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Private Plea Bargains

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PRIVATE PLEA BARGAINS*

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This Article analyzes the phenomenon of private criminal settlements; that is, settlements in which the victim or witness agrees not to report the perpetrator to the police in exchange for some consideration on the part of the perpetrator. The Article first examines why these settlements occur and then determines whether they should be permitted.

There are two different paradigms that can be used in analyzing private criminal settlements. The first paradigm, used by scholars who have previously considered this issue, is to treat these settlements as a form of blackmail. Legislatures in every state have used this paradigm to criminalize private criminal settlements. But, as the Article points out, the justifications for criminalizing these agreements under a blackmail paradigm turn out to be particularly weak.

The Article goes on to analyze private criminal settlements under a different paradigm, by treating them as the private analogue to public plea bargains. Using this analysis, the true cost of these agreements becomes apparent. Public plea bargains have long been criticized as providing a sort of second-class justice, but many scholars have also concluded that the process of plea bargaining brings certain benefits to the criminal justice system. The Article applies the critiques of plea bargaining to private criminal settlements, and concludes that private settlements share all the drawbacks and costs of public plea bargains, while providing almost none of the benefits.

The Article ends by discussing the implications of this analysis for current laws regarding private criminal settlements. It concludes that private criminal settlements should remain criminalized, but with one significant exception: settlements made between individuals who had a preexisting relationship should be permitted.

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INTRODUCTION

After a crime is committed, the victim or a witness will frequently report the crime to the police, thereby commencing the public criminal justice process. But, as it turns out, this course of action is the *atypical* response to criminal activity.[1] Surveys have shown that over half of violent crimes and about two-thirds of all property crimes are unreported.[2] This translates to roughly fourteen million crimes each year that are not reported to the police.[3] And this number only includes crimes with identifiable victims, such as assault and theft, not "victimless" crimes such as narcotic sales, drug or firearm possession, prostitution, and vandalism against state property.[4] Although there are no reporting statistics for these crimes, it is likely that many of them are witnessed by private individuals but not reported to the police. The vast number of unreported crimes raises an interesting question: when a witness or a victim does not report a crime to the police, does he or she take any other action toward the perpetrator?

Many times the answer is no. Often, the witness or victim may not know the identity of the perpetrator. Or she may believe that reporting the crime will be a waste of time because the police response will be weak or nonexistent. Perhaps the perpetrator is a friend or a family member, and the victim wishes to forgive and forget. Or perhaps the perpetrator is able to intimidate or otherwise persuade the witness not to report the crime. Or perhaps the injury—whether to person or property—is so slight that it is simply easier to move on rather than call the police or take any private action (especially if the witness was not a victim of the crime).[5]

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1. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2007, at 6 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cv07.pdf (showing a forty-six percent reporting rate for violent crimes, and a thirty-seven percent reporting rate for property crimes). These numbers are determined by household surveys in which respondents are asked whether they have been victims of crimes, and if so, whether they reported the crime to the police. *Id.* at 2.

2. *Id.* at 1.

3. According to the Bureau of Justice Statistics National Crime Victimization Survey, there were approximately 17.5 million property crimes and 5.2 million crimes of violence in 2007. *Id.* Based on the report rates, nearly fourteen million crimes in 2007 were never reported to the authorities. *Id.* Because the crime rate in 2007 was "at or near the lowest levels recorded since 1973," at least fourteen million crimes are never reported each year. *Id.*

4. *Id.* at 2.

5. This reason has probably become more prevalent in recent decades as the state continues to criminalize more conduct, thus creating more "crimes" which victims and

But many nonreporting witnesses and victims do take some action.[6] If they are victims of the crime, they may sue the perpetrator in civil court, though it would be unusual to do this without having reported the crime to the police.[7] They may impose their own private punishment, either by taking a privilege away from the perpetrator, or by acting as a vigilante and inflicting harm upon him.[8] If they have a preexisting relationship with the perpetrator, they may sever or alter that relationship, as when a wife leaves her abusive husband or a company fires or penalizes an employee who embezzled money.

But there is one other possible option for a nonreporting witness or victim: bargaining with the perpetrator. In making such a bargain, the witness or victim promises to refrain from reporting the perpetrator to the public authorities if the perpetrator takes (or abstains from taking) some action. In other words, the witness or victim and the perpetrator could reach a private settlement to resolve the criminal dispute. In making these agreements, the private party is essentially harnessing the power of the state and converting that state authority into a more flexible, personalized power over the perpetrator.[9]

Private criminal settlements come in many varieties. They may occur between two private individuals who have (and wish to maintain) a preexisting relationship, as in the case when the victim and the perpetrator are family members. They may involve a retail store or shopping mall which apprehends a customer who shoplifts

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witnesses do not think are worth reporting. This is an example of the law of unintended consequences: when the state overcriminalizes conduct, victims and witnesses may be less likely to report criminal activity. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 727 (2005) ("Mistrusting citizens are less likely to assist law enforcement and to obey legal commands, which undermines the efforts of police and prosecutors and, paradoxically, renders the law counterproductive.").

6. *See, e.g.*, Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 589–91 (noting that Macy's private response to shoplifters is to ban them from the store for seven years); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1277 (1999) ("The sanctions [imposed by private companies in response to criminal behavior] range from dismissal or ejection, to a return of purloined merchandise, to fines or restitution extorted by the threat of criminal complaint.").

7. *See infra* Part I.A.

8. *See infra* Part I.B.

9. A good amount of energy is lost in this conversion process, since the method only works if the perpetrator believes that (1) agreeing to the bargain will be less onerous than being apprehended by the public authorities and (2) the state will not learn about the crime from another source. But because the perpetrator has so much to gain from making a private agreement—and because the victim or witness who negotiates with him gains so little from instituting a public prosecution—there is quite a bit of room for negotiation. *See infra* Part I.C.1.

and decides that referring the case to the public criminal justice system is too expensive and time consuming. And the witness may not even be the victim of the crime; he or she could be a third party who either accidentally discovered evidence of the crime or who actively sought the information in order to extract a payment from the perpetrator. Or these agreements may be a response to so-called "victimless" crimes, when an individual or an organization threatens to call the police unless the perpetrator pays money or agrees to refrain from continuing the activity.

Should these private criminal settlements be permitted? The general public may react to the idea of private criminal settlements in different ways, depending on the context. A wife who was abused by her husband but decides to give the perpetrator another chance if he agrees to undergo counseling may seem sympathetic and even laudable, while a retail store bullying a shoplifter into paying his way out of an arrest may seem unsavory. A neighborhood association that fights back against drug dealers by threatening them with criminal prosecution if they do not leave the neighborhood also garners sympathy, while a mercenary who stumbles upon criminal activity and asks for money instead of calling the police seems greedy. But it is not entirely clear how to legally distinguish between these different kinds of cases—or indeed, whether we *should* draw any distinctions between these cases. In order to fully understand the costs and benefits of private criminal settlements, it is necessary to analyze them from two different perspectives: both as blackmail and as private plea bargains. The blackmail paradigm provides a necessary framework for understanding the process of private criminal settlements, but it is unable to provide a legitimate justification for banning or regulating them. A private plea bargaining analysis reveals the true costs of these settlements, and allows policymakers to make informed decisions about the conditions under which these settlements should be permitted.

Most of the scholars who have considered these private criminal settlements have described them as blackmail[10]—the victim or witness to the crime possesses incriminating information about the perpetrator, and he or she is agreeing to keep that information secret

10. *See, e.g.*, MIKE HEPWORTH, BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE 73–77 (1975); Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 860 (1998); Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1935–36 (1993); William M. Landes & Richard A. Posner, *Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 42–44 (1975). For further discussion, see Part II.

if certain demands are met. Legislators agree with this characterization: these arrangements have been criminalized in every jurisdiction in the country, though some states provide limited exceptions.[11]

But, as it turns out, this perspective is incomplete. Indeed, this Article argues that simply describing these private criminal settlements as blackmail does not provide a compelling or even a sufficient reason for their criminalization. The criminalization of blackmail generally is somewhat controversial,[12] and justifications for criminalizing blackmail are particularly unpersuasive in the context of private criminal settlement. In fact, treating these arrangements as blackmail leads to a conclusion that almost all types of private criminal settlements should be legalized, if not encouraged.

But these private settlements can also be analyzed from another perspective: as a privatized form of plea bargaining. Given the widespread privatization of our criminal justice system,[13] it makes sense to analyze private criminal settlements in this way. After all, criminals can be investigated, arrested, and detained by private police, without any involvement on the part of public law enforcement; private plea bargains provide a method for a criminal case to be resolved without the public criminal justice system ever becoming involved.

As with public plea bargaining, the perpetrator who agrees to a private settlement is voluntarily relinquishing certain rights in exchange for a lesser punishment. However, the private agreements are a more extreme version of public plea bargaining in two ways. First, the perpetrator is giving up even more rights than he would in traditional plea bargaining—such as the right to an attorney, the right to have his charges formally presented to him, and the right to have a neutral judge review the case and approve the agreement. Second, the defendant is avoiding not only the full punishment he would receive after a criminal trial, he is also avoiding even the collateral punishments that the criminal justice system imposes on any

11. *See infra* Part IV.B.

12. *See infra* Part II.

13. *See generally* Joh, *supra* note 6 (discussing the expansion of private police forces in the United States and their relationship with the public police and criminal justice systems); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004) (examining how the private police have adopted and supplanted many public police functions); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911 (2007) (describing the history and growth of private police forces and their role in a public criminal justice system); Sklansky, *supra* note 6 (providing extensive discussion of the growing influence of private police forces).

individual unwise or unlucky enough to be caught up in it: the inconvenience of arrest, the possibility of pretrial incarceration, the innumerable court appearances, and the stigma of a criminal accusation.

It is only by analyzing private criminal settlements as a private analogue to plea bargaining that the harmful aspects of these agreements become clear. By examining private criminal settlements as a form of private plea bargaining, we can see that these agreements are problematic because they remove the prosecutor from the settlement process. In public plea bargaining, the prosecutor plays a critical role in selecting which cases should be prosecuted, how they should be charged, and what sentence is appropriate.[14] Without a prosecutor present, the criminal settlement process cannot work properly, and so—with one significant exception—these settlements should be criminalized. The exception is the case in which a victim and a perpetrator with a preexisting relationship negotiate a settlement directly, a context which offers benefits (such as increased efficiency, greater flexibility, and a higher possibility of preserving these relationships) which are sufficient to overcome the problems caused by the lack of a prosecutor.

Before we conduct these analyses, we must first define exactly what we mean by private criminal settlements. Part I of this Article will examine the variety of different actions that a private party can take in response to criminal activity and categorize the different types of private criminal settlements that are possible. Part II will examine both the laws against blackmail and the rationale behind them, and conclude that these rationales cannot provide a sufficient justification for criminalizing private criminal settlements. Part III will then compare private criminal settlements to public plea bargaining. Part IV will discuss the implications of the analysis for current laws regarding private criminal settlements.

14. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123–24 (1998). Lynch describes the process of plea bargaining as one in which the prosecutor is a de facto adjudicator in an administrative system, not an advocate in an adversarial system. *Id.* at 2135. Although defense attorneys have the opportunity to convince the prosecutor to make a more generous offer during plea negotiations, the process essentially consists of the prosecutor offering a lower charge and/or sentence in exchange for a guilty plea, and the defendant deciding whether to take the offer or "opt out" of the administrative system and fight the charges in the adversarial system. *Id.* at 2144.

I. PRIVATE RESPONSES TO CRIMINAL ACTIVITY: AN OVERVIEW

As noted in the Introduction, a crime victim or witness who does not report the crime to the police can still take some other action against the perpetrator: she can sue the perpetrator in a civil suit (if she suffered damages as a result of the crime); she could impose her own private punishment against the perpetrator; or she could bargain with the perpetrator and get him to agree to furnish some consideration in exchange for her silence—in essence, reaching a private settlement that resolves the criminal case. In order to understand exactly what we mean when we discuss private criminal settlements, we must first describe the other possible actions that a victim or witness could take.

A. Instituting a Civil Suit Against the Perpetrator

Victims of most crimes have the right to sue the perpetrator for damages that they have suffered as a result of the crime. Many victims will choose not to exercise this right, since the offender is often judgment proof, and thus the time and expense required to hire a lawyer and file a case is not worthwhile. We can assume that it is even more unusual for a victim to fail to contact the police but still proceed with a civil suit. Many of the reasons for not contacting the police in the first place—the victim is intimidated by the perpetrator, the injury or damage is too minor, or the victim does not know who the defendant is—also preclude the filing of a civil suit. Even more significantly, victims who do institute a civil suit have a strong incentive to contact the police as well, since a criminal conviction will be admissible in the victim's subsequent civil suit, thus lowering the cost of winning a judgment.[15]

Of course, victims and perpetrators frequently settle these civil suits, resulting in a settlement agreement. However, these civil settlement agreements need to be distinguished from private criminal settlements: The former resolves all civil claims but does not preclude the victim from contacting the police, and the perpetrator will almost certainly face criminal sanctions in addition to the civil damages. In contrast, private criminal settlements include an agreement on the part of the victim that he or she will not contact the police, and thus the perpetrator will not face any criminal sanctions as a result of his conduct. As we will see below, this allows for a much greater

15. Under the doctrine of collateral estoppel, a criminal conviction is admissible in a subsequent civil case and usually precludes the defendant from challenging the issue of liability. *See, e.g.*, Am. Family Mut. Ins. Co. v. Savickas, 739 N.E.2d 445, 449–50 (Ill. 2000).

bargaining range than a civil settlement, and consequently could result in much more favorable terms for the victim.

B. *Privately Punishing the Perpetrator*

Victims also have the option of punishing the perpetrator directly. The types of "punishments" imposed by the victim can be placed into two separate categories. The first category is when the victim merely withdraws privileges that had previously been extended to the perpetrator (such as banning the perpetrator from the property) or exercises a right pursuant to a previously existing contract with the perpetrator (such as fining, demoting, suspending, or docking the pay of an employee). This type of punishment is only available to the victim of a crime,[16] and where the victim is acting wholly within his or her legal rights in enacting the punishment.

In contrast, the second category of private punishments occurs when the private actors (that is, the victims or witnesses) act against the perpetrator in a way that goes beyond their legally recognized power. For example, private security guards may be trained to hold shoplifting suspects in custody for a short period of time while taking statements and processing paperwork, effectively imprisoning them for a few hours. Bouncers at a bar might unnecessarily inflict physical pain on rowdy patrons in order to deter them from engaging in unwanted behavior in the future, while victims of assault frequently choose to fight back rather than call the police.

In its most extreme form, this second type of private punishment takes the form of vigilantism—when an individual or group acts with the purpose of imposing private punishment on individuals.[17] America has a dark history of such groups, from the lynchings carried out by

16. Certainly in some contexts the perpetrator may face repercussions from nonvictims—for example, other department stores, gated communities, or casinos may bar a known thief from entering their property, while other employers might learn of the perpetrator's criminal activity at his previous employer and refuse to hire him—but such actions are more accurately classified as collateral consequences of the perpetrator's actions rather than direct punishment.

17. Note that some so-called vigilante groups who only seek to apprehend criminals and then turn them over to the public authorities are not truly vigilantes under this Article's definition, since they do not impose their own punishment on the criminal. An example of these volunteer private police is the Minutemen, a group of private citizens who patrol the border with Mexico in an attempt to apprehend illegal immigrants, but who do not directly punish the illegal immigrants that they apprehend. *See, e.g.*, Peter Nicholas & Robert Salladay, *Gov. Praises 'Minuteman' Campaign*, L.A. TIMES, Apr. 29, 2005, at B1 (describing Governor Schwarzenegger's support of "armed volunteers" whose "practice is not to apprehend people but to report instances of illegal crossings" even though President Bush denounced the Minutemen as "vigilantes").

the Ku Klux Klan to modern-day abortion protestors assassinating physicians who provide abortion services.[18] Vigilantes may be moved to act by a number of different motivations: they may view certain conduct as criminal even though the state does not; they may believe that the police will not respond to the criminal conduct; or they may believe that the sentence that would be imposed by the public system will be too lenient. Vigilantes may not even be "victims" of the crime in any real sense of the term; instead, they may be nonvictims taking action against criminals in order to advance what they see as the cause of justice, or perhaps individuals who see themselves as suffering from "victimless" crimes, such as drug dealing or prostitution.

Vigilantes and others who go beyond their legal rights to impose a private punishment could be criminally liable for their actions.[19] In practice, however, criminal prosecution is likely to be rare for a number of reasons. First, many prosecutors may be reluctant to bring charges if a jury is likely to see the vigilante's punishment as proportional to the perpetrator's crime.[20] And second, the perpetrator who is suffering the punishment no doubt realizes that if he reports the punishment to the police, he may be arrested for the underlying crime. In some cases, the private party inflicting the punishment may explicitly explain that fact to the perpetrator (e.g., "Either I call the police right now, or you stay here for a couple of hours while I process these papers and have you sign a confession"). In these cases, the second category of private responses overlaps with the third category: private criminal settlements.

C. *Threatening Criminal Prosecution in Order to Obtain a Benefit or Take Away a Privilege*

The final option for a nonreporting witness or victim is to threaten to report the crime unless the perpetrator provides some consideration. Unlike civil suits, this option is available to either victims or witnesses, but only if two conditions are met: (1) the victim

18. One scholar has argued that vigilantism itself can provide a public good for the criminal justice system by highlighting the existence of a new crime that has become more prevalent or destructive. *See* Kelly D. Hine, *Vigilantism Revisited: An Economic Analysis of the Law of Extra-Judicial Self-Help or Why Can't Dick Shoot Henry for Stealing Jane's Truck?*, 47 AM. U. L. REV. 1221, 1244–48 (1998).

19. *Id.* at 1227 ("No state currently recognizes a 'Justified Vigilantism' or 'Community Protection' defense to criminal prosecution. As a result, the established legal system treats vigilantes no differently than other citizens.").

20. *Id.* at 1222 (describing a case in Texas in which a grand jury refused to indict some security guards who beat thieves with belts and canes).

or witness knows the identity of the perpetrator, and (2) the victim or witness has exclusive control over whether or not the crime is reported. If there are other witnesses who can report the crime to the police, the perpetrator has no reason to agree to the deal. Therefore, this option is not available for every crime.[21]

1. Incentives to Enter into an Agreement

Because these arrangements must be made in secret, there is no way of knowing how common these arrangements are. But bargaining theory[22] suggests that both parties have a great incentive to enter into these agreements when the above two conditions are met. The victim or witness receives some consideration from the defendant if an agreement is reached, whereas his or her alternative to an agreement—reporting the crime to the police—looks much less appealing. The following table summarizes the costs and benefits to a victim or witness of reporting a crime to the police.

21. In recent years, many jurisdictions have created state-sanctioned private plea bargains: Victim-Offender Programs (VOPs) and Victim Offender Reconciliation Programs (VORPs). These programs operate along the same principle as purely private plea bargains—that is, if the defendant does not reach an agreement with the victim, he or she will be prosecuted—but unlike purely private plea bargains, which can only occur if the state does not yet know about the crime, VOPs and VORPs are created and monitored by the state. *See, e.g.*, VORP, http://www.vorp.org/ (last updated Apr. 14, 2010) (describing the "safe mediation" between victims and offenders that allows the offender to "make things as right as possible with the victim").

22. For a discussion of bargaining theory, see generally Robert J. Condlin, *"Every Day and in Every Way We Are All Becoming Meta and Meta," or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)*, 23 OHIO ST. J. ON DISP. RESOL. 231 (2008).

Table 1: Victim/Witness's Alternative to Agreement (Reporting the Crime to the Police)

COST	BENEFIT
Immediate requirement of interview and paperwork with police officer	Victim or witness is contributing to prevention of crime generally, making crime slightly less likely in this jurisdiction, and thus making victim or witness slightly safer (theory of general deterrence).[23]
Strong possibility that victim/witness will need to interview with prosecutor	This specific perpetrator will know that the victim will call the police if a crime occurs and be less likely to commit crimes against him. This incentive applies only to victims who report, not witnesses (theory of specific deterrence).[24]
Remote possibility that victim/witness will need to testify at trial	The victim or witness will feel that he or she is fulfilling a duty, by contributing to public justice and helping to ensure that those who commit crime are punished.
Remote possibility that perpetrator will seek retribution	

The perpetrator, of course, must give up some consideration in order to make a private agreement, but he is even more at risk if he rejects the agreement. The following table summarizes the perpetrator's costs and benefits of refusing to make a deal with a victim or witness who is willing to bargain.

23. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (4th ed. 2006).
24. *See id.* at 15–16.

Table 2: Perpetrator's Alternative to Agreement (Refusing Victim's Offer and Being Arrested and Prosecuted)

COST	BENEFIT
Discomfort/humiliation of arrest	Agreeing to terms of private settlement means certain, immediate consequences, while most of the negative aspects of public punishment are not definite and are far in the future.
Possibility of being held in jail until arraignment (if no summons given)	
Cost of attorney (if not eligible for public defender)	
Chance of being convicted (through trial or plea bargain) and creating or adding to criminal record	
Expected sentence after conviction	
Collateral consequences of conviction, including stigma of being labeled a criminal	

The perpetrator has the more difficult calculation to make: whereas an arrest and a brief incarceration before arraignment are relatively certain, the possibility of conviction and ultimate sentence are dependent on a number of factors, such as the strength of the case against him, the willingness of the prosecutor to strike a deal, and the disposition of the sentencing judge.[25] Furthermore, the perpetrator has additional risks in agreeing to the private settlement: there is always the possibility that the victim or witness will take the consideration and report the crime anyway.[26] Finally, there is the possibility that another witness or victim who is not party to the private agreement will report the crime. The likelihood of this possibility obviously depends on the facts and circumstances of the case—thus, the more likely it is that a third party could report the crime, the less likely a perpetrator will be willing to negotiate.

25. *See, e.g.*, Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 748–50 (2009) (listing factors that affect potential trial outcome).

26. This possibility seems remote because the victim or witness is committing a crime in even making the agreement and is unlikely to want to bring the entire incident to the attention of the authorities once a deal has been struck.

But when the perpetrator and the private party are both willing to make a deal, there is a wide bargaining range for them to work with—certainly a wider bargaining range than exists in the contexts of traditional plea bargains between a prosecutor and a defendant. During private negotiations, the victim or witness is free to offer any kind of deal, unconstrained by legal or institutional requirements. The only limit is what the defendant is willing to accept. A prosecutor, on the other hand, has institutional limitations on what he or she can or cannot do, and usually must choose among a limited number of punishments: fine, community service, probation, and/or incarceration.[27]

For his part, the perpetrator at the point of private apprehension has more to lose by not making a deal than the defendant who is negotiating with a prosecutor. A perpetrator who agrees to a private criminal settlement can avoid all of the punishments—both direct and indirect—of the public criminal justice system. The defendant in a public plea bargaining setting has already been arrested, charged, and brought to court.[28] And even if he accepts the offer from the prosecutor, he faces a criminal conviction and the accompanying stigma and collateral consequences.[29]

2. Types of Private Plea Bargains

These private arrangements can be placed into three different categories. The first category includes the agreements which arise out of the crimes detected by private security guards. Private police—who are much more numerous than their public counterparts[30]—always have the option of turning the suspect over to the public authorities for adjudication and punishment, but this course of action may not be in the best interest of the private employer.[31] Cooperation with the

27. *See* DRESSLER, *supra* note 23, at 25 (explaining that the usual punishment after conviction entails imprisonment and/or a fine).

28. Malcolm Feeley has written quite accurately that for lower-level crimes, "the process itself is the punishment. The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence." MALCOM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 30–31 (1979). By its very nature, public plea bargaining imposes this "punishment," while private plea bargaining offers the defendant the chance to avoid this punishment altogether.

29. These extra costs, of course, will be lower for a defendant who already has criminal convictions, since the stigma and collateral consequences of having a criminal conviction already exist.

30. *See* Simmons, *supra* note 13, at 920–21.

31. *See, e.g.*, Joh, *supra* note 6, at 587–88; Joh, *supra* note 13, at 86; Sklansky, *supra* note 6, at 1189–90.

authorities takes time—time that the private employer will likely have to pay for.

The second category consists of agreements made by individuals who already have a preexisting relationship with the perpetrator: a friend or family member; or a neighbor, employer, or teacher. The victim or witness may value the relationship with the perpetrator and not want to jeopardize that relationship by calling the police and potentially being required to testify against him. And although the victim or witness might believe that the public criminal justice system will treat the perpetrator too harshly, he or she still could demand something from the perpetrator in return for not contacting the authorities. For example, the victim may ask for restitution, or require the perpetrator to undergo treatment or counseling. The informal nature of the bargaining procedure, combined with the ongoing relationship between the victim and the perpetrator, allow for an extraordinary broad bargaining range and a high level of flexibility in the negotiations.

The final category consists of agreements made by those who seek out criminals for the express purpose of extracting concessions from them. These individuals are not victims or witnesses in the traditional sense; instead, they are private investigators who search for incriminating evidence and then contact the perpetrator, offering to keep the evidence secret in exchange for payment. Frequently the investigators are motivated purely by financial gain, but not always. Consider the following two hypothetical cases:

Residents of an urban neighborhood are fed up with the drug dealers and prostitutes who work on their block. The police occasionally arrest the criminals, but the dealers and prostitutes simply return a few days later. Residents decide to take matters into their own hands and form a neighborhood watch organization. Members of the organization take turns observing and recording the criminal activity that occurs in the area. When cars come through their neighborhood to buy drugs or hire the prostitutes, the observers take pictures and then write down the license plates of the cars. Every week the residents determine the owners of the cars and then send letters to all of them. The letters include pictures of the illegal transactions and explain to the customers that the police will be contacted unless the customer contributes $500 to the neighborhood watch organization. The money is then used to hire part-time security guards, install better lighting, and create after school programs for the neighborhood youth.

A stockbroker in a midsized brokerage firm notices some unusual patterns in the trades made by his officemate. She does some investigation and learns that her officemate is illegally trading on inside information given to him by his brother-in-law, who sits on the board of several major publicly traded corporations. She confronts her colleague and threatens to report him to the SEC unless he agrees to pay her $50,000.

In the first example, the bargainer has motives which are generally consistent with the public criminal justice system—deterring crime, increasing security—but has determined that the best way to advance those motives is to arrange a private criminal settlement rather than contact the authorities. In the second example, the individual is simply motivated by personal gain, seeking to uncover the secrets of others in order to personally profit from them.

Of all the categories, this last hypothetical sounds the most objectionable, because it seems the most similar to blackmail. But in truth, every type of private criminal settlement is blackmail.[32] Thus, when a department store demands $200 in "restitution" from the shoplifter, or the domestic violence victim requires her husband to stop drinking and enroll in a program, or the neighborhood organization demands money from those who commit crimes on their block, all of these individuals or private groups are committing a crime—usually a felony.[33]

But does it make sense to criminalize *any* of these agreements? As it turns out, the crime of blackmail itself is a controversial topic. After decades of scholarship on the topic, there is still no consensus among legal scholars as to whether blackmail should be a crime.[34] And the controversy over criminalizing this conduct only becomes more intense in the context of private criminal settlements. In the next Part, we will evaluate the rationales for criminalizing blackmail and see which of them apply to our particular brand of extortion.

32. *See* Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1818 (1993). As Judge Posner explains, blackmail occurs any time an individual "possesses information about his prospective victim that the latter would prefer not be made public," and offers to keep the information quiet in exchange for consideration. *Id.* Threatening to reveal information about the criminal activity of the blackmailer's victim unless some consideration is paid is a type of blackmail. *Id.* at 1820.

33. *See infra* notes 35–36 and accompanying text.

34. *See infra* Parts II.B and II.C.

II. PRIVATE CRIMINAL SETTLEMENTS AS BLACKMAIL

Agreeing not to report a crime to the police in exchange for consideration is illegal under blackmail statutes in every jurisdiction in the United States,[35] generally with potential penalties of a year or more of imprisonment.[36] Even so, there are two reasons to believe that private criminal settlements still occur. First, as we have seen, both parties have a strong incentive to engage in private criminal bargaining.[37] And second, the law against private criminal settlements provides little in the way of deterrence because the chances of the blackmail crime being detected are very small. As with other forms of blackmail, private criminal settlements occur in secret, usually with no witnesses aside from the two contracting parties. Both parties to the agreement have reasons to keep the agreement confidential—in fact, the "victims" of this type of blackmail arguably have an even greater incentive than other blackmail victims, since they will face arrest, prosecution, and punishment if the information is revealed.

More importantly, there is a significant scholarly debate as to whether blackmail itself *should* be criminalized—and in particular, whether the justifications for criminalizing blackmail apply to the specific case of private criminal settlements.[38] To help us review these debates, we must first categorize blackmail cases based on how the blackmailer acquires his or her information.[39] One commentator has

35. Many states have broad blackmail statutes which prohibit private criminal settlements. The federal statute is typical: "Whoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined under this title or imprisoned not more than one year, or both." 18 U.S.C. § 873 (2006); *see also* CAL. PENAL CODE §§ 518, 519 (West 2010) (describing extortion as "fear" induced by a threat to expose a secret or crime); N.Y. PENAL LAW § 135.60(4) (McKinney 2009) (describing the offense of "coercion in the second degree" as a class A misdemeanor). Some statutes have specific defenses and/or exceptions; we will consider these in Part IV.B *infra*.

Some states also make it a crime to fail to report a felony once a person has knowledge that a felony was committed. *See, e.g.*, OHIO REV. CODE ANN. § 2921.22(A)(1) (LexisNexis 2010). Ohio's law provides for an exception for all privileged information and exempts individuals from reporting family members. § 2921.22(G).

36. *See, e.g.*, CAL. PENAL CODE § 520 (West 2010) (setting out penalties of two to four years for extortion of property).

37. *See supra* Part I.C.1.

38. *See infra* note 42 and accompanying text.

39. Many scholars also categorize blackmail along another axis, based on the type of information used to blackmail the victim. This Article is only concerned with information which would tend to prove the victim was involved in criminal activity. This so-called "crime exposure blackmail" has itself been the subject of intense debate, mostly on the question of whether allowing or even encouraging incriminating blackmail would increase or decrease the crime rate. *See, e.g.*, Berman, *supra* note 10, at 860–62 (arguing that "crime exposure blackmail should be a crime" because its motivations prove that the blackmailer

divided blackmail up into four different categories: "opportunistic blackmail," in which the blackmailer accidentally comes upon the information; "participant blackmail," in which the blackmailer and the victim participated in the underlying act together; "commercial research blackmail," in which the blackmailer invests resources to discover the information; and "entrepreneurial blackmail," in which the blackmailer creates incriminating information about the victim by enticing or encouraging him or her to act in certain ways.[40] Participant blackmail and entrepreneurial blackmail are distinct in that they involve the blackmailer committing an additional crime;[41] thus, there is no real debate as to whether these forms of blackmail should be considered criminal behavior. Therefore, this Article is only concerned with opportunistic blackmail and commercial research blackmail.

A. The Blackmail Debate Generally

Blackmail is a crime that has puzzled commentators and scholars for decades.[42] It is an offense that feels intuitively wrong to many individuals, but it is difficult to explain why the activity should be criminalized. Most scholars begin their discussion of blackmail by describing the "blackmail paradox"[43]: it is not a crime to disclose information, and it is not a crime to ask for payment in exchange for not doing something you are legally permitted to do, but it is a very serious crime to combine the two legal activities and ask for payment

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is a morally blameworthy actor); Brown, *supra* note 10, at 1974 (arguing that incriminating blackmail may reduce crime but should still be illegal because "we fundamentally alter the *quality* of justice when we take enforcement away from a public audience"); Landes & Posner, *supra* note 10, at 42–44 (concluding that there is no way to know the effect of legalizing incriminating blackmail on the crime rate).

40. *See* HEPWORTH, *supra* note 10, at 74–77.

41. In participant blackmail, the blackmailer and the victim committed the underlying crime together. *Id.* at 76–77. In entrepreneurial blackmail, the blackmailer causes the victim to engage in criminal activity, and thus could be considered an accessory to the crime. *See id.* at 74–75.

42. There is a vast amount of literature on this subject, but the most relevant articles to our discussion are Brown, *supra* note 10; Landes & Posner, *supra* note 10; Posner, *supra* note 32; and Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877 (1993).

For general background on the blackmail debate, see generally Berman, *supra* note 10; Walter Block & Gary M. Anderson, *Blackmail, Extortion, and Exchange*, 44 N.Y.L. SCH. L. REV. 541 (2001); Russell J. Christopher, *Meta-Blackmail*, 94 GEO. L.J. 739 (2006); Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984); Henry E. Smith, *The Harm in Blackmail*, 92 NW. U. L. REV. 861 (1998).

43. *See, e.g.*, Berman, *supra* note 10, at 796.

in exchange for not disclosing information. Given this anomaly, dozens of law professors, philosophers, and economists have all struggled to come up with a theory to explain why blackmail should be criminalized;[44] in contrast, a small minority of scholars has argued that blackmail should not be a crime because there is no theory that adequately justifies its criminalization.[45]

An exhaustive examination of each of these justifications is beyond the scope of the Article,[46] but we must consider them briefly in order to determine which of them apply specifically to private plea bargaining. As we will see, many of the justifications for criminalizing blackmail simply do not apply in the private plea bargaining context, while others become even more compelling.

B. Utilitarian Justifications

1. Blackmail Is "Inefficient"

The primary argument for criminalizing blackmail from a utilitarian perspective is that blackmail is an economically inefficient activity. In the paradigmatic case, the blackmailer will invest resources in finding out about the victim's activity, and then ask the victim to pay money to the blackmailer in order to not disclose the information. As one commentator argues, this is akin to "digging up dirt, at real resource cost, and then reburying it."[47] If blackmail were legalized, entire industries would spring up devoted to finding the most embarrassing and damaging secrets about individuals, extracting

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44. For an excellent overview and taxonomy of the different theories, see *id.* at 799–833. Of course, after rejecting all of the existing theories as flawed, Professor Berman proposes his own justification for the criminalization of blackmail. *Id.* at 833–52. For an overview of these theories as applied to incriminatory blackmail specifically, see Brown, *supra* note 10, at 1950–66.

45. *See, e.g.*, Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905, 1907–08, 1925–32 (1993) (arguing from a law and economics perspective that the social cost to criminalizing blackmail outweighs the social benefit); *see also* Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 674 (1988) ("It would be better if this [ultimately suppressed] information were not collected and the resources were used to produce something of value.").

46. As of March 1, 2011, a LexisNexis search revealed sixty-two articles and notes with the word "blackmail" in the title. Search Results for "Blackmail" Within the Title of an Article in the "US Law Reviews and Journals" Database, LEXISNEXIS, http://www.lexisnexis.com (last visited Apr. 14, 2011).

47. Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1860 (1993); *see also* Shavell, *supra* note 42, at 1897–99 (discussing the costs of blackmail to both the blackmailer and the subject of the blackmail).

payment for these secrets, and then destroying the information they found.

There are two possible responses to this utilitarian argument. The most powerful response is to simply ask: so what? Economic inefficiency is hardly a sufficient justification for criminalization. People engage in economically inefficient behavior all the time—from taking long drives through the country to making trades on their fantasy football team—and nobody argues those behaviors are criminal.[48] As a voluntary transaction between consenting adults,[49] blackmail should not be criminalized unless—as is at least arguably true for selling drugs, pornography, or sex—there is some negative externality caused by the transaction that is damaging to society.[50]

Another response to the economic inefficiency argument is that it paints with too broad a brush. Here it is important to distinguish between commercial research blackmail and opportunistic blackmail. In the former case, the actions by the blackmailer do indeed seem inefficient—he or she has invested resources in finding this information, only to hide it again. But in the latter case, the victim is merely buying a commodity from a blackmailer who happened to stumble on the information, and it is difficult to see how there are any wasted resources. The blackmailer may be unjustly enriched to some extent, but this is hardly a reason to criminalize the behavior.

The inefficiency justification for criminalizing blackmail is even weaker when applied to the specific context of private criminal settlements. In fact, it is possible that private criminal settlements—what at least one commentator has labeled "incriminating blackmail"[51]—do serve a socially useful purpose in that they exact a cost from the criminal and thereby deter criminal activity.[52] But here,

48. *See* Block & Anderson, *supra* note 42, at 546 ("There are lots of idle, time wasting, 'sterile' activities which, presumably, no one would wish to make into a criminal offense: watching soap operas, reading poetry, listening to non-baroque music, gardening and camping.").

49. Some commentators have argued that blackmail is not actually voluntary, since it involves an implied threat: pay me money or I will reveal unpleasant information about you. *See, e.g.*, Posner, *supra* note 32, at 1819 (stating that blackmail is similar to duress because "both involve threats"). But most economists reject this characterization, arguing that the blackmail transaction—since it does not involve a threat of violence—is no more "coercive" than any other free-market exchange. *See, e.g.*, Block & Anderson, *supra* note 42, at 545 ("*Every* voluntary interaction can be couched in the form of a threat.").

50. As we will see below, there is a possibility that incriminating blackmail might have a positive externality by increasing deterrence and thereby decreasing the crime rate.

51. *See* Brown, *supra* note 10, at 1936.

52. There is some debate as to the net effect that allowing private plea bargains would have on overall deterrence. On the one hand, the blackmailer by definition will exact a

the distinction between opportunistic blackmail and commercial research blackmail becomes significant for an entirely new reason: opportunistic blackmailers may in fact *decrease* deterrence, and commercial research blackmailers almost certainly increase deterrence.

Opportunistic blackmailers acquire evidence of a crime through chance, usually by being witnesses or victims of a crime. In the absence of incriminatory blackmail, many of these victims and witnesses would contact the police, which would lead to the optimal level of deterrence—or at least the level of deterrence that is generally provided by the public criminal justice system. But if incriminatory blackmail is encouraged and becomes more widespread, there may be a *decrease* in overall deterrence since these witnesses and victims would be more inclined to extract their own penalties from the defendant. Because the defendant would not agree to the deal unless it provided better terms than he would receive from the public criminal justice system, the private criminal settlement penalties would not be as severe as what the public system would provide, thus leading to a lower level of deterrence.

Professor Landes and Judge Posner add two points to this underdeterrence argument: first, a private blackmailer can only extract money from the perpetrator, and, second, the perpetrator may not have sufficient resources to pay a price which is equivalent to the punishment that he or she deserves.[53] Thus, the private blackmailer will be forced to settle for even less than he would otherwise demand.[54] In contrast, the state can incarcerate a perpetrator for an appropriate period of time regardless of the perpetrator's financial resources.

One flaw in this argument is that it assumes that money is the only consideration that the perpetrator can give to the blackmailer. In fact, one of the appealing aspects of incriminatory blackmail (as with any form of alternative dispute resolution) is its flexibility: the blackmailer could demand services from the perpetrator, or require that he abstain from certain behaviors, or request any other kind of

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lower cost than the criminal would face if the crime was reported (otherwise there would be no bargain). *See* Landes & Posner, *supra* note 10, at 42. On the other hand, victims and witnesses who would never report the crime to the authorities might engage in incriminating blackmail, thus increasing the number of criminals who must face consequences for their actions. *See* Brown, *supra* note 10, at 1941–50; Shavell, *supra* note 42, at 1899.

53. *See* Landes & Posner, *supra* note 10, at 42.

54. *Id.*

consideration. Therefore, even the very poor who have no financial resources could still suffer some punishment—and thus be deterred—by incriminatory blackmail.

Even if we assume that allowing opportunistic incriminatory blackmail would result in a lower level of deterrence, it is not clear that society would be any worse off because opportunistic blackmail achieves *some* level of deterrence and expends far fewer state resources than the public criminal justice system would. In other words, in the same way that public plea bargaining offers a defendant a reduced sentence (and thereby provides less deterrence) in exchange for a saving of resources, opportunistic blackmail offers an even lighter sentence in exchange for not using *any* state resources. Although the punishment may be inadequate to sufficiently deter the defendant from committing the crime again, it certainly provides *some* deterrence to the defendant, and at no cost to the state.

Finally, some commentators have disputed the very premise of the underdeterrence argument, noting that even for opportunistic blackmail, there are situations in which the victim or witness would never call the police even if the private criminal settlement option were unavailable.[55] Some crimes between friends and family members could go unreported if the victim does not want law enforcement to get involved in the case. Likewise, private security guards who catch people trespassing or shoplifting might never report the crime to the police, since the time and money it would take to do so would not be worthwhile. If a ban on private criminal settlements was effectively enforced, the perpetrators would receive no punishment and would thus not be deterred at all.[56] Thus, a law which permitted opportunistic blackmail only in cases where the victim or witness would be unlikely to call the police would help to minimize the harm of these agreements.

Commercial research blackmail, on the other hand, unequivocally increases deterrence. Unlike the opportunistic blackmailer, the commercial research blackmailer would not have even known about the crime, much less reported it, if he or she had not been given the incentive of payment from the perpetrator.[57] Legalizing incriminatory blackmail would encourage third parties to

55. *See* Brown, *supra* note 10, at 1954–55.

56. Granted, in these cases, the victim's or witness's threat to punish is a bluff, but as with all bluffs it could be persuasive enough to convince the perpetrator to agree to the victim's or witness's demands.

57. *See* Brown, *supra* note 10, at 1954.

seek out evidence of a crime that by definition would otherwise remain undiscovered.[58] This would result in an increase of private detection of criminal activity, and a corresponding increase in private payments from perpetrators to blackmailers, thus increasing the cost of crime in general and increasing the amount of deterrence.

In other words, opportunistic incriminatory blackmail actually saves resources, since it costs the state nothing and inflicts some type of punishment on the perpetrator—although it achieves less deterrence than the public criminal justice system would. Commercial research incriminatory blackmail uses private resources, but they are not wasted: they result in certain crimes being discovered and indirectly punished through a blackmail payment.[59] Because these crimes would otherwise remain undiscovered and unpunished, commercial research and opportunistic incriminatory blackmail thus increases deterrence.

2. Blackmail Encourages Fraud, Theft, and Secrecy

Some utilitarians, notably Richard Epstein, argue that blackmail should be criminalized, not because it is inherently harmful, but because its practice leads to socially undesirable results, such as fraud and theft.[60] Blackmail does this in two ways: first, it leads otherwise law-abiding citizens to commit theft in order to pay the blackmailer's demands;[61] and second, the blackmailer will have an incentive to ensure that the victim's secret (i.e., his criminal activity) is kept safe, and so he will encourage the victim to keep silent about his crime and advise him on how to do so.[62]

This argument is not unique to blackmail—it can be used to justify other so-called "victimless crimes" such as drug use, prostitution, and gambling—but in most other cases it is not offered as the sole reason for criminalization. Although drug addicts and compulsive gamblers can and do commit theft to support their habits, these acts are also criminalized because they are inherently damaging to the individual—that is, they have a paternalistic justification as well. And, at least traditionally, there is a strong moral component to

58. Commercial research blackmailers could only profit off of crimes which were undiscovered or unsolved by the public authorities, so any investigations they undertake would focus on these crimes.

59. Brown, *supra* note 10, at 1945–46.

60. *See* Epstein, *supra* note 42, at 562–66.

61. *See* Smith, *supra* note 42, at 862–63 (arguing that blackmail creates such a strong sense of fear in the victim that he will do anything to keep the information secret).

62. *See* Epstein, *supra* note 42, at 564.

the criminalization of these actions: gambling or using drugs or prostitutes is considered to be morally wrong by many people. In short, utilitarians would find it hard to justify laws against drug possession, prostitution, and gambling on utilitarian grounds alone, especially since there is a reasonable argument that criminalizing these actions creates more harm to society than the underlying act itself. And in the end, the underlying undesirable activity—the theft or fraud—is already itself criminalized, and presumably punishments for theft and fraud could be increased if the state wanted more deterrence.

Likewise, it is hard to justify criminalizing blackmail solely based on the fraud or theft that it might encourage. Unlike drug addiction or compulsive gambling, there is no real argument that the blackmailer needs to be protected from himself. Furthermore, not all blackmail leads to fraud and theft;[63] nor is there any evidence that it leads to fraud and theft more often than other perfectly legal activities.

Epstein's other point—that blackmail leads to secrecy[64]—is self-evident. Obviously a blackmailer will have an incentive to help his victim keep the information secret—it is valuable information to the blackmailer, after all—and so this would conceivably encourage the blackmailer to give advice and even assistance as to how to prevent others from discovering the information.[65] But this argument has very little force in justifying a general ban on blackmail. Secrecy in and of itself is not against the law; in fact, we value secrecy and privacy in many contexts.[66] If the blackmailer assists his victim in protecting information that the victim would prefer to keep private—perhaps his sexual orientation or a sexual indiscretion in the past—the assistance would probably be welcomed by the victim as a positive byproduct of the blackmailing process.

However, when applied to incriminatory blackmail, the secrecy concern becomes more legitimate. Incriminatory blackmailers are not

63. *See, e.g.*, Berman, *supra* note 10, at 815–16 (using the example of an individual blackmailing his victim by demanding sexual favors in exchange for not revealing the fact of her illegitimate birth).

64. *See* Epstein, *supra* note 42, at 562.

65. *Id.* at 564.

66. For example, a person may privately enjoy certain activities that would be embarrassing to him or her if coworkers or family members knew about them—anything from unorthodox hobbies, like knitting or playing bagpipes, to unusual sexual practices. On a more serious level, businesses keep trade secrets, and governments keep state secrets. Both types of secrets are generally considered to be beneficial, if not necessary, in a modern society.

merely helping victims keep embarrassing information secret; they are helping to cover up crimes. The blackmailer is likely to become an accessory after the fact by helping to prevent detection of the crime by law enforcement.[67] This problem is particularly acute for commercial research blackmailers; since they are likely to be repeat players in the industry who invest resources to unearth evidence and track down witnesses that could incriminate the perpetrator, such evidence could be destroyed and witnesses could be deterred from testifying if the perpetrator pays the asking price. In this sense, under Epstein's utilitarian theory, incriminating blackmail is the worst kind of blackmail, and commercial research blackmailers are the worst kind of blackmailers.[68]

Even so, Epstein's objection still covers only a byproduct of blackmail, not the blackmail itself. Just as the fraud and deception which sometimes accompany blackmail are independently criminalized, so is the crime of hindering the apprehension or prosecution of a crime.[69] If commercial research blackmail were legalized, penalties for assisting in the cover-up could be increased.[70] Additionally, a jurisdiction could criminalize any further compensation after the initial payment to the commercial research blackmailer. This would effectively eliminate the blackmailer's incentive to help with any cover-up, since he or she would have no interest in whether the perpetrator was ultimately apprehended.

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67. *See, e.g.*, 18 U.S.C. § 3 (2006) ("Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact."); N.C. GEN. STAT. § 14-7 (2009) (criminalizing accessory after the fact).

68. Opportunistic blackmailers—victims or others who just happen to witness a crime—are far less likely to be able to provide any useful assistance to the perpetrator. They can guarantee their own silence, of course, but they will generally not be in a position to help the perpetrator cover up the crime or hide it more effectively from the authorities.

69. *See, e.g.*, MODEL PENAL CODE § 242.3(3) (1985) (stating that it is a crime to "conceal[] or destroy[] evidence of the crime, or tamper[] with a witness, informant, document, or other source of information . . . .").

70. The Model Penal Code makes this crime a third-degree felony if the defendant is assisting in covering up a first- or second-degree felony, but the crime is only a misdemeanor if the defendant is assisting in covering up any other kind of crime. *See* § 242.3. Blackmail is "theft by extortion." *See id.* § 223.4 ("A person is guilty of theft if he purposely obtains property of another by threatening to . . . accuse anyone of a criminal offense . . . ."). Under section 223.1(2)(a), the Code punishes theft as a third-degree felony if the amount demanded exceeds $500. *See id.* § 223.1(2)(a). Thus, if blackmail were legalized, it would make sense to increase the crime level for concealing evidence to a third-degree felony in all cases, thus providing the necessary amount of deterrence to those blackmailers who are tempted to provide criminal assistance to those whom they are blackmailing.

In the end, utilitarian theories do not seem to sufficiently explain why most individuals believe that blackmail should be illegal.[71] Blackmail has been criminalized not because it wastes resources or because it could lead to other crimes, but because people believe it is morally wrong.[72] We therefore turn our attention to the retributive justifications for criminalizing blackmail.

C. *Retributive Justifications*

At the outset, many of the retributive justifications for criminalizing blackmail fail because of a mischaracterization of the act itself—specifically, a conflation of extortion with coercion.[73] If an individual blackmails his victim by threatening to carry out an illegal act against the victim unless a payment is made, then the individual has coerced the victim, not blackmailed him. For example, if A threatens to burn down B's house, or break B's kneecaps, or kidnap B's child unless B pays A $100,000, the transaction may look like blackmail, but it is not. True blackmail consists of the blackmailer threatening to take an action that is *not* criminal, which the blackmailer has every legal right to do—usually the disclosure of information—unless the victim complies with the blackmailer's demand. This is the essence of the "paradox" of blackmail—how two legal actions can combine to create a crime.[74]

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71. Utilitarians offer a number of other justifications for criminalizing blackmail, but none of them are able to justify the breadth of the blackmail prohibition—in particular, they would not serve to justify criminalizing incriminating blackmail. For example, one commentator argues that legalizing blackmail would create an incentive for individuals to invade each other's privacy in the search for potentially valuable information. *See, e.g.*, Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 165 (1980). If the potential blackmailers were in fact only looking for incriminating blackmail, a utilitarian would almost certainly concede that the cost of the invasion of privacy would be outweighed by the benefit of exposing more criminal conduct. Of course, if the invasion of privacy went so far as to constitute an independent crime—a trespass, perhaps, or a theft of private property—the potential blackmailer would be criminally liable without the need for a blackmail prohibition.

72. Professor Mitchell Berman, who provides an excellent summary of the various utilitarian and retributive justifications for blackmail, expresses this idea very well, stating that the utilitarian justifications "fail even to approximate common intuitions regarding what's wrong with blackmail." Berman, *supra* note 10, at 820.

73. *See* Epstein, *supra* note 42, at 555–57 (distinguishing illegal threats of physical violence from nonviolent, legal threats); Posner, *supra* note 32, at 1818–19 (noting that blackmail "is often grouped" with contracts made under duress, such as when a gun-wielding assailant says, "Your money or your life").

74. *See, e.g.*, Berman, *supra* note 10, at 796.

1. An Illegal Offer

At least one commentator has attempted to justify blackmail on retributive grounds by narrowing the definition of blackmail to cover only those cases when the action the blackmailer threatens or offers to undertake is itself illegal.[75] As noted above, a *threat* to do something illegal transforms the blackmail into coercion, which provides an easy case for justifying criminalization. But if the *offer* is illegal, the blackmailer is in effect committing two crimes: solicitation to commit the underlying crime (whatever he or she is offering to do) and the blackmail itself (receiving payment in exchange for committing the illegal act).

One problem with this narrow definition of blackmail is that it would decriminalize most acts of extortion—acts which many people consider *should* be criminal—such as threatening to disclose adultery or sexual orientation.[76] But for the purposes of justifying incriminatory blackmail, the definition could potentially be useful if failing to report a crime were itself a crime. If so, the incriminatory blackmailer who offers to remain silent in exchange for consideration is offering to commit an illegal act for money. In a sense, the blackmailer is offering to enter into an illegal conspiracy with the victim.

But this justification for criminalizing incriminatory blackmail does not get us very far because modern criminal law does not impose a general duty to report a crime.[77] The common law offense of failure to report a crime—known as misprision of a felony—was created centuries ago, during a time before professional police forces existed.[78] In that era, ordinary citizens were required to apprehend felons themselves, or, barring that, to raise a "[h]ue and cry" so that other citizens could respond.[79] The crime was ultimately abolished by twentieth-century judges who applied the principle that a mere

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75. *See* 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 240–58 (1988).

76. *See* Berman, *supra* note 10, at 821–22 (calling this narrow definition "startling").

77. *See infra* notes 81–82 and accompanying text; *see also* Brown, *supra* note 10, at 1944–49 (comparing the desirability of incriminatory blackmail in jurisdictions where there is a duty to report crime with jurisdictions where there is no such duty).

78. *See* Gabriel D. M. Ciociola, *Misprision of Felony and Its Progeny*, 41 BRANDEIS L.J. 697, 699 (2003).

79. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 39 (1993); *see also* Ciociola, *supra* note 78, at 702 ("In England, before the seventeenth century, primary responsibility for law enforcement was not delegated to paid, full-time professionals; the community as a whole was obliged to combat the crime.").

omission cannot be a crime.[80] The drafters of the Model Penal Code likewise declined to make nonreporting a crime, and currently only two states have laws which criminalize the nonreporting of a crime.[81] Federal law only prohibits active "concealment" of the crime,[82] which courts have interpreted to mean more than merely the omission of nondisclosure; to be convicted a defendant must also commit some kind of affirmative action, such as lying to investigators or concealing evidence.[83]

In short, this justification for criminalizing incriminatory blackmail is not very persuasive. The law rejects the idea that the mere nonreporting of a crime should itself be a crime, following the basic criminal law principle that omissions cannot themselves be criminal.[84] There are some exceptions to this principle, of course, and

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80. Ciociola, *supra* note 78, at 710–21.

81. *Id.* at 726; *see also* MODEL PENAL CODE § 242.5 cmt. (1985) ("The Model Code accords with the vast majority of jurisdictions in assigning no penalty to simple failure to inform authorities of criminal conduct."); OHIO REV. CODE ANN. § 2921.22 (LexisNexis 2010) ("[N]o person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities."); S.D. CODIFIED LAWS § 22-11-12 (2006) ("Any person who, having knowledge, which is not privileged, of the commission of a felony, conceals the felony, or does not immediately disclose the felony, including the name of the perpetrator, if known, and all of the other relevant known facts, to the proper authorities, is guilty of misprision of a felony."). Both statutes apply only to felonies and are subject to certain exceptions. *See* § 2921.22; § 22-11-12. Both statutes make an exception if the information about the crime is privileged. *See* § 2921.22; § 22-11-12. Ohio's law also exempts "information that would tend to incriminate a member of the actor's immediate family." *See* § 2921.22(G)(2).

82. *See* 18 U.S.C. § 4 (2006) ("Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.").

83. Stuart P. Green, *Uncovering the Cover-up Crimes*, 42 AM. CRIM. L. REV. 9, 23 (2005). Professor Green notes:

> As interpreted by the courts, passive failure to report a crime does not constitute 'concealment'; a defendant must engage in some affirmative act, such as making a false statement to an investigator, seeking to divert the attention of the police, harboring a felon, or retrieving and secreting proceeds of evidence of a crime. Indeed, the affirmative act requirement is so important that one court concluded that a defendant's truthful but incomplete disclosure of what he knew about an alleged counterfeiting operation did not constitute misprision, since it did not result in any greater concealment than would have occurred if the defendant had remained silent.

Id. (footnotes omitted).

84. *See* DRESSLER, *supra* note 23, at 109–10. For an excellent discussion of this issue, see generally Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws*, 40 SANTA CLARA L. REV. 971 (2000) (stating the general rule that omissions are not criminal, explaining the reasons for such rule, and noting the exceptions

the "illegal offer" justification is sensible under the rare circumstances when specific individuals are legally bound to report evidence of a crime. For example, law enforcement officers (who have a duty to report and enforce the criminal law) are obviously making an illegal offer when they request money in exchange for not reporting a crime. Also, many states impose a specific crime reporting duty on certain professions. For example, physicians who see evidence of gunshots or other violence are frequently required to report the incident to the police,[85] while certain professionals are "mandated reporters" for child abuse.[86] Furthermore, a handful of states require eyewitnesses to report certain violent felonies and rapes, though prosecutions under these statutes are extraordinarily rare.[87] In other words, if an individual has a statutory *duty* to report a crime, then it should be a crime for that individual to agree to violate that duty by withholding the information in exchange for money. But there is nothing in this justification to suggest that *all* incriminatory blackmail should be illegal.

2. The Blackmailer as a "Parasite"

Professor James Lindgren has argued that blackmail is morally wrong because the blackmailer is offering to sell something that does not truly "belong" to him—that he "interposes himself parasitically in an actual or potential dispute in which he lacks a[n] . . . interest."[88] For example, if an employer would want to know about an employee's drug problem and the blackmailer demands and receives money from the employee in order to keep the drug use secret from the employer, then the blackmailer has in a sense profited from information that would be valuable to the employer. In other words,

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and justifications for the exceptions to the general rule).

85. *See* Ciociola, *supra* note 78, at 730.

86. *See id.* at 731. Many states have so-called mandated reporting laws requiring certain professionals (such as social workers, school personnel, health care workers, mental health professionals, and childcare providers) to report any signs of child abuse to the authorities. *See, e.g.*, CAL. PENAL CODE §§ 11165.7, 11166 (West Supp. 2011) (defining who is included as a "mandated reporter" and requiring mandated reporters who have knowledge of or observe a child who is the victim of abuse and neglect to report such abuse or neglect).

87. Ciociola, *supra* note 78, at 730–42. Three states (Massachusetts, Rhode Island, and Washington) require reporting of violent felonies, though as of 2003 no prosecutions have been reported under any of these laws. *Id.* at 730–35. Three states (Vermont, Minnesota, and Rhode Island) require assistance to those in peril. *Id.* at 735–38. And Florida and Rhode Island have laws specifically requiring contacting the police if one witnesses a sexual assault. *Id.* at 740–42.

88. Lindgren, *supra* note 42, at 702.

the blackmailer has inserted himself as an unwanted intermediary between the victim and the person who would like to have this information, thus effectively stealing the money from both of them.[89]

The "parasitical" argument has intuitive appeal, but it also has been criticized for not fully explaining why this particular type of exploitation should be considered criminal.[90] For example, if it is immoral—even criminal—to profit as a "parasite" for not revealing information, then why is it not immoral to profit by *revealing* the information? What if, for example, the blackmailer learned about the employee's drug use and offered to sell the information to the employer? What about a company that spends resources to locate untapped lucrative oil reserves, finds them underneath a farmer's fields, and then offers to sell the precise location to an oil company? There are plenty of legitimate situations where an individual learns information about one person which would be valuable to another and offers to sell the information—in effect bargaining with someone else's information. Why is it then criminal to offer to *not* disclose the information?

But once again, although this argument is a relatively weak justification for the criminalization of blackmail generally, it appears to carry more weight for incriminating blackmail specifically. In the case of incriminating blackmail, the blackmailer is inserting himself between the perpetrator and the state—thus, he is not merely bargaining with chips that belong to an employer or a wronged spouse, but bargaining with chips that belong to the state. The blackmailer in this case has become an "unauthorized agent for the public,"[91] using a unique type of leverage that comes from the criminal justice system, a leverage that has been put into place to further the cause of justice and is now being subverted to further the blackmailer's own personal goals.

This argument can best be understood by using an analogy with tort law. Plaintiffs and defendants in civil cases frequently reach out-of-court settlements, with the plaintiff agreeing to forgo the lawsuit in exchange for a monetary payment from the defendant. Incriminating blackmail is analogous to a third party learning about a personal

89. Professor Lindgren gives an example of a woman who learns that a company is criminally polluting the air and seeks $1,000,000 in exchange for her silence. She may deserve some amount of compensation (if she lives near the smokestack herself), but she has "stolen" money that belongs to the state. *Id.* at 714–15.

90. *See* Berman, *supra* note 10, at 823–24 (criticizing Lindgren's argument and citing other critics).

91. Lindgren, *supra* note 42, at 715.

injury and then settling the case on behalf of the plaintiff, keeping the settlement money for him or herself, and never even notifying the plaintiff that the tort occurred or that a claim existed. In a criminal case, when the witness or even the victim agrees not to contact the police in exchange for some payment, he or she is gaining something from the defendant that ought to belong to the state.

But this analogy also points out the fundamental flaw in the "blackmailer as parasite" justification. In the civil context, a plaintiff literally gains money from the defendant as a result of the settlement—money that the plaintiff legally and morally deserves and is intended to compensate the plaintiff for the harm caused by the defendant. In a criminal case, the state does not actually gain anything of monetary value from the defendant. True, it has a right to punish the defendant, but exercising that right actually *costs* the state money. The state's interest in learning about and pursuing the criminal case is not financial (as it is for a civil plaintiff); it is to further the goals of the criminal justice system: making him suffer for the crime that he already committed (from a retributivist standpoint) and deterring the defendant from committing more crimes (from a utilitarian standpoint). When a third party—the victim or a witness—supplants the state in a criminal case, he or she is furthering those same goals by extracting something of value from the perpetrator, or by requiring the perpetrator to do something he does not want to do. Granted, the third party will not impose the exact same punishment as the state would if the case were reported (in fact, by definition the punishment will be less), but as discussed earlier, this is no different from traditional plea bargaining: the state pays less (in this case nothing), and the defendant is deterred less and punished less severely. Whether it is worth it to reduce the punishment so drastically in exchange for dropping the cost imposed on the state to zero is an empirical question—one already discussed in the context of the utilitarian justifications.[92]

It is true that the third party is (probably) not doing this out of a sense of justice—perhaps he or she is doing it out of pure greed—but why would the state (who is the alleged victim of this

92. *See supra* Part II.B. Professor Brown also sets forth a version of this argument, noting that there is not necessarily a "disjunction" between the interests of the state and the interests of the blackmailer. *See* Brown, *supra* note 10, at 1963–65. Brown argues that "the blackmailer 'appropriates' the state's leverage but also creates some deterrence value that inures to the benefit of the general public.... [I]n the absence of a reporting requirement, the public might benefit more from incriminating information if blackmail is allowed." *Id.* at 1965.

"misappropriation" under this theory) care about the third party's motives? In short, the analogy to civil cases is misleading. Nothing is actually being "stolen" from the state; rather, the third party is advancing the state's goals (at least part of the way) and saving the state money.

3. The Blameworthy Actor

Perhaps the most compelling argument for criminalizing blackmail comes from Professor Mitchell Berman, who proposes an "evidentiary theory" of blackmail.[93] Under Berman's theory, one sufficient set of criteria for criminalizing any action is that the act (1) tends to cause or threaten identifiable harm, and (2) is undertaken by a morally blameworthy actor.[94] By adding the second criterion, Berman resolves the paradox of blackmail. If B *discloses* an embarrassing fact about A, then B causes identifiable harm to A—in reputation, if not financially—but B may or may not be disclosing as a morally blameworthy actor. B may be disclosing the fact because B believes it is important for the world to know the truth, or because B is a friend of the person he is disclosing to and wants her to know the information. Likewise, if B keeps the information secret, B may be causing harm—there may be a spouse or employer who remains deceived and makes poor decisions as a result of the deception. In the context of private plea bargains—incriminating blackmail—B's silence will prevent a perpetrator from being brought to justice. But once again, we have no way of knowing why B remained silent—B might have been afraid to come forward, or might be a good friend of A and selflessly not wish to harm A. Thus, under Berman's scheme, it would be unfair to punish B under either scenario—whether B disclosed or not.[95]

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93. Berman, *supra* note 10, at 833–52.

94. *Id.* at 836. Berman actually creates an entire scheme for deciding what conduct should be criminalized in a liberal society, and creates three separate criteria for criminalization. He argues that conduct should be made criminal if:

> (1) it is likely in the aggregate to yield net adverse social consequences (taking into account the costs imposed by the ban itself); (2) it (a) tends to cause or threaten identifiable harm and (b) is morally wrongful in itself; or (3) it tends both (a) to cause or threaten identifiable harm, and (b) to be undertaken by a morally blameworthy actor.

Id. Since Berman believes consequentialist arguments against blackmail fail, and because there is no way to prove the act is morally wrongful in itself, he rejects (1) and (2) as justifications for its criminalization. *Id.* at 837.

95. *Id.* at 843–44.

However, if B *threatens* to disclose the information in a way that will damage A unless A gives B some consideration, we can now assume B's motives are morally blameworthy. The circumstances of the blackmail make B's motives clear. As Berman puts it, "[A] reasonable fact-finder could infer with confidence sufficient for purposes of criminalization that if B carried out his threat he would be engaging in harm-causing conduct with bad motives . . . ."[96]

Berman's evidentiary theory sufficiently resolves the blackmail paradox, as it provides a principled way to explain why two legal actions—withholding information and agreeing to carry out a legal act—become illegal when combined together. Berman even discusses the specific case of incriminatory blackmail[97] and concludes that it fits perfectly within his model.[98] An individual might fail to disclose a crime out of fear or loyalty, but we can infer from the very fact of the blackmail demand that an individual who threatens to disclose a crime unless payment is made is motivated by "pure selfishness."[99]

But in order to justify criminalizing incriminating blackmail using Berman's theory, one must make two assumptions, neither of which is self-evident.[100] First, we have to agree that a person's motive should be relevant in determining whether or not an action is criminal. Second, we must assume that when the victim or witness demands something of the perpetrator in exchange for not calling the authorities, the act of blackmail itself triggers an evidentiary presumption that the blackmailer is acting with a "bad" motivation.

The first assumption is, at the very least, controversial—as Berman himself admits, it is contrary to the general rule that "motive is immaterial in the substantive criminal law."[101] Berman does little to defend himself against this point, merely stating that motive is relevant in some specific criminal contexts, such as euthanasia, justification defenses, and determining punishment.[102] These are, however, narrow exceptions to a very broad and well-established rule.

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96. *Id.* at 848.

97. *Id.* at 860 (referring to this type of blackmail as "crime exposure blackmail").

98. *Id.* at 860–63 (stating that the "crime exposure blackmail" case fits within his evidentiary theory and concluding that "crime exposure blackmail" should be a crime, one more serious than misprision of felony).

99. *Id.* at 862.

100. *See id.* at 860–62, 872 (stating that it can be inferred that the motive of a person engaging in "crime exposure blackmail" is acting with a selfish motive while also noting that motive has substantial relevance in evaluating whether an action is criminal).

101. *Id.* at 872 (quoting WAYNE R. LEFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 227 (2d ed. 1986)).

102. *Id.* at 872–73 & n.249.

Euthanasia defenses are relatively modern and not widely accepted, for example,[103] and the fact that motive is a valid consideration in determining the proper sentence once liability is established is quite different from arguing that it is relevant in determining whether liability exists in the first place. He also engages in a bit of circular reasoning. First, he concludes that blackmail ought to be illegal because the act of blackmail demonstrates the bad motive of the actor. Then, to justify this conclusion, he argues that it must be proper to consider the motive of the actor since doing so helps to justify the illegality of blackmail.[104]

But more significantly, Berman's second assumption—that the very act of incriminatory blackmail proves a "bad" motive on the part of the blackmailer—is suspect. Simply put, when a person demands something of the perpetrator in exchange for not calling the authorities, he or she may not be acting out of "pure selfishness" or any other improper motive. He or she may be the victim, seeking to receive compensation for physical, economic, or emotional harm that was suffered. Or the blackmailer may be an "entrepreneur" who invested time and money investigating this case and now feels that he or she deserves compensation for all the work. Are either of these two motives "morally blameworthy?"

The Model Penal Code appears to acknowledge the possibility that a blackmailer may not have an improper motive, at least with respect to a victim-blackmailer. The Code includes a special provision for incriminatory blackmail, which it calls "compounding," and creates a defense for the victim-blackmailer if the pecuniary benefit demanded by the victim "did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense."[105] Some state codes also make exceptions for incriminatory blackmail if the blackmailer was acting in good faith. Ohio, for example, allows for a victim or a witness to engage in incriminatory blackmail as long as "the actor's purpose was limited to . . . [c]ompelling another to refrain from misconduct or to desist

103. Currently only three states provide for a euthanasia defense to homicide: Oregon, Washington, and Montana. *See State Laws on Assisted Suicide*, PROCON.ORG (Jan. 4, 2010, 12:49 PM), http://euthanasia.procon.org/view.resource.php?resourceID=000132.

104. Berman, *supra* note 10, at 873.

105. MODEL PENAL CODE § 242.5 (1985) ("A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.").

from further misconduct . . . [or] [p]reventing or redressing a wrong or injustice . . . ."[106]

Berman is not convinced. Because we all have a moral duty to report criminal activity, the failure to do so "tends to bespeak a disregard for the common good and the concrete interests of actual and potential victims."[107] Even a victim who is merely seeking compensation for the injuries she suffered—someone who would fit perfectly into the Model Penal Code's defense—is acting with an improper motive: "[Since] all members of the community have a civic duty to report crime, then it cannot be morally acceptable for a victim to offer to ignore her obligation for personal gain—even if that gain is in some sense compensatory."[108] In other words, Berman's justification for criminalizing incriminatory blackmail is contingent upon the premise that we all have a civic duty to report crime, and it is morally wrong to fail in that duty in order to pursue one's goals.

Professor Berman acknowledges that moral blameworthiness is a "nebulous concept"—he says it is comprised of a "conscious willingness to cause [or risk] harm without adequate moral justification," or "an unjustifiable failure to appreciate the risks he creates."[109] But Berman does not allow for the possibility that the victim or witness could be serving the public interest in reaching a private settlement. Although Berman later acknowledges the possibility of "public interest blackmail"[110] which would not be criminalized—cases where both "the act threatened . . . and the condition demanded . . . would serve the same public interest"[111]—he fails to consider whether incriminatory blackmail could fit into that category.

In the end, whether Berman's theory can justify criminalizing private criminal settlements depends not only on accepting the proposition that motive should be relevant in determining whether an action is criminal, but also on how one defines "improper motive" and whether a victim or even a witness is presumptively acting with an improper motive when he or she receives compensation in exchange for not reporting a crime. Like most judgments made on retributive grounds, this may be a question which it is impossible to objectively resolve, but there is certainly reason to believe that

106. OHIO REV. CODE ANN. § 2905.12(C) (LexisNexis 2010).
107. Berman, *supra* note 10, at 861.
108. *Id.* at 863.
109. *Id.* at 839.
110. *Id.* at 864.
111. *Id.* at 865.

Berman's presumption may be overbroad, particularly with respect to victims of a crime. Consider the following two hypothetical situations:

Sam and Diane are married. Sam has an alcohol problem, and when he drinks he tends to become verbally abusive toward Diane. One night his verbal abuse turns into physical abuse, and he hits Diane in the face with a beer bottle, breaking her cheekbone. Diane goes to the hospital, but does not call the police and refuses to tell the doctor how she got injured. When she gets home, she gives Sam an ultimatum: he must immediately enroll in an alcohol treatment program and he can never drink again. If he fails to comply with either demand, she will call the police and report his assault on her.

Timothy is a sixteen-year-old high school student. One day a teacher catches him spray-painting graffiti on the outside wall of the school. Timothy has decent grades, and has never been in trouble before. A criminal conviction will lead to him being suspended from school and hurt his chances of going to college. Even an arrest will humiliate him in front of his friends and family. The teacher tells Timothy that she will refrain from calling the police only if Timothy buys a can of paint remover, comes to school next Saturday, and cleans off his own graffiti as well as the rest of the graffiti on the wall.

These examples certainly meet the definition of incriminatory blackmail, but would we really say that the victim or witness in these cases is acting with a "morally blameworthy" motive? Are Diane or the teacher "ignoring their obligations" and failing in their "civic duty" to report these crimes—and if so, do we really feel a need under the retributive model to punish them for these omissions?

Even in the case of commercial research blackmail, the "moral duty" of the blackmailer to report the crime is questionable. Consider a case in which private investigator Smith is hired by ABC Company to determine whether a certain employee is stealing corporate funds. After a week of surveillance and combing through bank records, Smith reports back to his corporate employer, providing mounds of evidence that the employee is indeed embezzling money. The company pays Smith for his work and asks him to keep the results of his investigation secret, even from the authorities, so that the company can handle the matter internally. In accepting money for his work—and in agreeing to abstain from reporting the crime as one of the conditions of his payment—has Smith acted with morally

blameworthy motives? Some people would perhaps say yes—investigator Smith, like every other citizen, has a moral duty to report every crime he or she discovers to the proper authorities, and in receiving payment, even in part because of his agreement to remain silent, he is providing evidence of his improper motive. But many others would be uncomfortable saying that Smith has committed a crime in this situation.[112]

To take this one step further, suppose that XYZ Company hired investigator Jones for similar work, and after Jones' report, the company made no request one way or the other about keeping the information secret. Jones, however, decided on his own not to contact the authorities because it would be too much of a hassle—he would have to be interviewed by law enforcement, respond to subpoenas, and perhaps testify at a trial. Under Berman's analysis, the investigator in the second scenario is presumably not acting with blameworthy motives—since his compensation was not in any way dependent upon his silence[113]—but it is hard to see how Jones' actions are all that different from Smith's.

In short, the "morally blameworthy motive" justification for criminalization will not always serve to justify incriminatory blackmail. Sometimes an individual engaged in incriminatory blackmail will be acting out of purely selfish motives, sometimes he or she will be trying to repair the damage from the crime, and sometimes he or she may even have the perpetrator's best interest at heart. Determining the motive of an actor is a tricky thing, and presuming a specific motive simply from the type of crime that was committed is bound to lead to inaccuracies—which is one of the reasons why motive is almost never relevant for criminal liability.[114]

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112. Some would argue that the investigator's actions are morally superior to a pure commercial research blackmailer because the investigator is remaining silent with the knowledge and consent—indeed, at the request—of the victim. But as we saw when we discussed the second retributive justification, the victim's knowledge and consent cannot be relevant, because the party that truly "deserves" the information is the state, which has still not been informed of the crime. *See supra* Part II.C.2.

113. *See* Berman, *supra* note 10, at 861–62. If Berman claimed that avoiding the time and inconvenience of getting involved as a "morally blameworthy motive," he would be criminalizing the conduct (or nonconduct) of an enormous number of nonreporting witnesses by equating their conduct with extortion.

114. There is another, related problem with Berman's theory. He argues that blackmail should be criminalized because it both tends to (1) "cause or threaten identifiable harm" and (2) "be undertaken by a morally blameworthy actor." *Id.* at 836. He then assumes that incriminatory blackmail causes harm because "[i]t hampers efforts to punish and deter crime, and . . . can be a but for cause of the criminal's future crimes." *Id.* at 861. But as we saw when we discussed the utilitarian justifications, the blackmailer may in fact be serving

D. *Using Blackmail Theory to Justify Criminalizing Private Criminal Settlements*

In summary, the utilitarian and retributive justifications for criminalizing incriminating blackmail are not very strong. In fact, incriminatory blackmail offers a number of benefits to society. In many cases, the blackmailer would be unlikely to report the crime whether or not incriminatory blackmail is an option. For example, if the witness or victim is a friend, family member, or employer of the perpetrator, or he or she has engaged in commercial research blackmail and therefore would not even have known about the crime if not for the incentive provided by the potential blackmail payoff, then the crime could nonetheless go unreported. Thus, allowing incriminatory blackmail imposes some punishment onto the perpetrator (a punishment he would not otherwise suffer) and—in the cases where the victim participates in the agreement—a rough sort of restitution.

There are only two dangers that may arise from allowing private criminal settlements: first, that the blackmailer will become an accomplice after the fact and assist with covering up the crime;[115] and second, that the blackmailer may be violating a moral or statutory duty to report the crime.[116] But lawmakers could address these potential dangers easily enough. The danger of the blackmailer becoming an after-the-fact accomplice could be solved in two ways: by increasing the punishments (and thus the deterrence level) for actively concealing criminal activity; and by banning ongoing, continuing requests from the blackmailer—that is, by only allowing the blackmailer to make a single demand of the perpetrator. This would remove any incentive on the part of the blackmailer to help the perpetrator avoid detection. Lawmakers can avoid the second risk by criminalizing any attempt to blackmail using incriminating information if the blackmailer has a statutory duty to report the crime in question—for example, if a police officer attempts to blackmail a suspect instead of arresting him, or if a mandatory reporter sees evidence of child abuse and uses the evidence to blackmail the perpetrator.

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the public interest by achieving some level of punishment and deterrence at no cost to the state. *See supra* Part II.B.1. Thus, on balance the blackmailer may not be causing or threatening any identifiable harm.

115. *See supra* notes 67–70 and accompanying text.

116. *See supra* notes 85–87 and accompanying text.

But as noted above, blackmail theories are only one possible lens through which one might analyze private criminal agreements. They can also be thought of as a private analogue to another aspect of our criminal justice system, one which (though legal) is almost as controversial as blackmail: plea bargains. When we examine private criminal settlements as a private form of plea bargaining, the true costs and risks of these arrangements become clear.

III. PRIVATE CRIMINAL SETTLEMENTS AS "PRIVATE PLEA BARGAINS"

The existing literature on plea bargaining provides useful insight into the costs and benefits of private criminal settlements. Plea bargaining has a large number of passionate critics[117] and many of the criticisms apply, with even greater weight, to the process of private criminal settlements. Plea bargaining also has a smaller number of (somewhat less passionate) supporters,[118] and some of their arguments about the benefits of plea bargaining (the saving of resources, the increased flexibility)[119] also apply to private criminal settlements. But the two settlement procedures—plea bargains and private criminal settlements—are significantly different in a number of ways. Private criminal settlements may provide some benefits, such as preserving existing relationships between the victim and perpetrator, that plea bargaining cannot offer. More importantly,

117. One of the most passionate critics of the plea bargaining process is Professor Albert Alschuler. *See, e.g.*, Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1141–42 (1976) [hereinafter Alschuler, *Trial Judge's Role*] (characterizing plea bargaining as an "impediment to the effective operation of the criminal justice system" and a "deliberate mislabeling of offenses"). Professor Alschuler has written at least seven articles attacking the process of plea bargaining; for a summary of his critiques, see Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 931–34 (1983) [hereinafter Alschuler, *Right to Trial*]. He concludes that "an effort to describe comprehensively the evils that plea bargaining has wrought requires an extensive tour of the criminal justice system." *Id.* at 934; *see also* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 18 (1978) (analogizing plea bargaining to medieval torture); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1106 (1984) (arguing that plea bargaining short-circuits the adversarial system).

118. *See, e.g.*, Lynch, *supra* note 14, at 2136–41 (arguing that plea bargaining allows prosecutors to exercise necessary discretion); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1915 (1992) (arguing that if defendants truly have the right to a jury and other procedural trial rights, they should have the ability to trade these rights away in exchange for the consideration of a lower sentence).

119. *See, e.g.*, Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 297 (1983) (noting that both parties save resources by agreeing to a plea bargain).

however, the biggest benefit of plea bargaining—that it allows the prosecutor more freedom to exercise her discretion and seek justice[120]—is absent from the private criminal settlement context. It is ultimately this consideration that justifies criminalizing most forms of private criminal settlements.

Therefore, in analyzing the costs and benefits of private criminal settlements, Part III will examine both their similarities with public plea bargains, and the ways in which the private nature of these agreements makes them unique. But first, we need to discuss whether it is even legitimate to categorize private criminal settlements as part of the criminal justice system.

A. Are Private Criminal Settlements Actually "Criminal"?

On the surface, the public plea bargains and private criminal settlements seem similar. In both situations, the perpetrator is giving up certain rights in exchange for a lesser punishment. If anything, private criminal settlements seem like a more extreme version of plea bargains, since the perpetrator is giving up even more rights than he does in a public plea bargain, and he is receiving even less punishment. But this analogy contains a significant flaw: a private criminal settlement involves the perpetrator and a private party, while a plea bargain involves the perpetrator and the state.

Many would therefore argue that no agreement between two private parties could be termed a "criminal" settlement. On one level, this is purely a question of semantics: certainly one could conceive of a definition of criminal activity as behavior that elicits a response from the state, but this is a fairly narrow definition. If an individual shoplifts, trespasses, or assaults someone, then he has committed a crime whether the state knows about it or not. And if private parties reach an agreement and resolve the dispute, then the criminal justice system has been affected. Consequently, how society regulates or controls these agreements will also affect the criminal justice system.[121]

But on a deeper level, the distinction between public plea bargains and private criminal settlements is quite significant: even if

120. *See* Lynch, *supra* note 14, at 2129–36 (describing the prosecutor's role in plea bargaining).

121. I have argued elsewhere that the public criminal justice system has become so overly politicized and centralized that it has lost a certain amount of legitimacy, and thus in some ways private settlements of criminal disputes are more legitimate than state-sponsored resolutions. *See* Simmons, *supra* note 13, at 968–69.

the private agreements could be construed as "criminal" in some sense, at least one commentator argues that a private criminal settlement is an inappropriate substitute for the public criminal justice system because the former lacks the official sanction and condemnation of the state.[122] Criminal activity is traditionally defined as "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."[123] A criminal conviction from the state properly brings with it a unique stigma, intended to make the criminal feel shame and remorse. In a recent article, Professor Kenworthy Bilz explored the question of why victims are so eager to "delegate their revenge" to the state and concluded that the formal, official pronouncement of guilt by the state is a valuable commodity that taxpayers and victims are willing to pay quite dearly for in terms of time, money, and inconvenience.[124]

This type of formal moral condemnation is most evident when a jury of twelve citizens reaches a guilty verdict after being presented with the evidence. It is somewhat less powerful when the criminal conviction resulted from a deal cut between the prosecutor and defense attorney. Granted, the state is still making a formal declaration of criminal liability, but without a formal adjudication, without the victims and witness taking the stand and facing the defendant, and without the full participation of a judge and/or jury in determining guilt. A plea bargained conviction does not carry with it the same level of solemn condemnation.[125] For many misdemeanors, a prosecutor will be willing to bargain away criminal liability completely—offering a noncriminal violation or even dropping the

122. *See* Brown, *supra* note 10, at 1970–71.

123. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

124. Kenworthey Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1076–85 (2007).

125. Professor Bilz acknowledges that the public aspect of a trial is critical to the sense of a formal condemnation. *Id.* at 1076–77. At one point she quotes a British editorial writer who states that:

> Justice by pub-talk or lynchmob is summary and brutal, but it is not real justice, for it lacks the intellectual satisfaction of evidence adduced and weighed, and it is empty of that moral soundness that comes from a decision made by us, as represented by 12 of our number, affecting the final destiny of the prisoner.

Id. at 1077 (quoting Brian Masters, *He Cannot Be Allowed To Escape Justice*, DAILY MAIL (London), June 11, 2003, at 12). A plea bargain simply does not provide the same level of "intellectual satisfaction" or "moral soundness" as a public trial.

charges completely if the defendant agrees to enter a treatment program or reimburse the victim.

In this sense, the public plea bargain resembles a private criminal settlement. The public plea bargain short-circuits the traditional path of criminal adjudication by allowing the defendant to waive certain rights in exchange for a lower punishment—and perhaps less of a formal condemnation—while a private criminal settlement asks the perpetrator to waive even more rights and in return receive an even lower punishment, including the lack of a formal condemnation. In this sense, the formal condemnation is merely one more chip on the bargaining table, and one more unpleasant consequence that the perpetrator seeks to avoid, thereby increasing the bargaining position of the victim or other private party who is conducting the settlement.

In other words, the current practice of plea bargaining already treats the shame and stigma of the criminal conviction as merely one more element of the punishment that is on the bargaining table in the plea negotiation. Private criminal settlements are simply another step down the same path, a way of gaining flexibility and efficiency by eschewing the formalities of the "traditional" criminal justice system. Because prosecutors and defendants can already use the plea bargaining process to potentially barter away all aspects of the criminal justice system—constitutional rights, incarceration, the stigma of a criminal conviction—it is hard to argue that any of these aspects are fundamental and essential parts of the process. Thus, the difference between public plea bargains and private criminal settlements is properly seen as one of degree and not of kind.

B. Critiques of Plea Bargaining

Academic criticism of plea bargaining is widespread and spirited.[126] It is possible to distill the critiques into four different categories which are particularly pertinent to the question of private criminal settlements: (1) plea bargaining results in a lack of transparency;[127] (2) plea bargaining will lead to inequality in result based on income;[128] (3) plea bargaining can become coercive, resulting in innocent defendants pleading guilty;[129] and (4) the results

126. *See supra* note 117.

127. *See* Alschuler, *Trial Judge's Role*, *supra* note 117, at 1141–42; Brown, *supra* note 10, at 1974.

128. *See, e.g.*, Lynch, *supra* note 14, at 2123 (noting that poorer defendants may end up with less favorable plea bargains, but also arguing that income disparity results in inequality for cases that go to trial).

129. *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L.

of plea bargaining do not accurately simulate the results which would occur at trial.[130] As we shall see, most of these criticisms apply with even more weight to private criminal settlements.

1. Lack of Transparency

Plea bargaining makes the criminal justice system less transparent in two ways. First, the negotiations are conducted in private, so criminal cases are resolved in relative secrecy—in contrast to the constitutionally guaranteed public nature of a criminal trial. Second, the ultimate disposition of a case is frequently misleading: a defendant will frequently agree to plead to a charge that is less severe than (and perhaps completely unrelated to) what he was actually charged with—and thus his criminal record will not be an accurate record of his actual criminal conduct.[131]

Unlike other rights which the defendant waives in exchange for his plea bargain, the right to a public trial does not belong exclusively to the defendant. Thus, resolving the case in secret affects society as a whole, not just the defendant. In a full-fledged trial, the judge can monitor both sides to ensure fairness in the proceedings, the public can monitor the judge and both parties, and a record is made which can be consulted in the case of an appeal. None of these apply in the plea bargaining context, so that abuses by either side go unchecked and unnoticed, unless one of the attorneys brings it to the attention of the court. More broadly, secrecy in the process threatens the integrity of the entire system, decreasing its legitimacy in the eyes of lay people.[132]

The need for transparency in the labeling of convictions is a bit more subtle. Professor Albert Alschuler notes that correctional facilities rely on the name of the crime when classifying prisoners and setting parole dates, and the "mislabeling" of the crimes makes this less efficient.[133] A greater problem arises later in the process, when a

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REV. 652, 713–16 (1981); Douglas G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 58–61; Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 97–99 (1976); Scott & Stuntz, *supra* note 118, at 1948.

130. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2467–68 (2004).

131. *See* Alschuler, *Trial Judge's Role*, *supra* note 117, at 1141–42.

132. *See* Brown, *supra* note 10, at 1974 ("The fear is not that [incriminatory] blackmail *precludes* public justice or reduces the *quantity* of public involvement. Rather, the concern is that we fundamentally alter the *quality* of justice when we take enforcement away from a public audience.").

133. *See* Alschuler, *Trial Judge's Role*, *supra* note 117, at 1142. Professor Alschuler also

defendant is arrested and convicted for a new crime, and the judge (or prosecutor, in a plea bargaining situation) is attempting to determine the appropriate sentence for the new crime. A defendant's prior criminal record is perhaps the most important factor in determining what sentence is appropriate, and past plea bargaining can disguise the actual nature of much of the defendant's prior conduct. For example, a defendant who has committed three acts of domestic violence in the past may have a criminal record of three disorderly conducts, and the prosecutor or judge seeking to set an appropriate sentence for the fourth domestic violence conviction will be acting with imperfect information.[134]

These critiques apply with even greater force to private criminal settlements. The parties conduct the negotiation and private resolution even further from the public eye, so that there is no way to monitor for abuses and no reason for anyone to believe that the process is fair and impartial.[135] Those who are inexperienced with the criminal justice system are more likely to be abused, especially if the party with whom they are negotiating is a repeat player. For example, if a first-time shoplifter is apprehended by an experienced store security guard, the guard could employ bullying and other inappropriate tactics to unfairly influence the perpetrator. Unlike potential reforms of the plea bargaining process, such as requiring a judge to more critically examine the completed deals that the parties bring to the court, there is no feasible way to regulate private criminal settlements to make them more open and make the parties more accountable. For the parties, this may be one of the benefits to the process—both the victim/witness and the perpetrator might prefer not to be involved in a public process. However, for the criminal justice system as a whole, the secrecy of the process detracts from its legitimacy.

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notes that mislabeling can make it difficult for a court or a defendant to determine whether a defendant has been convicted of a crime that has later been found to be unconstitutional, and that mislabeling the crimes "may encourage a belief in the hypocrisy of the guilty plea system." *Id.* at 1141–42.

134. I say imperfect information rather than misleading information because the prosecutor or judge almost certainly knows enough about the system to realize that past convictions are not always what they seem, and can take that into account when reviewing a criminal record littered with arrests for certain conduct and guilty pleas for different conduct.

135. *See* Brown, *supra* note 10, at 1974 ("[Incriminatory blackmail] involves no public review of the facts or interpretation of the law. It transfers an otherwise public process to a private venue where records are sealed and results are inaccessible.").

Similarly, the defendant's criminal record is completely unaffected by a private criminal settlement, so a prosecutor or judge in a future case will not have any hint as to the nature of the defendant's previous criminal activity—or even that he committed a crime at all. This could lead to dramatically different treatment between criminals who were able to settle their previous criminal disputes privately and those who could not.

Of course, this is one of the factors that make the private criminal settlement so appealing to the perpetrator in the first place; avoiding a criminal record is one of the intangible benefits he derives from making a deal with the private actor. By agreeing to a private settlement, the perpetrator not only lessens his punishment on this occasion, but he also lessens his punishment for the next crime or crimes that he commits. In other words, this secrecy gives the parties even more room to negotiate, further increasing the incentives to enter into these agreements.

2. Inequality Based on Income

Another critique of the plea bargaining system is that it creates disparities based on the economic class of the defendant.[136] Plea bargaining allegedly does this in two ways. First, those who can afford a good lawyer can negotiate a better deal with the prosecutor, if only by filing more motions, requesting more hearings, and generally making the litigation longer and thus more expensive for the prosecutor—which should, under the logic of plea bargaining, result in a prosecutor more willing to deal. Second, and far more importantly, defendants who are able to post bail fare much better than those who cannot. Defendants who are held in jail pending trial are far less able to participate in their defense, and far more willing to plead (especially in misdemeanor cases, where the time spent in jail awaiting trial may begin to approach the maximum sentence for the crime charged).

It is debatable whether this critique of plea bargaining is well taken, however. Good lawyers will certainly help a defendant get a better plea bargain, but they will just as certainly help the defendant's chances at trial as well,[137] and it is not clear whether the disparity is greater for plea bargains than for trials.[138] Likewise, the problem of

136. *See* Lynch, *supra* note 14, at 2123.

137. *Id.*

138. In fact, one could argue that public defenders—who cost nothing—are the most skilled plea bargainers of all, since they are repeat players in the system and know exactly

pretrial detention leading to a coercive plea is more of a critique of pretrial detention than of plea bargaining itself.

However one resolves this dispute with regard to public plea bargains, it seems at first glance that disparity based on income inequality is a far greater problem for private criminal settlements. In fact, the effect of income disparity may be the primary objection that most individuals have to allowing such agreements. Allowing the privately wealthy to buy their way out of criminal liability might result in one type of justice for the rich, who can pay off their victims and avoid even the inconvenience of an arrest, and another type of justice for the poor, who will be unable to strike a deal and will inevitably end up in the public system, incarcerated and burdened with a criminal record.

Upon closer analysis, however, the dynamic between income and disposition in a private criminal settlement is a bit more complex. First of all, it is not clear that less wealthy perpetrators would be unable to reach a private agreement. As noted above, many victims/witnesses receive very little benefit (or even suffer costs) when they report the crime to the police and would potentially be willing to accept a very small amount of consideration in exchange for their promise not to report the crime.[139] And the consideration given by the perpetrator need not be monetary—as noted in some of the hypothetical cases described earlier, it could be a promise not to engage in certain activity, or to stay away from a certain commercial establishment, or to perform some service. These low cost or nonmonetary amounts are likely common for less severe crimes, which likely make up the bulk of crimes that are resolved by private criminal settlements.

In fact, if private criminal settlements were to become more widespread, it is likely that wealthy perpetrators would face harsher consequences than their less wealthy counterparts. A wealthy individual faces greater opportunity costs if arrested and incarcerated, and would therefore be willing to pay more money than someone less wealthy in order to avoid criminal liability. Even more important, however, would be the increased enforcement that would occur against wealthy criminals. If private criminal settlements were to be allowed, one could imagine private individuals or companies conducting their own investigations into criminal activity for profit—

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what each case is "worth" in the system.

139. *See supra* Part I.C.1.

what we earlier termed "commercial research" blackmail.[140] These private parties would surely target the wealthier members of society, investigating every possible indiscretion on their part in order to determine whether criminal activity has occurred.[141] Granted, these individuals will be able to pay money in order to avoid arrest, incarceration, and a criminal record—but if the private party never had the incentive to investigate the conduct in the first place, then the perpetrator would never have been detected at all. Thus, it is certainly possible that wealthy individuals will be punished more often, and thus deterred more effectively, if private criminal settlements were to become widespread.

3. Plea Bargaining Leads to Wrongful Convictions

One of the most powerful critiques of plea bargaining is that it can lead to innocent defendants pleading guilty. There are a number of variants to this argument. Some commentators argue that plea bargaining is coercive, since the defendant faces such a severe sentence if he does not agree to the deal that even an innocent defendant may feel forced into taking the plea.[142] Others argue that a defendant offered a plea bargain will make his decision based not on whether he is guilty or innocent, but on his level of risk aversion—and since innocent defendants are likely to be more risk averse than guilty ones, the plea bargaining process leads to more innocent convictions than the trial process would.[143]

Of course, trials can and do occasionally result in the conviction of an innocent person, and there is no way to know which method in

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140. *See supra* note 40 and accompanying text.

141. Professor Steven Shavell made a similar point when discussing the possibility of allowing police officers to profit from collecting what he calls "privately arranged bounties" when making arrests. *See* Shavell, *supra* note 42, at 1901. He criticized this idea because the police would spend a disproportionate amount of resources on investigating wealthy suspects; thus "a poor murderer would not be sought after since he could not pay much, whereas a wealthy man who got involved in a brawl would be a prime target." *Id.* As noted above in the text accompanying notes 84–85, since police officers have a duty to report (and act on) criminal activity, they should not be permitted to engage in private criminal settlements under any circumstances.

142. *See, e.g.*, Alschuler, *supra* note 129, at 713–16; Gifford, *supra* note 129, at 58–61; Kipnis, *supra* note 129, at 97–99.

143. *See, e.g.*, Scott & Stuntz, *supra* note 118, at 1948 ("Innocent defendants are probably highly risk averse relative to guilty defendants . . . . In other words, due in part to adjudication costs, the risk from going to trial is likely to be substantial, not because the probabilities of conviction are altered, but because the impact of conviction is so great. Risk averse defendants, meaning in part innocent ones, might well avoid that risk even at the cost of accepting a deal that treats them as if they were certain to be convicted at trial.") (footnote omitted).

fact leads to a greater percentage of false convictions. But fundamentally, this critique is not based on the numbers of false convictions; instead, it focuses on the very nature of the plea bargaining process. Because the defendant has so much to lose merely by going to trial, even if the case against him is weak, there is almost always some offer that the prosecutor can make which will be more attractive than the prospect of going to trial and would therefore induce the defendant to plead guilty—even if he is in fact innocent. As one commentator puts it:

> [Prosecutors] merely have to offer each defendant a settlement he prefers to trial. Only very rarely is the highest acceptable sentence of a defendant zero; in fact many innocent defendants are willing to accept minor punishment in return for avoiding the risk of a much harsher trial result. Therefore, prosecutors can extract guilty pleas even from defendants who are likely to be found not guilty at trial.[144]

This problem is only exacerbated in the context of private criminal settlements, since a defendant has so much more to lose by not reaching an agreement. In other words, the very same factors which make a private criminal settlement so attractive will also increase the likelihood that an innocent defendant will agree to pay some consideration in exchange for not having to become involved in the system. In the plea bargaining context, a defendant knows that the alternative to a negotiated settlement is undesirable only if a prosecutor can convince a jury of his guilt beyond a reasonable doubt—a very high standard, and one that many innocent defendants might be willing to gamble on. In the private criminal settlement context, the perpetrator's alternative to a negotiated settlement is undesirable if the witness or victim can convince a police officer that there is probable cause to make an arrest—a much lower standard that even innocent defendants may not care to test.

On the other hand, the consequences of an innocent person agreeing to a private criminal settlement are far less severe than when an innocent person accepts a plea bargain, since in the former case, the accused does not end up with a criminal conviction. In fact, private criminal settlements provide a valuable opportunity for an innocent person who is accused of a crime. In the absence of a private criminal settlement, if the accused cannot convince the victim/witness

144. Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2304–05 (2006) (footnotes omitted).

of his innocence, then the likely result is arrest and the very real possibility of a criminal conviction. In effect, the chance to agree to a private criminal settlement could prevent an innocent person from being convicted.

4. Plea Bargains Do Not Accurately Simulate Results from Trials

Defenders of plea bargains frequently respond to these first three criticisms by arguing that plea bargaining is a voluntary process, so the defendant is perfectly free to reject the agreement and go to trial. The same response applies with regard to private criminal settlements—by their nature, these settlements are voluntary, and so if a defendant is not satisfied with the offer, he can call the other party's bluff and take his chances in the public criminal justice system.

This argument, however, rests on a fundamental assumption which may not be true: that private criminal settlements and plea bargains take place in the shadow of the law, and therefore the results from these agreements are similar to the results from a public trial (minus some discount, of course, in exchange for the perpetrator admitting responsibility). Once again, the literature on plea bargaining is a rich source of analysis on this question. Commentators have debated this issue for decades in the plea bargaining context, since it directly affects the desirability of plea bargaining. If the plea bargaining process is indeed a reasonable replacement for a trial, then plea bargaining should be encouraged, since it can achieve the same result with far fewer resources.[145] On the other hand, if the results are dependent on factors unrelated to what would occur at trial, then society should work to reform, limit, or abolish the practice.[146]

The idea that plea bargains mostly reflect what would happen at trial is perhaps best identified with Judge Frank Easterbrook,[147] although others have endorsed the model as well.[148] The essential argument is as follows: Both prosecutors and defense attorneys are repeat players in the system, and so they both have a good idea as to

145. *See, e.g.*, Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509, 523 (1979).

146. *See, e.g.*, Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 49–60 (1988).

147. *See* Easterbrook, *supra* note 119, at 289 (arguing that plea bargaining is an element "of a well-functioning market system"); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1972 (1992).

148. *See, e.g.*, Church, *supra* note 145, at 537; William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 61 (1971); Scott & Stuntz, *supra* note 118, at 1910–11 (arguing that plea bargaining is generally a fair outcome for trials but suggesting certain reforms to prevent the conviction of innocent defendants).

what would happen if the case went to trial—both with regard to the chances of conviction and the likely sentence. Thus, they are able to bargain within a relatively narrow range to reach a result which is more or less equivalent to what would happen at trial, discounted by the possibility of acquittal and discounted again in exchange for the defendant's willingness to forgo his right to trial and thereby save the state time and money. For example, if the defendant has a ninety percent chance of being convicted of a crime, and the crime carries an average sentence of ten years, he might be offered a plea deal of six years: nine years as an approximation of the result at trial, minus three years in exchange for saving the state the resources of going to trial. Under this theory, the attorneys use the handful of trials that do occur as the standard to guide the hundreds or thousands of plea bargains which they strike—much like real estate appraisers use actual sales of neighboring houses to estimate the value of a specific property. Plea bargains are therefore a relatively efficient method of disposing of cases—the state gets almost the same amount of justice, having to settle for slightly lower sentences in exchange for the time and money that is saved. Under this model, giving the defendants more procedural rights—a more robust *Miranda* right, for example, or more extensive discovery rights—is in reality simply giving the defendant more to bargain away, effectively lowering the ultimate sentence.

Of course, Judge Easterbrook's contract theory of plea bargaining rests upon the assumption that the attorneys who are bargaining are veterans of the criminal justice system who can easily determine (and agree upon) the expected result at trial. In criminal law, this is generally a valid assumption, since most defense attorneys and all prosecutors are repeat players, or at the very least have an opportunity to consult with more experienced colleagues.

More fundamentally, however, commentators have attacked the contract theory for ignoring agency costs in plea bargaining.[149] Prosecutors and defense attorneys have other, more personal incentives when they engage in plea bargaining, which could tend to

149. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54–55 (1968) (discussing the volume of indictments in Cook County Circuit Court and the pressure put on prosecutors to move cases quickly); Bibas, *supra* note 130, at 2477 (discussing attorneys' inconsistent incentives at plea bargaining depending on how the attorney is being compensated); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 812 (2004) (pointing out that courts and lawyers have incentives to dispose of cases as expeditiously as possible).

skew the outcome of the plea bargain far from what might happen at trial. Prosecutors might be willing to give too deep a discount because they wish to reduce their workload, or because they are afraid of losing a case at trial.[150] Defense attorneys might be overburdened and underresourced, and may enjoy close relationships with the judges and the prosecutors which they do not want to jeopardize with aggressive bargaining tactics.[151] To make matters worse, these agency costs vary from case to case based on factors which are completely unrelated to the goals of justice or even to what might happen at trial. Some prosecutors may have political ambitions and be more risk averse than others, while some private defense attorneys may be much more willing to go to trial than their state-funded counterparts.[152]

Recently, Professor Stephanos Bibas launched an even broader attack on the contract model of plea bargaining (which he calls the "shadow-of-trial" model).[153] In addition to arguing that the agency costs are far more significant than other commentators are willing to acknowledge, Professor Bibas also examines psychological factors which tend to skew the results of plea bargaining.[154] He concludes that there are four "structural and psychological forces" which influence plea bargaining: uncertainty, self-interest, money, and demographic variation,[155] and he proposes a number of structural changes to reform the plea bargaining process to align its results more closely with those of a trial.

First, uncertainty on behalf of both parties leads to many psychological pitfalls: overconfidence and risk taking in some cases, and risk aversion and anchoring in others. The two primary remedies that Professor Bibas proposes to combat the pitfalls from uncertainty are liberalized discovery rules, to be enforced before the plea bargaining takes effect, and more determinant sentencing regimes.[156] The problem of self-interest is somewhat trickier. It is closely related to the agency costs discussed earlier, in that both prosecutors and defense attorneys have their own personal goals and motivations

150. *See* Alschuler, *supra* note 149, at 54–55.

151. *See* Brown, *supra* note 149, at 812.

152. *See* Bibas, *supra* note 130, at 2477.

153. *Id.* at 2465.

154. Bibas mentions overconfidence, self-serving biases, denial mechanisms, discounting future costs, loss aversion, risk preferences, framing, and anchoring. *Id.* at 2496–2519.

155. *Id.* at 2528.

156. *Id.* at 2531–34.

beyond what is best for their clients, but it also means something more—defendants will act in irrational ways during the plea bargaining session, and attorneys must work to debias them and overcome their denial of the risk or overconfidence.[157] Professor Bibas suggests taking steps to reduce agency costs by supervising the line prosecutors more carefully, changing the fee structure for defense attorneys, and giving judges a more active role in reviewing the plea bargain.[158] He also suggests that defense attorneys work harder to overcome a client's irrational psychological biases.[159]

The other two issues Bibas discusses—money and demographic variation—tend to exacerbate the first two problems. Defendants with money can hire attorneys with better information, thereby reducing uncertainty during the bargaining process. These attorneys may not have the same self-interest to accept an unfairly low offer.[160] Demographic variation can also aggravate problems because variation between different defendants creates a wider range of biases and irrationalities, sometimes with perverse results. For example, repeat offenders are likely to be less risk averse, meaning that they will not take a deal unless the prosecutor offers a steep discount. In contrast, first-time offenders will be more likely to take a much harsher deal in order to avoid the potentially severe sentences after trial.[161]

Most of these critiques apply with even greater force in the case of private criminal settlements. In plea bargaining, both negotiators are almost always repeat players with legal training and extensive knowledge of the chances at trial and the expected sentence. But this is generally not the case in the context of private criminal settlements because the parties are private citizens, and private citizens who are negotiating are unlikely to have information pertaining to the expected outcome at trial. Consequently, the negotiations may lead to results which are completely unrelated to what might happen at trial—or even what would happen after a public plea bargain. Even more troubling is the possibility that one of the private parties (such as a recidivist criminal or an experienced security guard) has this kind of information and the other does not, leading to asymmetrical results.

157. *Id.* at 2543–44.
158. *Id.* at 2540–43.
159. *Id.* at 2540–45.
160. *Id.* at 2539–40.
161. *Id.* at 2529–30.

This lack of information will only increase uncertainty, leading to a greater level of the psychological biases that Bibas discusses: overconfidence, risk taking, risk aversion, and anchoring. And although the parties are negotiating on behalf of themselves, which should eliminate agency costs, Bibas' problem of self-interest is even more pronounced. Without defense attorneys present to debias the perpetrator away from these skewed perceptions, the party will likely act irrationally.[162]

Even if the private parties had perfect information, and even if they were able to overcome the irrationalities inherent in negotiation, private criminal settlements still may result in sentences that are more severe than what a perpetrator would receive at trial. For example, if the perpetrator is charged with a crime that would result in a light sentence from the public authorities but would be embarrassing to the perpetrator, such as soliciting a prostitute or indecent exposure, he may be willing to concede a good amount during the negotiation in exchange for keeping the incident secret.

C. Benefits of Plea Bargaining and Private Criminal Settlements

Thus, there is ample evidence that the contract model of plea bargaining is flawed. Contract model theorists would freely acknowledge that other factors (such as the caseload of the court and the prosecutor) will also influence the bargain that is struck—the more overloaded the prosecutors are, the more they will discount their offer; that is, after all, the entire point of plea bargaining. Contract model theorists would also acknowledge, perhaps a bit more grudgingly, that other factors unrelated to the chance of conviction and possible sentence will affect the offers made and the outcomes that are reached, but they tend to downplay these other factors. Opponents of the contract model go much further, arguing that these other factors are so significant that they overwhelm the "legitimate" factors, thus rendering plea bargaining illegitimate.[163]

There are good reasons to believe that private criminal settlements, even more so than plea bargains, are likely to produce dispositions that are inconsistent with what would happen at trial. But

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162. We have already discussed the effect that the wealth of the perpetrator might have on private criminal settlements: On the one hand, it may allow wealthier perpetrators to buy their way out of criminal liability more than their less wealthy counterparts. On the other hand, if the "commercial research blackmail" form of private settlements were allowed, it might make the wealthy more likely to be targeted in the first place. *See supra* Part III.B.2.

163. *See* Bibas, *supra* note 130, at 2470–76.

perhaps both sides are asking the wrong question by assuming that the ideal for plea bargaining—or for private criminal settlements—is to approximate the results at trial. Certainly that is the original goal of plea bargaining. And there should be a presumption that the results at trial are the socially optimal results—that is, the results that are most consistent with our ideals of achieving justice while still protecting the rights of the defendant.

However, it is possible that plea bargaining does more than merely increase the efficiency of the criminal justice system: it provides unique benefits that the traditional adversary trial does not provide. Traditionally, plea bargaining has been seen as little more than an inexpensive way of producing rough justice, a process that is accepted as a necessary evil because the criminal justice system cannot afford to provide every defendant with a trial. But like other forms of alternative dispute resolution, plea bargaining creates the chance for a more creative and flexible resolution to the dispute. By allowing defendants more input into the process, plea bargaining can increase the procedural justice in the system. Finally, plea bargaining allows prosecutors to exercise broad discretion and seek justice in each individual case.

As in the earlier discussions, this Article will apply the arguments in favor of plea bargains to private criminal settlements, leading to a similar but distinct conclusion. Although private criminal settlements provide even more flexibility than plea bargains, they do not increase procedural justice or allow prosecutors to exercise discretion. They do, however, provide one additional benefit not afforded by trials or plea bargains: the chance of maintaining long-term relationships between the perpetrator and the victim, leading (perhaps) to a greater chance of rehabilitation and lower recidivism rates.

1. Flexibility in Reaching a Resolution

One obvious benefit of plea bargaining is that it allows for greater flexibility in resolving the criminal dispute. When a judge sentences a defendant after a guilty verdict, the judge is limited by statutory restrictions as to the sentence that can be imposed. A prosecutor and a defense attorney who work out a plea bargain, however, can agree to alter the charge in order to accommodate any disposition that the two parties agree upon. Thus, if a prosecutor believes incarceration is inappropriate, he or she can amend the

charge to a crime which does not carry mandatory jail time.[164] If the crime the defendant committed carries with it a collateral consequence which is unjust under the particular circumstances of this case—such as deportation for a legal permanent resident who is a productive member of society, or lifelong sexual registration for a juvenile who committed a relatively minor sex crime—the prosecutor has the power to adjust the charge and allow the defendant to plead guilty to a different offense. In return, the prosecutor may demand concessions from the defendant which would be impossible or at least unlikely after a conviction at trial, such as agreeing to engage in a specific kind of community service, voluntarily entering counseling, restitution beyond what is required by law, or cooperation in the investigation and prosecution of others. None of these arrangements would be possible without the use of plea bargaining.

Of course, in the criminal law context, flexibility can be both positive and negative. On the one hand, flexibility may allow the parties to reach a more just result than would occur if a judge were to formally follow strictly enforced sentencing guidelines. This is especially true if one accepts the premise that prosecutors are seeking to do justice in individual cases, which would mean that allowing them broad discretion in selecting charges and proposing dispositions only increases their ability to reach a just result in each case.[165] On the other hand, this kind of flexibility leads to inconsistent results for identical crimes, even within the same jurisdiction, and consistency is a key element of fairness, particularly in the context of criminal law. Furthermore, whenever a prosecutor and a defense attorney become creative in crafting a resolution specifically for their particular case, they are ignoring the intent of the legislature, which set out a specific sentencing range, perhaps including particular collateral consequences, for a given crime.

For better or for worse, private criminal settlements allow for even greater flexibility than plea bargains. Although prosecutors have more freedom to craft dispositions during plea bargaining than judges do at sentencing, they are still somewhat restricted by the law and by institutional office policies. Private parties who are settling a criminal dispute, on the other hand, are free from any institutional limitations

164. A prosecutor may also amend the charge to avoid what she believes is an overly harsh mandatory sentence. For example, in a three strikes jurisdiction, if the defendant has two prior felonies, and he commits a burglary which would result in life in prison, the prosecutor could amend the charge to a misdemeanor in order to avoid the lengthy prison time that the three strikes law would require.

165. *See infra* notes 188–91 and accompanying text.

whatsoever. This enhanced flexibility is one of the reasons why private criminal settlements are so attractive; if the public authorities are not involved, the parties can come up with any sort of resolution, as long as they both agree to it. But while flexibility is potentially a positive element in the plea bargaining context when one of the parties is (at least arguably) attempting to reach a just resolution, there is little reason to believe it leads to a more just result in the case of private criminal settlements, where each party is simply trying to maximize gain (or, in the case of the perpetrator, minimize one's punishment). Instead, the flexibility inherent in private agreements merely leads to inconsistent results for identical crimes.

This inconsistency problem is only magnified by the secretive nature of these agreements. Prosecutors and defense attorneys in the same jurisdiction can, and often do, compare the proposed disposition of their cases to other cases which have pled out in the past to ensure that a potential plea agreement is not severely out of line with the "going rate" for that crime. In contrast, most (though not all) individual private parties will have no idea how other private parties have resolved their criminal disputes, and will therefore begin from a blank slate for every negotiation, resulting in inconsistent results.[166]

2. Procedural Justice

A second benefit that plea bargaining provides is that it endows the criminal justice system with a greater amount of "procedural justice." Psychologists have devoted a significant amount of study to determining what leads participants to believe that they have been treated fairly when a dispute is resolved, and they have concluded the primary factor is not the actual substantive outcome of the case, but rather whether the individual believed the *procedure* to be fair.[167] This has led to a field of study that is known as procedural justice. It is a method of evaluating dispute resolution systems based not on the substantive outcomes they produce (which is known as "distributive

166. Of course, private criminal settlements can result in consistent results in certain situations involving repeat players: for example, when a security guard for a specific retail store catches shoplifters, he or she probably has a standard deal to offer the perpetrator. Even in these situations, however, there is only a consistency for perpetrators apprehended by the same repeat players. To take the same example, different stores in the same jurisdictions would likely have different policies regarding shoplifting.

167. *See* Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 319–20 (2009) (describing studies of procedural justice).

justice"), but instead on whether the individuals who were affected by the resolution believe the procedure that was used was fair.[168]

Studies in the field of procedural justice[169] have demonstrated that there are three factors that determine whether or not an individual believes that a given procedure is fair.[170] The first is known as "process control," which is the individual's opportunity to participate in the procedure, whether or not their participation affects the actual outcome.[171] The second factor is whether the participant

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168. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 74 (1990). Citing six separate psychological studies, Professor Tyler notes that:

> Recent research confirms that people evaluate their experience in procedural terms. Such procedural effects have been found in trials as well as in other procedures used to resolve disputes, including plea bargaining, mediation, and decision making by police officers .... Wherever procedural issues have been studied they have emerged as an important concern to those affected by the decisions.

Id. (citations omitted). As Professor Tyler explains, there are two potential reasons for this focus on process rather than on substance. First, in a complex society, individuals receive a diverse variety of benefits (from monetary benefits to clean and safe streets) and pay a similarly diverse variety of costs (from paying taxes to having liberty restricted to a certain degree). Since it is impossible for any individual to keep track of all the benefits received and all the costs paid, the individual finds it easier to focus on the procedure itself and evaluate its fairness. If procedures are generally fair, the individual will conclude that in the long run he or she will pay and receive a just distribution of costs and benefits. The second possible explanation is that in a diverse society, individuals may disagree on what constitutes a just distribution of substantive benefits and costs, but they can generally agree on what constitutes a fair procedure. *Id.* at 109.

As will be shown, the preference for a fair and meaningful process over any specific substantive result has been confirmed in the restorative justice context. As one restorative justice proponent has noted: "Several studies have consistently found that the restitution agreement is less important to crime victims than the opportunity to talk directly with the offender about their feelings regarding the crime." Mark S. Umbreit, *Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment*, W. CRIMINOLOGY REV. (June 1998), http://wcr.sonoma.edu/v1n1/umbreit.html (citations omitted).

169. The name of the discipline is misleading, since the studies are only focused on the *perception* of fairness and not the *actual* fairness of the process. Of course, just because most victims and defendants *believe* that restorative justice programs are more fair does not make them so. Obviously the question of whether the parties involved are *in fact* better off is a critical one. But the issue of perceived fairness should not be overlooked since it is critical to the legitimacy, and therefore to the long-term survival of the criminal justice system. In other words, even if the traditional criminal justice system were to utilize procedures and produce outcomes which all of the experts agreed were fair and just, the system would have no long-term viability if the individuals within the system—victims and defendants—perceived it to be unfair.

170. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 121 (2000).

171. *Id.*; *see also* E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY &

views the decisionmaker as neutral and unbiased; that is, whether the rules are impartially followed and the decisionmaker appears motivated to be fair to both sides in a given case.[172] The final consideration is whether the individual is treated with dignity and respect during the process.[173]

In a recent article, Professor Michael O'Hear noted that plea bargaining has the potential to fulfill the criteria for procedural justice better than the traditional criminal trial, at least with respect to the defendant.[174] Professor O'Hear divides plea bargains into two different categories: "routine case processing" and the "adversarial interaction."[175] Routine case processing, which is more common for high volume misdemeanors and low level felonies, does not really involve bargaining or negotiating, but merely involves reviewing the police report to learn the key facts for the alleged crime and then telling the defense attorney the preestablished offer for that particular offense. This process resembles " 'less a Middle Eastern bazaar than shopping in a supermarket.' "[176] This category of plea bargains does not fulfill many of the requirements of procedural justice, mostly because the defendant has "no real voice in the process."[177]

Adversarial interaction, on the other hand, occurs when the prosecutor and defense attorney cannot agree quickly on the going rate for the specific offense with which the defendant is charged. In these cases, the prosecutor has three options: she can engage in "horse trading" by simply offering a lower sentence than the going rate; she can withdraw from negotiations altogether; or she can "adopt a position of principled engagement" by discussing the merits

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SOC. PSYCHOL. 952, 952–59 (1990) (testing empirically both instrumental and noninstrumental voice effects on judgments of fairness of procedures). One study found that allowing victims to testify at sentencing hearings increased the victim's perception of the fairness of the process even if their arguments had no effect on the ultimate sentence given to the defendant. *See* Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV. 349, 364 (1979).

172. *See* Tyler, *supra* note 170, at 122; Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, *in* 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115, 153–58 (Mark P. Zanna ed., 1992) (explaining the preconditions for the effective functioning of authorities).

173. *See* Tyler, *supra* note 170, at 122.

174. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 410–13 (2008).

175. *Id.* at 415.

176. *Id.* at 416 (quoting MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 187–88 (1979)).

177. *Id.* at 417.

and equities of the case with the defense attorney and the client.[178] Principled engagement, unlike the other two options, creates a situation where the prosecutor is at least willing to listen to the defendant's story and is potentially amenable to the idea of reducing or changing the offer in response to what the defendant says.

Obviously it is only this last option—adversarial interactions in which the prosecutors enter into principled engagement—which has any hope of increasing the level of procedural justice for the defendant.[179] As O'Hear notes, the prosecutor himself usually decides what type of bargaining will occur and what stance she will take in that bargaining, since the pressures of the system almost always result in a guilty plea for the defendant regardless of how the prosecutor conducts the negotiation. Therefore, in order to enhance the level of procedural justice in the plea bargaining context, O'Hear proposes training prosecutors in the importance of giving defendants a meaningful opportunity to convey their side of the story (what he calls providing "meaningful voice opportunities")[180] and encouraging prosecutors whenever possible to adopt a position of principled engagement.[181] He also encourages prosecutors to treat defendants with respect and dignity throughout the process.[182] In addition,

178. *Id.* at 417–18.

179. As O'Hear says, there are

> two areas of procedural justice concern: the defendant who is railroaded into accepting a deal without first having a meaningful opportunity to tell his or her side of the story [(in the "routine case processing" scenario)], and the defendant who faces a high-handed prosecutor unwilling to address his or her view of the case in a principled fashion [(prosecutors in the adversarial interaction scenario who do not engage in principled engagement)].

Id. at 419–20.

180. *Id.* at 447–49.

181. *Id.* at 431. O'Hear offers five protocols that could enhance the procedural justice of plea bargaining:

> (1) before starting plea negotiations, ensure that defendants have had a meaningful opportunity to tell their side of the story, either through police officers during pre-charge processing or through counsel after charging; (2) develop objective criteria to guide plea negotiations; (3) explain positions taken in negotiations; (4) expressly acknowledge arguments for more lenient treatment; and (5) refrain from pressure tactics like exploding offers and charging threats.

Id.

182. *Id.* at 429–30. For example, O'Hear suggests that prosecutors "take care to use the appropriate honorific when referring to the defendant (e.g., Mr. Smith, Ms. Jones) and discourage unnecessary handcuffing and other forms of rough treatment." *Id.* at 430.

O'Hear argues that prosecutors should develop—and convey to defendants—objective criteria to guide plea bargaining decisions.[183]

What proportion of plea bargains already involve principled engagement, or how many prosecutors currently refer to objective criteria and treat the defendants with respect during the process is an open question, but at least these factors are possible in the process of public plea bargaining. And, as O'Hear points out, if procedural justice is a desirable goal, then it would be relatively inexpensive in most jurisdictions to adjust the methods of plea bargaining to enhance these elements of the process.[184]

But private criminal settlements offer no such possibilities. There is no unbiased, neutral decisionmaker applying objective criteria when a private party bargains with the perpetrator, and there is no real hope of imposing such criteria. Whether defendants are treated with respect in these private negotiations will depend on the private party conducting the negotiation. Some private parties will treat the perpetrator with dignity and avoid unnecessary threats and humiliation, but some will not. Most crucially, there is no way to change the system in order to ensure that the person negotiating with the perpetrator treats him with respect during the process. Unlike prosecutors, the private parties who conduct these negotiations cannot be trained to act in a certain way or sanctioned if they fail to do so. Of course, the defendant will be allowed to tell his story, probably more so than in most public plea bargaining situations, but whether the private party conducting the negotiation pays any attention to the defendant's story by engaging in principled engagement will vary from case to case. Again, there is no way to train the private parties or regulate their conduct while engaging in the settlement negotiations, so there is no way to systematically increase the level of procedural justice in the process.[185]

3. Shifting Power from Judges to Prosecutors

A third potential benefit that plea bargains provide to the criminal justice system is the shift in adjudicatory power from judges to prosecutors. The traditional criminal justice system divides power among various actors: prosecutors have the original charging power;

183. *Id.* at 428–29.

184. *Id.* at 469.

185. It could be argued that private criminal settlements enhance the level of procedural justice for the *victims*, who experience very little procedural justice in the public criminal justice system, whether a case is plea bargained away or goes to trial.

juries decide guilt or innocence; and judges set the appropriate sentence if the defendant is convicted. During the plea bargaining negotiation process, the prosecutor assumes all three roles, as he or she becomes de facto adjudicator and sentencing authority. When plea bargaining becomes as ubiquitous as it is under the current system, this represents a significant shift in the balance of power in the criminal justice system.

Critics of plea bargaining see this shift as a negative development. Professor Alschuler argues that the process

> tends to make figureheads of judges, whose power over the administration of criminal justice has largely been transferred to people of less experience, who commonly lack the information that judges could secure, whose temperaments have been shaped by their partisan duties, and who have not been charged by the electorate with the important responsibilities that they have assumed.[186]

The lack of experience and legitimacy are important concerns, but probably the most troubling aspect about this shift in power is that a prosecutor is meant to be both an advocate for the state and a neutral adjudicator, zealously pursuing the case but at the same time willing to offer a plea deal which represents the most "just" disposition for the case. It is certainly not impossible for a prosecutor to take on both roles[187]—indeed, most prosecutors are committed to ensuring a just resolution for each of their cases. But at the very least the breakdown of the separation of powers between the judge and the prosecutor gives an appearance of impropriety.

Other commentators have seen the shift in power from prosecutors to judges as a positive development.[188] In the modern criminal justice system, plea bargaining involves more than just a reduction of sentence based on the risk of acquittal; it also involves the exercise of discretion on the part of the prosecutor.[189] In other words, a prosecutor who offers a plea bargain is making a determination that the proposed disposition is a just and fair resolution of the case—a determination based on her expertise and her duty to do justice for the citizens of her jurisdiction.

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186. Alschuler, *Right to Trial*, *supra* note 117, at 933.

187. *See, e.g.*, H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1713–18 (2000).

188. *See, e.g.*, Lynch, *supra* note 14, at 2124–36.

189. *Id.*

A prosecutor's exercise of discretion at the plea bargaining stage can be broken down into three different categories. First, the prosecutor makes a calculation about the risks of going to trial and the cost to the system of litigating a case, and offers a discount to the defendant based on these two factors. How much each factor weighs into this discount will vary widely depending on the case. For example, in a rape case which relies heavily on the testimony of a victim with credibility problems, the prosecutor may be quite concerned about the risk of acquittal and offer a significantly reduced sentence. On the other hand, if the crime is a minor one, such as shoplifting an item of small value, a guilty verdict may be assured—but the prospect of using up even a few hours of a judge's and jury's time on the case may convince the prosecutor to offer a similarly sized reduction. As repeat players in the system, prosecutors will develop quite a bit of expertise in making these calculations—both in terms of the chances of conviction and the likelihood of conviction.

The second way a prosecutor will exercise discretion in the plea bargaining process is by choosing among a number of different crimes to find the most appropriate to which the defendant can plead. The prosecutor (or police officer) has already exercised discretion in the charging decision, selecting the appropriate crime from the vast (and growing) list of criminal prohibitions passed by the legislature. Professor Landes and Judge Posner have called this the problem of "discretionary nonenforcement" and have argued that a public monopoly on criminal enforcement is a necessary condition for the practice.[190] According to Landes and Posner, the criminal justice system requires a great deal of discretionary nonenforcement because it is impossible for legislatures to write laws with sufficient precision to perfectly cover only those who are guilty of crimes and not also potentially cover those who are innocent.[191]

The third and related way that prosecutors exercise discretion in conducting plea bargaining is in setting punishment. In theory, a prosecutor will seek the socially optimal punishment for each crime based on the culpability of the defendant. Critics of plea bargaining, of course, see this as a cost of plea bargaining, if not an outright travesty of justice: the judge is the neutral party that is supposed to

190. Landes & Posner, *supra* note 10, at 38–41.

191. *Id.* at 38. Landes and Posner write that the broad laws passed by legislatures could potentially lead to overinclusion—that is, criminal laws being enforced against the innocent. Discretionary nonenforcement is the most efficient way to reduce the costs of overinclusion, without increasing the dangers of underinclusion (which would occur if legislatures tried to craft their criminal laws more narrowly). *Id.*

set the punishment, and delegating this power to one of the parties in the case (who may only be a few years out of law school) subverts the adversarial nature of the system.[192] On the other hand, prosecutors have a sworn obligation to seek justice, and many of them take that duty seriously when plea bargaining. Prosecutors are able to listen to equitable arguments from the defense attorney and the victims, and—compared to judges—they have the time to investigate these arguments and greater discretion to respond to them.

In the end, whether the derogation of power from judges to prosecutors is a negative or positive development remains an open question. When the same analysis is applied to private criminal settlements, however, the answer is clear: a further derogation of power from prosecutors to private parties results in a net loss of justice.

As noted above,[193] the parties in a private criminal settlement will frequently have limited or no experience in the criminal justice system; thus, they may end up with settlements which have very little relationship to what an eventual outcome at trial might have been. More significantly, the private individual, whether a victim or a witness, who bargains with a perpetrator is presumably only trying to get the greatest possible gain out of the transaction, without any concern whether the ultimate disposition is just for the perpetrator or beneficial to society. Furthermore, a prosecutor can (and does) think about whether it is sensible to expend a certain amount of resources to prosecute a minor crime. A private party will have no such consideration—he or she will decide to settle the case privately or call the police based only on his or her own individual cost.

Furthermore, the parties who negotiate a private criminal settlement do not practice discretionary nonenforcement, at least not knowingly. As long as the private party negotiating with the perpetrator believed that he or she could receive some consideration in exchange for the private criminal settlement, he or she might threaten to report perpetrators for every minor infraction of the broadly worded (and extensive) criminal law, leading to overenforcement.[194] And of course a private party is not likely to seek justice in setting punishment; frequently she will seek to maximize the amount she can get out of the perpetrator, regardless of how culpable

192. *See, e.g.*, Alschuler, *Trial Judge's Role*, *supra* note 117, at 1063.
193. *See supra* Part III.B.4.
194. *See supra* Part III.B.4.

the perpetrator is.[195] A private party will (presumably) not care about the mens rea of the defendant, nor about the cost to society, nor any of the other many factors that make up the complex calculus of criminal liability.

4. Preserving Relationships

Private criminal settlements do offer one potential benefit that plea bargaining does not provide: parties who engage in private criminal settlements are more likely to maintain any preexisting long term relationships, whether it is a personal relationship (such as husband and wife), or a professional one (such as employer and employee, or teacher and student). Contacting the authorities frequently causes significant, and perhaps irreparable, damage to these relationships. After the first contact, the criminal justice system puts additional strain on these relationships by putting the victim and the defendant in adversarial positions and forcing the victim to make statements against the perpetrator and (at least occasionally) to testify against him in court.

In contrast, private criminal settlements create a situation where the victim and perpetrator are working together—both to resolve the dispute in the first place and to ensure that the perpetrator ultimately satisfies the obligation he has undertaken. The victim-centered nature of the resolution may also help to mend the relationship rather than tearing it further apart, allowing the victim to feel that the perpetrator is atoning for his action.

Of course, not all of these relationships are worth preserving—in many cases, it may be best to fire the embezzling employee or leave the abusive spouse. Moreover, many private criminal settlements do not involve a preexisting relationship at all. However, under the right conditions, private criminal settlements could help to preserve certain relationships if both parties are inclined to do so.

5. The Narrow Benefits of Private Criminal Settlements

Viewing private criminal settlements as an analogue to public plea bargains provides a number of strong justifications for banning the practice. Although both the private and public processes follow

195. There are exceptions, of course. If the private parties have an ongoing, continuing relationship—as friends, family members, or coworkers—the victim may attempt to ensure that the defendant is treated fairly and receives a just disposition. This possibility is another reason why private criminal settlements should be permitted when there is a preexisting relationship. *See infra* Part IV.A.

the same pattern—delivering a lesser amount of punishment in exchange for a smaller investment of resources—the intangible costs associated with private criminal settlements are much greater. All of the drawbacks of plea bargains—the lack of transparency, the increased chance of wrongful convictions, the distorted results when compared to the expected result at trial, and (to some extent) the pernicious influence of economic inequality—apply with even greater force to private criminal settlements. Meanwhile, two of the potential benefits of plea bargaining—the increased level of procedural justice and the increased amount of discretion given to a prosecutor who (at least ideally) is seeking a just resolution of the case—are simply not present in private criminal settlements. The only benefits private criminal settlements offer is a greater potential for flexibility and creativity in reaching a resolution (a dubious benefit in the criminal justice context) and the possibility of preserving long-term relationships between the perpetrator and the victim.

IV. IMPLICATIONS FOR LAWS REGULATING PRIVATE CRIMINAL SETTLEMENTS

This Article has analyzed private criminal settlements through the lenses of blackmail theory and plea bargaining theory in an attempt to justify the current criminalization of such agreements. The analysis leads to several conclusions about the justifications for banning private criminal settlements, which in turn lead to conclusions about how these settlements should be regulated.

A. Justifying the Ban on Private Criminal Settlements

The first conclusion is that the criminalization of these settlements cannot be justified using blackmail theory.[196] Although there are some dangers in allowing incriminatory blackmail, they can be mitigated by criminalizing ongoing blackmail arrangements (which could easily turn into conspiracies to cover up crimes) and increasing penalties for the "negative externalities" of blackmail (such as theft, fraud, and concealing evidence).[197] It would also be sensible to

196. Berman, *supra* note 10, at 863 (defending the ban on incriminatory blackmail because the criminal law "serves retributive, deterrent, incapacitative, and rehabilitative goals that are not comparably well served by monetary (let alone confidential) settlement between offender and victim"). But as we have seen, private criminal settlements do serve a retributive and deterrent function and could also provide restitution to the victim of a crime. Nor can a ban on incriminatory blackmail be justified based on the idea that we all have a "moral duty" to report crime. *See supra* notes 77–87 and accompanying text.

197. *See supra* notes 68–71 and accompanying text.

prohibit incriminatory blackmail on the part of those who have a statutory duty to report specific crimes. With these safeguards, it could be argued that incriminating blackmail provides a number of benefits to society by creating at least some level of deterrence and punishment in certain situations in which the crime would otherwise go unreported.[198] For example, crimes that occur between friends, family members, or others who have preexisting relationships are less likely to be reported to the authorities, but they could result in an informal agreement between the perpetrator and the victim that results in a rough restitution to the victim and a punishment against the defendant (albeit a small one compared to what the criminal justice system might impose). Likewise, private criminal settlements as a result of commercial research blackmail produces punishment for crimes that would otherwise go unpunished in the public criminal justice system.

But analyzing these settlements as a private analogue to plea bargains paints a different picture. The disadvantages of public plea bargains have been well catalogued for decades, with numerous commentators calling for an outright ban on the practice[199] while others merely accept them as a necessary evil.[200] Private criminal settlements suffer from almost all of the defects of public plea bargains and offer almost none of the potential advantages that plea bargaining can provide. The only benefit that private criminal settlements offer is the chance of preserving preexisting relationships between the parties, relationships that might otherwise be damaged or torn apart by the filing of formal criminal charges.

Comparing these two analyses side by side leads to a conclusion: although the criminalization of private criminal settlements is justified, there is a certain category of these agreements which ought to be permitted. Specifically, private settlements should be permitted between individuals who already have a preexisting relationship—a relationship which is close enough that the victim is unlikely to report the crime to the authorities anyway, and a relationship which might be endangered if formal criminal charges are filed. The existence of a preexisting relationship between the victim and the perpetrator will likely facilitate more creative punishments or resolutions to the

198. *See supra* Part II.B.1.

199. *See, e.g.*, Alschuler, *Right to Trial*, *supra* note 117, at 935–36; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992).

200. *See, e.g.*, Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 524 (1980).

dispute—that is, the parties will have options other than a simple monetary payment. For example, the victim may require that the perpetrator seek counseling or treatment in exchange for not reporting the crime.

Commercial research blackmail, which appeared to offer significant benefits under the blackmail analysis, fares quite poorly when examined in the context of plea bargaining. First, there is no long-term relationship to preserve between the private party and the perpetrator. Second, the private party who conducts the commercial research blackmail is likely to be a repeat player with an extensive knowledge of the criminal justice system, resulting in a large discrepancy in experience between the private party and the perpetrator and an increased chance that the perpetrator will be treated unfairly.

B. Current Laws Regarding Private Criminal Settlements

As noted above, most states prohibit incriminating blackmail altogether,[201] but a few allow the practice in limited circumstances. The exact contours of the exceptions differ from jurisdiction to jurisdiction. The Model Penal Code, for example, focuses on the amount that is received by the blackmailer and whether the blackmailer believed that amount to be a fair restitution: "It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense."[202]

New York (which labels blackmail as "coercion") looks more broadly at the purpose of the blackmailer:

> In any prosecution for coercion committed by instilling in the victim a fear that he or another person would be charged with a crime, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole purpose was to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge.[203]

Ohio's exception for incriminatory blackmail is even broader, providing a defense if "the actor's conduct was a reasonable response

201. *See supra* notes 35–36 and accompanying text.
202. MODEL PENAL CODE § 223.4 (1985).
203. N.Y. PENAL LAW § 135.75 (McKinney 2009).

to the circumstances that occasioned it," and that the actor's purpose was limited to "preventing or redressing a wrong or injustice."[204]

These exceptions are probably derived from the retributive justifications for criminalizing blackmail that were reviewed in Part I. This is to be expected: if blackmail is criminalized because the blackmailer is acting with blameworthy motives,[205] then it makes sense to exempt those blackmailers who are simply attempting to "redress an injustice" or whose payment merely "makes good the wrong" done by the perpetrator. But if blackmail theory cannot justify criminalizing these agreements in the first place, then it makes little sense to base the exceptions on the retributive theories of blackmail.

Instead, our analysis of private criminal settlements as an analogue to public plea bargaining leads to a somewhat different conclusion: it is not the amount of the payment that matters, nor the intent or purpose of the blackmail, but rather the relationship between the two parties that is critical. If the victim and the perpetrator share a close relationship that predates the crime itself, then a private criminal settlement is less harmful to society. In fact, it may help society since the private settlement will provide punishment, deterrence, and restitution in a situation where the public criminal justice system would likely never become involved.

In fact, laws derived from the Model Penal Code, which limits the amount of payment to a reasonable level of restitution, are both poor policy in theory and difficult to enforce in practice. The laws are poor policy because they limit the effectiveness of private criminal settlements. As we have seen, these settlements serve a purpose in punishing and deterring the perpetrator. Usually the amount of punishment imposed will be lower than what the perpetrator deserves for the crime, since he is only agreeing to the private settlement in order to avoid the full consequences of his actions. Placing a statutory limit on the amount of punishment further reduces the level of punishment and deterrence created by the settlement, thus weakening one of the primary benefits of private criminal settlements. Indeed, if the victim is only permitted to "make good the wrong" that was done by the perpetrator, the punishment will be even less likely to meet the objectives of the criminal justice system. For example, a shoplifter would only have to pay for or return the item

204. OHIO REV. CODE ANN. § 2905.12(C)(2) (LexisNexis 2010).
205. Berman, *supra* note 10, at 848.

that he stole which provides little in the way of deterrence and does not satisfy the retributive goals of the criminal justice system.

The laws are difficult to enforce because these agreements, by their very nature, may not only involve monetary payment; they may also (or exclusively) consist of the perpetrator promising to undertake or abstain from an action. These nontraditional resolutions to a criminal dispute may be hard to quantify and compare to the "amount the actor believed to be due." For example, assume a teacher or guidance counselor finds marijuana or cocaine in a student's backpack and threatens to call the police on the student unless he (1) throws away his stash, (2) anonymously reports the name of the dealer to the police, and (3) attends a drug rehabilitation program. If the teacher were later brought up on charges of blackmail, how would a prosecutor or jury decide whether the teacher believed her demands to be what she was due as "restitution" or "indemnification" for the "harm caused by the offense," or even whether her demands were "reasonable action[s] to make good the wrong?"

Instead, exceptions to the blackmail law which permit private criminal settlements should focus on the cases in which the victim and the defendant are in a preexisting relationship. This relationship should be (1) one that society wants to preserve and (2) one in which the victim would be unlikely to report the crime to the public authorities. The law could set out examples, such as immediate family members, employer-employee relationships, and relationships between students and teachers or school counselors. This would permit private criminal settlements which are the most beneficial to the criminal justice system.

CONCLUSION

Our criminal justice system has become increasingly privatized, particularly at the detection and apprehension stage of the process. As more perpetrators are caught by private parties, the opportunities for private criminal settlements will become more numerous. Simultaneously, legislatures continue to criminalize more types of behavior and increase the severity of both sentences and collateral consequences for all crimes—thus increasing the temptation for victims and perpetrators to privately resolve their disputes. Therefore, it is imperative to understand the costs and benefits of these agreements in order to know whether and how they should be regulated.

Currently, private criminal settlements are almost universally banned, but this ban exists for the wrong reason. Legislatures treat private criminal settlements as blackmail and criminalize them accordingly. But the justifications for criminalizing blackmail are weak to begin with, and they become even weaker when applied to incriminatory blackmail. Analyzing these agreements under the blackmail paradigm therefore leads to overcriminalization and other poor policy choices, such as artificial restrictions on the amount of consideration the perpetrator is allowed to pay in those rare instances when these agreements are permitted.

Instead, legislatures should view these private agreements as another element of the growing private criminal justice system. It is possible—perhaps even likely—that private mediators will soon begin to take the place of public prosecutors and judges in order to resolve these disputes.[206] But until then, many crimes will continue to be resolved informally by the parties involved, through a private analogue to the plea bargaining that resolves most of the cases in the public criminal justice system. Analyzing private criminal settlements under this plea bargaining paradigm provides a sufficient justification for criminalizing this conduct, since private criminal settlements involve all of the costs of plea bargains but offer almost none of their benefits.[207] Our criminal justice system requires judges and prosecutors to exercise discretion in choosing which crimes to prosecute and what sentences to impose. Private individuals who reach settlements with perpetrators will exercise that discretion for their own selfish purposes, and this problem will be especially acute when the witness or victim is a repeat player in the system, such as a private security guard or a private investigator conducting commercial research blackmail.

But if the witness or victim has a preexisting relationship with the perpetrator, the private criminal settlement offers benefits which are

206. In an earlier article I argued that private criminal mediators could be a positive development in the evolution of criminal law. *See* Simmons, *supra* note 13, at 988–90. These systems of private criminal dispute resolution would offer many more advantages over private plea bargains, not the least of which is that their processes can be regulated by the state and their resolutions can be reviewed by the local prosecutor in ways which are impossible in the context of private criminal settlements.

207. In the end, of course, these agreements may prove to be impossible to regulate, particularly for smaller crimes. The incentives for each side to bypass the public criminal justice system are quite strong; both parties will work to keep the arrangement secret, and most prosecutors will be reluctant to bring charges in these cases even if they do learn about them. But most of these agreements should remain illegal in order to provide some level of deterrence against individuals who are tempted to engage in this behavior.

not available in the public criminal justice system. Not only are the settlements more efficient and flexible than plea bargains, but they can also help preserve the relationship between the private parties. Under current law, parties who enter into these beneficial agreements are treated as criminals. Neither the blackmail paradigm nor the plea bargaining paradigm can justify such treatment.