

BLACKMAILING FOR MUTUAL GOOD: A REPLY TO RUSSELL HARDIN

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Blackmail is the demand for money, or other valuable consideration, coupled with a threat, typically, to expose information the blackmailee prefers to keep secret. For example, I threaten that unless you give me \$1,000, I will tell your wife that you have been unfaithful to her. Since you value your marriage more than this amount of money, you pay me for my silence. As a result, you gain the difference between these two amounts. If my silence is worth \$5,000, you benefit to the tune of \$4,000. My gain is roughly \$1,000 because sending a letter to your wife telling her about your peccadillo, and enclosing the pictures I have of you in the act will cost me only postage and a moment of time. As such, blackmail is like any other mutually beneficial economic transaction, at least in the *ex ante* sense.¹

Blackmail must be sharply distinguished from extortion. They are often confused because both involve a demand for money combined with a threat. However, the threat in blackmail is an entirely legal one of engaging in free speech or gossip, whereas extortion is decidedly not licit. It consists of the threat to maim, kill, or in other ways violate personal and/or property rights. In extortion the demand for money would typically be accompanied by the threat to murder, kidnap, or commit arson.

In addition to this distinction, Hardin draws another between different kinds of practices related to blackmail and extortion.² His views are not congruent with my own.³ In his view there are not two but three different

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1. There is an author of detective literature who appears to take a similarly benevolent view of blackmail. The heroine of the novel, Victoria I. Warshawski, has an aunt who needs an apartment in a public housing complex. The bureaucrat who can make this happen wants our detective not to probe too deeply into her own affairs. Warshawski promises to refrain, in consideration for this dwelling for her relative, and concludes on the following note: "As I locked the office door behind me I started whistling for the first time all day. Who says blackmailers don't have fun?" SARAH PARETSKY, *BURN MARKS* 417 (1990).

2. See generally, Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787 (1993).

3. See generally Walter Block, *A Libertarian Theory of Blackmail: Reply to Leo Katz's "Blackmail and Other Forms of Arm-Twisting"*, 33 IRISH JURIST 280 (1998); Walter Block, *Toward a Libertarian Theory of Blackmail*, J. LIBERTARIAN STUD. (forthcoming); Walter Block, Steven Kinsella and Hans-Hermann Hoppe, *Second Paradox of Blackmail*, Q.J. BUS. ETHICS (forthcoming); Walter Block and Hans-Hermann Hoppe, *Let's Legalize Blackmail*, SETON HALL L. REV. (forthcoming); Walter Block & Robert W. McGee, *Blackmail and Economic Analysis*, THOMAS JEFFERSON L. REV. (forthcoming); Walter Block & Robert W. McGee, *Blackmail from A to Z*, 50 MERCER L. REV. 569 (forthcoming Winter 1999); Walter Block, *Blackmail IS Private Justice*, U. BRIT. COLUM. L. REV. (forthcoming); Walter Block, *The*

relevant categories. First is the protection ancient Scottish chieftains sold against other marauders; this was "merely an ordinary exchange of services for services."⁴ Second, "if their protection was from their own depredations, the chieftains were like the modern mafia. Their offer of a deal was extortion."⁵ Blackmail comes third and "typically lies somewhere between these [previous] two possibilities."⁶

By contrast, my view of blackmail, to use Hardin's vernacular, is "merely an ordinary exchange of services" not necessarily limited to services, but including money or other valuable consideration. And what about the services given by the blackmailer to the blackmailee in return for this payment? Characteristically, services might include silence about an embarrassing secret or refraining from a legal activity such as gossiping, opening up a store in competition with one owned by the blackmailee, or building a fence on one's own property which would block the blackmailee's view.

Hardin proposes to analyze the issue of blackmail legalization based on "a moral theory," specifically "utilitarianism . . . driven by concern with optimal arrangements that can be characterized as mutually advantageous."⁷ This leads him to a further distinction, between blackmail which is mutually advantageous and blackmail which is not. With regard to the former he states "it seems likely that the most acceptable case for blackmail would be for mutual advantage blackmail."⁸ As we have seen, both the blackmailer and blackmailee gain from their commercial interaction, otherwise a voluntary agreement between them would not take place. Nor is it true, as it is in the case of extortion, that the blackmailer begins the negotiation by taking away something that is legitimately owned by the blackmailee, e.g., "your money or your life."⁹ While the blackmailee is also asked to choose between two

Crime of Blackmail: A Libertarian Critique, CRIM. JUST. ETHICS (forthcoming); Walter Block & Robert W. McGee, *Blackmail as a Victimless Crime*, 31 BRACON L.J. (forthcoming 1999); Walter Block, *Blackmail as a Career Choice: A Libertarian Assessment; Reply to Kipnis*, CRIM. JUST. ETHICS (forthcoming); Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 274 (1982); MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (1998); MURRAY N. ROTHBARD, *MAN, ECONOMY AND STATE* 443 (1993); WALTER BLOCK, *DEFENDING THE UNDEFENDABLE* (1991); Walter Block and David Gordon, *Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37 (1985); Walter Block, *Trading Money for Silence*, 8 U. HAW. L. REV. 57 (1986); Walter Block, *The Case for DeCriminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997).

4. Hardin, *supra* note 2, at 1787.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 1788.

9. The numerous contributions to this debate by James Lindgren maintain the opposite view; he would argue that the blackmailer is dealing with "chips" (the right to gossip about his secret) which

things, his money and the ability to keep his secret hidden, he properly owns only the former and not the latter.¹⁰

I. FACTS AND VALUES

Hardin begins this section with a plea to keep "normative and positive or conceptual claims separate."¹¹ Fair enough. This is part and parcel of any serious analysis of the law. But he derives from the rather unexceptionable premise "we cannot read values exclusively from facts"¹² the remarkable thesis "any moral argument that concludes that blackmail is right or wrong *tout court* is specious. Blackmail, like every other kind of action or result, is right or wrong, good or bad, only as an implication of particular moral theories."¹³ This would be unproblematic if Hardin would tie himself to a moral theory which had clear implications for blackmail law. Unfortunately, he does not. Therefore, he is reduced to a sort of agnostic position: whether or not the prohibition against blackmail is just depends upon context, and there is no right or wrong context from which anyone can draw any definitive conclusion.

This perspective is buttressed with what would otherwise appear as a large concession to the case for legalization. Hardin states: "The problem with blackmail in the law is that virtually identical actions can be blackmail in one instance and not in the other. We cannot simply read from the facts of the cases that one was wrong and the other right."¹⁴ But if this is so, then the

really belong to the blackmailee, and are in effect stolen from him. *See generally* James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984); James Lindgren, *More Blackmail Ink: A Critique of Blackmail, Inc., Epstein's Theory of Blackmail*, 16 CONN. L. REV. 909 (1984); James Lindgren, *In Defense of Keeping Blackmail a Crime: Responding to Block and Gordon*, 20 LOY. L.A. L. REV. 35 (1996); James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597 (1989); James Lindgren, *Kept in the Dark: Owen's View of Blackmail*, 21 CONN. L. REV. 749 (1989); James Lindgren, *Secret Rights: A Comment on Campbell's Theory of Blackmail*, 21 CONN. L. REV. 407 (1989); James Lindgren, *Blackmail: An Afterward*, 141 U. PA. L. REV. 1975 (1993); James Lindgren, *The Theory, History, and Practice of Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993). *But see The Case for Decriminalizing Blackmail: A Reply to Lindgren and Campbell*, *supra* note 3, at 225; *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, *supra* note 3; Sydney W. DeLong, *Blackmailers, Bribe-takers, and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849 (1993).

10. There is all the world of difference between these two situations. This is a point that managed to elude the jury during the "extortion" case where Autumn Jackson sued Bill Cosby. *See* U.S. v. Jackson, 986 F. Supp. 829 (S.D.N.Y. 1997).

11. Hardin, *supra* note 2, at 1789.

12. *Id.* at 1791.

13. *Id.* at 1816.

14. *Id.* at 1789.

blackmail enactment is incompatible with the "rule of law."¹⁵ It is like a poker game, where one player makes up the rules as he goes along. Surely, if this is so, it is a good and sufficient reason for repeal.

Hardin next moves on to the subject of plea bargaining. The district attorney offers a lighter sentence to the accused than he would obtain were he to be found guilty. Plea bargaining, it would appear, is yet another case in point for agnosticism:

To decide whether plea bargaining is good under some moral theory or principle requires assessment of its general effects, especially its broad systematic effects. We cannot decide the issue simply from consideration of a particular case, in which plea bargaining is not inherently either right or wrong. But it is now legally accepted in many jurisdictions. *The difference between pleas [sic] bargaining when it is legal and when it is illegal is conventional. Illegal plea bargaining might count as blackmail. Legal plea bargaining would not.*¹⁶

Strictly speaking, plea bargaining is indistinguishable from blackmail. In both cases, a valuable consideration is demanded, under the threat of doing something entirely licit, something that everyone would agree is legitimate if it occurred in any other context. For example, money is usually the valuable consideration demanded under blackmail and the threat is to engage in entirely legal gossip. In the case of plea bargaining, the demand is typically that the accused agree to serve a reduced sentence from what a guilty finding would require, and the threat is to hold a trial where the accused risks a longer sentence. Anyone, at any time, whether prosecutor or not, can legitimately ask anyone else to voluntarily serve a term in jail. Therefore, when the prosecutor asks that of the accused, he commits no crime. On the other hand, the same applies to an accusation of criminal behavior. Anyone, no matter what his status, can make an accusation of criminal behavior. It is part and parcel of free speech.¹⁷ Therefore, when the prosecutor threatens the accused with a trial, he commits no crime. And since two legal whites, even when combined into a complex act consisting of both of them, cannot be turned into a legal black, plea bargaining is a licit act. Therefore, both plea bargaining and blackmail ought to be legal.

15. See FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 397-411 (1960) (defending the rule of law as a sufficient condition for legitimacy of the legal system); Ronald Hamowy, *Law and Liberal Society: F. A. Hayek's Constitution of Liberty*, 2 J. LIBERTARIAN STUD. 287 (1978); *But see generally* THE ETHICS OF LIBERTY, *supra* note 3 (maintaining that the rule of law is necessary but not sufficient).

16. Hardin, *supra* note 2, at 1791 (emphasis added).

17. The point here is that in the free society the prosecutor has no more rights, and certainly no fewer, than anyone else.

Hardin notes that Lindgren would nevertheless distinguish between these two cases, based on his "chip" ownership theory.¹⁸ Hardin's response is yet another example of his unsatisfactory refusal to take a stand. Hardin says, "[t]he chief weakness in Lindgren's claim is that he simply posits the chip argument as inherently immoral. Perhaps it is."¹⁹ Perhaps it is? One would have thought that an author with a contribution to make would have made more of an effort to come down on one side or the other of this important contentious issue.

II. INSTITUTIONAL-LEVEL ANALYSIS

Much of the discussion of blackmail is about whether there is something inherently wrong in it, as though we could infer what the law should be from looking at the characteristics of a particular case. For an institutionalist, this approach is wrong; instead, we should determine what overall result would be better and then design the law to achieve that result.²⁰

One way to characterize Hardin's view would be as a legal philosophy. Alternatively, and perhaps more accurately, this might be described as a lack of a legal philosophy. There is really no right and wrong, legal and illegal *per se*; rather, it depends upon "better results," but these are never specified. And this is only the beginning of the problem. Suppose that the good results *were* specified, e.g., they consisted of the maximization of wealth.²¹ Anything that led to maximization of wealth would be legal, and any activity which led in another direction would be illegal. This would imply compulsory cloning of Bill Gates and the prohibition of vacations, at least those in excess of the time necessary to maximize production. By taking up the "institutionalist" cudgels, and then failing to specify any criterion of "better," Hardin is safe from such criticism,²² but only because he adds nothing to our considerations concerning

18. See *Unraveling the Paradox of Blackmail*, *supra* note 9, at 717.

19. Hardin, *supra* note 2, at 1792.

20. *Id.*

21. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); Steven Shavell, *An Economic Analysis of Threats and Their Legality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877 (1993); Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905 (1993); Ginsburg & Shtetman, *supra* note 9, at 1849-1875 (characterizing the law in general, and certainly as applied to blackmail prohibition, in an attempt to maximize wealth); *But see* Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639 (1993); Block and Gordon, *supra* note 9, at 37-54; Delong, *supra* note 9, at 1663-93; Hardin, *supra* note 2, at 1792-95.

22. Strangely, Hardin himself later offers a blistering criticism of another blackmail analyst, which could be used against himself in the present context. "Richard Posner says blackmail . . . has no social product and should therefore be criminalized. This is a very odd conclusion. Much of what I do has no social product (for instance, I consume, I waste time), but surely it should not be criminalized." Hardin,

the legal status of blackmail, or indeed, of any law. With regard to plea bargaining, for example, Hardin once again raises the issue, but continues to decline to vouchsafe us an opinion as to its legitimacy.²³

In contrast, the libertarian philosophy which underlies my own analysis of blackmail has clear implications for plea bargaining.²⁴ In the philosophy of liberty, a man may do whatever he wishes with his person and legitimately owned property as long as he respects the same rights of all other people. For blackmail, since it is not a violation of rights to ask people for money, nor to tell secrets honestly acquired, it would not be illegal to combine these two righteous acts. For plea bargaining, since there is no positive obligation for a district attorney to prosecute all possible cases, he may offer a lesser punishment to a person he strongly suspects to be guilty in order to avoid the risk of an acquittal.²⁵

Hardin launches another half-hearted attack at blackmail prohibition with the following volley: "Any claim to outlaw blackmail might seem weak if at the same time the sale of embarrassing information on another to the press remains legal."²⁶ This is really a devastating blow insofar as no advocate of outlawry has even attempted to rein in press freedom on so-called privacy grounds.²⁷ The attempt to do so would involve an embarrassing *reductio ad*

supra note 2, at 1806.

23. See *id.* at 1793.

24. See generally MURRAY N. ROTHBARD, FOR A NEW LIBERTY (1978); THE ETHICS OF LIBERTY, *supra* note 3; HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993); BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990); Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, J. LIBERTARIAN STUD. 1 (1989); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); LYSANDER SPOONER, NO TREASON 1870 (1966); DAVID FRIEDMAN, THE MACHINERY OF FREEDOM: GUIDE TO RADICAL CAPITALISM (2nd ed. 1989); Tibor Machan, *Law, Justice, and Natural Rights*, 14 W. ONTARIO L. REV. 119 (1975); TIBOR MACHAN, INDIVIDUALS AND THEIR RIGHTS (1989); Walter Block, *Libertarianism vs. Libertinism*, 11 J. LIBERTARIAN STUD. 117 (1994).

25. Further, the whole enterprise must take place in the context of the libertarian legal code. That is, it must be a real crime that the suspect is accused of, one that involves a violation of another person or his property, not a victimless one. See generally THOMAS SZASZ, CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS AND PUSHERS (1985); MARK THORTON, THE ECONOMICS OF PROHIBITION (1991); DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL (Ron Hamowy ed., Lexington Books 1987); THE CRISIS IN DRUG PROHIBITION (David Boaz ed., Cato Institute 1990). As well, the punishment must "fit" the crime, e.g., be proportionate to it. See generally ASSESSING THE CRIMINAL (Randy Barnett & John Hagel III eds., Ballinger Publishing Co. 1977); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998).

26. Hardin, *supra* note 2, at 1793. But given the ambivalence of his underlying legal philosophy, I view with suspicion his seeming advocacy of the legalization of blackmail.

27.

But is there really such a right to privacy? How can there be? How can there be a right to prevent Smith by force from disseminating knowledge which he possesses? Surely there can be no such right. Smith owns his own body, and therefore has the property right to own the knowledge he has inside his head, including his knowledge

absurdum. Hardin says, insightfully: "We might therefore outlaw every offer to sell information to someone likely to take offense or be harmed by its publication"28

III. THE COMPLEX NATURE OF INTERACTION

In an attempt to elevate his focus on "outcomes" or "consequences," Hardin contrives an example he regards as "superficial." He states:

It may be perfectly legal to own a firearm and even to fire it. It may nevertheless be illegal to kill you with it. My actions of acquiring and then firing a gun were both legitimate. How can it be illegitimate that you happen to be dead as a result?29

The fallacy here is due to a mis-specification of the case, not to any need to consult aftermaths or results.³⁰ The second action was not merely the totally legitimate one of firing a gun, but rather firing a gun *at* an innocent person and killing him. On the ordinary libertarian maxim of "non-invasiveness," the judge hardly needs to hear the results of such an action. It is invasive on that ground alone, even if the bullet misses or just grazes but does not kill the victim. And it certainly violates his rights if he dies.

We need not concern ourselves with Hardin's obfuscation concerning paradoxes like flipping light switches, arrays and strategies.³¹ Nor even with his very interesting point about it being "right to threaten something, which if carried out, would be wrong," such as to threaten to drop a nuclear bomb on innocent people, in order to preserve the peace.³² That would take us too far afield. We can content ourselves with agreeing with Hardin who asks "why one cannot threaten to do what one has the full legal right to do (such as pass

about Jones. And therefore he has the corollary right to print and disseminate that knowledge. In short, . . . *there is no such thing as a right to privacy except the right to protect one's property from invasion. The only right "to privacy" is the right to protect one's property from being invaded by someone else. In brief, no one has the right to burgle someone else's home, or to wiretap someone's phone lines. Wiretapping is properly a crime not because of some vague and woolly "invasion of a 'right to privacy,'" but because it is an invasion of the property right of the person being wiretapped.*

THE ETHICS OF LIBERTY, *supra* note 3, at 121-22.

28. Hardin, *supra* note 2, at 1794.

29. *Id.* at 1795.

30. Without a particular theory, such as the libertarian axiom of non-aggression against non-aggressors, how are the results, outcomes, ends or consequences to be evaluated?

31. See Hardin, *supra* note 2, at 1796.

32. *Id.*

relevant information to the press[?]"³³ Here, Hardin puts his finger precisely on the matter at issue. If a person can threaten things he has no right to do (drop the bomb), he can certainly threaten things that are fully legal (talk to the press). Therefore, reason would presumably lead us to accepting the legality of refraining from doing what we have a right to do (spilling the beans), even for a price (blackmail).

IV. STRATEGIC STRUCTURE OF EXCHANGE BLACKMAIL

Next Hardin places blackmail in the context of game theory.³⁴ Hardin "refers to the person blackmailed not as the victim but as the target of the blackmail . . . in order to avoid the air of persuasive moral definition."³⁵ He very insightfully notes that "law can enter to stabilize the blackmail interaction . . . [and] it can be used to enforce any deals the blackmailer and the target make, thereby permitting them to secure a mutually beneficial outcome."³⁶ So why should we prohibit this commercial arrangement which ends up providing for "mutual good?" Hardin gets into trouble mainly because there is no real justification for this conclusion; all of his attempted explanations must of necessity be erroneous. This essay now considers a few of them.

1. *"Perhaps blackmail is wrong primarily because we have de facto chosen not to back it with enforcement of contracts for blackmail."*³⁷

This is the lowest form of legal positivism. Is the law justified merely because of the way a legislature enacted it? Using this rationale one could defend any law in Nazi Germany or under Soviet Communism. This opens up the question as to why our society has chosen to make such contracts unenforceable, but it gives no answer. Worse, it is factually mistaken. At present, it is not true that blackmail contracts are only unenforceable; worse, they are also illegal.

33. *Id.*

34. *See id.* at 1798.

35. *Id.* I too have refused to characterize the person blackmailed as a victim. This is because such an individual is actually the beneficiary of the blackmailer, at least when we compare his welfare to the situation where his secret is in the hands of a compulsive gossip. Instead, I have used the morally neutral term "blackmailee." But Hardin's "target" will do quite nicely. *See generally A Libertarian Theory of Blackmail, supra note 3; Toward a Libertarian Theory of Blackmail, supra note 3; Blackmail: Reply to Altman, supra note 3; The Second Paradox of Blackmail, supra note 3; Let's Legalize Blackmail, supra note 3.*

36. Hardin, *supra* note 2, at 1800.

37. *Id.*

2. *The target of legal blackmail "might still view the general situation as radically unstable, because one blackmailer might soon be followed by others, each fully in the legal right. The payoff to one blackmailer would then be a sunk cost when the second blackmailer's offer is considered."*³⁸

This, is also highly problematic. What is wrong, with paying off not just one blackmailer, but an entire series of them? After all, if the first blackmailer provides a service like keeping silent, so do all the others. This is akin to banning any other activity where a succession of vendors provide a service. For example, on this ground we could compel shopping at a supermarket and outlaw patronizing a whole series of separate shops: butcher, baker, and candlestick maker, to say nothing of the green grocer and hardware store. For "one [merchant] might soon be followed by others, each fully in the legal right."³⁹ Moreover, "the payoff to one [retailer] would then be a sunk cost when the second [one]'s offer is considered."⁴⁰

There is the fact that so many blackmailers tend to obviate one another. Like "too many cooks spoiling the broth," too many blackmailers ruin things for each other as well. For once a secret is in the hands of several, to say nothing of dozens of people, it is almost by definition no longer a secret. Why should the target or blackmailee be willing to pay off an entire horde of people to keep quiet if the secret is out in any case?

3. *"Perhaps this grievous instability in the blackmail system, even when it is restricted to exchange blackmail,⁴¹ makes it ex ante desirable to have the law prohibit blackmail."*⁴²

This will not do either. Why is instability grievous? Annoying? Perhaps. Although perhaps not, when we reflect that the only true "stability" is death. Further, if we can outlaw something because it is unstable, blackmail is the merest tip of the iceberg. The markets for oil and agricultural products are traditionally volatile, to say nothing of the stock and commodities market. Not too many people pay attention to it, but the market for used bubble gum baseball cards is a veritable roller coaster. Should we outlaw them all on this ground? Hardly.

38. *Id.*

39. *Id.* at 1800.

40. *Id.*

41. We still have not been shown that there is any other kind of blackmail, although Hardin relies heavily on this distinction.

42. Hardin, *supra* note 2, at 1800.

4. "Perhaps there is disagreement on the rightness of keeping certain information private."⁴³

Strictly speaking, this cannot be true. A mere disagreement over anything could hardly account for the outlawry of an act such as blackmail. Perhaps what Hardin meant to say was that in this disagreement, one of the parties is correct, and that this view supports the legal status quo. For example, Gorr's view is that privacy rights ideally should legally preclude all gossip.⁴⁴ Hardin properly rejects this, but only on pragmatic grounds.⁴⁵

However, in so doing he mistakenly buys into the relevance of the distinction between public and non-public figures regarding libel.⁴⁶ In this perspective, although full free speech rights are denied in both cases, there is a higher threshold for proving tortious slander or libel against non-public figures. This, however, seems highly contrived. Where does this distinction come from? Nobles and commoners, at least in the just society, have identical rights. Hardin correctly places himself in the camp which demands of an "assertion [that it] would have to be inferred from more general principles," but he leaves the New York Times case⁴⁷ hanging in the air as it were, an unprincipled, artificial, fabricated, legal Frankenstein.⁴⁸

Fortunately, there is a principle upon the basis of which not only libel but also blackmail law can be based. This is called private property rights.⁴⁹ According to this doctrine, legitimate law consists of, and of nothing but, the protection of private property rights. The most important private property right, of course, is our ownership over ourselves. This eliminates enslavement, kidnaping, rape, assault and battery, etc., as legitimate acts right off the bat. But there is more. Based on the Lockean homesteading principle,⁵⁰ property rights in animals, inanimate resources and land can be obtained by "mixing one's labor" with them. Then, when one owns them, he can trade them or their products with the legitimately owned property of others.⁵¹

43. *Id.*

44. See Michael Gorr, *Nozick's Argument Against Blackmail*, 58 PERSONALIST 187, 190 (1977); Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. PUB. AFF. 43, 44 (1992).

45. See Hardin, *supra* note 2, at 1801.

46. See *id.* at 1801 n.28.

47. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

48. Hardin, *supra* note 2, at 1802.

49. See generally HOPPE, *supra* note 24.

50. See generally JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* (J.W. Gough ed., Basil Blackwell Oxford 1948); JOHN LOCKE, *An Essay Concerning the True Origin, Extent and End of Civil Government*, in *TWO TREATISES OF GOVERNMENT* 27-28 (Peter Laslett ed., Cambridge Univ. Press 1960).

51. See generally, ROBERT NOZICK, *ANARCHY STATE AND UTOPIA* (1974) (calling trading products a legitimate property transfer).

How do libel and blackmail fit in to all of this? The libertarian law predicated on property rights states that the only crime shall be to violate them, whether through threat, fraud, or physical invasion such as kidnaping or theft. Since neither the libeller nor blackmailer are guilty of any such uninvited border crossing, their activities should be legalized. We have already seen that blackmail, consisting of two separate legal "whites," cannot properly be construed as a legal "black." This is true even when the two separate activities are combined.

The private property rights basis of libel and slander legalization is equally straightforward. The typical complaint is that libel is akin to stealing, but instead of the theft of a jacket or a wallet, it concerns a man's reputation. But a momentary reflection will show that this is not so. A reputation cannot be owned by the person to whom it refers since it consists of the thoughts of other people,⁵² and a man cannot own other people's thoughts.⁵³ For example, I hereby libel John Smith by saying, "John Smith is a dodo bird." The argument for preventing me from this act is that on the basis of my say so⁵⁴ people will now avoid Mr. Smith. For example, no one will employ him or befriend him.⁵⁵ But the reason for this sudden renunciation is my doing only in the first instance. Suppose people do not believe my allegation. Then, Smith's reputation will remain intact despite my best efforts to undermine it. The only way I can succeed in my nefarious doings is by convincing others that my claims about him are correct. But if I do succeed, the changes I will have wrought will be in terms of the thought patterns of my audience. Since each of us owns his own thinking or thought patterns, and this is precisely what forms Smith's (or anyone else's) reputation, Smith paradoxically cannot own even a part of his own reputation because no part of it consists of what Smith thinks of himself. If Smith cannot own his reputation, when I take it away from him I cannot have done anything akin to stealing his wallet.

This private property or libertarian theory of law is not that far removed from what Hardin calls "mutual advantage." Apart from self ownership and the initial acquisition of virgin territory into the capitalist nexus, all further interaction is on the basis of voluntary, mutual agreement, based on some sort of advantage, whether monetary or psychic. When I buy a newspaper for \$1, or work for an employer for \$50,000 per year, both parties to such trades expect them to be of "mutual advantage." If they did not, they would hardly

52. DEFENDING THE UNDEFENDABLE, *supra* note 3, at 59-62.

53. Unless he has, somehow, purchased them. See generally Walter Block, *Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Kinsella and Epstein*, J. LIBERTARIAN STUD. (forthcoming); Walter Block, *Market Inalienability Once Again: Reply to Radin*, THOMAS JEFFERSON L. REV. (forthcoming).

54. Well, assume I am a *New York Times* editorial writer.

55. Since, as everyone knows, we are all in thrall to the *New York Times*.

agree to take part in them.⁵⁶ Since laissez-faire capitalism, the only system under which both libel and blackmail would be legal, is just a name for the concatenation of all such events, one would expect Hardin to embrace this system. He does not. This suggests that he does not take seriously his advocacy of "mutual advantage," or at least that he is unwilling or unable to pursue this perspective to its logical conclusion.

V. BLACKMAIL FOR MUTUAL ADVANTAGE

Hardin characterizes as a "quick conclusion" that the principle of "mutual advantage . . . might seem to allow [for the legalization of] exchange blackmail because such blackmail is to the mutual advantage of the parties to it."⁵⁷ Why is this wrong? "Such blackmail would, *ex ante*, make people generally worse off even though it would, in a particular application, make the two parties to it better off."⁵⁸ Here, he has in mind the effects on third parties, or negative externalities.⁵⁹ Even on the assumption that these are not operational, Hardin attempts to show via his theoretic game model, that blackmail can still fail to be mutually advantageous.

And why is this? Hardin informs us that in Game II, which admits to payoffs by the newspaper as well as the blackmailee, "[i]f 4,1 is the status quo ante, then movement to 2,2 is not Pareto efficient, because that move reduces the welfare of the target."⁶⁰ It will be remembered that 4,1 means that the blackmailer suppresses the embarrassing information, while the target does not pay. Of course blackmail, *i.e.*, movement to 2,2, worsens the situation of the target, under these assumptions, for under this so called status quo ante the blackmailer has suppressed the information. This is exactly what the target wants, but the blackmailer has not yet been paid for this service of providing silence.

GAME II: BLACKMAIL WITH PAYMENT FOR PUBLICATION⁶¹

	Target	Target
Blackmailer	Doesn't Pay	Pays

56. In addition to barter, trade and sales or rentals of human or physical capital for money, there is also gift giving, inheritance, gambling, etc. These are all ways in which resources may legitimately be transferred from one person to another under this system.

57. Hardin, *supra* note 2, at 1803.

58. *Id.*

59. See DeLong *supra* note 9, at 1663-1693 (offering a more developed critique of legalization along these lines); *But see The Second Paradox of Blackmail, supra* note 3.

60. Hardin, *supra* note 2, at 1803.

61. See *id.* at 1799.

Gives info to press	3,3	1,4
Suppresses info	4,1	2,2

(1 is the best outcome, 4 the worst; the first number in each cell applies to the row player, the blackmailer, and the second to the column or target player.)

Any trade could be made to look non-Pareto optimal on this basis. For example, consider the initial position where the grocer gives me a quart of milk, and I have not paid for it. Now, he demands that I pay for it as the price of keeping it. But when he does this he worsens my position compared to the scenario with which we opened this exercise. Therefore trade, all trade, is non-Pareto optimal.

Hardin correctly sees that 4,1, the situation where the blackmailer keeps quiet, is untenable. "[T]he blackmailer is likely to release the information eventually,"⁶² presumably if he is not paid. This anyone can see. But Hardin is to be congratulated for dismissing 1,4, the scenario where the blackmailee pays and yet is double-crossed by the blackmailer, as well. This is unlikely, because when the blackmailer does this he will garner a bad reputation. Why should anyone trust him and pay him off to keep quiet when he is a blabbermouth? Where Hardin goes astray, however, is that he does not realize that blackmail legalization *strengthens* this tendency. Under these conditions, if the blackmailer reneges he can also be subjected to a lawsuit as well as losing his reputation or "good will" capital.⁶³

Next, Hardin launches into a spirited and very successful attack on Lindgren's defense of the outlawry of blackmail. This is based on the claim that the blackmailer uses information and threats, i.e., "chips," which properly belong to other people. Hardin likens the blackmailer to the agent or intermediary, who knows that A and B, unbeknownst to each other, would gain from a business association with one another. He says: "I can make a great profit for myself by getting them to deal through me as an intermediary, perhaps even while keeping A and B ignorant of each other. . . . In Lindgren's vocabulary, I profit from the use of A's and B's chips."⁶⁴

But this is a distinction without a difference. Hardin states:

Unlike a threat of pure harm that does not directly benefit the person causing the harm, blackmail may be a genuine case of exchange. The blackmailer may have the prospect of a significant reward for revealing her information to the press. She merely offers

62. *Id.* at 1804.

63. Although, to be fair to the other side of the argument, under prohibition the blackmailer faces a jail sentence.

64. Hardin, *supra* note 2, at 1805.

to sell it to someone who values keeping the information private more than the press values its publication, and who therefore might pay more for it than the press would.⁶⁵

In other words, Game I, blackmail with no payment for publication, should be illegal, but Game II, blackmail with payment for publication should be decriminalized. Why should it matter so much, let alone at all, whether the blackmailer has an alternative audience for his wares? There is "mutual advantage" in *either* instance. Is it not enough that while we are in Game I or II, there are in both cases two licit and mutually beneficial activities, the request for money and the offer of silence, which all concede are separately legal?⁶⁶ Certainly, the blackmailer will gain from releasing the information if not paid to refrain, whether or not there is a newspaper payment.⁶⁷ Why, if there were no benefit, would he do any such thing? Hardin tries to avoid this logical implication of all human action with the weasel word "directly" in the phrase "does not directly benefit."⁶⁸ What difference does it make whether the benefit is direct or not? Why should the law turn on such an irrelevancy?⁶⁹

Although Hardin refuses to allow legalized blackmail for Game I, at least when it comes to Game II he is nothing short of magnificent in his criticism of the so called "economic" analysts of this subject:

A newspaper that pays a reporter to dig up newsworthy material on someone likely does so in order to increase circulation and advertising revenue. One might object to what the newspaper produces but it would be silly to say it is unproductive. By analogy, a blackmailer is essentially a free agent who sells the same material to that newspaper, and so also is productive.⁷⁰

This insight notwithstanding, Hardin advocates legalization, if even only under the following narrow circumstances: "if evidential or strategic considerations made it very difficult to identify exchange [e.g., Game II] blackmail and to exempt it from coverage."⁷¹ In effect, Hardin is saying that

65. *Id.* at 1805.

66. For a description of Game I, see *id.* at 1799.

67. See generally LUDWIG VON MISES, HUMAN ACTION (1966).

68. Hardin, *supra* note 2, at 1805. What Hardin means is that the balked blackmailer will not financially gain from broadcasting his target's secrets in the event of non-payment. But why should this be the *sine qua non* of the law on blackmail?

69. See, e.g., Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655 (1988); Ginsburg & Shechtman, *supra* note 9, at 1849-75; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 43 (1975).

70. Hardin, *supra* note 2, at 1806.

71. *Id.*

rape and seduction are very different, but, if it is difficult to separate them, let us prohibit both. In my view, exchange and all other types of blackmail⁷² are legally the same; therefore, this issue does not arise. But even if they were somehow different, the burden of proof is always on the plaintiff. Thus, it is incompatible with libertarianism to ban acts which are not invasive, even if they are difficult to distinguish from ones which are.

Every once in a while Hardin sounds just like a libertarian on the blackmail issue. Consider the following:

Suppose I know how you succeed so remarkably at marketing some product, and suppose I can give this legally unprotected knowledge to a competitive firm. I make an offer to you that sounds like blackmail. You put me on a generous retainer as an "advisor" and give me attractive stock options in your firm, and I keep my knowledge secret. If your competitor adopts your technique, you are immediately to fire me as advisor and, without action at all on your part, my stock options become far less attractive as your firm loses market share. In this trade-secret case, we might think there is nothing wrong with my actions. I have the legal right to go to your competitor and to negotiate favorable terms with her. All I do is give you a chance to salvage your interests by matching or topping the likely price your competitor would pay.⁷³

Magnificent! A trenchant defense for the legalization of blackmail. The only problem is that this insightful piece of analysis is logically incompatible with Hardin's "mutual advantage theory." To reprise his views of only a few pages ago, Hardin is on record as maintaining that blackmail which consists of "a threat of pure harm that does not directly benefit the person causing the harm" should not be legalized.⁷⁴ But is this not true of the trade secret holder? Surely it is. He derives no direct benefit from making the competitor aware of the marketing skills of the target firm. The only benefit he obtains is money, filthy lucre, to remain silent.

I admire Hardin's insights in the trade secret case. They furnish a powerful argument for legalization. But to show that he really means it, Hardin would have to renounce the philosophy which he mistakenly thinks undergirds this point. For that is not one which unreservedly advocates the lawfulness of blackmail of any type or variety.

Hardin's comments about murder and dueling also present difficulties. He thinks that because at one time "killing in a duel" was not considered

72. But not extortion, the threat of something which is a (property) rights violation.

73. Hardin, *supra* note 2, at 1807-08.

74. *Id.* at 1805.

murder, but at present it is, the law against unjust homicide "requires a relatively detailed moral theory or principle."⁷⁵ I maintain that nothing of the sort is true. Rather, this is an example of legal positivism⁷⁶ run amuck: whatever the legislators say at any given time is proper law, and if they contradict themselves over time or even reverse fields once again, all that is left for the scholar is the sociological explanation of "how a particular law came to be what it is." My claim to the contrary is that there is such a thing as just law, that it is based on unchanging property rights, and sometimes legislators act in accordance with it and sometimes they do not.

Dueling is certainly a case in point. Under libertarianism, if two parties agree to fight each other, for whatever reason, the loser cannot claim to be the victim of violence. When the loser cannot claim this, then the winner cannot be considered guilty of murder if the battle ends in death, or of assault and battery if it ends with some lesser injury. If those who would prohibit dueling were logically consistent, they would also have to ban boxing, martial arts, football, rugby, soccer, handball, and even baseball.

Take boxing, for example, as the closest analogy to a duel with swords or guns. Boxers A and B voluntarily enter the ring. The latter leaves on his shield, headed for the morgue. What is the difference between this and the old fashioned duel to the death with pistol or blade? Only the purpose for which the skirmish is organized. In a previous century it was honor, now it is money. Surely, this does not constitute a relevant difference for the law of murder. Or take any other athletic interaction where injury or even death occurs. What is the defense of the "killer" in any of these cases? Surely, it is that the deceased entered the fray knowingly and willingly.⁷⁷ But no less can be said on behalf of the victorious side in a duel.⁷⁸

75. *Id.* at 1808.

76. Yes, "conceptions of the right and the good change over time." *Id.* at 1808. But, contrary to Hardin, the right and the good themselves are immutably based on the libertarian axiom of non-aggression.

77. Or, in the cases of children who die or are injured in sports, with their parent's permission.

78. If the king or emperor had wanted to eliminate dueling, he could have done so not by prohibitive legislation, but in a manner compatible with libertarianism. All he need have done was set an example announcing that he would not fight in any duel and that the institution had "burdened the aristocratic class." Hardin, *supra* note 2, at 1808. One objection is that had he done so, his own position would have been rendered precarious. But this cannot be counted as an argument against the libertarian position, for the passage of this legislation would have had the same effect. Alternatively, he could have expressed it as his opinion that one of the practices of dueling should be broadened. In the good old days, the person who was challenged could choose the weapons; but this was traditionally limited to gun or cutlass. All that need be done was extend this, a bit, to allow whichever weapon the challenged person wished: chess, tiddly winks, jacks, charades, poetry reading, whatever. Since there is bound to be something in which the defense excels over the offense, there would be precious few dueling challenges laid down under such a system.

VI. BLACKMAIL IN THE PUBLIC INTEREST

Hardin offers yet another sterling defense of blackmail legalization: the Justice Department's blackmail of then Vice President Agnew. They would not prosecute him for taking bribes from contractors when he was governor of Maryland, if he resigned his present office. (The Department feared he would have become President had Nixon been impeached.) Hardin states, "[o]ne might conclude that it was blackmail but nevertheless a morally correct action."⁷⁹ But why the "nevertheless?" Why can it not be blackmail *and* "morally correct?" For Hardin, it cannot be because, despite his frequent defenses of blackmail legalization, at bottom he has bought into the notion that there is something intrinsically noxious about such contracts.

This is no mere slip of the pen for Hardin, for he indicates the same sentiment a second time. He says of the Agnew deal, "[w]as it blackmail? Were the prosecutors not simply acting in the public interest . . . ?"⁸⁰ Why can it not be *both* blackmail *and* an act in the public interest? Presumably it cannot be if blackmail is intrinsically illegal. But we have been furnished with no reasons in defense of this supposition.

Hardin then uses the Sol Wachtler case to the same end. Wachtler was the Chief Judge of the New York State Court of Appeals and "was involved in an ugly attempt at blackmail coupled with threats of kidnaping."⁸¹ The U.S. Attorney's Office threatened to bring suit against him unless he resigned his post.⁸² Hardin states, "[p]erhaps there was pleasing irony in the potential use of blackmail to punish a blackmailer."⁸³ But there are two problems here. First, this again illustrates that Hardin sees intrinsic lawlessness in blackmail. Second, our author fails to distinguish blackmail and extortion. If Wachtler threatened kidnaping, he removed himself from the realm of the former and entered that of the latter. No one has a right to kidnap anyone else. To threaten what one has no right to do must therefore be a crime. In contrast, one has a right to prosecute a judge for wrongdoing. What the U.S. Attorney did then, in sharp contrast, was to commit blackmail, not extortion.

79. Hardin, *supra* note 2, at 1810.

80. *Id.*

81. *Id.* at 1811.

82. *See id.*

83. *Id.*

VII. CAVEATS AND OTHER MORALITIES

In this section Hardin compounds his inability or refusal to distinguish between blackmail and extortion with a misplaced reliance on the property rights analysis of Coase.⁸⁴ Hardin uses the example of a person "aim[ing] missiles with high explosives at [his] neighbor's home" and goes so far as to characterize this as an attempt "to extort more from our joint production than merely the maximal amount of profits."⁸⁵ Thus, Hardin accurately describes extortion; he even calls it extortion. Yet he adamantly refuses to distinguish this from blackmail.

As for Coase, this is neither the time nor the place for a full scale investigation of his denigration of property rights. Suffice it to say, for Coase there really is no such thing as property rights, at least not as they are commonly understood.⁸⁶ In the world view of this University of Chicago economist, things are not owned by right or on the basis of past legitimate acquisition, e.g., on the basis of homesteading, trade, or purchase. On the contrary, things are owned by A vis-a-vis B, and only on the most temporary of bases because a judge would theoretically rule that A's use of the resources were and would be more valuable than B's. When and if the judge comes to believe that B, not A places a higher value on it, the property would then be taken away from A and placed in the hands of B. In other words, nobody's life or property is secure when the Coasean judge is presiding.⁸⁷

Hardin's read on Coase is the exact opposite of the truth. Hardin maintains that "the Coasean system has broken down" when the "missiles with high explosives [are aimed] at [his] neighbor's home . . . since we are no

84. Ronald Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960); *The 1987 McCorkle Lecture: Blackmail*, *supra* note 68 at 655-676.

85. Hardin, *supra* note 2, at 1811.

86. See generally, Walter Block, *Coase and Demsetz on Private Property Rights*, 1 LIBERTARIAN STUD. 111 (1997); Walter Block, *Ethics, Efficiency, Coasian Property Rights and Psychic Income: A Reply to Harold Demsetz*, 8 REV. AUSTRIAN ECON. 61 (1995); Walter Block, *O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner*, 3 EUR J.L. ECON. 265 (1996); Walter Block, *Private Property Rights, Erroneous Interpretations, Morality and Economics: Reply to Demsetz*, Q. J. AUSTRIAN ECON. (forthcoming 1999); Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12 HAMLIN L. REV. 229 (1989); ROY E. CORDATO, WELFARE ECONOMICS AND EXTERNALITIES IN AN OPEN-ENDED UNIVERSE: A MODERN AUSTRIAN PERSPECTIVE (1992); ELISABETH KRECKE, *Law and the Market Order: An Austrian Critique of the Economic Analysis of Law* in COMMENTARIES ON LAW AND ECONOMICS 86-108 (Robert W. McGee ed., 1997); GARY NORTH, THE COASE THEOREM (1992); MURRAY N. ROTHBARD, *Law, Property Rights and Air Pollution* in ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION 233-279 (Walter Block ed., 1979) (critiquing Coasean socialism).

87. As we have seen, a man's life is "merely" his most important piece of property rights. The same analysis critical of Coase applies whether we are discussing an inanimate object over which A and B are contending or the very lives of one of them.

longer in a world of consensual exchange and production."⁸⁸ But the Coasean world is not one of "consensual exchange and production." The very reverse is the case. The Coasean world is like the law of the jungle. Anyone can at any time seize the property of another person, as long as he can convince a judge that he values it more than the present owner. It is simply not true that "[a]n actor threatening a harm who derives no direct benefit from its imposition subverts social cost analysis because the Coasean framework is grounded in voluntarist assumptions."⁸⁹ This is the very opposite of the truth. As is the claim "[Coase's] whole analysis of the problem of social cost takes place, after all, in the context of a given set of rights assignments that are presumably backed by adequate state power to secure them."⁹⁰ For Coase, power is to be unleashed to *undermine* extant property rights.

If Hardin on Coase is faulty, the same applies to his analysis of the nuclear threat. Again, Hardin correctly identifies this as "violent extortion," but in the very next sentence characterizes this as "nuclear blackmail."⁹¹ Whatever it is called, the same nomenclature should be applied to mutual assured destruction (MAD), notwithstanding Hardin. He refuses to do so on the ground that MAD had "good" effects, but so can real extortion, like outright robbery. For example, Jean Valjean in *Les Misérables* stole a loaf of bread in order to feed his family.⁹² In the movie *Dr. Strangelove*, the hero had to shoot a non-threatening Coca-Cola machine in order to get change to make a phone call so he could avert a nuclear war.⁹³ Surely, for the utilitarian; or "mutual advantage" philosopher such as Hardin, "good" ends can sometimes be achieved through "bad" means.

Next, Hardin resorts to economically impermissible, interpersonal comparisons of utility to account for the law against reckless endangerment.⁹⁴ He does so explicitly on the basis of his "mutual advantage argument."⁹⁵ But there are no measurements of happiness ("utils"). Even if there were, there is still no way to compare the happiness of different people. If somehow this could be accomplished, we would then open ourselves up to the depredations

88. Hardin, *supra* note 2, at 1811-12.

89. *Id.*

90. *Id.*

91. *Id.* at 1813. This has nothing to do with the lack of an "overarching international government" however. Probably, there will come the day when "private" gangsters issue nuclear threats. This is already a staple of adventure movies. Can reality be far behind?

92. See VICTOR HUGO, *LES MISÉRABLES* 126 (Little, Brown, & Co. 1907).

93. See *DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB* (Hawk Films 1964).

94. See generally MURRAY N. ROTHBARD, *TOWARD A RECONSTRUCTION OF UTILITY AND WELFARE ECONOMICS* 21 (1977) (Center for Libertarian Studies Occasional Paper #3, San Francisco); LIONEL ROBBINS, *AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE* (2nd ed. 1935).

95. Hardin, *supra* note 2, at 1814.

of the "utility monster." For example, his appetite for human flesh would render laws against murder obsolete. Alternatively, we would thereby unleash a new Coasean defense against the charge of rape: "I was so desperate, so needy, and she had such low self esteem, that my pleasure in forcing her was greater than her disutility in my attack."

In the view of Hardin: "The only general argument against blackmail that can fit mutual advantage arguments must be in an institutional or ex ante form: ex ante each would prefer that blackmail be illegal because each would expect to be better off as a result."⁹⁶ Again, I part company with Hardin by 180 degrees. Both the potential blackmailer and blackmailee would prefer that blackmail be legal "because each would expect to be better off as a result."⁹⁷ Nor, as Hardin claims, is this an empirical issue. It is apodictically clear that all blackmail contracts are mutually advantageous, at least in the ex ante sense. Otherwise, blackmailers and targets would never agree to them in the first place. The expected advantage to all potential targets, which cannot possibly be overemphasized, is that they would prefer to pay the money rather than see their secret exposed. If this were not so, they would say to the blackmailer "[p]ublish and be damned."⁹⁸

Hardin is quite correct in asserting that "[w]hen Joy Silverman"⁹⁹ went to the F.B.I. about the blackmail threats she had received, she risked public exposure roughly equivalent to what the blackmailer threatened."¹⁰⁰ But with legalized blackmail, she as the target, would still have a hold over him, the blackmailer. If she paid and he reneged, he would be guilty of contract violation. If the secret were valuable to her, and why else would she have paid blackmail, then the damages for this contract violation would be severe. In contrast, when blackmail is illegal she still has a hold over her blackmailer because he is in violation of the law. The point is, her situation is not worsened by legalization.

96. *Id.* at 1814.

97. *Id.*

98. Richard Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 PA L. REV. 1817, 1839 n.43 (1993).

99. The woman being blackmailed by Sol Wachtler.

100. Hardin, *supra* note 2, at 1814.

CONCLUSION

Hardin's use of "mutual advantage morality,"¹⁰¹ the basis of his analysis of blackmail, has resulted in no clear implication for legalization. Based on this doctrine not all types of blackmail should remain outlawed. This is an unsatisfactory result given that there has been no clear moral difference adumbrated between "mutual advantage blackmail" and any other kind.

101. *Id.* at 1815.

