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Paradigm Shift: #MeToo and the Paradox of Bribery Secrets

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I. INTRODUCTION

Let us define a *secrets bribe* as a transaction in which one person (a *secrets briber*) offers another person (a *secrets bribe-taker*) money in return for the secrets bribe-taker's agreement not to disclose information the secrets briber wishes to keep secret.[1] Despite the use of the word *bribe*, there is nothing illegal about paying someone to keep your secret. But the identical exchange of money for secrecy may become *secrets blackmail* if the offer comes from the payee rather than the payer. Blackmail is a crime. The paradox of secrets bribery[2] is that the legality of the transaction seems to depend entirely on which of the two

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1. The use of the term "bribe" in this context has no negative connotation. Economists often refer to payments made to induce parties to act as non-criminal "bribes." Sidney W. DeLong, *Blackmailers, Bribe-takers, and the Second Paradox*, 141 U. PENN. L. REV. 1663, 1664, n.5 (1993) ("DeLong, *Second Paradox*"). Sidney W. DeLong, *Coasean Blackmail: Protection Markets and Protection Rackets*, 67 U. KANS. L. REV. 281 (2018) ("DeLong, *Coasean Blackmail*").

2. This was earlier referred to as the "second paradox" of blackmail; DeLong, *Second Paradox*, *supra* note 1. I am using "the paradox of secrets bribery" in this paper to focus attention away from the blackmail transaction and toward the bribery transaction's use of non-disclosure agreements.

parties proposed it.

It might be objected at the outset that a blackmailer does not just *propose* the exchange of money for secrecy, he threatens to harm the victim just as an extortionist does. The difference between bribery and blackmail is no more inexplicable than the difference between a gift of money to a stranger on the street and a payment made to the same person as a result of armed robbery.

But unlike an armed robber who obtains money by a threat of physical harm, a secrets blackmailer threatens to do nothing illegal and nothing that causes cognizable legal harm to his victim. He is legally free to do what he *threatens* to do—to expose the victim's secret. The paradox of secrets blackmail is why it should be a crime when the blackmailer threatens nothing criminal. The related paradox of secrets bribery is why, if secrets blackmail is a felony, secrets bribery is not. As will be shown below, legal theory has thus far been unable to answer either of these paradoxes satisfactorily and consistently.

The average person, unencumbered with the legal theorist's need to produce an internally consistent legal theory supported by rational justification, would probably say secrets blackmail is illegal because it is a terrible thing to do to a person (imagining how he would feel if he were blackmailed), while a secrets bribe is legal because it can be a useful form of agreement that the law should encourage (imagining how he might use such a transaction to preserve his own secrets). Pressed to go further, the average person might imagine the blackmailer to be a cruel, exploitative character (imagining himself in that role) while the bribe-taker is a cooperative fellow doing a service to the briber (imagining himself in the role).

Thus, when we imagine the secrets blackmail scenario, we imagine ourselves as the blackmail victim. When we imagine the secrets bribery scenario, we imagine ourselves as the bribe payer and as the bribe taker. Casting oneself in the active roles in the blackmail and bribery scenarios causes us to care about blackmail and bribery in a way we might not if they were described in the generic abstractions of the criminal law. This empathy may serve to invest the paradigmatic blackmail and bribery exchanges with the normative valence necessary to rationalize the law's otherwise inexplicable responses to them.

In sum, the paradoxes of secrets blackmail and secrets bribery can be explained by the different social understandings of secrets blackmail and secrets bribery. These understandings arise from imagined narratives that raise different normative implications. The imagined blackmail scenario is sinister, the bribe scenario benign. Therefore, blackmail should be made illegal and suppressed while bribery should be freely available to parties willing to engage in the purchase and sale of secrecy. Although the blackmail and bribery transactions may be substantively identical, both these views can be held simultaneously by the same person because they never come into conflict, dwelling as they do in separate social narratives.

If the paradigm theory is correct, the scenarios underlying our understandings of secrets blackmail and secrets bribery are understood in much more detail than

are the abstract terms of the blackmail statute. In forming our understandings, we imagine real people, particular kinds of secrets, and particular surrounding circumstances. Most importantly, when we imagine ourselves as the characters in these dramas, we empathize with their roles in the transaction in a way that gives them normative bite.

But the imagined details that give paradigmatic scenarios their normative force also make them inherently unstable. When public events affect loosely moored popular understandings of the relations between the parties to a bribery or blackmail transaction by shifting the prototypical blackmailer and victim around, or recasting the prototypical briber and bribetaker as quite different people, the normative implications of those paradigms can shift dramatically. That has happened with the #MeToo movement.

Part I of the following discussion briefly describes the paradoxes of secrets blackmail and of secrets bribery, and the inadequacy of conventional legal theory to explain the illegality of blackmail and the legality of bribery. Part II describes the paradigmatic explanation of the different treatment of blackmail and bribery by reference to two competing scenarios, which will be described in some detail. Part III describes the way in which the #MeToo movement has destabilized the secrets bribery paradigm by making the secrets briber more sinister than the secrets bribe-taker. The paradigmatic secrets bribe now seems to be exploitative rather than welfare-enhancing. The conclusion suggests paradigmatic thinking may also influence our acceptance of more ordinary legal rules.

II. THE PARADOXES OF SECRETS BLACKMAIL AND SECRETS BRIBERY

The crime of secrets blackmail is uniquely paradoxical.[3] It is defined as obtaining money by means of a threat to disclose a secret.[4] Although other forms of extortion involve obtaining money by threats of violence,[5] the secrets

3. ALAN WERTHEIMER, COERCION 90–91 (1987) ("WERTHEIMER, COERCION"); James Lindgren, *Unraveling the Paradox of Blackmail* 84 COLUM. L. REV. 670 ("Lindgren, *Unraveling*").

4. For example, the District of Columbia statute provides

(a) A person commits the offense of blackmail when that person, with intent to obtain property of another or to cause another to do or refrain from doing any act, threatens to:

(1) Accuse another person of a crime;

(2) Expose a secret or publicize an asserted fact, whether true or false, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation;

(3) Impair the reputation of another person, including a deceased person;

(4) Distribute a photograph, video, or audio recording, whether authentic or inauthentic, tending to subject another person to hatred, contempt, ridicule, embarrassment, or other injury to reputation; or

(5) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status.

(b) Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both. § 22-3252.

5. 18 U.S.C. § 873 (2012) (punishing anyone who receives payment "under a threat of informing" against any violation of federal law); 18 U.S.C. § 1951 (b) (2) (2012) (Extortion consists of "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or

blackmailer does not threaten to do anything that causes legally cognizable harm.[6] The victim is free to ignore the threat of disclosure, as many do. While an extortionist threatens to violate his victim's rights, the victim of secrets blackmail may have no right to secrecy. Neither the disclosure of the secret nor the threat to disclose it is illegal, so long as the threat is not accompanied by a demand for money.

Nor is it the payment of money that makes the act wrongful. A victim who pays a secrets blackmailer purchases silence to which he is not otherwise entitled and which he may be eager to purchase. The mere acceptance of money for silence is not unlawful either. For example, if a person, fearing that another person may expose his secret, takes the initiative and bribes the other party not to disclose the secret, neither party has committed a crime. Yet, if the money is paid as a result of a threat to disclose the secret, the crime of blackmail has occurred.

It is no mystery why the law criminalizes forms of extortion in which the defendant obtains money by means of a threat to commit violence or other tortious harm against the victim.[7] Although secrets blackmail is sometimes classified as part of the law of extortion, it cannot rest on the same basis as extortion by threats of violence because without incurring liability, the secrets blackmailer may disclose the secret; she may threaten to disclose the secret; or she may not agree not to disclose the secret. The only thing that she may not do is to demand and obtain money for not disclosing the secret. The puzzle is to explain how the blackmail exchange can be harmful if all of its elements are separately legal and if *both* parties prefer the payment of blackmail to the menace's disclosure of the secret.

One cannot simply make the intuitive claim that blackmail is made illegal to prevent the emotional and financial harm a blackmailer inflicts on the person who is blackmailed. The victim of secrets blackmail has no right to secrecy and no right not to be harmed by the threatened disclosure. Unlike the perpetrator of other crimes or torts, the blackmailer may legally disclose the victim's secret or not. Why then is it illegal for the blackmailer to demand and receive payment for agreeing to do something he has no duty to do from someone who must pay him for the agreement? That is the first paradox of blackmail.

A. Economic Theories of Blackmail

Economic theory and moral philosophy have struggled to rationalize the paradoxes of blackmail. Some economic analysts find the justification for blackmail statutes in the incentive effects that legalization of blackmail would

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fear, or under color of official right.").

6. For a survey of theories that address this issue *see* WERTHEIMER, COERCION, *supra* note 7, at 90–103 (1987) (concluding tentatively that the wrongfulness lies in the blackmailer's proposal rather than the action proposed in the threat).

7. WERTHEIMER, *supra* note 3, at 90.

lead to a waste of resources in the activities are both the blackmailer and his victim the transaction costs involved in the blackmail bargain. Thus, economic theorists have sought to justify outlawing blackmail by arguing there are indirect costs and inefficiencies that would arise if blackmail transactions were legal.[8] The availability of legalized blackmail would give parties incentives to discover embarrassing secrets and then leverage those secrets into income by threatening their disclosure. This would be a sterile exchange creating deadweight costs to society.[9]

Such arguments about economic waste rest on unproven and unproveable assumptions about the behavioral effects of legalization. It is implausible that legalizing secrets blackmail would increase resources that are already being devoted to the discovery and concealment of secrets in the digital age. Consider the enormous resources that are currently devoted to protecting privacy—both personal and commercial—and on penetrating that protection. The payoff for discovery of deeply hidden commercial secrets is already profitable far beyond the marginal amount that legalized blackmail might produce.

The resource arguments also ignore the losses attributable to efficient non-disclosure agreements that are currently prevented by blackmail's illegality. Many victims would prefer the opportunity to purchase their secrets back from the one who stole them and would often bid higher than the alternative purchaser or the public. Criminalizing blackmail inhibits non-disclosure agreements that might otherwise be achieved by potential bribe takes warning victims of pending disclosures, with the result that both parties lose.

Economic analysis does not explain the second paradox either. Why is an exchange initiated by the payer more likely to result in wasted resources than one initiated by the payee?[10] Why, in other words, is blackmail more wasteful than bribery?

B. Non-economic Theories of Blackmail

Theorists not identified as either economic-based or philosophically based have tried to justify the illegality of blackmail by appealing to the socially harmful consequences of legalization, but these appeals are vulnerable to the arguments made against the economic waste theorists.

James Lindgren has taken the counter-intuitive position that blackmail is made illegal not to protect the feelings of blackmail victims but to protect the interests of the nosy public from whom the blackmail victim wishes to keep the

8. Douglas Ginsberg & Paul Schectman, *Blackmail: An Economic Analysis of the Law* (1993) (arguing that blackmail diverts resources solely for wealth redistribution purposes).

9. Richard Posner, Symposium, *Blackmail, Privacy, and Freedom of Contract,* 141 U. PA. L. REV. 1817, 1820 (1993) (arguing from an economic perspective that blackmail should be unlawful because it is a coercive wealth-reducing transfer that has a sterile redistributive effect).

10. DeLong, *Second Paradox, supra* note 1, at 1672–74 (responding to the argument).

secret. He argues the blackmailer's wrong is he appropriates for his own profit the leverage third parties hold against the victim (i.e., bargaining with their chips) as he exploits the force of their potential disapproval to sell secrecy to the victim. This popular theory has problems I have addressed elsewhere at length.[11] Its chief weakness is that it is not premised on preventing harm to the victim of blackmail and seems instead to prevent the victim from protecting himself by a non-disclosure agreement.

C. Moral Philosophy

Philosophers who wish to justify the illegality of blackmail must explain what there is about the morality of a blackmail transaction that justifies making it illegal. Unlike the economists, most of the moral philosophers do focus on the harm to the victim.[12] Moral philosophers have struggled unsuccessfully to justify the law of blackmail by reference to the moral rights of a blackmail victim.[13] Their general commitment to explanations grounded in moral rights leaves them in the anomalous position of asserting a general right not to be blackmailed on behalf of people who have no right not to be exposed and who may well prefer being blackmailed to being exposed.

D. Secrets Blackmail Should be Legal

In the face of these theoretical difficulties in justifying the illegality of secrets blackmail, several theorists have argued the law should be changed, and blackmail should be legalized so long as what is threatened is not itself tortious or criminal.[14] Walter Block has long espoused an iconoclastic, libertarian view that informational and other forms of blackmail transactions should be legal.[15] Block focuses on the substance of the blackmail transaction and the parties' interests. Because of the lack of any credible economic or moral justification for blackmail statutes, Block argues blackmail should not be illegal. In a long series

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11. *Id.* at 1679–88.

12. WERTHEIMER, COERCION, *supra* note 3, (Describing such arguments as "internal theories"); LEO KATZ, ILL-GOTTEN GAINS 133–97 (1996) (explanation of the paradoxes of blackmail and similar forms of misbehavior from a deontological perspective).

13. DeLong, *Second Paradox*, *supra* note 1, at 1686–87.

14. Russell Hardin, Symposium, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787, 1794 (1993) (offering a limited endorsement of certain types of blackmail, such as plea bargains, from an institutional perspective and arguing that outlawing blackmail penalized some victims, threatened with exposure in the press); F.E. Guerra-Pujol, *The Problem of Blackmail: A Critique of Coase, and the Case for Blackmail Markets*, 5 CRIT 1 (2012) (arguing for the creation of markets in secrets and discounting moral intuitions that blackmail is wrongful).

15. Walter Block & Robert W. Gorden, *Blackmail, Extortion, and Free Speech: A Reply to Posner, Epstein, Nozick, and Lindgren*, 19 LOY. L.A. L. REV. 37 (1985) (criticizing theories that blackmail should be illegal); Block has written over twenty articles in this vein. Most are cited in Walter Block & Robert W. McGee, *Blackmail from A to Z: A Reply to Joseph Isehbergh's "Blackmail from A to C"* 50 MERCER L. REV. 569, 570–71, n.2 (1999).

of articles, Block has consistently maintained that the laws against secrets blackmail are not justified by either law or morality.

The problem with Block's analysis is that while he makes a good case for mutually beneficial non-disclosure agreements prevented by blackmail laws, he does not give a credible account of why blackmail has nevertheless been made unlawful everywhere. Block fails to acknowledge the harm secrets blackmail causes to the victim of blackmail or the universal feeling that it should be prevented despite the lack of a theoretical justification.

E. The Paradox of Secrets Bribery

As we have defined secrets bribery, it consists of an agreement between a briber and a bribe-taker whereby the bribe-taker, for consideration, agrees not to disclose information that the briber wishes to keep secret. Secrets bribery is a common feature of our economy, usually accomplished by a non-disclosure agreement. From an economic perspective, the secrets bribery exchange appears to be an efficient transaction that produces an exchange surplus. Agreements for confidentiality are understood to be useful to other business transactions and are essential to the efficient functioning of many enterprises in which secrecy is essential to competitive success. They are used to preserve property interests in information and to facilitate commercial and professional relationships that require candor and sharing sensitive information. Thus, it is commonplace to purchase secrecy by entering into non-disclosure agreements incident to business or professional transactions and relationships. No one considers these agreements to be problematic. But such agreements are usually entered into *before* the secret is known to the payee, the person selling the secrecy. A person will *sell* secrecy at a competitive price in an *ex ante* non-disclosure agreement.[16]

Thus, an attorney will promise a potential client confidentiality at the outset of the engagement and will be compensated for that aspect of her services as part of her fee. An employee will undertake to keep the employer's trade secrets at the outset of the employment, expecting to be compensated for undertaking this obligation out of the wage or salary to be paid. In most cases, the marginal cost of secrecy will be low, although not zero.[17]

The price of secrecy can skyrocket if the secrets bribery exchange is entered *ex post*—after the party promising the secret has learned the secret. To an economist, the seller of secrecy is now a monopolist because she is the only person who can sell her own non-disclosure.[18] The party buying secrecy must deal with her if she is to prevent her disclosure. The price the monopolist may demand for secrecy will thus not be a function of the marginal cost of keeping

16. Delong, *Second Paradox*, *supra* note 1, at 1667; DeLong, *Coasean Blackmail*, *supra* note 1, at 293–94.(generalizing the *ex ante/ex post* analysis to extortionate leverage).

17. Delong, *Second Paradox*, *supra* note 1, at 1667.

18. *Id.*

the secret, but rather of the amount of harm disclosure will cause to the party purchasing secrecy—who will be willing to pay up to that amount to prevent disclosure.[19]

In contrast to secrets bribes, blackmail transactions are always *ex post* non-disclosure agreements. No one can threaten to disclose a secret he does not know. But an *ex post* secrets bribe that is not brought about by means of a threat made by the person promising secrecy is generally legal. If an ex post non-disclosure agreement is brought about by means of an offer by the briber, rather than a threat by the payee, the agreement is in theory non-problematic from both a legal and an economic perspective.

But it is not always clear whether a bribe has been induced by an implicit rather than an explicit threat. A blackmailer may induce a bribe by openly acquiring confidential information about the victim and waiting patiently for a bribe offer.[20] The blackmail/bribery distinction on which the secrets bribery paradox rests is often unclear in practice, making it even more difficult to justify in theory.

But the secrets bribery paradox poses an insoluble problem to the theory of blackmail. If demanding and receiving payment for non-disclosure in a blackmail exchange is illegal, then why is it not equally illegal to accept an identical payment for an identical non-disclosure in the form of a bribe offered by the victim?[21] Because it is not illegal. If the payer's motive in obtaining both non-disclosure agreements is fear of exposure of his secret by the payee, it seems anomalous that the legality of the transaction turns on which of these parties proposed it.[22]

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19. DeLong, *Coasean Blackmail*, supra note 1, at 298–99 (referring to the excess of the payment over the cost to the blackmailer as an "extortion premium").

20. DeLong, *Second Paradox*, *supra* note 1, at 1678 ("Without uttering a threat, menaces can often induce a bribe by openly gaining the power to harm the victim.") For this reason, James Lindgren argues that under the Hobbs Act, transactions initiated by the victim are considered to be blackmail. James Lindgren, *Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1702–03 (1993) [hereinafter Lindgren, *Bribery-Extortion Distinction*] (Denying that the existence of a threat distinguishes bribery from extortion).

21. DeLong, *Second Paradox*, *supra* note 1, at 1664–65, 1685–86 (1993); DeLong, *Coasean Blackmail*, *supra* note 1, at 300–05 (examples of the threat requirement in extortionate exchanges). The second paradox is denied by some. See James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597, 603 (1988) ("Lindgren, *On Waste*") (employee's acceptance of another employee's bribe to keep a guilty secret constitutes blackmail).

22. Leo Katz has argued that it is not paradoxical to punish threat-initiated non-disclosure agreements while permitting identical agreements proposed by the payer. LEO KATZ, ILL-GOTTEN GAINS 133–97 (1996) (arguing that it is not unusual in deontological reasoning to differentiate the morality of behavior with identical outcomes on the basis of path-specific criteria. Unfortunately, Katz does not say exactly why the two paths to a non-disclosure agreement should have the different legal and moral consequences they do).

III. AN ALTERNATIVE TO THEORY: A PARADIGMATIC EXPLANATION OF THE LAW OF SECRETS BLACKMAIL AND SECRETS BRIBERY

Because neither economic reasoning nor moral philosophy seemed adequate to rationalize the law of blackmail, I proposed that the distinction between blackmail and bribery rests not on abstract reasoning that would be common to all cases of bribery and blackmail, but rather on paradigmatic reasoning that rests on particular narratives of bribery and blackmail that make the one seem innocent and the other criminal.[23] A description of the two narratives shows how they generate the normative conclusions that give rise to both blackmail paradoxes. It should be emphasized this paradigmatic approach abandons any claim to rational coherence of law and instead traces law to emotional and narrative understandings that need not be reconciled with each other.

A. The Secrets Blackmail Paradigm.

In the blackmail paradigm, the victim has a shameful secret discovered by the blackmailer who threatens the victim that if she does not pay him he will expose her secret to the world. Although the nature of the secret may be unspecified, most people can imagine a shameful secret whose exposure would prove embarrassing or worse. The threat of exposure threatens a victim's relationship with her family, her employer, or her community and will inflict serious harm on her. She is told she must meet the blackmailer's demands or suffer this harm.

Facing this threat, a blackmail victim can turn to no one for help or advice. A victim of other forms of extortion can complain to the police. But although the blackmailer's threat is a crime, its victim cannot complain to the police because to disclose the existence of the blackmail threat will often subject her to the very harm the blackmailer threatens her with. The people the blackmail victim would usually rely upon in times of stress, her family and friends, may be walled off by the need to keep her secret from them. Ironically, the only person who shares knowledge of her dire situation is the blackmailer himself, whom she must trust to preserve her secrecy. The blackmailer's threat isolates the victim from her community.

The secrets blackmail victim's isolation and desperation create the leverage the blackmailer can use to extract all the wealth she can raise.[24] Her attempts to raise wealth may plunge her more deeply into secrecy or illegality, binding her more closely to the blackmailer and making her more vulnerable to his threats.

The blackmailer in this story is an opportunistic predator who preys on the

23. Delong, *Second, Paradox, supra* note 1, at 1688–92.

24. DeLong, *Coasean Blackmail, supra* note 1 (describing the concept of leverage in a blackmail transaction as the cost of harm that disclosure would inflict on the victim that could be avoided by payment to the blackmailer).

helpless victim. And the threats may never end: the blackmailer may renew his demands after being paid. The victim may never know security from this overhanging threat. The constant anxiety created by the threatened exposure might ruin her life.

By situating the paradigmatic secrets blackmail exchange in a narrative context with these imagined facts, the story creates an affective reaction of sympathy with the victim and abhorrence of the blackmailer. Because people identify with the imagined victim of secrets blackmail, they understand the purpose of blackmail statutes as protecting potential victims from devastating harm.

Of course, like all criminal statutes, the law of blackmail is generic in its terms. It is not nearly as dramatic as the foregoing description. Its featureless, abstract characters engage in abstract transactions and interactions, free of detail. The statute ignores the identity of the parties and their history and relationship, the moral character of the blackmailer and his victim, the nature of the guilty secret, the effect of secrecy or disclosure on the interests of third parties or the public, and the relations of power or subordination that may exist between the blackmail and his victim. As a result, in its abstract form, the statute does not generate any emotional response in the average reader.

It is only when the abstract characters who inhabit the statutes description are replaced with real, albeit imagined, human beings in real circumstances, that a reader gives the statute normative life. We come to believe that a victim of blackmail suffers intolerable harm and the blackmailer is a cruel villain who should be punished for what he has done. A paradigmatic case is born of this dramatic enactment and the statute acquires moral weight. Paradigm theory posits that people hold a variety of similar understandings of the standard case of secrets blackmail, but they all lead to this normative conclusion.

But the devil is in these dramatic details. Different details in a different paradigmatic story might well change the emotive response to the narrative. If we recast the victim of secrets blackmail not as ourselves with a shameful—but human—secret to keep from the public, but instead as a powerful person who has committed a crime and who wants to keep the crime a secret; and if we imagine the secrets blackmailer not as a heartless villain bent on bleeding his victim dry but instead as the victim of that crime; and if we imagine the money demanded not as unjust enrichment of the blackmailer but as partial compensation for the injury suffered by the victim; then, the implicit normative value of the blackmail law largely evaporates. The paradigm shifts 180 degrees.

B. The Secrets Bribery Paradigm.

Unlike the blackmail exchange, the typical secrets bribery exchange is an undramatic business agreement between ordinary people. In the business world, secrets bribery comes about through the use of a non-disclosure agreement. For purposes of this paper, a non-disclosure agreement will be defined as a contract

in which a person (the *promisor*) promises another person (the *beneficiary*) not to disclose information (the *secret*) the beneficiary wishes to conceal. In a compensated non-disclosure agreement, the promisor is paid for the promise of confidentiality, and the beneficiary acquires a legal right to enforce the promise. Because they are voluntary mutual exchanges, compensated non-disclosure agreements presumptively increase both parties' welfare.

Non-disclosure agreements are familiar ways of creating legally enforceable rights to secrecy and legally enforceable obligations not to disclose specific information. Non-disclosure obligations are commonplace features of our economy, arising in a variety of circumstances. Common examples include: the obligations by professionals to maintain the confidences of secrets learned in their relationships with their clients; the obligations of employees not to disclose trade secrets of their employer; and the obligations that agents and other fiduciaries have to their principals. These obligations of confidentiality or non-disclosure arise by operation of law.

Obligations of non-disclosure can also arise by contract. For example, attorneys negotiating corporate acquisitions usually promise not to use or disclose any information obtained from inspection of confidential business records during the due diligence phase. A plaintiff who settles a products liability or other tort claim is often required to undertake not to disclose matters learned during discovery. Divorcing spouses may agree not to disclose details of their settlement.

Although a secrets bribe is economically identical to a blackmail exchange (i.e., it involves the exchange of money for non-disclosure), its narrative is dramatically different. In the secrets bribe narrative, the person who wishes to keep the secret becomes concerned about the possibility of disclosure and takes the initiative. This person approaches the bribe taker who knows the secret. The bribe taker knows the secret, is free to disclose it, and may even be planning to disclose it. The bribe payer offers the bribe taker money for a promise not to disclose the secret to anyone else. A bribe taker who accepts money in return for a non-disclosure agreement thus consents to the secret keeper's wishes.

While accepting money for secrecy is not always admirable, the bribe taker certainly does not assume the role of villain in the story. In a non-business non-disclosure agreement, the bribe taker may be an ally of the secret keeper, one who is helping her to protect her place in her community or her family.

Unlike the blackmail exchange, the bribery narrative incidentally satisfies the economist because a supposed mutually beneficial exchange has taken place. The bribery narrative also satisfies the moral philosopher because no one's autonomy seems to have been threatened, and the parties have rearranged their rights in accordance with their desires.

Like the blackmail paradigm, the bribery paradigm ignores many of the details of the transaction. We do not know whether the bribe offer followed a tacit threat by the bribe taker or some warning that disclosure was imminent. We do not know whether the bribe taker refused to agree to confidentiality unless

paid an unreasonable price. We do not know the character of the bribe payer, the nature of the secret, or the effects of the secrecy on third parties.

The paradigmatic way of understanding the bribery/blackmail distinction has many shortcomings as a theory of law. In both the blackmail and bribery narratives, the same person has paid the same money to the same recipient in return for the same promise of secrecy. In both stories, both parties are motivated by the same concerns: fear on the part of the payer and greed on the part of the payee. Indeed, not only are the narratives formally similar, but it is not difficult to imagine they are in fact similar in motivation and circumstance as well. The blackmailer may instead be someone who gives a warning of something that will be disclosed unless payment can be made. The blackmail payment may replace a benefit the disclosing party would otherwise have enjoyed from disclosure of the secret. Conversely, the party who pays a bribe may have been subtly threatened by the person who receives the bribe by learning that the bribetaker is aware of the secret and intends to disclose it. The paradigmatic justifications do not sort out true bribery from true blackmail.

Reference to narrative understandings of standard cases replaces rational legal analysis with something else. Rather than attempting to explain blackmail by reference to public policy or moral philosophy, the paradigmatic explanation rests on a form of imaginary casuistry—reasoning from a case whose outcome appears to be agreed upon and attempting to generalize from that case without recognizing the degree to which the circumstances of the case determined its outcome. The imaginary case is furnished as much by literature as it is by theory, public policy, or moral philosophy. The narratives of bribery and blackmail can accomplish their work because the details on which they rest are never made explicit.

Yet paradigmatic reasoning is clearly operational when a theorist such as economist Ronald Coase refers to blackmail as "moral murder."[25] Coase must have had a specific scenario in mind to generate such a reaction, visualizing real people in real circumstances.

IV. #METOO AND PARADIGM SHIFT OF BRIBERY

Whether or not the paradigmatic explanation is a satisfactory explanation of the second paradox, the events associated with the #MeToo movement have upended the explanation. In the paradigmatic theory, secrets bribery is seen as a relatively innocuous transaction—an action of a vulnerable party seeking to reduce risks to his reputation in the community or his relationship with his family by enlisting the cooperation of the bribe taker. It borrowed its normative status from the widespread use of non-disclosure agreements in business.

This benign view of the secrets bribery transaction has been shattered with

25. Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 675 (1988)

the public's changing view of non-disclosure agreements by the #MeToo phenomenon.[26] The events of the #MeToo movement have shown widespread use of non-disclosure agreements by men who assaulted and harassed women within their employment or otherwise made women feel vulnerable to their power. These men purchased the silence of these women for money in exchange for a legally enforceable non-disclosure agreement. The non-disclosure agreement has become a mechanism of abuse and criminality that enhances the power of the abuser by adding the force of law to his demand for secrecy and concealment of his crime.

Non-disclosure agreements have become infamous, and the secrets bribery paradigm has been rewritten. Today, the bribe taker's identity has shifted from a third party, such as a journalist, to someone who has been victimized by the bribe payer. The secret she is paid to keep is not some shameful event in the bribe payer's life but the fact of his assault on her. She acquired this knowledge not fortuitously but as a result of painful experience. She is not simply agreeing to exchange her silence for cash. She is instead forced to agree to the non-disclosure agreement as a condition of receiving compensation for the act she is required to keep a secret. Moreover, where the payee's marginal cost of providing secrecy in the standard bribe paradigm is low to non-existent, the cost to a #MeToo victim of keeping the assault secret is very high. Indeed, it can be seen as a separate harm suffered at the hands of the bribe payer, for it prevents her from telling her story and seeking support and solidarity from others. The recipient of a #MeToo bribe may desperately want to disclose the secret, but because she has signed a legally binding agreement, the abuser has the added force of the law against the victim.

Finally, in the #MeToo non-disclosure agreement, the persons from whom a secret is kept are not just the scandal-hungry public but include governmental agencies and future victims of the bribe payer. By increasing the risks of harm from serial abusers, secrecy bribes paid to abuse victims can have effects that are contrary to public policy. A secrets bribe transaction between the victim and her victimizer ceases being an innocent transaction and becomes an abuse of the legal system. The villain in the narrative of non-disclosure agreements that shape our affective opinions and underlies law is no longer the payee but the payer.

This paradigm shift requires that a paradigm-based law become more sophisticated in its treatment of both blackmail and bribery. Standards for the abuse of non-disclosure agreements should be developed along with public policy limitations on non-disclosure agreements.

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26. The #MeToo "movement" began in 2006 with a MySpace post by Tarana Burke. *#MeToo: A Timeline of Events*, CHI. TRIB. (Jun. 19, 2020, 3:55 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html (on file with the *University of the Pacific Law Review*). It became associated with the hashtag in the disclosures on social media following the accusations made by several women against producer Harvey Weinstein. It has evolved into an international movement against sexual violence, both assault and harassment, of women. The use of the hashtag #MeToo signifies a report of sexual violence by a survivor and an expression of solidarity.

V. CONCLUSION

Law, whether common or statutory, is always generic, abstract, bloodless, and formulaic—a two-dimensional, verbal world in which *A's* interact with *B's* in one-sentence scenarios with definitive legal consequences. But the legal imagination dreams in virtual reality. Our narrative imaginations paint these colorless, generic rules in vivid, concrete particulars. The formulas are incarnate in real people enacting real scripts with real consequences, quite often with ourselves cast in the leading roles. It is only in this way that abstract law gains its emotional and moral significance from our intuitive reactions to these imagined stories.[27] Emotions are not only a controlling force at the point at which legal rules are applied to emotionally charged disputes: they are also prominent when those rules are promulgated. Emotional responses to imaginary scenarios motivate and energize law and supply its ultimate social justification.[28]

The suddenly shifting social understandings of secrets blackmail and secrets bribery illustrate the emotional understanding of law depends critically on narrative imagination, and collective narrative imagination can turn on a dime. The very particularity that gives life to the rule immediately limits our understanding of its effect on people. Our imagined scenarios are peopled with characters whose race, gender, age, class, mental condition, and other features are all filled in, usually by our unreflective subconscious. These unacknowledged axioms nevertheless dictate our affective response to the legal rule and its normative meaning.

Like the law of blackmail, contract law in the Restatement or Article 2 posit a contextless, geometric relationship between one-dimensional *A's* and *B's* doing simple deals. To rationalize and justify these rules, most of us instantiate them by casting ourselves as imaginary players in imaginary deals and seeing how we feel when they fall into disputes. Witness the illustrations in the Comments to the Restatements, for example.

For lawyers, of course, this is the happy result of the case law method. When analyzing a dispute, we do not speak of non-bargain promisees, but of Katie Scothorn[29] or Antillico Kirksey.[30] Their stories lend color to the notion of

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27. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Eric A. Posner, *Law and the Emotions*, 89 GEO. L. J. 1977 (2000–01) (Emotions, though prominent in legal problems, are ignored in the dominant strains of normative legal theory); On the relationship between narrative and the emotions it engenders to moral understanding, *see* MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001) ("Emotions shape the landscape of our mental and social lives"); MARTHA NUSSBAUM, POLITICAL EMOTIONS (2013).

28. David Hume advocated a form of moral empiricism in which both reason and emotion were essential to moral understanding. DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (1777), *reprinted in* THE PHILOSOPHY OF DAVID HUME 395–400 (V.C. Chappell ed., Modern Library 1963) (Here Hume argued that the foundations of morals required both reason and "sentiment," or feelings and intuitions, the latter a matter of empirical observation. Sentiment informs reason; reason describes and systemizes that information.)

29. *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898) (holding uncle's promise to pay money enforceable

"injustice" in Section 90. But our students learn that they must resist the notion that their stories rationalize Section 90. In the case method, appellate opinions give other examples of expected reliance on non-bargain promises that leave us cold. Generations of feminist and critical race theory have taught us that when we cast different characters in the roles of *A* and *B* and shift the circumstances of the transaction so abstractly described in the rule, we can have radically different affective responses and judgments leading to radically different normative conclusions. This leaves us unable to draw conclusions about Section 90 or any other contract rule that will be good for all circumstances. Nor can we do so for secrets bribery.

because it induced payee to quit work in reliance on receiving the payment, as uncle intended her to do).

30. *Kirksey v. Kirksey*, 8 Ala. 131, 132 (1845) (holding brother-in-law's promise of "a place to raise your family" not enforceable because not supported by consideration, despite promisee's reliance in moving her family 60 miles).

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