threatener has no legitimate claim to confidentiality. Similarly coercive is: (4) "If you disclose my secret, I will tell the police you tried to blackmail me."

⁵⁷ The rare quality of a criminal statute creating incentives to violate itself is shared by perjury statutes that penalize inconsistent testimony. *See* Sidney W. DeLong, *Testimonial Consistency: The Hobgoblin of the Federal False Declaration Statute*, 66 DENV. U. L. REV. 135, 138-39 (1989).

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"But surely," said I, "the fellow must be within the grasp of the law?"

"Technically, no doubt, but practically not. What would it profit a woman, for example, to get him a few months's imprisonment if her own ruin must immediately follow? His victims dare not hit back."⁵⁸

Why does blackmail strike us as so wrongful? So wrongful that even in the midst of a transaction cost analysis, the economist Ronald Coase would refer to it as "moral murder?"⁵⁹ None of the foregoing theories seems to touch the nerve that the blackmailer rubs; none explains the societal abhorrence of the blackmailer's craft. Purely economic explanations of the criminal law often produce bizarre conclusions, such as that blackmail rules are intended to reduce expenditures by blackmailers. Such provocations are part of the charm of economic analysis. We all know that blackmail laws are meant to do more than prevent waste. Admittedly, it is no criticism of an economic theory that it does not seek to make such normative arguments for that is not a task it has set for itself.⁶⁰ But a *legal* theory that does not explain the wrongness of a blackmailer's behavior is in need of supplementation, unless one takes the view that the law is indifferent to morality.⁶¹

A different way to understand the legal treatment of both blackmail and bribery is by reference to their social meaning rather than their economic effects. I suggest that society understands bribery and blackmail not as rationally consistent, mutually exclusive categories within a coherent legal or ethical order but as unrelated prototypes whose application to social facts might well overlap. Each transaction is associated with a narrative description of its standard case through which its social meaning is revealed. The justifications for the different legal treatment of bribery and

⁵⁸ ARTHUR C. DOYLE, *The Adventure of Charles Augustus Milverton*, in *THE RETURN OF SHERLOCK HOLMES*, reprinted in *THE COMPLETE SHERLOCK HOLMES* 481, 572-73 (1960).

⁵⁹ Coase, *supra* note 23, at 675.

⁶⁰ See generally HAROLD DEMSETZ, *OWNERSHIP, CONTROL, AND THE FIRM* 281-92 (1988).

⁶¹ Even Professor Coase seems to acknowledge this as he searches for a rationale for the fact that, efficiency aside, society abhors blackmail as "the foulest of crimes." Coase, *supra* note 23, at 674 (quoting BECHHOFFER ROBERTS, *THE MR. A. CASE 9* (Bechhofer Roberts ed., *The Old Bailey Trial Series*, No. 7, 1950)). Coase reasoned that the blackmailer does not operate under the constraints of an ordinary businessman and that blackmail's unending threat leads to "moral murder." *Id.* at 675. He nevertheless concluded "[i]t would be a sad day if all the answers had to be provided by economists." *Id.* at 676.

blackmail may seem to reside more in intuition than in instrumental logic,⁶² but they can equally be seen to arise from a vision of social order that is more communitarian than individualist.

In the story of blackmail, the blackmailer is the protagonist, the agent whose action is directed at her victim. She knows a secret whose disclosure would exclude the victim in important ways from his community. The blackmailer hopes that her threat will inflict sufficient emotional distress on the victim to cause him to pay in order to preserve the security of his social status or role in the community.

The victim is not only injured, but is silenced and isolated by the threat. He cannot complain or seek help for his dilemma without abandoning that which he wants to preserve.⁶³ His relationship with the blackmailer becomes a second secret. His efforts to raise money to pay blackmail further deepens his secret life. The blackmail story is one of bitter irony, in which the victim must actively participate in the crime, protecting the menace in order to protect himself, and must distance himself even farther from his community in order to preserve his connection to it.

Blackmail is an oppressive relationship, not a discrete event like most other crimes.⁶⁴ The victim is bound to the blackmailer in a relationship that continues for so long as the blackmailer retains the power to disclose the secret.⁶⁵ The victim buys nothing certain

⁶² See Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) ("The law can ask no better justification than the deepest instincts of man.").

⁶³ In most other social interactions, a person cannot initiate an offensive contact with another person while compelling the second person to keep the contact a secret. There are exceptions, however: the current moral and political climate makes it costly for victims of sexual abuse or harassment to expose the wrongful contact.

⁶⁴ Some other criminal activities are constituted by oppressive relationships that involve repeated interactions between an oppressor and a victim who has no power to end the relationship, such as child abuse, spousal abuse, and slavery. Most crimes, however, are discrete interactions in which victims can seek protection from society after they are harmed.

⁶⁵ It was this characteristic that Ronald Coase had in mind when he referred to this relationship as "moral murder." Coase, *supra* note 23, at 675. A blackmailer who "bleeds" the victim by repeated demands can capture virtually all the victim's surplus from the exchange, making the victim *almost* as bad off as if disclosure had occurred. See *supra* note 13. It should be noted, however, that the bilateral monopoly relationship between blackmailer and victim may work to the victim's advantage. A victim may realize a substantial surplus if he values secrecy more highly than his entire wealth.

Moreover, because blackmail is unlawful, the blackmailer's leverage may often be offset by the victim's leverage. A blackmailer who threatens to disclose after the first payment is made can be met with a counter-threat to file a criminal charge of

with his payment because the blackmailer can renege on her promise of silence and demand more money, bleeding the victim indefinitely.⁶⁶

There are two sides to society's moral response to the blackmail story. The victim, whose crime or immoral act would have merited censure in another story, engenders sympathy because of his suffering. Perhaps because of universal fear of exclusion, the blackmail story elicits a strong identification with the victim's hopelessness and isolation.

The second side to the normative meaning of the blackmail story is our condemnation of the menace's attempt to profit from her threat.⁶⁷ A person who simply exposes a victim's guilty secret to society may be said to violate one community in the interest of another: she betrays the victim while benefiting those to whom the secret is revealed. The victim's snitch is society's whistleblower. But a blackmailer betrays both communities and can claim respect from neither. She is a traitor, who betrays the victim by demanding money for silence and betrays the public by accepting it. Blackmail thus entails a double isolation and a double crime against community.

If this account of our phenomenological response to blackmail is accurate, it suggests that the purpose of the law of blackmail is to protect the community against the conspiratorial agreement of blackmailer and victim, which isolates the victim and subjects him to a submissive relationship with the blackmailer. The prototypical story of blackmail can achieve its normative justification only by suppressing and excluding certain possibilities—possibilities that have constituted some of the problematic cases. Thus, this story ignores both the cost of nondisclosure to the blackmailer and the victim's eagerness to buy secrecy.

blackmail if she does. The parties are thus in a state of mutually assured destruction, whereby each is both menace and victim. Outlawing the blackmail exchange thus has the paradoxical effect of making it more enforceable.

⁶⁶ An often overlooked reason for outlawing blackmail is to avoid the violence that might be engendered by the victim's desperation. The intensity of a victim's reaction to blackmail may be something that the law simply wants to avoid.

⁶⁷ When we view a threat as a legitimate maneuver in a market economy, we are prepared to countenance a considerable degree of suffering by the victim. See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 624-28 (1943) (describing the free market as a form of coercion); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471-74 (1923) (giving examples of allowable market coercion).

The prototypical story of noncriminal bribery proceeds from a different point of view and arises from different perspectives on the effects of secrecy on community.⁶⁸ In the bribe story, the active agent is the victim, not the menace. Only if he can maintain his secret can the victim preserve his valuable place in the community. Bribery permits him to construct or reinforce this essential secrecy by purchasing the cooperation of the menace, whose innocent disclosure might threaten the victim's interests. Through bribery, the victim transforms the menace into an ally whose cooperation preserves the victim's place in the larger community.⁶⁹ The menace accepts the bribe to compensate her for joining this enterprise.

The different perspective of the bribery story induces different normative responses. While blackmail is something the menace does, bribery is something the victim does. The blackmailer threatens; the briber offers. Blackmail makes the victim worse off; bribery makes him better off. Bribery elicits neither a sense that the victim has been exploited nor a sense that the menace has betrayed the community.

Yet these reactions are largely the result of the narrative framework of the bribe story. First, like the blackmail story, the bribe story tends to exclude possibilities that would undermine these reactions. It does not consider that the menace may have subtly threatened the victim or that once the negotiation begins, the menace may hold out for an exploitative price. Second, the focus on agent and action peculiar to the two stories obscures the substantive equivalence of the exchanges. It is apparent that many transactions could fit either story. The difference between blackmail and bribery is at the level of social meaning rather than economic or deontological logic.

CONCLUSION

An analysis of the original unconditional threat/conditional threat paradox has yielded several new paradoxes of blackmail. Some are paradoxes of counter-productivity. Thus, outlawing blackmail may create opportunities for new forms of blackmail, as in the case of counter-blackmail. Outlawing blackmail may also

⁶⁸ See SCHEPPELE, *supra* note 43, at 301-16.

⁶⁹ For a discussion on the effect of secret-keeping and the creation of community through social distribution of knowledge, see SCHEPPELE, *supra* note 43, at 23.

facilitate the making of otherwise unworkable blackmail exchanges by giving the victim an enforcement mechanism. Instrumentalist law abounds in unintended consequences.

A different kind of paradox is presented by the bribery/blackmail distinction. Economic reasoning seems inadequate to explain this dichotomy. While economic stories can be told about the efficiency of the line we draw between blackmail and noncriminal bribery, these stories seem no more persuasive than their contraries, at least in the absence of empirical data that we are unlikely ever to possess. Nor do ethical theories concerning the victim's rights or the wrongfulness of the threats justify the bribery/blackmail distinction, at least in cases in which disclosure of the secret is a real possibility in the absence of exchange. By contrast, while the prototypical stories of bribery and blackmail fail to satisfy rationalist criteria, these accounts nevertheless appear to capture the conflicting societal values these doctrines serve and thus permit the nontheorist to be reconciled to the second paradox of blackmail.

