

A Priest Responds to the Bean Counters: Leo Katz on Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law

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LEO KATZ. *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law*. Chicago: University of Chicago Press, 1996. Pp. 293. \$29.95.

In *Ill-Gotten Gains*, a delightful book, Leo Katz explores an important philosophical fault line that runs through modern legal scholarship. Katz describes the camps arrayed along this line as the consequentialists and the deontologists. A colleague of mine, who best remains nameless, calls them the "bean counters" and the "priests." Consequentialists, or bean counters, believe that the law should maximize human happiness, human welfare, or wealth.¹ This camp includes self-avowed utilitarians, many pragmatists,² as well as many scholars who believe that the most important thing to know about the law is how it affects human behavior (that is, much of the law and society movement is in the camp of the bean counters).

It is not so easy to say what the deontologists, or priests, believe in. Katz defines his position mostly in terms of opposition to consequentialism.³

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1. More formally, a consequentialist ethic has two components: a theory of the good (e.g., human happiness) and a theory of the right that consists of maximizing that good. See Rawls 1977, 24. Rawls uses the term *teleological* to define a consequentialist theory.

2. Posner's (1995, 391–95) is a strong statement of instrumental legal pragmatism.

3. So, too, does John Rawls. Speaking of the theory of justice as fairness, Rawls observes, "By definition, then, the latter is a deontological theory, one that either does not specify the good independently from the right, or does not interpret the right as maximizing the good" (Rawls 1977, 30). Rawls defines *utilitarianism* as a teleological theory, and not as a consequen-

In legal scholarship, a deontological point of view often is associated with “rights-based” reasoning (Dworkin 1977). A deontological point of view also often is associated with the Kantian principle that it is impermissible to treat a human as a means to an end.⁴ Neither of these statements quite describes Katz’s position.⁵ He postulates a variety of norms to which he assigns moral weight, norms that he derives from the judgments people make in everyday life, literature, religion, and the law. For example, Katz concludes that giving and not taking are morally different actions, though they may have similar consequences, because people pervasively judge the two actions differently. His theory is deontological because these norms can justify different moral and legal judgments about actions that have equivalent practical consequences.⁶

A provocative aspect of this book is that it takes the battle between the bean counters and the priests to the heart of bean-counter country by arguing for a deontological point of view on issues that modern legal scholars look at almost exclusively from a consequentialist point of view. Among these are issues of tax policy. Katz will persuade few tax scholars to look at their field in a different light; indeed he acknowledges at the end of the book that “my three tax scholar friends . . . all took issue with my tax analysis” (p. 265). Most tax scholars will dismiss the book as inconsequential. Judge Posner’s review of the book—he describes it as an exercise in casuistry—suggests that pragmatists will also find it distressingly unpragmatic (Posner 1996). This is a pity. Had Katz pushed his tax scholar friends a little harder, he could have found issues on which they would have been forced to

tialist theory, because he believes “all ethical doctrines worth our attention take consequences into account in judging rightness.”

4. For an excellent essay explaining the law of blackmail in these terms, see Gordon 1993, 1758–66.

5. Katz never speaks in terms of rights. This may be because he is as much concerned with explaining moral practices that are not customarily thought of as conferring rights as he is concerned with explaining the law. For example, the last part of the book considers how honors are awarded. While we might say that someone deserves an honor, it would be odd to say that she has a right to it. Or he may not speak of rights because it is odd to say that rights are “path-dependent.” As for the Kantian principle, Katz might well endorse it (his theory tracks a necessary supplement to the Kantian principle, the doctrine of double effects; see note 7 below), but he endorses other norms as well that do not follow logically from the Kantian principle. One such norm is the moral distinction he draws between giving and taking.

6. If one wanted to quibble, then Katz’s theory could be turned into a utilitarian theory. The norms he proposes ultimately derive from human psychology. Thus, he argues that there is a moral difference between giving and taking because people feel differently about the two actions. If we assigned a value to these feelings, then that would justify treating the two actions differently on utilitarian grounds. For example, a tax break might be preferred over a subsidy—though the two programs have equivalent allocative and distributive effects—because the public at large feels less unhappy about supporting the indirect program and the recipients feel less guilty about receiving support indirectly. I think this point is a quibble because these sorts of preferences almost never are taken into account in consequentialist analysis. I know of no analysis of the welfare effects of taxing and subsidy programs that takes into account people’s different feelings about the two programs.

concede the strength of a deontological perspective. There is a lesson here for the pragmatists as well. Although Katz cannot succeed in the mission he sets for himself by vanquishing the consequentialist perspective on its “home turf,” by taking the fight across familiar lines he raises important questions about how or why those lines are drawn. A significant shortcoming in the book is that Katz does not grapple with these important questions he raises.

I. KATZ'S GENERAL ARGUMENT

Once the delightful armature of stories in the first part of *Ill-Gotten Gains* is stripped away, Katz's general argument boils down to something like this:

1. Much of law and morality is better described from a deontological point of view than a consequentialist point of view.
2. A deontological point of view is inherently path-dependent, meaning that the path taken to achieve an end often affects human judgment about the legal status and moral value of the action (pp. 56–57).

In particular, in law and morality we often distinguish between action and inaction though their consequences are the same, and we often distinguish between actions with the same consequence on the basis of whether the consequence is direct or indirect.

3. The path-dependence of law and morality creates the phenomenon of “avision.” Avision falls in the gray area between tolerated avoidance of legal and moral rules and condemned evasion (hence its name). Avision involves an actor positioning himself so that a forbidden outcome is accomplished as a by-product of a permitted act or occurs through his inaction. Katz terms this “causal restructuring” (p. 59).⁷

A central premise of Katz's project is that the deontological features of law and morality exhibit sufficient regularity (sometimes he calls them “deontological rules” [p. 84]) that they can be profitably analyzed across widely disparate areas of law and morality. For example, he likens rules in tax law that prohibit assignments of income but permit assignments of wealth and the income that wealth produces to moral practices that condemn the assignment of fame but permit the assignment of the means to acquire fame

7. The phenomenon Katz describes seems similar to what has been called the doctrine of double effect. The doctrine is an aspect of a strand of deontological theory that condemns treating humans as means to an end. It recognizes that whereas we might morally condemn intentionally or directly harming a person to benefit another's welfare, we might not condemn an action inflicting the same harm and providing the same benefit when the harm is an unintended or indirect consequence of the act. See Gordon 1993, 1759–66. Katz does not draw this connection, perhaps because he does not want to ground his argument on the sole deontological principle that what is morally impermissible is treating humans as a means to an end.

(pp. 84–89). And he adverts to the example of the “Shabbes Goy” (a practice of orthodox Jews of stationing non-Jews to operate machinery, such as elevators, so that Jews may utilize the machinery on the Sabbath, which they are forbidden to do themselves) to “resolve . . . decisively” the question whether a firm should be able to insulate itself from liability by conducting operations through a subsidiary. Yes, Katz answers, because, as the example of the Shabbes Goy demonstrates, we distinguish between doing things directly and doing things indirectly through an intermediary (p. 94).

II. THE CASE FOR A DEONTOLOGICAL POINT OF VIEW

Katz makes his case that humans judge things from a deontological perspective by drawing on everyday experience and stories from law, literature, and religion where people make judgments that are difficult to explain on consequentialist grounds. Many of his stories are far afield from the law. There is, for example, the story of Lillian Hellman, whose memoirs fell into “curious disrepute” when the public learned that they were largely fictional. Katz tells Hellman’s story in making the larger point that humans disdain fakery in ways that are inexplicable from a consequentialist perspective (pp. 79–83). Hellman’s story is relevant, according to Katz, because it is difficult to explain the disdain for her work on consequentialist grounds: its fictional nature should not diminish the work’s literary, artistic, or entertainment value. Though some might quibble with his analysis of Hellman’s case,⁸ Katz does not stoop to responding to case-by-case rationalizations of seemingly “irrational” human judgments. Instead, he tells other stories with a similar lesson. This approach is persuasive because his “deontological rules” elegantly explain human judgments in a wide variety of settings that consequentialists are hard pressed to explain.

When Katz turns to real issues in law and legal policy, his argument becomes more challenging. For example, Katz dissents from a core tenet of modern tax policy that relieving an activity from a general tax is no different from subsidizing the activity. Most tax analysts accept Stanley Surrey’s position that certain tax breaks should be understood as subsidies (Surrey and McDaniel 1985), a position that has been institutionalized through the

8. Scholars who take the position that all human behavior can be explained as rational self-maximization of pleasure will construct complex arguments to explain how behavior that seemingly does not conform with their model really does. Altruism has been explained as self-motivated on the grounds that people give for the joy of giving or the pleasure they derive from the pleasure of others (Becker 1974, 1064–66). David Collard (1978, 16) has observed: “The standard assumption of self-interest . . . has to be stretched to accommodate everyday instances of altruistic conduct. . . . [T]he modifications needed proliferate in an ad hoc fashion. Once this happens to a theory it is perhaps time to look elsewhere.”

Treasury's annual "tax expenditure" budget since 1968.⁹ Katz makes both a descriptive and a normative claim in challenging the concept of a tax expenditure. It is important to separate the two. The descriptive claim is that people perceive tax breaks and subsidies differently. Surrey would not have disagreed with this claim; indeed, he advocated describing tax breaks as tax expenditures to overcome this human tendency, which makes it possible for legislators to favor activities that lack broad public support. The normative claim is more problematic. Katz argues that a subsidy is morally different from a tax break because "different norms attach to demands for forbearance and demands for assistance" (p. 118). I explore the problem with this normative claim later, for my objection goes to the heart of his thesis.

Katz could have found stronger examples in fiscal policy of implications of adopting a consequentialist perspective that many people would think wrong or even offensive. Much normative work in tax is done from a laissez-faire perspective: the best tax is thought to be that which has the least distortionary impact on the production, saving, and consumption decisions of people and firms. From this perspective, a head tax (in the United States this is sometimes called a poll tax) is clearly preferable to an income tax, sales tax, or property tax, since a head tax has a de minimis effect on people's decisions to labor or to save (Rosen 1995, 307). Notwithstanding this attractive characteristic, the head tax is not a serious policy option. The Thatcher government tried to implement a head tax in Great Britain and was met with intense hostility (Rosen 1995, 308). One could reject a head tax on consequentialist grounds. For example, someone committed to maximizing social welfare—call her a welfarist¹⁰—might oppose a head tax notwithstanding its attractive effects on people's incentives to work and save because of its unattractive distributive effects. But this distributive objection to a head tax does not seem strong enough to explain the visceral reaction to a head tax, for the same objection could be made in even stronger terms against using a lottery as a source of public revenue.

Another more arcane example comes from the debate over what should be the transitional rules if we replaced the existing income tax with some form of a consumption tax. From a welfarist perspective, it is clear that an excellent way to raise revenues is through a one-time tax on accumulated wealth. Such a one-time seizure of wealth is nondistortionary and is

9. This is not to imply that the concept of tax expenditure is uncontroversial in the tax area. See Kahn and Lehman 1992. Their critique is not grounded on the claim that there is an inherent normative difference between not-taking and giving. Rather, they observe that the concept of tax expenditure presupposes a "normative, normal, or correct tax rule," for only deviations from that norm can be identified as tax expenditures. Because they question the existence of such a normative baseline, they argue that all tax and spending provisions should be judged by the same criteria.

10. The laissez-faire perspective is often justified on welfarist grounds by reasoning that government interventions in the economy through nonuniform taxes or subsidies are likely to diminish aggregate social welfare.

not likely to have troubling distributive consequences. For this reason, some economists oppose giving transitional relief to people who accumulated wealth on which they have already paid tax under an income tax were we to replace the income tax with some form of a consumption tax, for denying such relief has the effect of imposing a one-time tax on "old capital" (Bradford 1996, 37–38).¹¹ I expect that most people would think such a policy unfair. A welfarist might agree that such a policy was unwise on the ground that it would be difficult to maintain secrecy in planning the change to a consumption tax, or that the public would not trust the government's assurances that such a thing would not be done again. Such expectations can have harmful consequences. But these welfarist reasons for protecting old capital in a shift to a consumption tax do not go to the heart of what seems unfair about denying such protection. A welfarist would not be troubled by the tax on old capital if it was truly a surprise, for that would eliminate its harmful consequences; to someone who cares about respecting people's expectations, the surprise nature of the taking makes it seem all the more unfair.

Yet another issue regards the taxation of gifts to family and friends. From a welfarist perspective, gifts ought to be subsidized because of the double benefit in giving—the donee derives pleasure from consuming the gift, and the donor derives pleasure from pleasing the donee. Stimulating gifts can have a profound positive impact at the margin. Imagine that A is tempted to give \$1 to B but does not because A derives only 90 cents' worth of satisfaction from pleasing B. Giving A a 10 cent subsidy to make the gift of \$1 increases social welfare by 90 cents if we assume that A, B, and whoever bears the cost of the subsidy values money equally.¹² As with the last example, there are welfarist reasons to question the wisdom of such a policy,¹³ but the problem may be more general. There is something deeply problematic about taking account of "other-regarding" or "external" preferences, meaning the pleasure or pain that one human derives from the pleasure or pain of another, in deciding how scarce resources should be

11. Under the existing income tax, the elderly who have accumulated wealth on which they have already paid tax can consume that wealth tax free. Under a consumption tax without transitional relief they would pay tax again when they liquidated their investments for consumption. This hidden tax on old capital is not of trivial significance. Much of the welfare gains from replacing the existing income tax with a consumption tax result from this hidden tax on "old capital" (Auerbach, Kotlikoff, and Skinner 1983, 98).

12. Without the subsidy, A has \$1. With the subsidy, A has 10 cents plus 90 cents' worth of satisfaction from giving, B has \$1, and someone bears a 10 cent loss.

13. For example, the subsidy might have harmful distributive consequences in the aggregate if the people who bear the burden of the subsidy are poorer than the beneficiaries. This effect is exaggerated by the effect of the subsidy on "inframarginal" gifts—i.e., those that would have been made without the full amount of the subsidy. In the example in the text, if the subsidy was 40 cents, then A would have 40 cents plus 90 cents' worth of satisfaction from giving, B would have \$1, and someone would bear a 40 cent loss. If this unknown someone was very poor and A was very rich, then aggregate welfare might be reduced.

allocated.¹⁴ For example, it would be very controversial to adopt a policy allocating livers to the more-beloved person in need of a transplant.

These examples suggest that Katz could have convinced even his tax colleagues that some relatively uncontroversial policy decisions made in the tax area are best explained from a nonconsequentialist perspective. This is not a trivial point to establish. Much tax scholarship done from a laissez-faire or welfarist perspective is of little practical significance because the policies indicated are offensive for reasons that are incomprehensible from that perspective. Good scholarship of this type offers elegant and original solutions to what are in effect intriguing mathematical puzzles, but its significance (other than the joy of solving a difficult technical problem, which can be considerable) lies mostly in the challenge it poses to others who do not view the world through the same lens to think through why the policies indicated are offensive.¹⁵

III. THE FLAW IN THE ARGUMENT

Let me clear away some underbrush before I get to what I believe is the real flaw in Katz's general argument. A consequentialist could respond to the argument about why the law tolerates avoision (proposition 3) in the following way:

You have identified a common phenomenon in the law. Your point stated abstractly is that a person is not punished for causing consequence X , though the law generally prohibits X , when X is a by-product of his doing act A , and the law generally approves of A . This phenomenon is entirely consistent with a consequentialist point of view once we take account of error and cost in enforcing the law.¹⁶ If there were no risk of error and enforcement costs were zero, then we would punish act A if (or to the extent that) its bad consequences (X) outweighed its normal good consequences. Instead, because we fear we may overestimate X and/or underestimate the good effects of A , and so overdeter A , or because we believe that the administrative cost of monitoring A to measure the magnitude of X in a given case may ex-

14. Dworkin (1977, 234–38) argues that this is because taking account of external preferences detaches utilitarianism from the belief that individuals are entitled to equal treatment.

15. Auerbach (1991) illustrates my point. He proposes an intriguing solution to the problem of "cherry picking" under an income tax where gains and losses are taxed only when an asset is sold. This rule of realization enables investors to accelerate the recognition of losses while deferring the recognition of gains. The problem is dealt with poorly under existing law by allowing losses only to be deducted against gains. Auerbach proposes a solution that ensures the tax law will not affect decisions to make or liquidate investments—i.e., ensures tax neutrality. But the solution entails imposing a tax on liquidation of an investment that bears no relation to the taxpayer's actual gain on the investment.

16. Katz addresses one facet of this response: that "avoision" is a product of errors in drafting laws (pp. 16–17).

ceed the benefits of suppressing A's bad by-product X, we do not punish X when it is a consequence of A.

More generally, a consequentialist would argue that Katz focuses only on how particular cases are decided. Some decisions that Katz finds to be inexplicable from a consequentialist perspective may follow from structural decisions—that is, decisions about who should be given the power to make a decision and how that person's discretion should be constrained—that make a great deal of sense from a consequentialist perspective.¹⁷ In particular, while it may seem inexplicable on consequentialist grounds that we do not sacrifice an individual against his will to save many others when we are faced with a case in which his sacrifice is obviously to the general good, a structural decision to afford significant protection to the individual makes a great deal of sense on consequentialist grounds once we take account of the risk of error and abuse in a system where one person (or the state or a collective body) is given the power to sacrifice an individual for the good of others.

Katz responds to this sort of critique by showing that the phenomenon he describes is common in moral and religious practice as well as in legal practice. One of his examples, as mentioned above, is the "Shabbes Goy" (pp. 24–25).¹⁸ Another example is advice reportedly given by F. Scott Fitzgerald: "Don't marry for money. Go where the money is, then marry for love" (quoted by Katz, p. 1).

By shifting the discussion to the moral and religious spheres from the legal sphere, Katz undercuts the argument that "aversion" is tolerated because of enforcement error and cost, for we don't think these "administrative" constraints inhibit self-judgment or divine judgment. The actor knows perfectly well what he is doing in these cases, and so too should his God. An economics-minded critic might respond that these examples show only that humans will resort to trickery rather than challenge their own religious and moral beliefs head-on when those beliefs stand between them and the satisfaction of their desires. Thus, this critic would argue, these are odd examples to sustain the proposition that humans are not really rational self-maximizers at heart, for in these examples humans use tricks to satisfy their preferences while preserving the facade of inconvenient moral or religious beliefs. You have to read Katz's book to appreciate his answer to this argument, for it is through the accumulation of many stories like these, and his gentle

17. Such a line of argument is developed at length by Russell Hardin (1988, 77–84).

18. Brian Leiter suggests that this particular example may misfire because the religious injunction may apply only to the operation of machinery on the Sabbath, and not to the enjoyment of the benefits of machinery. Another example is less susceptible to this response. Katz tells the story of the advice given by Jesuits on dueling. Although dueling was a sin, priests advised that a man challenged to a duel could stroll by the dueling grounds at the appointed time and defend himself without offending God.

insistence that the characters (be they real or fictional) are not acting in a way that is foolish, delusional, or self-serving, that he makes the case that this is simply how humans look at the world.

The troubling move in Katz's argument comes when he converts what is essentially a descriptive claim about human judgment into a claim that these characteristics of human judgment ought to have moral weight. This shift takes place near the surface of his argument in his discussion of work in behavioral psychology that demonstrates such phenomena as the "framing effect" (pp. 111–12). The framing effect refers to the fact that the way in which a question is framed will influence how people answer the question. Katz gives a classic example from a study of physicians. The problem posed to the physicians assumed a group of 600 individuals faced with a fatal new disease and the choice between two responsive measures. One measure would save 200 but do nothing for the other 400, while the other measure would have a one-third chance of saving all 600. When the question was framed as whether it was right to put 200 at risk for a chance of saving 400, most doctors said it was not. On the other hand, when the question was framed as whether it was right to leave 400 in harm's way to ensure the safety of 200, most doctors said no again, implicitly accepting the proposition that it was right to put 200 at risk for a chance of saving 400 others. Such findings from the field of behavioral psychology support Katz's basic argument, for they show that human judgment does not conform to the consequentialist model in real life. But Katz strongly objects to the tendency in behavioral psychology to label such features of human judgment as irrational (p. 105).

Yet Katz's argument for why such behavior should be described as having a moral element rather than being described as irrational is unpersuasive. The following passage is the heart of his argument:

To decry our obedience to them [such features of human judgment] as irrational (and others' exploitation of them as dishonest) leaves you no choice but to declare yourself an out-and-out utilitarian. And that we know has other implications which [the author] would surely decry even more vehemently. (P. 105)

The problem with this argument is that it assumes that a person can take a consequentialist point of view only if he is an "out-and-out utilitarian." Katz doesn't really believe this. Later in the book he concedes that some parts of the law¹⁹ may best be explained from a consequentialist point of view (pp. 203, 261). He surely does not mean to say that judges who decide some cases with an eye to maximizing welfare are "out-and-out utilitarians." In-

19. His specific example is American tort law of negligence, though other examples—such as contract law or the law of takings—would serve him better.

deed, it is clear that Katz appreciates that both the consequentialist and the deontological points of view are natural to humans, though they sometimes yield opposing answers.

Katz's argument can be restated in a more modest way that overcomes the last objection while exposing what I think is the real objection to his argument. He could say "It is harsh to describe nonconsequentialist decision rule or belief R as irrational (and others' exploitation of R as dishonest) for people may genuinely believe R." In this sentence, R may be thought of as the beliefs implicit in a decision that cannot be explained on consequentialist grounds. It might be a belief that a special tax break is different from a subsidy, or it might be the belief that although it is wrong to reach out to sacrifice one person to save two others, it is right to withhold lifesaving aid from one person if that aid is instead used to save the lives of two others.

I chose these examples because I expect that most readers will think that the second set of beliefs (about when it is proper to sacrifice one person for the greater good) is correct, while they will think that the first belief (about the difference between a tax break and a subsidy), if not irrational, is potentially a source of great mischief. Katz's argument may trick the reader by tying these different beliefs together, implying that if you accept the second set of beliefs as unassailable on consequentialist grounds, you must also accept the first on the same terms. At this point it is Katz's argument that seems counterintuitive. This is troublesome, given the character of his argument, for its power lies in its intuitive appeal and not in its logic.

The real flaw in Katz's argument occurs when he takes the position that a deontological perspective is the one correct perspective on a specific issue where a significant number of readers believe otherwise. What is missing is a theory that would allow Katz to bridge the gap from the observation about the general power of a deontological point of view in explaining human judgment to the claim that the perspective should dominate on any specific legal or moral issue where the reader disagrees and feels he has good company in disagreeing. Katz's eclectic style is poorly suited to bridging this gap, for observations drawn from afar may not tell us much about specific issues like tax-expenditure theory or legal evasion, and the cases he uses are so divergent that many different accounts could be given for why we might have different moral perspectives on those cases.

IV. THE "PUZZLE" OF BLACKMAIL

Is it possible to fill in the missing theoretical bridge in a way that could ever persuade a skeptical reader that a deontological perspective was uniquely appropriate on a contested issue? To begin to explore this question I turn to the second part of the book where Katz presents his solution to the

"puzzle" of blackmail.²⁰ The crime of blackmail is thought to be puzzling because it can be criminal to threaten to perform an act to obtain leverage in an exchange when neither the act, the threat, nor the exchange would itself be criminal if done alone. To take a realistic example, it is not a crime for A to file criminal charges against B for a perceived injury if A honestly believes B committed a crime, nor is it a crime for A to threaten to file criminal charges if A demands nothing in return. And it is not a crime for A to demand or accept compensation for an injury from B in exchange for relinquishing his claim if A honestly believes B committed a tort against him. Indeed, the law promotes such a settlement by enforcing the agreement. But it may be a crime in some states²¹ (and it is clearly duress sufficient to void any settlement agreement²²) for A to threaten to file criminal charges to obtain leverage in settlement negotiations with B even if A honestly believes B committed a crime and a tort.

Katz focuses on what he calls the "punishment puzzle" in the law of blackmail—if A threatens a lesser wrong²³ to induce B to consent to a loss that would be a greater wrong for A to inflict without B's consent, then the law punishes A for the greater wrong. Katz's theory is that the threat negates B's consent to the greater wrong, exposing A to liability as if he had committed that wrong without consent (pp. 157–63). This is a neat point, as far as it goes. It helps to explain why the punishment for extorting \$10,000 may be the same whether the defendant threatens to kill the victim, to punch him, or to disclose embarrassing information. Whatever the gravity of A's threat, so long as the threat is improper under the law, A is guilty of the same crime—extortion of \$10,000. This observation also squares with the common law doctrine of duress, for the precise legal effect of common law duress is to void consent and to allow the victim to recover amounts paid and, if appropriate, sue for conversion or battery in tort.

20. The crime of blackmail is usually denoted as extortion. Under the term *blackmail* Katz includes two crimes as defined by the Model Penal Code: theft by extortion, § 223.4, and criminal coercion, § 212.5. Theft by extortion covers threats to obtain property; criminal coercion protects nonpropertylike interests, covering threats that "restrict another's freedom of action to his detriment." There is a broader definition of what may be an improper threat under theft by extortion, including the catchall covering a threat to "inflict any other harm which would not benefit the actor." Model Penal Code, § 223.4(7). Because of this structure some cases that are thought to be straightforward cases of blackmail do not fall within either crime under the Model Penal Code. An example is a threat by an employer to fire an employee if she does not agree to engage in sex.

21. The Model Penal Code takes the position that such a demand is not criminal if the settlement demand is not excessive. It provides an affirmative defense to cover the case where criminal charges are threatened and the party making the threat demands no more than he is rightfully due. Model Penal Code, § 223.4, comment (f). As the comment notes, state law varies on this issue.

22. Restatement (Second) of Contracts § 176 (defining threat of criminal prosecution as an "improper threat," which makes a contract voidable on grounds of duress).

23. Katz defines a wrong as a crime, a tort, or any act that warrants strong moral disapproval.

Katz's solution to the "punishment puzzle" does explain the core cases in the law of blackmail better than do other theories that have been offered to explain blackmail.²⁴ However, his solution to the "punishment puzzle" does not explain where precisely the boundaries are drawn around the crime of blackmail. Katz has this to say about the boundary of blackmail: only an "improper threat" can be blackmail, and a threat is improper, according to Katz, only if it is a significant "moral wrong" (p. 159), meaning a "piece of 'swinishness'" that exceeds "some de minimis threshold" (p. 160). That is, the boundary of blackmail turns on a moral judgment or intuition that Katz does not try to justify within his theory of blackmail. Katz does comment on an important property of the boundary area around the law of blackmail. There is a discontinuity in the treatment of conduct as we pass from an immoral threat that is just short of "swinish" to a "swinish" threat: we jump from no possible punishment to (potentially) punishing a threat to the same degree that we would punish the worst possible threat. Katz finds nothing especially worrisome in this sort of "radical discontinuity" because such things occur occasionally in law and morality (pp. 163–69).

There is more to Katz's solution to the boundary-drawing problem than there might seem on the surface. While some of the other theories of blackmail might seem to do a better job in explaining the resolution of cases that lie along the boundary, Katz's theory better captures our mixed feelings about these cases. Consider the case of price gouging for food, water, or other essentials during an emergency. Price gouging is not blackmail (or even common law duress), no matter how extreme the price demand or desperate the needs of the victim. This is a difficult case for Katz, for the price gouger can be made to seem a swine if we make the facts extreme enough.²⁵ On the other hand, the case of the price gouger is an easy one to explain under some other theories. James Lindgren would explain that the

24. Before laying out his theory, Katz dispatches some of the other leading theories. Richard Epstein's (1983) theory is that the law discourages "rent-seeking behavior" in the form of socially unproductive efforts to uncover embarrassing private information that would otherwise have private exchange value. As Katz observes, this theory explains only so much of the law of blackmail as deals with threats to reveal private information that is costly to discover; it does not explain why it is blackmail to threaten to press criminal charges for a perceived wrong to obtain leverage in a settlement of a tort claim. Jim Lindgren's (1984) theory is that the law prohibits bargaining with other people's "chips"—e.g., using the public's right to prosecute crimes as leverage in a settlement. This theory cannot explain why it may be blackmail to demand money from parents in return for not giving a motorcycle to their son. Robert Nozick's (1974, 61–62) theory is that blackmail is a bargain where the victim would be better off if he had nothing to do with the party making the threat. This theory does not account for cases where the threat is to withhold some benefit from the victim.

25. Katz is of the view that the threat maker's selfish motive can render his threat swinish. He is compelled to take this position in order to explain why it is blackmail to threaten to disclose an extramarital affair for selfish reasons (to extract cash or some other personal gain from the victim), while it is not blackmail to threaten to disclose an affair if it is not ended (pp. 275–76 n.32). This aspect of Katz's theory distinguishes it, I believe, from Joel Feinberg's theory, which is that blackmail consists either of threatening to do something immoral or offering not to do something immoral. As Katz observes, Feinberg's theory cannot explain

price gouger is not a blackmailer because he is bargaining with his own rights. Robert Nozick would explain that price gouging is not blackmail because, on balance, the victim is better off for having the opportunity to buy necessities from the price gouger. But Katz's theory better describes our feelings about the price gouger than do these other two theories because it expresses our unease about the price gouger's behavior. Katz tells us that the question finally turns on whether the price gouger is committing a sufficiently grave immorality, and while from some moral perspectives he is not acting immorally (Lindgren's and Nozick's theories are evocative of some of the reasons), from other moral perspectives he is.

Of course, the law does not end at the boundaries of blackmail. Other bodies of law exist to deal with conduct like that of the price gouger that falls short of blackmail. Perhaps there is no overarching theory that can explain how these different bodies of law fit together. Different bodies of law may be woven around different "standard cases" that we think of in different and sometimes irreconcilable ways.²⁶ The law of blackmail is woven around stories about vile extortionists exploiting ill-gotten private information. It would not be surprising if such a body of law was at some fundamental level irreconcilable with contract law, which is woven around very different stories. If this is true, then Katz's methodology, which assumes that reflections from one area of law can illuminate other areas, would be suspect. But I do not fault Katz on this ground. I believe that there is a rough continuity in the law, but this continuity is not the product of a single moral perspective. Katz's mistake is his failure to see that although a deontological perspective dominates the area of law with which he is most familiar, criminal law, a consequentialist perspective dominates other areas of the law.

V. MOVING BEYOND UNITARY MORAL THEORIES EXPLAINING THE LAW

Katz tilts at a familiar windmill in trying to formulate a theory that explains the entire law of blackmail from a single moral perspective.²⁷ I do

why it is blackmail to threaten to disclose an affair if cash is not paid, for the threatened act is not in itself immoral (pp. 142-43).

26. Sidney DeLong (1993, 1689) comments: "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."

27. The general point that the law of blackmail cannot be explained from a single moral perspective is not original. It is made quite well by Gordon (1993). The same point is made by Altman (1993) but only to excuse the under- and overinclusiveness of his own particular theory. I would restate Altman's theory as that it is impermissible to overcharge for information. He defines blackmail as exploitation or coercion, which he defines as either demanding

not fault him or others who have tried to construct a theory that explains the law of blackmail, for it seems a good thing to try to make the law coherent. The mistake lies in assuming that there must be a unitary moral explanation.²⁸ Underlying this assumption may be a deeper assumption that as we move from specific decisions to general legal principles and then to moral principles to justify those legal principles, we will create something that looks like a pyramid with specific decisions at the base and a moral principle at the apex. My colleague William Powers has said for years that an hourglass is a better metaphor than is a pyramid for the structure of legal justification. As we move up from particular cases to more general rules, doctrines, and principles, the scope of possible justification in the law does seem to narrow; but as we move farther up to argue about the moral justification for those legal principles, the grounds of justification widen (though there may be only a handful of credible moral theories, these theories are sufficiently different at their core that it seems appropriate to describe them as covering much space). Powers's basic point seems correct. His point can be tied to Cass Sunstein's description of much of the law as an "incompletely theorized agreement on a general principle" (1996, 35). Sunstein emphasizes the virtue such positions have in making it possible to achieve consensus among people with different views. Their virtue could be psychological as well as political. The conflict subsumed by incompletely theorized agreements may be internal—we as individuals may judge things both from a consequentialist and a deontological perspective, which would cause us to prefer vaguely drawn principles that did not put these views at odds.

This point does not mean that it is fruitless to try to give a coherent moral account of the law, for it might be possible to give an account that incorporates both a consequentialist and a deontological point of view. In many areas of the law, one moral perspective dominates in the sense that most of the "core cases" in that area can be explained from that perspective, while the other perspective is indeterminate in a significant number of cases. Consider the law of blackmail. Most theories of blackmail are framed to fit "easy" cases where everyone would agree that the case did or did not involve blackmail.²⁹ Strikingly, none of these cases would provoke strong disagreement between a committed utilitarian critic of the law³⁰ and a com-

payment for nondisclosure of information that the blackmailer would not have disclosed had there been an opportunity to demand payment or demanding a premium over what the blackmailer would have realized from other uses of the information (1993, 1661). Altman justifies this theory on the ground that "it violates norms of respecting autonomy and not treating others only as means" (1993, 1643).

28. This assumption is often implicit. For a bracing counterexample see Hardin 1993.

29. For example, George Fletcher (1993) builds his theory around ten cases, four of "clear instances of criminal blackmail" and six "where the consensus appears to be that the behavior is not subject to conviction either for blackmail or for any other offense."

30. I say critic rather than judge because Katz is not making claims about how judges decide cases or justify their decisions. He is trying to give a normative account of law as it is.

mitted Kantian critic who believes that it is not right to use people as a means to an end. Rather there are only some cases where one of the two critics (almost always the utilitarian)³¹ would be indifferent to the outcome because analysis from his perspective would be inconclusive.

The utilitarian justification for criminalizing blackmail turns on the social costs of blackmail, including costs blackmailers incur in searching for embarrassing information or otherwise trying to gain a position of power over others, harms victims inflict on blackmailers to rid themselves of the scourge, harms victims inflict on others to obtain resources to buy off blackmailers, and precautionary costs victims incur to protect themselves from potential blackmailers. The best argument against the utilitarian justification for criminalizing blackmail is that these “second-order” costs of blackmail are not sufficiently severe to justify the opprobrium in which blackmail is held (p. 141). Coming closer to my point, we consider blackmail morally offensive and criminal even in cases where such costs seem zero or close to zero. Blackmail is made no less offensive by the facts that the blackmailer stumbled across embarrassing information that was costless to the victim to hide as well as it could be hid, that the victim is wealthy, and that the victim is so terrorized that there is no threat he will retaliate against the blackmailer.³² The utilitarian is forced back to the weak argument that the costs of distinguishing cases with facts like these outweigh the benefits. The Kantian has no difficulty explaining the offense in blackmail in such cases.

A full account of an area of the law must explain cases at its boundary as well as cases at the core. The outer limits of the concept of blackmail are defined in the Model Penal Code by a catchall definition of an improper threat that covers any threat to “inflict any other harm which would not

31. Perhaps there are some blackmail cases where our Kantian critic would be indifferent to the outcome while our utilitarian critic would endorse the criminal sanction. I find it difficult to come up with such a case (an example might be a case involving economic extortion of a corporation, though this case may be the product of a more general confusion of artificial and real persons) because of the extraordinary breadth of the principle that it is wrong to use other people as means to an end. The principle is so broad that much of economic life runs afoul of it. This can be seen in Erich Fromm's relation of Marx's critique of the alienation of labor—which is a critique of the dehumanization of laborers in their own eyes and the eyes of others—to the Kantian principle (1966, 53–54).

32. A utilitarian might try to justify criminalizing blackmail even in such cases by citing the high bargaining costs of the blackmailer's negotiation with the victim. The blackmailer and victim are bargaining under what economists describe as conditions of bilateral monopoly—the blackmailer has an asset (the embarrassing information) that is uniquely of great value to the victim. Bargaining is notoriously difficult in such situations because the parties have strong incentives to engage in strategic behavior by misrepresenting the value of the asset to themselves and by threatening to hold out to capture a large share of the “gains from trade.” Viewed abstractly, the situation is similar to that when skilled and irreplaceable workers, such as professional athletes, threaten a strike in negotiations with a highly profitable employer. But it is not clear that criminalizing an exchange reduces bargaining costs (Isenberg 1993, 1097).

benefit the actor.”³³ This definition is drawn to exclude almost all economic exchanges from the crime because typically someone who proposes an exchange offers to give up something he values only marginally less than what he would get in the exchange. For example, it is not blackmail for professional baseball players to threaten to strike to obtain higher wages, though they would derive relatively little benefit from withholding their labor while the team owners would suffer an enormous loss, because the players do derive some benefit from leisure or working elsewhere.

When a body of law is best explained from a particular moral perspective, as blackmail may best be explained from a Kantian perspective, often the boundaries around that body of law can best be explained from some other moral perspective in the sense that the boundaries are defined so that that body of law gives way to other bodies of law that are at their core best explained from that other moral perspective. It would be naive and incorrect to say that the boundaries around the crime of blackmail are best explained on consequentialist grounds in the sense that welfare, wealth, or whatever other value you might care to maximize is maximized if the state leaves people free to bargain on the other side of the boundary. Rather, once one crosses these boundaries, other laws come into play to prevent people from taking too great advantage of others in bargaining. While a coercive threat by A to withhold goods or services that B values much more highly than anyone else will rarely be blackmail because there is value to A in carrying out the threat (the value to him or others of the goods or services), in a proper case it might be common law duress sufficient to void the resulting contract, or it might be a violation of antitrust laws or labor laws, or it might even be a tort such as bad-faith breach of contract or interference with contract. These bodies of law are best explained at their core on consequentialist grounds, though, as with blackmail, much of the core of these bodies of law can also be explained on deontological grounds. In sum, the boundaries of the law of blackmail are best explained on consequentialist grounds in the sense that the boundaries are defined so that blackmail gives way to other bodies of law that themselves are best explained at their core on consequentialist grounds.

For example, just over the line from blackmail in contract law lies a body of doctrines that empower courts to reconstruct contracts between parties who bargain as equals, including not only the doctrine of duress (which has obvious similarities to blackmail) but also the doctrine of impracticability and kindred doctrines that deal with cases where circumstances radically change after a contract is made, as well as the doctrine of good faith. I have

33. Model Penal Code § 223.4(7). Even this sweeping definition of an improper threat is thought to be too restrictive by some who would extend the crime of blackmail to cover the case where the threatened action would greatly harm the victim and only slightly benefit the actor.

argued that much of what courts do with these doctrines can be explained by a principle that prohibits one party to a contract from profiting himself by inflicting or threatening to inflict a significantly greater loss on the other party (Gergen 1995, 46). This principle echoes the broad definition of an improper threat in the law of blackmail as a threat to commit an act that would greatly harm the victim while only slightly benefiting the actor. I also have argued that while such a principle is not demonstrably efficient in the sense that the possibility of judicial reconstruction of contracts pursuant to the principle increases people's joint expected return on entering into a contract, neither is the principle demonstrably inefficient given its limited scope (typically the doctrines that embody the principle apply only in outcomes that the parties did not account for in contracting) (Gérgen 1995, 81–98).

In other words, contract law seems to be animated by something like the principle that animates the law of blackmail in cases at its periphery where economic analysis is inconclusive. If we move in from the periphery of contract law to the core, then we find the photo negative of the law of blackmail. While much of the core of contract law can be explained on both consequentialist and deontological grounds (prominent modern deontological theories of contract include Charles Fried's [1981] theory of contract as promise and Randy Barnett's [1986] consent theory of contract), a consequentialist theory covers more of the core better, for in a significant number of cases a deontological theory is inconclusive. In particular, Fried's and Barnett's theories are inconclusive when we ask what should be the background rules defining the obligations implicit in promising, such as the rules on damages incurred for breach, for any set of rules that we might expect people to learn can be justified under a promise- or consent-based theory of contract when the rules are applied after they are established because, by promising, people can be said to have accepted those obligations (Craswell 1989).³⁴

It seems to me that the dominant perspective in a body of law depends upon the nature of the interest protected and the conduct regulated by that body of law at its core. A deontological perspective dominates in criminal law and those areas of tort law where the central concern is protecting human interests (roughly life, health, dignity, and liberty) and property interests from intentional or knowingly harmful conduct. A consequentialist perspective dominates if the interest at stake is in the nature of an economic expectancy, or if the injury is unintentional. Economics-minded scholars are hard-pressed to explain singular features of the law of intentional torts, such as the fact that malice, meaning the pleasure one person derives from inflicting pain on another, exacerbates rather than diminishes the offensiveness of an injury (Landes and Posner 1987). Indeed,

34. For Randy Barnett's response to this argument, see Barnett 1992.

Posner describes the entire distinction between intentional and unintentional acts in the law as "both confusing and unnecessary" (Posner 1977, 119). Conversely, a consequentialist perspective dominates in contract law where the central concern is protecting "economic expectancies," and no significance is accorded to the defendant's motives for breaching. Indeed, contract law embraces the intentional "efficient breach." Tort law does not generally protect economic expectancies from unintentional injuries.³⁵ Thus, people who depend upon the sea for their livelihood will recover upon an oil spill only if the spill harms their property. Some exceptional torts do protect economic expectancies from unintentional injuries—such as the tort of negligent misrepresentation—but those torts tend to be analyzed in thoroughly consequentialist terms. Meanwhile, the torts that protect economic expectancies from intentional injuries (e.g., fraud, defamation, bad-faith breach of contract, and interference with business relations) are deeply embattled,³⁶ which I think is partly due to the fact that they straddle this fissure in the normative foundations of the law. This last point was brought home to me in reading W. David Slawson's recent book, *Binding Promises*, for he and I have different views on many issues, and in particular on the desirability of treating bad-faith breach of contract as a tort. I believe our differences result from our different moral perspectives. I have criticized the tort on consequentialist grounds focusing on the interests at stake, while he defends it on the deontological grounds focusing on the element of intent (Slawson 1996, 114).

Now I can make the argument that Katz is unpersuasive in arguing that our practices in other contexts commit us to taking a deontological perspective in tax matters. Tax law mostly affects economic expectancies, so our practices in the most closely related contexts would support taking a consequentialist perspective. Furthermore, tax law is unlike criminal law and private law in that it is the government and not a private actor that is causing the harm. When property and not human interests are at stake, it seems to me that we judge governmental invasions from a more consequentialist perspective than we judge individual invasions. The basis for this statement is the fact that while property interests are protected from intentional private invasions through punitive sanctions (that is, through property rules [Calabresi and Melamed 1972]), property interests are protected from governmental invasions through what is in effect a liability rule—the government may take property without consent for public purposes, but it must pay its value. While it is possible to explain property rules on both deontological and consequentialist grounds (the consequentialist theory of property rules

35. Negligence claims for purely economic loss are usually held barred by the "economic loss" rule. This rule is most clearly developed in the area of products liability—see Restatement (Third) of Products Liability § 6 (T.D. No. 2, 1995)—but it has been applied in other contexts, e.g., *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991).

36. I have written on some of these issues in Gergen 1994, 1996a, and 1996b.

is that they apply when bargaining costs are low [Landes and Posner 1987, 30–31]), it is difficult to explain liability rules as they pertain to intentionally inflicted harms on other than consequentialist grounds, for the best explanation for such rules is that they allow what is in effect a forced sale through a judicial hearing because private bargaining is impractical.

Nothing I have said to this point accounts for the possibility of a genuine conflict between a deontological and a consequential perspective (indeed, if I am right such conflicts are rare in the law),³⁷ much less suggests a principle to determine which perspective should “trump” should such a case arise.³⁸ It would be naive and wrong to reason that each body of law has a dominant moral perspective that we should apply within that body of law if there is a conflict, for the law is not so neatly organized in the interests or conduct it affects. For example, concerns of human liberty come to the fore in contract law when what is at stake is the right of an individual to work for whom he pleases, and they are not far beneath the surface in tax law when the issue is whether tax should be assessed on the “imputed value” of leisure. It may not be that these areas of the law are best explained on deontological grounds. Moreover, the distinction between property and economic expectancy is itself a legal artifact. Although property may once have been the most important thing to an individual after health, freedom, and relationships to people in his household, in the modern age individuals depend as much or more on contract rights, in particular insurance and employment. In recent years, greater protection has been afforded to these interests through new doctrines in tort law often using the trope of property.

CONCLUSION

The theory I sketched here, like Katz’s theory, takes law as a given and tries to come up with a coherent account of it. While this is the sort of work

37. It is not as easy as you might think to come up with practical moral questions on which a Kantian and a utilitarian would disagree. Katz suggests that the question of whether it is right to reach out to sacrifice the life of an innocent person to save the lives of two others is of this character. I am not persuaded by this example, for once we take account of the danger of abuse of power, there are excellent consequentialist reasons to protect the individual. A more prosaic legal question that might provoke disagreement between consequentialists and some stripes of deontologists is whether there should be a duty to aid strangers (the deontological argument against a duty to aid proceeds from principles other than the principle that it is wrong to treat people as a means to an end).

38. The concept of one form of argument trumping another is from Ronald Dworkin (1977, xi). Douglas Laycock (1985, 409–10) has suggested that judges in such cases must balance the two different sorts of claims. Perhaps judges do this in constitutional law. In the common law, it seems to me that such issues often are settled by judges through “modalities” of legal argument that are neither consequentialist nor deontological, e.g., by application of doctrine or interpretation of authoritative texts. Katz is not interested in questions about how judges actually justify legal decisions. He is instead trying to describe the normative underpinnings of the law.

law professors often do, it is deeply problematic for a variety of reasons. I want to touch on one of these reasons briefly as a conclusion because it is a problem that I find worrisome but that many of the readers of this journal may be unfamiliar with. Philip Bobbitt (1991) has offered a compelling theoretical account of the law as an argumentative practice. Strong echoes of consequentialist and deontological reasoning can be found in two of Bobbitt's accepted "modalities" or forms of legal argument—prudential argument and ethical argument. But these are only two modalities of six identified by Bobbitt, and they are among the least common forms of arguments actually used by lawyers and judges, who prefer doctrinal or interpretive arguments (two of Bobbitt's other modalities). If law is understood as an argumentative practice in which ethical and prudential arguments are persuasive, but only sometimes so, then it may be folly to try to give an account of the law in solely these terms.

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