

BLACKMAIL: AN ECONOMIC ANALYSIS OF THE LAW†

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In fiction and in real life, blackmail is a particularly odious crime. Despite the fear and loathing with which its practitioners are regarded, however, blackmail remains an ill-defined and enigmatic concept. The legal literature especially suffers from an inability to define blackmail in a way that meaningfully distinguishes it from threats of unquestioned legality made in the course of economic bargaining. All agree that a key employee may lawfully threaten to quit unless his wages are raised, and that if his threat comes at a time when his employer is particularly vulnerable, he may have engaged in sharp practices but not criminal conduct. Many threats, such as those of a customer to take his custom elsewhere if a price is not lowered, or to enter production for his own use if suppliers are not more obliging, are actually relied upon in a competitive exchange economy to discipline the market. But despite our general ability to agree on the lawfulness of particular threats, drafting a general law that separates blackmail from bargaining has proved an elusive task.

Related to this problem of definition is an apparent paradox embedded in the law of blackmail. Consider this paradigmatic blackmail transaction: *B* has taken a photograph of *A*, a temperance advocate, drinking whiskey; he approaches *A* with an offer to sell him the photographic negative, threatening disclosure to the newspapers if *A* fails to pay. Again, all would agree: *B* is guilty of blackmail. The point to notice, however, is that *B* has threatened to do only what he had an undoubted right to do, namely to facilitate

† This paper was written in 1979 when the authors were respectively professor and student at the Harvard Law School. We did not publish the paper at that time but presented it at a University of Chicago Law School workshop on law and economics (which yielded many helpful comments, for which we are grateful) and circulated it among interested scholars. Professor James Lindgren discussed the paper at some length in his own publications. Accordingly, when Professor Lindgren asked us to participate in this Symposium, we decided that rather than revise the original paper we would publish it for the first time and add a postscript in order to respond to his comments on the analysis.

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the publication of the photograph. Had *B* not approached *A* but sent the photograph directly to the publishers, no liability would have attached. The paradox, then, is that of a legal system that gives *B* the right to reveal information, but prevents him from seeking remuneration in exchange for his forbearance.

This paper applies an economic analysis to transactions in order to define blackmail and to unravel the apparent paradox of an inalienable right—whether it be to disclose compromising information or to do whatever else is threatened in a particular case. In the process, we hope to show that the law of blackmail, as it has developed in the United States and England, is consistent with economic rationality. This is not to say that judges or draftsmen have articulated an explicit economic rationale for the law; they have not. Rather, our claim is that an economic planner, shaping the laws to achieve economic efficiency, would include a law of blackmail in his criminal code, and that his law would decide cases in much the same way as have Anglo-American judges (and commentators) groping to apply poorly drawn statutes to real (and imaginary) facts. We shall first set out the state of the law in general.

I.

At common law, robbery was defined as the “taking of money or goods of any value from the person of another or in his presence and against his will by violence or putting him in fear.”¹ Typically, therefore, robbery involved the threat of immediate personal violence,² delivered in person. As the criminal law is strictly

¹ 4 WILLIAM BLACKSTONE, COMMENTARIES *242. Robbery was never defined by statute, although the term appears in many statutes.

² One exception to the requirement of a threat of immediate personal violence was created in order to reach the “constructive robbery” accomplished by threatening to accuse another of an unnatural act. See *Rex v. Hickman*, 1 Leach 278 (1783) (holding that if a man obtains property from another by accusing him of an unnatural crime, it will amount to robbery although the party was under no apprehension of personal injury); *Rex v. Jones*, 1 Leach 139 (1776) (holding that the crime of robbery is committed by obtaining money from a man by threatening to charge him with sodomitical practices). As Russell explained, the “imputations of being addicted to sodomitical practices would be sufficient to deprive the injured person of all comforts and advantages of society, and would inflict a punishment more terrible than death, both in apprehension and reality.” 2 WILLIAM O. RUSSELL, RUSSELL ON CRIME 973-74 (J.W. Cecil Turner ed., 11th ed. 1958). This form of the common law crime survives in England. See *Rex v. Pollock*, [1966] 2 W.L.R. 1145 (Eng. Crim. App.).

construed, one who could accomplish the same result—obtaining the property of another by intimidation—but do so by mail-order could avoid the sanction for robbery for want of an element of that crime, i.e., a taking from the presence of another.

A. *English Origins*

The first entrepreneurs of crime to have exploited this inadequacy in the early law of property crimes appear to have been a band or bands of Scottish marauders, poachers, and kidnappers who were outlawed in Scotland³ and then turned up committing outrages in the northern counties of England. The first English statute against them recounted a variety of mischiefs, including kidnapping for ransom, pillage, and robbery, and made it a felony, punishable by death without benefit of clergy, to pay or to receive “any money, corn, cattle or other consideration, commonly called *black-mail*, for the protecting or defending” of one’s person or property.⁴ Coming over a century later, the better known Waltham Black Act of 1722⁵ suggests an origin for the particular term “blackmail,” since it recites that “several ill-designing and disorderly persons [had] of late associated themselves under the name of *Blacks*” to commit various armed offenses, “several of them with their faces blacked.”⁶ With the Blacks’ specific acts apparently in mind, the statute punished anyone who should, inter alia, “knowingly send a letter, without any name subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing.”⁷

The 1722 statute was broadened in 1754 by deleting the requirement of a demand for money, etc., again in response to the particular methods being used against victims, viz., letters “threatening their lives or burning their houses” but making no express demand for money.⁸ It was extended yet again in 1757 to reach

³ See Scot. Act., Jam. 6, ch. 27 (1567) (Scot.) (outlawry); Scot. Act., Jam. 6, ch. 59, § 13 (1587) (Scot.) (a crime to receive or to pay “blak meill”).

⁴ 43 Eliz., ch. 13, § 2 (1601) (Eng.).

⁵ 9 Geo., ch. 22 (1723) (Eng.). See generally E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975).

⁶ 9 Geo., ch. 22, § 1 (1722) (Eng.).

⁷ *Id.* G. WHITE, *THE NATURAL HISTORY AND ANTIQUITIES OF SELBORNE* 20 (1833) refers to poaching by “the Waltham blacks” as “blackening.” In another place and time, depredations like those of the Blacks would be called “Ku Kluxing.” See *Commonwealth v. Patrick*, 105 S.W. 981, 982 (Ky. 1907).

⁸ 27 Geo. 2, ch. 15 (1754) (Eng.).

the use of anonymous letters threatening to accuse any person of an infamous crime "with a view or intent to extort or gain money[.]"⁹

From 1757 until 1827 the crime of blackmail stood largely as defined by these enactments: one could not lawfully threaten another with death, arson, or accusation of an infamous crime, in order to gain money.¹⁰ Notice that in this form the law posed neither the definitional problem nor the apparent paradox noted at the outset of this paper. The first two prohibited categories, involving death and arson, dealt with threats to commit criminal violence. As for the third, to accuse another of an infamous crime would also be unlawful if done maliciously, i.e., without a reasonable ground to believe the accusation true, while to refrain from making the charge, if believed to be true, would be misprision of felony. Thus the blackmailer trafficking in threats of criminal accusation either threatened or offered to commit a crime, and the law rather unremarkably treated him like the blackmailer menacing death or arson. What one could not lawfully do, one could not lawfully threaten to do in order to be paid for refraining.

The laws relative to larceny and related offenses were revised in 1827, and the provision concerning threats assumed the general form it was to retain almost to the present era in England. The 1827 revision carried forward the provision against threatening to accuse another of an infamous crime and expanded the scope of the statute by making it a crime "knowingly [to] send or deliver any letter or writing, demanding of any person, with menaces, and without any reasonable or probable cause, any chattel, money or valuable security . . ."¹¹ Under this phrasing for the first time it was possible to issue a criminal threat to do a noncriminal, and indeed even a nontortious, act; it was only necessary that the threat be made "without reasonable or probable cause"—whatever that would be held to mean.¹²

⁹ 30 Geo. 2, ch. 24, § 1 (1757) (Eng.); see also 52 Geo. 3, ch. 64 (1812) (Eng.) ("with [i]ntent to cheat or defraud").

¹⁰ There were minor amendments. Most notably, the penalty was reduced from death to seven years' transportation or imprisonment, and it was made an offense maliciously to threaten another with accusation of an infamous crime even if done without using a letter. See 4 Geo. 4, ch. 54 (1823) (Eng.).

¹¹ 7 & 8 Geo. 4, ch. 29, § 8 (1827) (Eng.); see also Larceny Act of 1916, 6 & 7 Geo. 5, ch. 50, § 2931 (Eng.); 6 & 7 Vict., ch. 96, § 3 (1843) (Eng.) (repealed by 5 Geo. 5, ch. 50, § 48) (making it a crime to "threaten to publish any libel" or to "offer to prevent [publication] of any matter or thing touching any other person with intent to extort," while specifically preserving unaffected the laws concerning threatening letters).

¹² W.H.D. Winder, *The Development of Blackmail*, 5 MOD. L. REV. 21, 36-41

The problem of distinguishing permissible from impermissible threats under this standard is illustrated by a trilogy of cases involving the English Motor Trade Association. This organization lawfully fixed the prices at which its members would sell automobiles and related equipment. It also published a so-called "Stop List" of persons—members and nonmembers alike—selling at higher or lower prices so that members of the Association would then refuse to supply or otherwise deal with those listed. In a 1921 case brought to enjoin publication of the list as an unlawful combination to destroy the (nonmember) plaintiff's business, this activity had instead been upheld as a lawful means to pursue a legitimate trade interest.¹³

In 1926, however, the inevitable happened when Percy Ingram Denyer, the Stop List Superintendent, learned that Read's Garage, Honiton had attempted to undercut the Association price. On behalf of the Association, Mr. Denyer offered Mr. Read "an alternative to inclusion in the stop list of payment of 250£ to the Indemnity Fund of this Association."¹⁴ Mr. Read did not pay the money demanded but took the letter as soon as he received it to the police, causing Denyer to be indicted under the blackmail statutes and convicted by a jury.

On appeal, Denyer's counsel argued that "[a] menace implies an improper motive," so that "[w]hen a person has a lawful right to do an act for the protection of his own trade interest, he is not using menaces if he demands money as an alternative to doing such an act."¹⁵ Lord Hewart, C.J., in response to this argument, wrote with an equally broad sweep: "In the opinion of the Court, that proposition is not merely untrue; it is precisely the reverse of the truth. It is an excuse which might be offered by blackmailers to an indefinite extent."¹⁶

When the opinion in *Denyer's Case* issued, the firm of Hardie and Lane, Ltd. brought a civil action to recover the 100£ they paid

(1941) argues that the 1827 phrasing was not meant to extend the offense to threats other than those to do violence. The first clear instance of its extension, he reports, is *Rex v. Tomlinson*, [1895] 1 Q.B. 706 (Eng.). In that case, the defendant had threatened to disclose the prosecutor's alleged indecent behavior to his wife. It was said that the threat must be such as would operate to deprive a reasonably firm man of his free will. *See id.* at 709-10.

¹³ *See Ware & DeFreville v. Motor Trade Ass'n*, [1921] 3 K.B. 40 (Eng. C.A.).

¹⁴ *The King v. Denyer*, [1926] 2 K.B. 258, 260 (Eng. Crim. App.).

¹⁵ *Id.* at 262.

¹⁶ *Id.* at 268.

toward a 200£ levy imposed upon them by the same Association. Although they obtained a judgment at trial, on the theory that the defendants had conspired to obtain money by duress, occasioned by threats, the Court of Appeal reversed, with two of the three judges expressly doubting the reasoning of the prior case.¹⁷ Scrutton, L.J., put the case in general, referring to the Chief Justice's statement in *Denyer*, quoted above:

I cannot understand this. The blackmailer is demanding money in return for a promise to abstain from making public an accusation of crime. The very agreement is illegal, even if the crime of a certain class has been committed. A man has no right to suppress his knowledge of a felony. How can this be analogous to proposing not to do a thing which you have a legal right to do, if money is paid you, there being no public mischief in the agreement?¹⁸

And he offered a specific illustration to reinforce the point:

A. has land facing a new house of B.'s. A. proposes to build on that land a house which will spoil the view from or light to B.'s house and depreciate the value of his property. B. implores A. not to build. A. says: "I will not build if you pay me 1000£., but I shall build if you do not." B. pays the money and A. does not build. Could it be seriously argued that B. could recover the money back as obtained by threats?¹⁹

In Lord Scrutton's view, then, there could be no instance in which the law of threats and the substantive law concerning the thing threatened would be out of step with each other: if it would be lawful to carry out the threat, then it is lawful so to threaten, and the converse.

In order to resolve this conflict among the lower courts, the Motor Trade Association got up a "friendly action" against itself, and the cooperating plaintiff appealed the case to the House of Lords.²⁰ The Lords chose a middle ground, rejecting Scrutton's broad view precisely because it did indeed protect the "ordinary blackmailer [who] normally threatens to do what he has a perfect right to do—namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threat-

¹⁷ See *Hardie & Lane, Ltd. v. Chilton*, [1928] 2 K.B. 306, 320, 331 (Eng. C.A.).

¹⁸ *Id.* at 322.

¹⁹ *Id.* at 316.

²⁰ See *Thorne v. Motor Trade Ass'n*, 1937 App. Cas. 797, 797 (appeal taken from Eng. C.A.) [hereinafter *Thorne's Case*].

ened."²¹ But Hewart, C.J., had erred in the other direction, overstating the reach of the statute by omitting to inquire into the reasonableness of the defendant; for

if a man may lawfully, in the furtherance of business interests, do acts which will seriously injure another in his business he may also lawfully, if he is still acting in furtherance of his business interests, offer that other to accept a sum of money as an alternative to doing the injurious acts. He must no doubt be acting not for the mere purpose of putting money in his pocket, but for some legitimate purpose other than the mere acquisition of money.²²

On this standard, the Motor Trade Association was adjudged not guilty, but the analytic line between blackmail and protected economic bargaining was left obscure.²³

B. *American Developments*

The American law of blackmail is almost entirely statutory, in the sense that there are federal and state laws that specify unlawful uses of threats and intimidation,²⁴ but there is a surprising paucity

²¹ *Id.* at 806 (Atkin, L.J.).

²² *Id.* at 807 (Atkin, L.J.); *see also id.* at 817-18 (Wright, L.J.) (stating that demand must be made in promotion of trade interest and not with intent to injure, and be reasonable in amount).

²³ The Larceny Act of 1916 and other statutes relating to blackmail were repealed and replaced by the Theft Act of 1968. *See* Larceny Act, 1916, 6 & 7 Geo. 5, ch. 50, § 2931 (Eng.); Theft Act, 1968, ch. 12 (Eng.). The Eighth Report of the Criminal Law Revision Committee acknowledged that the prior laws had worked reasonably well in practice, despite their facial anomalies "due rather to restraint and common sense of prosecutors in limiting prosecutions to what [was] clearly recognizable as blackmail . . . than to any merits in the sections themselves." CRIMINAL LAW REVISION COMM., EIGHTH REPORT, 1966, CMND 2977, at 54.

The new English statute provides in part:

- (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—
 - (a) that he has reasonable grounds for making the demand; and
 - (b) that the use of the menaces is a proper means of reinforcing the demand.
- (2) The nature of the act or omission demanded is immaterial . . .

Theft Act, 1968, ch. 12, § 21 (Eng.).

This statute is analyzed extensively in L.G. Toohar, *Developments in the Law of Blackmail in England and Australia*, 27 INT'L & COMP. L.Q. 337 (1978).

²⁴ *See, e.g.*, 18 U.S.C. §§ 271-79 (1988) (describing various offenses as "extortion and threats"); NEW YORK PENAL LAW § 155.05(e) (McKinney 1988) (detailing the elements of "extortion"); U.S. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS,

of reported judicial decisions interpreting them. There is no record of an American court struggling to distinguish economic bargaining from blackmail, for example, although the problem has not gone entirely unnoticed.

In *Vegeahn v. Guntner*²⁵ the court enjoined picketing by striking employees on the ground that it constituted a "moral intimidation" of those desiring to work. Justice Holmes, dissenting, "pause[d] . . . to remark" that threats were sometimes lawful, depending upon the thing threatened.²⁶ "As a general rule," he observed, "even if subject to some exceptions, what you may do in a certain event you may threaten to do, that is, give warning of your intention . . . and thus allow the other person the chance of avoiding the consequence."²⁷ Unfortunately, Holmes did not have occasion to elaborate.

The broad view that one may lawfully threaten to take any lawful action was expressly argued and rejected, however, in *Keys v. United States*.²⁸ The defendant there had written to the Aluminum Association threatening to distribute a pamphlet to the effect that the use of aluminum cooking utensils is harmful and causes diabetes and other diseases. In the court's literal-minded view of the federal statute under which the defendant had been indicted, neither the truth of his claims, nor his right to disseminate them to the public,²⁹ were relevant to his criminal responsibility for the threat "to injure the property or reputation of the addressee."³⁰ That is,

FINAL REPORT, A PROPOSED NEW FEDERAL CRIMINAL CODE § 1741(k) (1971) (defining "threat"); see also Alice K. Griep, Comment, *A Study of Statutory Blackmail and Extortion in the Several States*, 44 MICH. L. REV. 461 (1945) (reviewing various state extortion or blackmail statutes).

²⁵ 44 N.E. 1077 (Mass. 1896).

²⁶ *Id.* at 1081 (Holmes, J., dissenting).

²⁷ *Id.* (Holmes, J., dissenting). A distinguished panel of the Second Circuit was less qualified in its per curiam statement, which was also, significantly, made in the context of labor bargaining. See *NLRB v. Karp Metal Prods. Co.*, 134 F.2d 954, 955 (2d Cir. 1943) ("There can be nothing unlawful in threatening to do that which it is lawful to do."), *cert. denied*, 322 U.S. 728 (1944).

²⁸ 126 F.2d 181, 185 (8th Cir. 1942). The case was brought under the predecessor of 18 U.S.C. § 875(d), which makes it a crime to transmit in interstate commerce "with intent to extort [money, etc.] . . . any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime." *Id.*

²⁹ This right was squarely established in *Scientific Mfg. Co. v. FTC*, 124 F.2d 640, 644 (3d Cir. 1941).

³⁰ *Keys*, 126 F.2d at 182.

he may have been correct, and he could have publicized his views, but he could not demand payment for his forbearance.

As these judicial fragments suggest, the distinction between lawful and unlawful threats had not been clarified and articulated in the American cases to any greater extent than in the English cases when the drafters of the Model Penal Code turned to the problem in the 1950s. Rather than synthesize the law, however, they chose to follow "the prevailing legislative pattern in providing a list of particular harms which must be threatened" in order to commit a crime;³¹ the drafters explained that inclusion of all threats "would embrace a large portion of accepted economic bargaining,"³² but they offered no explanation for including any threats to perform an act that would itself be lawful.

Thus, in lieu of analysis as to why certain threats are "accepted economic bargaining," to which the application of theft penalties would be "quite inappropriate," while others are worthy of criminal treatment, the drafters offered only examples. The examples constituting the crime are threats to:

- (1) inflict bodily injury on anyone or commit any other criminal offense; or
- (2) accuse anyone of a criminal offense; or
- (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
- (4) take or withhold action as an official or cause an official to take or withhold action; or
- (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or
- (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (7) inflict any other harm which would not benefit the actor.³³

³¹ MODEL PENAL CODE § 206.3 cmt. (Tentative Draft No. 2, 1954). Originally the crime was to have been called "theft by intimidation." *Id.* § 206.3. This later became "theft by extortion." MODEL PENAL CODE § 223.4 (Proposed Official Draft, 1962).

³² MODEL PENAL CODE § 206.3 cmt. (Tentative Draft No. 2, 1954).

³³ MODEL PENAL CODE § 223.4 (Proposed Official Draft, 1962).

It is made an affirmative defense to threats in categories (2) to (4) that the property obtained was honestly claimed as restitution for harm done (to which the threat relates), or as compensation for property or services.³⁴

The first category of prohibited threats need not detain our attention; threats to commit a tort or crime are threats to take acts one clearly has no right to take, and they pose no anomaly. Similarly, threats to accuse another of a crime, as in (2), take or withhold official action, as in (4), or call a strike in order to profit personally, as in (5), all involve an offer to default on a duty owed to another, such as the state, or to an agent's (employer or union) principal. And threats to testify or withhold testimony, as in (6), should at least in a criminal case³⁵ be assimilated to threats to accuse another of a crime; again a duty to the state is being offered for exchange, which is for obvious reasons not a matter of right.³⁶ One of the enumerated categories, subsection (3), concerns threats to communicate information, and thus comes within our area of concern insofar as it would be lawful to make the threatened communication. And clearly, it is quite often lawful to reveal a contemptible secret or report a deadbeat to a credit bureau and thereby impair or expose another to ridicule by his peers (or in the case of a public figure, by the public).

We are also concerned with subsection (7)—“the general principle on which other threats are to be included”³⁷ within the criminal prohibition—which, to our knowledge, is unique to the Model Penal Code. The drafters gave three examples of criminal threats to which this subsection would apply: (a) the foreman in a manufacturing plant requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimina-

³⁴ See *id.* (delineating the scope of the affirmative defenses).

³⁵ The drafters noted that a provision comparable to subsection 6 but limited to testimony in criminal cases appeared in the proposed revision of the Wisconsin criminal code, but they gave no explanation for preferring the unqualified language of the Model Penal Code. MODEL PENAL CODE § 206.3 cmt. (Tentative Draft No. 2, 1954).

³⁶ The case of an expert witness who will not testify unless paid is different because he is under no duty to come forward with an opinion. See generally Marjorie P. Lindblom, Comment, *Compelling Experts to Testify: A Proposal*, 44 U. CHI. L. REV. 851 (1977) (suggesting a rule for determining when an expert witness should be compelled to testify). His “threat” to “withhold testimony or information” presumably returns us to the realm of lawful economic bargaining although it comes within the literal terms of the crime defined by the Model Penal Code.

³⁷ MODEL PENAL CODE § 206.3 cmt. (Tentative Draft No. 2, 1954).

tion; (b) a close friend of the purchasing agent of a great corporation obtains money from an important supplier by threatening to influence the purchasing agent to divert his business elsewhere; (c) a professor obtains property from a student by threatening to give him a failing grade.³⁸ It is most interesting that each of these hypotheticals involves a threat to betray or cause another to betray a duty of his office; indeed, in each example the duty is that owed by employee to employer.

The drafters of the Code, then, offered a "general principle" the only unique content of which is to bring certain threats by disloyal servants within the ambit of the blackmail prohibition. Nor did they give any analytic justification for the general principle; indeed, they did not even maintain the reciprocal proposition, i.e., that threats to take any lawful action would be lawful if the act, although harmful to another, "would . . . benefit the actor."³⁹

The point is not that subsection (7) is superfluous because the drafters have anticipated in subsections (1) to (6) every threat that it might cover; in a complex world, that proposition would be doubtful on its face. Rather, we shall argue in Part II that the subsection (7) principle of self-interest-as-justification, described by the draftsmen as "the general principle" of blackmail, is rather a close approximation to the rule that a rational economic planner would prescribe for distinguishing socially useful from socially wasteful threat activity. This analysis will explain the seeming anomaly that it should ever be a crime to threaten to do a lawful act, or put otherwise, to sell rather than to exercise a particular option one has, on the ground that a rule allowing such threats would encourage the waste of scarce resources.

II.

The economics of blackmail are best understood by first analyzing the simplest of fact patterns. Consider the paradigmatic blackmail transaction in which *B* threatens *A* with disclosure of certain information unless *A* pays *B* for its suppression. Further,

³⁸ *Id.* (footnote omitted).

³⁹ MODEL PENAL CODE § 223.4 (emphasis added). Instead of an exclusionary principle they offered only "[e]xamples of menaces which ought not to be included . . . : to breach a contract, to persuade others to breach their contracts, to infringe a patent or trade mark [sic], to change a will or persuade another to change a will, to refuse to do business or cease doing business, to sue, to vote stock one way or another." *Id.* cmt.

assume that we can view the transaction at its outset; *B* is contemplating the venture and has yet to unearth the damaging information. *B* calculates that, for \$200 invested in research, he can uncover information for the suppression of which *A* will pay him \$300.

If blackmail were not a crime, *B* presumably would proceed to research, to threaten, and to collect. On the other hand, if blackmail is a crime, *B* will be encouraged to seek alternative employment for his time and money. And that is precisely the point. Without a blackmail law, \$200 of real resources would have been invested in order to produce nil output. No rational economic planner would tolerate the existence of an industry dedicated to digging up dirt, at real resource cost, and then reburying it.⁴⁰

The analysis is not significantly altered by adding the reasonable assumption that a newspaper is willing to pay *B* for the fruits of his research—or investigative reporting, if you will. Assume that the newspaper offers *B* \$200 to uncover embarrassing information about *A*. Let *B* do the research, at a real resource cost of say, \$180, but assume that he has a change of heart and decides that publication is improper. Can *B* then ask *A* for his \$180 in costs in return for suppression? Can he demand \$200? \$300?

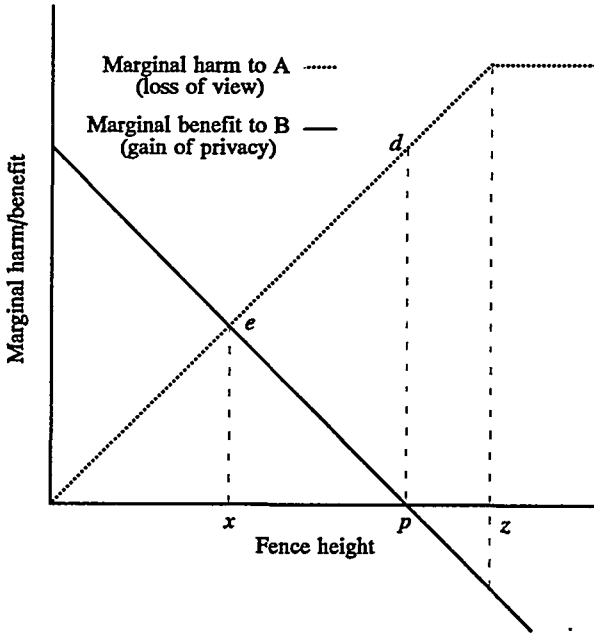
An efficient legal rule would draw the line at \$200, the price offered by the newspaper and *B*'s opportunity cost of selling to *A* instead of publishing. This rule allows for the operation of an independent economic incentive, so that *B* would undertake the same investigative activities—those with an anticipated resource cost less than \$200—regardless of whether *A* would pay more than that sum in order to suppress the output. It would not attract new resources to “investigative journalism,” whereas permitting sales to *A* at prices in excess of \$200 would do so. At such prices, *B* would have an incentive to engage in research that would otherwise be unprofitable, that is, to dig up dirt that would otherwise remain buried, only to rebury it once paid.⁴¹

To this point, we have considered only blackmail cases involving the suppression of information. That is the usual paradigm of

⁴⁰ Keynes was fond of saying that in a depression it was not unwise to dig up dirt only to rebury it, but he had in mind the use of labor with no opportunity cost.

⁴¹ The social cost of all this activity is not redeemed by the observation that *B* will also produce an effect on the behavior of potential *A*'s, since their avoidance of conduct that, although lawful, they would not want advertised cannot be presumed to be a gain. See *infra* text accompanying notes 70-77.

blackmail, but the analytics of threats do not depend upon any of the peculiarities of the market for information. Therefore, borrowing upon repeated judicial references to rights in land,⁴² and upon a paper by Buchanan and Stubblebine,⁴³ let us now take up the case of property owner *B* who plans to build a fence to increase the privacy of his backyard. The solid line in the graph below shows the marginal benefits (net of cost) that accrue to *B* from additional fence height. They are shown as diminishing on the reasonable assumption that successive fence height adds less and less to privacy;⁴⁴ beyond height *p* there are no privacy gains but costs are incurred, so that net benefits from additional height are negative. Unfortunately, the fence will also block neighbor *A*'s view of a nearby mountain; *A*'s marginal damage curve (the hatched line) rises with the fence until the mountain is obscured at height *z*.



⁴² See, e.g., *supra* text accompanying note 19.

⁴³ See James M. Buchanan & Craig Stubblebine, *Externality*, 29 *ECONOMICA* 371, 377-80 (1962) (providing a theoretical treatment of externalities).

⁴⁴ For simplicity, we ignore the fact that the first several feet of fence height would not yield any privacy benefits.

Under the familiar teaching of the Coase theorem, transaction costs aside, it does not matter, so far as allocative efficiency is concerned, whether *B* is liable to *A* for the damage *A* incurs.⁴⁵

Thus, assume that *B* has the legal right to "use his property as he sees fit," that is, would not be liable to *A* for the loss of view. If *B* were to build without internalizing the damage to *A*, the fence would be height *p*. Under the standard analysis, *A* will bargain *B* back to height *x*, where the social product (consisting of privacy and views) is maximized. Both *A* and *B* will be better off with any bargained division of EDP between them than if *B* were to have built to point *p*.

What if *B*, however, anxious to realize even greater gains from trade, threatens to build all the way to *z*, and thereby to block *A*'s view entirely? This would be the least efficient outcome, since both *A* and *B* would incur net marginal costs—*A* in additional loss of view, *B* in expenditure of additional fence-building resources. Just because neither *A* nor *B* would benefit, however, this will not normally occur; instead bargaining will again move *A* and *B* back toward *x*, but now *B* may have captured still more of *A*'s willingness to pay. Moreover, as explained below, the threats to build to *p* and to *z* have different efficiency implications, just as would carrying out those threats.

Substantively the most desirable outcome would be for *B* to build a fence of height *x*, and an omniscient lawgiver would locate height *x* for any given set of neighbors *A* and *B* and so decree. In the real world of less than omniscient lawgivers, however, *x* is an unknown quantity, and it would be objectionably intrusive as well as impractical, due to strategic behavior, enforcement problems, and the like, to require *A* and *B* to collaborate in locating and reaching *x*. As a practical matter the state must choose between (1) setting no limit upon the height of *B*'s fence, and (2) a policy limiting its height to the point beyond which *B* cannot show, if *A* complains, that additional height would yield additional value—gains in privacy in our simple two-commodity model. These alternatives translate into either (1) allowing *B* to build to height *z*, which is the furthest he would go in any event since beyond height *z* there are not even

⁴⁵ It matters, of course, in terms of the distribution of wealth as between *A* and *B*.

potential gains from trade with A , or (2) limiting his fence to height p , expressed abstractly in terms of marginal utility to B .

As between these two, limiting fence height to p is the superior choice, since the threat to build to z only increases the possibility of economic waste. First, the closer to x that B must locate his initial bargaining position the better, since any increase in the distance between the parties' initial positions presumably entails increased bargaining costs. At the limit, if x were known, the lawgiver would have been able to eliminate bargaining altogether by limiting B 's fence to height x . Second, it is possible that some A s would not place a high value on incremental units of view, so that the intersection (x) of the demand curves for privacy and view would lie to the right of p . In that event, bargaining need not take place, at least once it is revealed that B 's demand for privacy is such that there is no room, given A 's views about the scenery, for an improvement in their respective lots. On the other hand, if B had been able to threaten A with a fence of height z , he might have extracted a payment from A for his agreement not to exceed height p . The bargaining costs and the costs of effecting this transfer payment would have been unnecessary decrements from the potential social product, and they could have been avoided by limiting B to height p in the first place.

In addition, whether x lies to the left or the right of p , threats to build to z raise the possibility that, solely in order to convince A of the seriousness of his threat, B may have to put up the unwanted footage only to take it down again later. Real resources are thus expended to establish the credibility of B 's threat, but in the end there is nothing to show for the effort (other than the wealth transfer from A to B).⁴⁶ A rational economic planner (lawgiver) would simply prohibit the threat at the outset.

Of course, it is also true that in order to convince A of the seriousness of his preferences, B may have to build a fence to height p only to reduce it later. This too represents a waste of resources, and it is also occasioned by A 's treating B 's threat to build (to p) as incredible. This waste may be less likely to occur, since A may be able to make a better judgment about how much fence height will really be useful to B than he can about B 's willingness to incur costs in the hope of netting a profit after A makes payment. More

⁴⁶ A similar observation concerning "pollution entrepreneurs" who might threaten to undertake production in order to be bribed to refrain appears in Donald C. Shoup, Comment, *Theoretical Efficiency in Pollution Control*, 9 W. ECON. J. 310, 310-11 (1971).

important, however, it is difficult to conjure up a rule of law, for the elimination of this waste. Our rational (not omniscient) economic planner, that is, does not have access to the appropriate graph for each *A* and *B*.⁴⁷

Thus far we have implicitly disregarded the value of "spite" in analyzing *B*'s threat to build his fence to a height above *p*, as though spite, or revenge, or what-have-you were not a good for which *B* might have a demand, just as he does for privacy. If *B* does value spite, however, then he might wish to build a spite fence higher than *p*, perhaps as high as *z*, and there would be no reason in economic theory to dishonor his preference for making *A* suffer. In a world of free information, moreover, there would be no reason to insist that *B* impose upon *A* in kind (fence height beyond *p*) rather than in cash (by demanding payment for refraining from building higher than *p*). In the real world of the legal process, however, reliable information about *B*'s mental state is costly—perhaps unavailable at any price—and since one would normally expect the spite-motivated fence-builder to be willing, or even eager, to incur the cost of extra fence height, it is reasonable to disregard the slight possibility that any particular *B*, in threatening to build the fence beyond *p* unless paid, is offering to refrain from taking a step that would have served his demand for spite.⁴⁸ Disregarding this possible welfare loss in formulating a blackmail law would not really qualify the rational economic planner's pursuit of greater social product; it would merely take account of the fact that some potential gains are not realizable because they are not as great as the cost entailed in their identification.

⁴⁷ Harold Demsetz makes much the same point: "Because it is difficult to sort desirable from undesirable increases in herd or crop size [in our example fence size or privacy], there is a real danger of penalizing desirable increases . . . by mistake if such wealth transfers are treated as extortion." Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 25 (1972).

⁴⁸ Similarly, Epstein notes:

The motive test (whatever its weakness) has an apparent dual advantage [in spite fence cases]: it avoids the open-ended and explicit comparisons of costs and benefits that are everywhere the bane of the legal system; and it removes the need to make specific collective determinations about height, shape, color, and the like, which are again difficult to generate through common law decisions. Yet this approach requires a costly inquiry into motive and tends to break down where both "legitimate" and "illegitimate" desires lie behind a single act.

Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 97 (1979).

Recurring to the paradigmatic blackmail transaction with which we began this section, it is easy to appreciate that *B* stands to gain nothing from *A* by actually carrying through his threat to send compromising information to the newspapers. Since the release of information, unlike the construction of a fence, is irreversible, *B*'s only potential gain (again disregarding spite) is in establishing his credibility as someone willing to incur a cost if not obliged. But that is an asset only insofar as *B* is an entrepreneur of blackmail, i.e., someone who expects to engage in similar future transactions from which to realize a return on the investment in credibility.⁴⁹ Should *B* succeed in his efforts first to make himself credible and then to acquire information that he can threaten to disclose, the result will be an industry the output of which is nil, although resources are consumed in its operation, viz. for information-gathering and threatening.

In short, therefore, a legal system designed to maximize allocative efficiency would penalize not only (1) threats to do an act that the threatener has no right to do, i.e., that would occasion criminal or civil liability, but also (2) threats to do something that the threatener does have a right to do but that would (a) consume real resources, and (b) yield no product other than the enjoyment of spite or of an enhanced reputation as a credible issuer of threats. Reciprocally, it would not penalize the utterance of a threat to take an action that is (1) lawful in itself, i.e., neither tortious nor criminal, and (2) would confer some material benefit on the party making the threat.

III.

The preceding analysis suggests a distinction among threats to do a lawful thing depending upon whether they would give some material benefit to the party making the threat. This distinction is closely approached, but not quite reached, in some of the leading cases and commentaries on blackmail, and in the "general principle" of theft by extortion in the Model Penal Code.

In *Thorne's Case*, discussed previously, Lord Atkin focused on the English statutory requirement that a demand, to be unlawful, be made "without reasonable or probable cause." As reflected in a

⁴⁹ See Daniel Ellsberg, *The Theory and Practice of Blackmail*, in BARGAINING: FORMAL THEORIES OF NEGOTIATION 343, 358 (Oran R. Young ed., 1975).

passage quoted earlier,⁵⁰ he interpreted this to mean that a threat made "for some legitimate purpose other than the mere acquisition of money" would be lawful, having in mind, it seems, a distinction between "the promotion of lawful business interests," and other purposes.⁵¹ But this distinction suffers from a circularity of reasoning, the question being ultimately whether and why the making of threats to do lawful acts should not itself be a "lawful business interest." The answer we have suggested is that it would be a business that consumes resources without producing a net product.

Lord Wright's suggestion of a distinction between the promotion of trade interests and an intent to injure,⁵² although it may seem to break the circle, is not adequate to the case because the two motives may in fact coexist.⁵³ (On the graph, for example, *B* may threaten to build beyond *x* to *p*, which serves his interest in privacy, but, as he knows, damages *A*'s view to an even greater extent. It is of no moment to our analysis that *B* threatens to take his advantage, which he may previously have foregone out of friendship, because he now wishes to injure *A*.) Lord Wright was understandably at a loss, therefore, to give meaning (apart from examples) to his further proposed division between threatened acts one has a "legal right," as opposed to a "legal liberty," to carry out.⁵⁴

Lord Wright may well have been borrowing here from Professor A.L. Goodhart,⁵⁵ who attempted to distinguish lawful from unlawful threats to do a lawful act on the ground that the latter involve "immoral liberties" which "in most cases . . . are violations of a moral, although not a legal, duty," and hence are merely permitted rather than encouraged by the law.⁵⁶

So a man . . . has a legal liberty, as Sir Herbert Stephen has pointed out [in a letter to *The Times* (London) criticizing the opinion of Scrutton, L.J., in *Denyer's Case*], to show a damaging letter to a third person,

. . . .

⁵⁰ See *supra* text accompanying note 22.

⁵¹ *Thorne's Case*, 1937 App. Cas. 797, 807-08 (appeal taken from Eng. C.A.).

⁵² See *id.* at 817-18 (Lord Wright, concurring).

⁵³ See Epstein, *supra* note 48, at 97.

⁵⁴ See *Thorne's Case*, 1937 App. Cas. at 822-23 (Lord Wright, concurring).

⁵⁵ Arthur L. Goodhart, *Blackmail and Consideration in Contracts*, 44 LEGAL Q. REV. 436 (1928), reprinted in ARTHUR L. GOODHART, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* 175 (1931).

⁵⁶ GOODHART, *supra* note 55, at 179.

. . . The case given by Sir Herbert Stephen is a case of an immoral liberty . . .⁵⁷

Its exercise is tolerated, but not its surrender as consideration for a contract, so "there cannot be reasonable or probable cause for demanding money for the surrender of such a liberty."⁵⁸

As should be apparent, Professor Goodhart attempted to explain the peculiarity of the law of blackmail by reference first to contract doctrine and ultimately to unexamined moral norms. But he shows only that the law of blackmail carries moral force, as one would expect the criminal law to do as a reflection of the community whose values it enforces. He does raise, by implication, another interesting question—why does the law not penalize the taking of what he calls an "immoral liberty"—but he does nothing to explain why, having decided to tolerate that, the law nonetheless sanctions the threat to do so.⁵⁹

Professor A.H. Campbell, who correctly dismissed Goodhart's approach as unhelpful, noticed that the various examples of lawful threats appearing in the opinions in the several cases all involved "abstaining from some profit or advantage which [the threatener] might legitimately enjoy," whereas the common blackmailer "surrenders no profit or advantage of his own in return for the money he receives."⁶⁰ Professor Campbell accordingly suggested that the courts identify unlawful threats by asking whether there was reasonable and probable cause both for the demand made and for the particular menaces used. He was thus troubled by the opinions in *Thorne's Case*, because their emphasis upon the pursuit of a trade interest as the touchstone of a lawful threat appeared to be too permissive. It might, for example, allow the threat "of the powerful man who announces his intention of starting operations in a field in which he has hitherto shown no interest, unless those already established in that field pay him to stay out."⁶¹ His solution, under the banner of determining whether the man had reasonable and probable cause for making this demand, was to inquire into whether he had a "present intention" of exercising his right to enter the field and could do so "without considerable inconvenience."⁶²

⁵⁷ *Id.* at 179-80.

⁵⁸ *Id.* at 180.

⁵⁹ See *id.* at 189; see also *infra* text following note 77.

⁶⁰ A.H. Campbell, *The Anomalies of Blackmail*, 55 *LEGAL Q. REV.* 382, 388 (1939).

⁶¹ *Id.* at 390.

⁶² *Id.* For a related factual setting see *Leslie v. Lorillard*, 18 N.E. 363 (N.Y. 1888). Plaintiff shareholder in a steamship company brought a derivative action to recover

Although framed partly in terms of the threatener's mental state, it can be seen that this two-fold inquiry could yield substantively the same results as the test of material advantage suggested by our economic analysis.⁶³ Indeed, it would if the inquiry into the powerful man's intent were resolved solely by determining that it would have profited him to have entered the market and therefore, by inference, that he would have done so. If the "present intention" he must show requires more, however, the results would differ under our approach and Campbell's. Recast in terms of our example involving the threat to build a fence higher than x , the question whether the threat could be carried out "without considerable inconvenience" is analogous to the question whether B would realize net marginal benefits; it would be answered in the affirmative up to p , but in the negative between p and z . The further question whether B has a "present intention" to take a step that does yield net marginal benefits would not be meaningful if it is assumed that B is a rational utility-maximizer.

Finally, we return to the general principle of the Model Penal Code, which makes it unlawful to threaten a lawful act if carrying out the threat would not benefit the actor. Because the Code makes self-interest the touchstone of legality, the principle accords well, in general, with what we have argued a rational lawmaker would decree in the service of allocative efficiency. Thus, so long—and only so long—as our fence-builder B would realize net privacy gains from additional height, under the Code he may lawfully threaten to obtain them unless compensated for his forbearance.

But the general principle, without more, is imprecise and under-inclusive in its condemnation. First, it is under-inclusive if it does not reach the threat of our hypothetical investigative reporter B ,

money paid to the defendant's company per an agreement not to compete, which, it was alleged, was entered into after defendant threatened competition, and then competed at a loss, for the purpose of extorting money. Since the plaintiff alleged no fraud or collusion nor a clearly unlawful restraint of trade by the directors of his company, but at most an error of judgment, he stated no derivative cause of action to enjoin payments under the contract.

⁶³ See *Mogul Steamship Co. v. McGregor, Gow & Co.*, 1892 App. Cas. 25, 27 (appeal taken from Eng. C.A.). Plaintiffs alleged a conspiracy to injure them by excluding them from a shipping conference, and by engaging in predatory pricing and secondary boycotting. Per Halsbury, L.C., "If such an injury, and the motive of its infliction, is examined and tested, upon principle, and can truly be asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and consequently unlawful . . ." *Id.* at 36-37 (Halsbury, L.C.).

who offers to suppress information only if *A* will pay him a sum (\$300) larger than he could get from his newspaper (\$200). It would be in *B*'s self-interest, to the tune of \$200, to carry out the threat ("inflict [the] harm") if not obliged, but as we have shown, it would be inefficient to allow this sort of threat in aid of a demand exceeding the threatener's opportunity cost. Second, the general principle does not seem to have anticipated the problem of the threatened conduct that would "benefit the actor" by satisfying his demand for spite (not to mention enhancing his reputation as a credible threatener). Yet, it is difficult to imagine that the drafters intended freely to recognize as a defense *B*'s claim that he would have benefitted in a nonmaterial way from carrying out the threat. For the evidentiary reasons we adverted to before, this defense would substantially undermine the general principle unless denied or closely cabined, but the Model Penal Code offers no criterion for rejecting it either generally or in a particular case.

IV.

Quite a different economic explanation for the prohibition of blackmail has been offered by Professors Landes and Posner as part of their more general theory of the conditions under which public or private law enforcement are socially efficient.⁶⁴ According to this view, "the decision to discourage blackmail follows directly from the decision to rely on a public monopoly of law enforcement in some areas of enforcement, notably criminal law."⁶⁵ Otherwise, either over- or under-enforcement of the law might result, depending upon the blackmailer's pricing policies and the criminal's wealth position. Blackmail is not prohibited only with respect to the threatened revelation of criminal conduct, however; thus, Landes and Posner go on to explain that blackmail is forbidden where the information would humiliate but not incriminate the victim because:

The social decision not to regulate a particular activity is a judgment that the expenditure of resources on trying to discover and punish it would be socially wasted. That judgment is undermined if blackmailers are encouraged to expend substantial resources on attempting to apprehend and punish people engaged in the activity.⁶⁶

⁶⁴ See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

⁶⁵ *Id.* at 42.

⁶⁶ *Id.* at 43.

Insofar as the Landes-Posner analysis presupposes that the blackmailer is threatening to subject his victim to public obloquy—by exposing his violation of a norm that is widely subscribed but not the subject of criminal sanctions—I see no reason to quarrel with their point. It does not seem to be the case, however, that the prohibition on blackmail is limited to the threatened revelation of information that would generally, or even widely, be considered disgraceful.⁶⁷

Consider, for example, the case put by Professor Campbell in which a lawful bookmaker, who cannot sue to enforce a gambling debt, threatens to tell the client's "aged and pious parents who consider betting sinful about their son's activities";⁶⁸ the parents will be mightily distressed by this intelligence, and their son will be very embarrassed.⁶⁹

The general point is that information may be humiliating, but not incriminating, for any number of very particularized reasons. These may be quite unrelated to any "social decisions" about the economics of enforcement, and yet the prohibition upon blackmail will apply; more than concern for optimal norm enforcement is needed, therefore, to explain the law against blackmail.

The general principle of the Model Penal Code, by making self-interest the touchstone of a lawful threat, responds to this diversity of circumstances. Thus in the case of the bookmaker's threat to tell the aged and pious parents of their son's gambling, one would ask whether the bookmaker proceeded upon a reasonable belief that the gambler's parents would pay the debts; if so, then the threat indeed strikes one as lawful economic bargaining (at least as opposed to blackmail), while if payment could not be expected from the parents, the bookmaker would simply be threatening to "inflict [a]

⁶⁷ Compare, e.g., 7 & 8 Geo. 4, ch. 29, § 8 (1827) (Eng.) with 6 & 7 Vict., ch. 96, § 3 (1843) (Eng.); compare MODEL PENAL CODE § 223.4(3) (making it a criminal offense to threaten to "expose any secret tending to subject . . . any person to hatred, contempt, or ridicule") with *id.* § 223.4(7) (making it a criminal offense to threaten to "inflict any . . . harm which would not benefit the actor").

⁶⁸ Campbell, *supra* note 60, at 395.

⁶⁹ It should not be argued that the social decision to make gambling debts unenforceable at law reflects a judgment that gambling should not be encouraged. No such judgment need attach to the activity; one can readily substitute for gambling in Professor Campbell's hypothetical any other conduct—say, chewing tobacco—the revelation of which would bring the blackmail victim into difficulties with the person whom the blackmailer threatens to tell.

harm which would not benefit the actor"—i.e., under the circumstances, blackmailing.

But is the bookmaker really threatening to inflict a harm at all, as opposed to bestowing a benefit, upon the gambler's parents by telling them of his activity? Professor Posner might question whether the gambler's parents have truly been harmed when they are informed of their son's activities; he might also question whether the son has been harmed in any interest worthy of protection when the false premise for his parents' good opinion of him is corrected. For in Professor Posner's view, "the facts about a person . . . should be in the public domain so that those who have to decide whether to initiate (or continue) social or business relations with the person will be able to do so on full information."⁷⁰ Were it not for the inefficiency of private enforcement previously suggested by Landes and Posner, that is, blackmail should probably be lawful; it deters behavior that would lead others to shun the blackmail victim and, to the extent that both deterrence and ex post blackmail threats fail, it may at least bring to light more information upon which others can make decisions about their dealings with the person.

There are two related assumptions implicit in Posner's reasoning. First, deterrence of conduct that would, if known, cause others to shun a person is "efficient"; stated otherwise, behavior in conformity with others' wishes is efficient. Second, additional information about a person with whom one has social or business relations always has a positive value; it is a good in that having a marginal unit makes one better off.

These two assumptions would ordinarily seem unobjectionable, but the (social) situations in which blackmail is a problem are not ordinary, and the assumptions do not necessarily hold. An example will illustrate the point.

Suppose that *A* desires to engage in an activity, such as chewing tobacco in public, but that a *B*'s report of his behavior to *C* would cause her to lose respect for *A*'s character; indeed, *C* might lose affection for *A* as a result. If *A* is deterred for fear of a *B*, then *A*'s loss of the satisfaction of chewing tobacco is certainly less than his gain from *C*'s affection. But if he must choose between the two, it is only because *A* does not have the exclusive right to this informa-

⁷⁰ Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 421 n.57 (1978); see also *id.* at 399-400.

tion about himself—*B* can appropriate the datum and repeat it to *C*. Normally, however, *A* would not have to give up chewing tobacco because the risk of a *B* telling *C* will be trivial: *B* would have no incentive to expend time or money determining that *C* would be interested and carrying the tale to her, since *B* will not be able to sell the information to *C*.⁷¹ If blackmail were lawful, however, *B* could attempt to sell his silence to *A*, and *A* would therefore have been, let us assume, deterred from chewing tobacco in public. *A* will clearly be worse off than he would be in a world in which he could chew tobacco in public without fear of *C*'s learning it; but will *C* be better off as a result of *A*'s abstinence? Inasmuch as *C* desires that *A* not chew tobacco and *A* does not do so, it might seem that *C* is better off. But better off compared to what: a world in which *A* does chew tobacco, or only a world in which *A* chews tobacco and *C* knows it? Perhaps that depends on the basis for *C*'s preference that *A* abstains—that is, whether *C* is being self-interested or altruistic. If *C* is concerned with *A*'s welfare (e.g., tobacco stains *A*'s teeth) and not with her own (e.g., it will be unpleasant to kiss *A*), then it is not at all clear that *C* is any better off when *A* conforms his conduct to her desires, nor that *C* is any worse off when *A* fails to do so. But it is certainly difficult to see how the welfare of an altruistic *C* is affected by *A*'s behavior when that behavior is unknown to her.

Thus, the gambler's aged and pious (and altruistic) parents, who considered gambling to be sinful, were made miserable not by their son's gambling but by *B*'s report of it.⁷² It is not supportable to say that they were made better off by reason of having the information; *B*'s whole point in threatening to tell the gambler's parents was that they would be distressed and the altruistic gambler would want to avoid this.⁷³

In both the gambling and the tobacco chewing examples instanced above it is crucial that the person to whom *B* threatened

⁷¹ The problem arises because *B* must sell his information without first revealing what it is; *C* would find it impossible to evaluate undisclosed information, so that agreement on price would be difficult at best.

⁷² Indeed, the report need not have been true to have had its effect.

⁷³ Knowledge, that is, is not always a good—as the story of the Garden of Eden tells us. Sometimes what we don't know can't hurt us, and sometimes it does. Perhaps this accounts for our ambivalence on being offered a bit of gossip about a friend. Surely it is what accounts for the coexistence of phrases such as "the awful truth" and "ignorance is bliss" alongside their more abstract counterparts, such as "the truth shall make you free." *John* 8:32 (New King James); cf. *Ecclesiastes* 1:18 (New King James) ("[H]e who increases knowledge increases sorrow.").

to communicate embarrassing information about the blackmail victim was bound by ties of affection to that person. These recipients of information therefore had an altruistic concern for the victim that would not be replicated where the recipient and the subject of the information had a trade rather than a social (or familial) relationship. There, allowing blackmail might perform useful deterrence and informing functions, as Professor Posner suggested and as the reasoning and result in *Thorne's Case*⁷⁴ suggest. To be sure, that would sometimes occur in social contexts as well,⁷⁵ viz., where the recipient of information has primarily a self-interested concern with the victim's reported behavior.⁷⁶ Where the recipient is altruistic, however, the deterrent effect of blackmail would be inefficient. And it is almost surely against the disruption of social rather than trade relationships that the prohibition of blackmail is directed.⁷⁷

This paper has argued that the apparent paradox of blackmail, that one may not threaten to do what one has a lawful right to do, is an economically rational rule. If such threats were lawful, there would be an incentive for people to expend resources to develop embarrassing information about others in the hope of then selling their silence. In that case, some people would be deterred from engaging in embarrassing (but lawful) conduct, while some others who were undeterred would find that their business or social acquaintances or family were informed of their activity. Neither such deterrence nor such information can be counted as a good in many situations, however. These particularly include social and family relations in which the concern of one individual for another is altruistic rather than self-interested; i.e., where one might be distressed to learn another's secret, but was not harmed by

⁷⁴ 1937 App. Cas. 797 (appeal taken from Eng. C.A.).

⁷⁵ And perhaps rarely in familial contexts.

⁷⁶ Suppose, for example, that the gambler's parents would wish to know of their son's gambling in order to revise their wills to prevent the son from impoverishing the family.

⁷⁷ It is not a mere curiosity that the leading cases in England (and the only American cases) to grapple with the distinction between blackmail and lawful economic bargaining have arisen from the business setting. See, e.g., *The King v. Denyer*, [1926] 2 K.B. 258 (Eng. Crim. App.); *Vegetahn v. Guntner*, 44 N.E. 1077, 1078 (Mass. 1896) (case involving labor dispute stating that "a combination to do injurious acts expressly directed to another by way of intimidation or constraint . . . is outside of allowable competition, and is unlawful"). Almost all other reported cases involve threats to disrupt social or familial rather than business relations between the victim and the potential recipient.

ignorance of it. It is precisely these relationships that are threatened with disruption by the prototypical blackmail threat, and that would be protected by an economically rational law. The general principle of the Model Penal Code closely approximates this result by prohibiting threats that it would not benefit the actor to carry out.⁷⁸

An alternative economic explanation for the prohibition of blackmail is that private enforcement of social norms would be inefficient. While this paper does not take issue with the general analysis of private enforcement, that analysis does not explain why the blackmail prohibition extends to situations in which there is no social norm (or very low enforcement costs) at stake, but there is nonetheless a potential for embarrassment.

V. POSTSCRIPT 1993

Professor James Lindgren has twice taken issue with the analysis in this paper. In his 1984 article,⁷⁹ he says that our analysis "assumes that a blackmailer decides to dig up dirt and sell it before he knows if there is any dirt to dig up or what the dirt is," and that therefore we are "unable to explain why it is blackmail to sell information that is not purposely acquired."⁸⁰ Thus, using Hepworth's typology⁸¹ he says that we can account for the prohibition of "commercial research blackmail" and "entrepreneurial blackmail," but "cannot explain participant or opportunistic blackmail, since these are based on information that would have been acquired without any incentives for blackmail."⁸²

In a later article,⁸³ he levels the same criticism at Ronald Coase's analysis of blackmail.⁸⁴ Professor Coase acknowledged Lindgren's criticism of our paper⁸⁵ and responded: "While it is true that in [a case where information was accidentally acquired] no

⁷⁸ See *supra* notes 31-39 and accompanying text.

⁷⁹ See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984).

⁸⁰ *Id.* at 695.

⁸¹ See MIKE HEPWORTH, BLACKMAIL 74-77 (1975) (delineating four types of blackmail).

⁸² Lindgren, *supra* note 79, at 695.

⁸³ See James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597 (1989).

⁸⁴ See *id.* at 600; see also Ronald H. Coase, *The 1987 McCorkle Lecture, Blackmail*, 74 VA. L. REV. 655 (1988).

⁸⁵ See Coase, *supra* note 84, at 674 (citing Lindgren).

resources were used to collect the information, resources would certainly be employed in the blackmailing transaction."⁸⁶ Lindgren's rejoinder is as follows:

Here Coase assumes that the "resources . . . employed in the blackmailing transaction" are wasted. But where no expenses have been spent seeking damaging information, the blackmail bargain proceeds much as any other. The blackmailer and her victim will enter into the deal only if each expects a net gain—and a gain large enough to offset the transaction costs of bargaining. Thus, the mere expenditure of resources does not render the bargain wasteful.

The unwarranted assumption that lies behind Coase's argument is that, without the possibility of a bargain, the damaging information would not be released. But in our society damaging information passes even without an incentive for blackmail. . . . One can imagine a world without gossip or supermarket tabloids . . . but it isn't ours.⁸⁷

Lindgren again concludes that the "Coase-Ginsburg argument explains blackmail based on purposely acquired information but does not explain blackmail based on inadvertently acquired information."⁸⁸

Lindgren overlooks a fundamental aspect of our analysis, for we pointed out:

[In] the paradigmatic blackmail transaction . . . *B stands to gain nothing from A* by actually carrying through his threat to send compromising information to the newspapers. . . . *B's* only potential gain . . . is in establishing his credibility as someone willing to incur a cost if not obliged. But *that is an asset only insofar as B* is an entrepreneur of blackmail, i.e., someone who expects to engage in similar future transactions from which to realize a return on the investment in credibility.⁸⁹

Although we focused attention on the resources that a potential *B* would expend in order to "dig up dirt" about *A*, our essential point was that by viewing the blackmail transaction *ex ante*, the waste involved would be made apparent.

Thus, it is of no moment that a particular *B* may have come by compromising information accidentally. Should *A* refuse to pay

⁸⁶ *Id.*

⁸⁷ Lindgren, *supra* note 83, at 602 (footnote omitted).

⁸⁸ *Id.* at 607.

⁸⁹ See *supra* text accompanying note 49 (emphasis added).

him, *B* has no reason to begin incurring expenses, such as are necessary to secure publication of the information, except insofar as he is looking to future opportunities for blackmail. The resources he expends in order to publish the information (and presumably to get credit as the source of it) are justified only from his *ex ante* perspective on the *next* blackmailing opportunity—regardless of whether *B* sets out to find it or waits for it again to come knocking at his door.⁹⁰ Thus, assuming that the first blackmail opportunity arrives by accident, when *B* asks for payment to suppress what he knows, he has become an entrepreneur of blackmail; for *B* then to carry out his threat to reveal the information is an investment decision, not a part of the earlier accident.

In sum, Lindgren errs in concluding that “[t]he problem with the Coase-Ginsburg approach is that it is unable to explain why it is blackmail to sell information that is not purposely acquired.”⁹¹ On the contrary, the problem with the Lindgren-Hepworth approach is that it looks only at the blackmailer’s accidental acquisition of information and ignores his intentional exploitation of the information—in order either to get immediate payment or, failing that, to invest in credibility for the next time.⁹²

⁹⁰ “A man must make his opportunity as oft as find it.” FRANCIS BACON, *The Advancement of Learning* 1, 172 (bk. II, ch. xxiii, 3), in *THE ADVANCEMENT OF LEARNING AND NEW ATLANTIS* (Arthur Johnston ed., Clarendon Press 1974) (1605).

⁹¹ Lindgren, *supra* note 83, at 601.

⁹² Professor James Boyle recently proffered a slight variation on Lindgren’s argument, noting that the prohibition of blackmail may lead “the accidental blackmailer who would rather have been paid off than gossip, but rather gossip than keep quiet, to spill the beans.” James Boyle, *A Theory of Law and Information: Copyrights, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1475 (1992). That is, the would-be accidental blackmailer may derive value (e.g., status) from gossiping, independent from his status as a blackmailer, and therefore if not paid may be willing to incur the cost of disseminating the information. Boyle notes further that because it is difficult if not impossible to determine the source of a blackmailer’s information, there is no way for the law practically to distinguish among the various classes of blackmailers. He therefore posits that the economics of the blackmail prohibition might be thought to rest upon “the proportion of accidental blackmail to deliberate blackmail.” *Id.*

By first approaching the victim with an offer, Boyle’s would-be blackmailer, like Lindgren’s, becomes an entrepreneur even if he was not when he discovered the information. Regardless of whether he then sells his silence or “spills the beans,” therefore, the lesson of his experience is that the acquisition of damaging information is a profitable enterprise. Cf. Anthony Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEG. STUD. 1, 14 (1978) (distinguishing between information acquired deliberately and that acquired accidentally but noting that “in reality every adjustment . . . in the benefits of possessing a particular kind of information will have an incentive effect of some sort”). The prohibition of blackmail thus serves a prophylactic purpose by discouraging even the accidental acquirer of damaging information from acquiring an incentive to seek out information for use in a future blackmail attempt.