Trading Money for Silence

by Walter Block*

I. INTRODUCTION

When the term "blackmail" was first used in 1722, it had a specific and exact meaning. Its legal meaning was precise; it prohibited actions which were clearly at variance with the most basic and cherished of all human rights—the right to remain unmolested in one's person and property.

The Waltham Black Act of 1722 was passed as the result of the depredations of a gang of deer thieves called the Waltham Blacks, operating near the town of Waltham, England, who blackened their faces. Moreover, this gang undertook the quaint practice of sending letters "demanding venison and money, and threatening some great violence, if such their unlawful demand should be refused."[1] Hence the term "blackmail."[2] This law was clearly meant to punish demands for a victim's money or wealth coupled with threats to inflict violence on person or property.[3]

If the law prohibiting blackmail began with a clear and limited mandate, it was soon expanded through judicial determinations and legislative enactments. The law of blackmail began proscribing threats to do that which one would otherwise have a full and complete right to do—such as to publicize true information about another.[4]

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[1] *See* Winder, *The Development of Blackmail*, 5 MOD. L. REV. 21, 34-35 (1941). *See also* Williams, *Demanding with Menaces: A Survey of the Australian Law of Blackmail*, 10 MELB. U.L. REV. 118, 122-23 (1975) [hereinafter cited as *Demanding with Menaces*].

[2] *See* Winder, *supra* note 1, at 24 (This term also has been traced to piracy: "Blackmail was originally the tribute exacted by free-booters in the northern border countries to secure lands and goods from despoilment or robbery.").

[3] *See id.* at 21 ("[I]n those forms which require the presence of 'menaces' there had to be, originally, and until fairly recently, something like a threat of personal violence or of violence to property.").

[4] *See Demanding with Menaces*, *supra* note 1, at 140. The Criminal Law Revision Committee held that

In common parlance, the concept of blackmail has come to be used very loosely compared with its original meaning and is now applied to practically any commercial transaction disapproved of by the speaker. For example, the OPEC price hike of 1973 was widely castigated as "economic blackmail." The legal definition of blackmail has also been significantly broadened. This article shall attempt to chronicle the widening of the legal definition of blackmail. Section II attempts to show that the ever more encompassing behaviour prohibited under modern blackmail legislation has been inimical to the public good and has transgressed canons of justice, logic, and rights to free speech and has endangered, not protected, persons and property rights. Section III explores whether one can legitimately threaten to tell secrets one would otherwise have the right to reveal—unless one is paid to desist. Section IV discusses cases (1) where the "victim" approaches the blackmailer, (2) where the threat is to expose a victimless crime, and (3) where the threat is to expose a real crime.

II. THE CHANGING DEFINITION OF BLACKMAIL

Originally, blackmail in the common law was confined to threats of violence, or other violations of the rights of person or property.[5] In *Rex v. Parker*,[6] for

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there are some threats which should make the demand amount to blackmail even if there is a valid claim to the thing demanded. For example, we believe that most people would say that it should be blackmail to threaten to denounce a person, however truly, as a homosexual unless he paid a debt. It does not seem to follow from the existence of a debt that the creditor should be entitled to resort to any method, otherwise *noncriminal*, to obtain payment.

Id. (emphasis added).

[5] *See* Williams, *Blackmail* (pt. 1), [1954] CRIM. L. REV. 79, 87:

As has been seen, there can in general be no stealing where the property is handed over as the result of threats, unless the threats are of force or false imprisonment. . . .[T]he common-law doctrine has never been extended beyond threats of physical force or false imprisonment; thus a person who obtains goods by threats of accusation of immorality would not be guilty of larceny.

See also Winder, *supra* note 1, at 42:

The Act of 1734 recites that "many of His Majesty's subjects have of late frequently been put in great fear and danger of their lives by wicked and ill-disposed persons assaulting and attempting to rob them" and declares to be felony the conduct of such persons who "with any offensive weapon or instrument, unlawfully and maliciously assault, or shall by menaces, or in or by any forcible or violent manner, demand any money, goods or chattels, of or from any other person or persons with a felonious intent to rob or commit robbery." In its original context there can be no doubt that "menaces" means such menaces as, if the demand accompanying them be complied with, robbery is committed: the words "with intent to rob" make this clear and they give effect to the declared object of the Act. There can be no intent to rob unless the handing over of the property demanded amounts to robbery. Therefore, "menaces" in section I meant present threats of immediate battery if

example, a creditor was found guilty of blackmail for forging a letter in an attempt to recover money owed him. This is consistent with the limited construction since forgery is itself equivalent to an assault on property, and hence an action which is *per se* proscribed.[7] Similarly, a threat made at gunpoint that the victim would "suffer the consequences,"[8] and threats to burn down the prosecutor's premises[9] were deemed to be violations of law. On the other hand, a threat of a civil suit in order to facilitate the collection of a debt was ruled not actionable: "A threat to do what one has a legal right to do is not, as a general rule, duress and will not support an action for damages."[10]

Thus blackmail was originally limited to the use of a threat of violence, or rights violations, in order to obtain valuable considerations. The concept of blackmail was soon extended, however, to include threats which did not entail physical abuse or the violation of rights.

As early as 1776, the extortion (blackmail) of money by verbal "threat to accuse a man of unnatural practices" was held to be criminal.[11] Similarly, the draftsmen of the (Blackmail) Act of 1823 extended the definitions of blackmail from "demands coupled with a threat of violence to the person or to property" to the utterance of "verbal threats to accuse another of serious crime."[12] In the modern day, the concept of blackmail has been extended to include the threat of anything that might discomfort a person. This change is so thorough that many legal commentators and much modern legislation even fail to acknowledge the traditional distinctions between threats of violence, threatened accusations of a serious crime, and threatened accusations of embarrassing

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the property be not delivered up to the accused.

[6] 74 J.P. 208 (1910), *cited in* Campbell, *The Anomalies of Blackmail*, 219 LAW Q. REV. 382, 391 n.18 (1939).

[7] In the narrow definition of blackmail, threats of force against persons or property are the *only* proscribed threats. But are such threats *always* illegitimate? Surely not. Suppose, for example, that the father of a kidnap victim threatens the kidnapper with personal physical violence unless he releases his child. As long as the threatened violence is not out of proportion to the original crime (the kidnap), there would appear nothing untoward in such an extortionate demand. For the remainder of this paper, however, unless otherwise indicated, we shall assume that threatened (or carried out) acts of violence are all initiatory and hence unjustified, not retaliatory, or in response, and hence possibly justified. For a discussion of the proportion of punishment and retaliation, see M. ROTHBARD, THE ETHICS OF LIBERTY 85-95 (1982) [hereinafter cited as ETHICS].

[8] *See, e.g.*, State v. Morgan, 50 Tenn. 262 (1871).

[9] *See, e.g.*, Rex v. Smith, 169 Eng. Rep. 350 (Ch. 1850).

[10] *See* Shelton v. Lock, 19 S.W.2d 124, 126 (Tex. Civ. App. 1929).

[11] *See* Campbell, *supra* note 6, at 382-83. *But see* Winder, *supra* note 1, at 24 ("At first, therefore, blackmail implied a threat of violent injury to property and according to the Oxford dictionary was not used, by extension, in its modern sense until the nineteenth century. The first example given of its modern use is from the year 1840.").

[12] *See Demanding with Menaces*, *supra* note 1, at 135.

misconduct.[13]

Rex v. Tomlinson[14] was considered to be the first case to extend significantly the concept of blackmail.[15] Tomlinson was convicted of demanding money under the threat of telling a man's wife and friends of his alleged immoral behaviour with another woman. Lord Chief Justice Russell of Killowen stated:

> I should have regretted if the Court had felt compelled to confine the construction of the word "menaces" in the way suggested [limited to injury to person or property], with the result of excluding such conduct as that of the prisoner from the purview of the criminal law. . . .[I]t may [also] well be held. . .to include menaces or threats of a danger by an accusation of misconduct, though of misconduct not amounting to a crime, and that it is not confined to a threat of injury to the person or property of the person threatened.[16]

This history supports the conclusion, on the one hand, that while the traditional, limited concept of blackmail is indeed criminal behaviour, deserving the full punishment of law, the additional behaviour proscribed by the modern, extended concept of blackmail is generally legitimate and noncriminal and should be legalized, however immoral it may be.[17] As the modern conception

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[13] *See, e.g.*, Livermore, *Lawyer Extortion*, 20 ARIZ. L. REV. 403, 403 n.2 (1978) (discussing the Arizona Revised Criminal Code: "In addition to the conventional proscription of threats of physical injury, property damage, criminal conduct, and reputational injury, a general clause forbids threatening 'any other act which would not in itself materially benefit the defendant but which is calculated to harm another person materially.' "). *See also* Williams, *Blackmail* (pt. 2), [1954] CRIM. L. REV. 162, 168 ("[I]t is rightly treated as blackmail to attempt to obtain money. . .by the threat to accuse of discreditable conduct.").

Moreover, there are numerous cases which have cemented the widened comprehension of blackmail. See, e.g., Thorne v. Motor Trade Ass'n, 1937 A.C. 797, 817, where Lord Wright states, "I think the word 'menace' is to be liberally construed and not as limited to threats of violence but as including threats of any action detrimental to or unpleasant to the person addressed." Stated Lord Atkin in this case:

> If the matter came to us for decision for the first time I think there would be something to be said for a construction of "menace" which connoted threats of violence and injury to person or property, and a contrast might be made between "menaces" and "threats" as used in other sections of the various statutes. But in several cases it has been decided that "menace" in this subsection and its predecessors is simply equivalent to threat. . . .

Id. at 806.

See also Rex v. Boyle & Merchant, [1914] 3 K.B. 339, 343, where Lord Reading, C.J., stated: "We do not think that the meaning of the word 'menaces' in the section is so restricted. Whatever may have been the view in earlier days under the older statutes and decisions a wider meaning has been given to the word by later decisions. . . ."

[14] [1895] 1 Q.B. 706.

[15] *See* Winder, *supra* note 1, at 37-38 ("[I]t was not until *R. v. Tomlinson* in 1895 that there was indisputable authority for interpreting 'menaces' in a wide sense.").

[16] [1895] 1 Q.B. at 708-09.

[17] *See, e.g.*, State v. Stockford, 77 Conn. 227, 58 A. 769 (1904) (Any words or acts calculated

of blackmail prohibits both threats of violence as well as other threats, we cannot wholly condemn it.

The difficulty is that there is now no single word which describes only the original narrow concept of blackmail (a threat of criminal conduct) and no single word to describe what has been added to this concept (a threat which does not itself violate rights). Blackmail and extortion are used synonymously to describe the wider, modern concept of blackmail (threat for money which either violates rights or does not).

There is always a risk in offering a stipulative definition. "The world will little note, nor long remember," such efforts. Nevertheless, in this confused situation, this is the path we have chosen. We shall use the term "extortion" to refer only to a demand for money made on the basis of a threat of physical violence or other clearly criminal behaviour.[18] We shall reserve the appellation "blackmail" for those threats which, in the absence of a demand for money, would be considered legal.[19]

There is a vitally important distinction to be drawn between those who threaten violence to persons or property in order to obtain money from other people, and those who only threaten to exercise their legitimate prerogatives

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and intended to cause an ordinary person to fear injury to his person, business, or property are sufficient to constitute a punishable threat.); Rex v. Pacholko, [1941] 2 D.L.R. 444 (Saskatchewan Court of Appeal found that any threat of injury to character is equivalent to blackmail.); Rex v. Robinson, 168 Eng. Rep. 475 (Ch. 1796) (defendant demanded property, threatening to accuse a man of murder).

[18] For a discussion of the history of blackmail, see *In re* Sherin, 27 S.D. 232, 130 N.W. 761 (1911) (Extortion is derived from the Latin word "extortus" which means to twist or wrench out.).

[19] According to the Model Penal Code adopted by the American Law Institute:

> A person is guilty of theft [by extortion] if he obtains the property of another by threatening to:
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> (a) inflict bodily injury on anyone or commit any other criminal offense; or
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> (b) accuse anyone of a criminal offense; or
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> (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or
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> (d) take or withhold action as an official, or cause an official to take or withhold action; or
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> (e) 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
>
> (f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
>
> (g) inflict any other harm which would not benefit the actor.

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

Based on our definitions, and subject to the considerations as discussed below, only (a) is extortionate. The remainder should be considered merely blackmail.

unless such funds are forthcoming.[20] This distinction can and must be drawn.

Now it may be that both blackmail (threatening to exercise one's own rights) and extortion (threatening to violate the rights of other people) are, or should be, criminal acts. If so, this conclusion should be based on analysis, not assumptions, or mere definition.[21] By distinguishing "blackmail" and "extortion," we are at least in a position to argue that one is legitimate, the other not.

III. Can One Threaten What One Has a Right to Do?

An overwhelming majority of courts and commentators agree that a threat to disclose embarrassing information if money is not paid can be illegal even though the disclosure itself would not be.[22] There is, however, limited support for the view that blackmail as we have defined it, should be legalized. Lord Justice Romer in *Hardie & Lane v. Chilton*[23] expressed this view:

> I cannot find that the defendants have done anything of which complaint can be made in a Court, whether of civil or criminal jurisdiction. In my opinion the evidence shows at the most no more than that the defendants in good faith proposed and agreed to abstain from doing something that they could lawfully do, on the condition that the plaintiffs made a payment that they could lawfully make.[24]

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[20] *See* M. Rothbard, Man, Economy and State 443 (1962) ("*[B]lackmail* would not be illegal in the free society. For blackmail is the receipt of money in exchange for the service of not publicizing certain information about the other person. No violence or threat of violence to person or property is involved.") (emphasis original). *See also* W. Block, Defending the Undefendable 53-58 (1976).

[21] *See* Hibschman, *Can "Legal Blackmail" Be Legally Outlawed?*, 69 U.S.L. Rev. 474 (1935). The editors of this article note, "The phrase 'Legal Blackmail'. . .involves. . .a contradiction of terms." *Id.* at 474 ed. note.

[22] For a general discussion of this point, see Williams, *Blackmail* (pt. 2), *supra* note 13, at 162-63; *Demanding with Menaces*, *supra* note 1, at 129-30.

[23] [1928] 2 K.B. 306.

[24] *Id.* at 335-36.

As one commentator on *Hardie & Lane* has written:

> In the present case the threat involved no legal injury to (the trader). There was nothing contrary to public policy in expelling him or abstaining from so doing on condition that he paid a sum of money. But the fact that a thing perfectly legal in itself is not consistent with legal views of morality or public policy is often the dominating factor which causes a transaction to be found illegal. The (association) merely proposed and agreed to abstain from doing something that they could lawfully do, on condition that (the trader) made a payment which he could lawfully make, and there was no illegality in making the payment the consideration for the abstention. Nor was the letter in this case a demand with menaces without reasonable and probable cause, within the meaning of sec. 29(1), though I rest my judgment on the surer ground that it was not uttered without reasonable and probable cause.

This minority position derives additional support from Professor Livermore, who claims "that one may threaten to do what one is legally entitled to do to enforce that claim."[25] And again, the obverse: "There is no sound reason to allow lawyers to threaten what is legally unavailable to them to influence actions of others."[26] If lawyers are to be prohibited from threatening that which they cannot do, then the presumption is that they should be *allowed* to threaten that which they can legally do.[27]

So we have two schools of thought as to whether blackmail should be illegal. The overwhelming majority of the profession holds that it should be. Under this view two rights can make a wrong. This conclusion is troubling. First, it would appear that the burden of proof should be on the side that is making a counter-intuitive claim. And there can be hardly anything more counter-intuitive than the claim that two rights can make a wrong. And yet the majority opinion does not explain how this is can be so.

Second, given that the action is legal, then it can be legally implemented without recourse. That is, the would-be blackmailer can avoid the legal proscription by actually revealing the secret or embarrassment—so long as he does not ask for money for his silence. But if he does implement the threat without first offering his silence in return for payment, the blackmail victim may be far worse off as a result of the criminalization of this act. If blackmail were legalized, the victim would have the option of paying money in order to avoid what for him would be a worse fate, the publication of his secret.[28] With blackmail illegal, the victim's welfare is paradoxically diminished.[29]

Two influential cases involved the question of a cartel's right to discipline a violator of price fixing arrangements, and to fine the chiseling firm in lieu of

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> The real principle, in my view, may be expressed thus: Anyone who, without contravening morality or public policy, offers and agrees to receive, as an alternative to an act which he may lawfully perform, money which the other party may lawfully agree to pay as a consideration for such forbearance, is not guilty of a criminal offence.

Lecture, *Blackmail and Innocent Pressure: Interesting Middle Temple Moot*, 73 LAW J. 224, 225 (1932).

[25] Livermore, *supra* note 13, at 406.

[26] *Id.* at 409.

[27] *Id.* at 411 (A "lawyer would, of course, remain free to threaten legal action which is available to his client.").

[28] For a ringing affirmation of this principle, see ETHICS, *supra* note 7, at 121-27. *See also* W. BLOCK, *supra* note 20, at 53-54.

[29] *See* Livermore, *supra* note 13, at 406:

> Anomalously, it would be permissible to destroy reputation by bringing suit but not to allow the defendant to avoid that destruction by paying the claim. Not only would this mean a net loss to the privacy that the extortion status is, in part, aimed at protecting, but it would also involve significantly expanded litigation costs and burdens on efficient utilization of judicial resources.

expelling or boycotting it. In *Hardie & Lane v. Chilton*,[30] decided in 1928, the court held that the trade association did not breach the law by threatening to publicize a member's misconduct.[31]

Seven years later in *Thorne v. Motor Trade Association*,[32] a price-fixing violator was offered the option of paying a fine as an alternative to being boycotted (stop-listed) by the cartel. The House of Lords held that since the trade association had a right to place the violator on the stop list, it also had a right to demand a money payment as an alternative. Stated Lord Atkin:

> It appears to me that 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 the 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.[33]

In addition, Lords Wright and Roche held that were the fine too high, or "unreasonable," then the Motor Trade Association would have been guilty of extortion.[34]

The *Thorne* case may thus be interpreted as giving support to our contention that blackmail ought to be legalized. After all, the accused blackmailer, the secretary of the MTA, was found innocent. But *Thorne* furnishes only the weakest support for this position. The requirement that the fine be "reasonable" is a significant limitation on the blackmailer's ability to charge a market price for his services.[35] In addition, the defendant was held not guilty only because the MTA was deemed to have been acting "for some legitimate [business] purpose other than the mere acquisition of money." This, too, restricts the conduct of blackmailers. As well, it is nonsensical, for the major purpose of business is the

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[30] [1928] 2 K.B. 306.

[31] A commentator on *Hardie & Lane* analyzed the court's reasoning and wrote:

> [W]here a trade association was entitled by its constitution to put on a stop list the name of a person who had infringed its rule forbidding the sale of articles at other than the fixed prices, the association might, instead, lawfully adopt the more lenient course of asking the person to make a payment of money by way of compromise, and such money could be accepted and was not recoverable as if paid under duress.

Blackmail and Innocent Pressure, *supra* note 24, at 225.

[32] 1937 A.C. 797.

[33] *Id.* at 807.

[34] *Id.* at 817-18, 824.

[35] Williams, *Blackmail* (pt. 2), *supra* note 13, at 171 ("[It] appears to be somewhat anomalous, for in no other instance of an absolutely justifiable threat is there authority for saying that the matter is affected by the amount asked as the price for abstaining from carrying out the threat.").

"mere acquisition" of money. Certainly the MTA's objection to the price-cutter stemmed from its fear that such a practice would reduce the money that could be otherwise acquired. Not much furthers business interests *apart* from the acquisition of money.[36]

Let us consider one last version of this majority view before closing this section. In Campbell's view:

> If X and Y are rival candidates for an appointment and X offers to withdraw his name if Y pays him money, doubtless X is offering to surrender a material advantage which he might legitimately enjoy. But if X threatens to reveal some secret failing of Y's to the appointing board unless Y pays him money, is X not a blackmailer? Yet he had the right to reveal Y's secret to the board and if the revelation resulted in the rejection of Y and the appointment of X this would be a furthering of X's legitimate material interests and might even be in the public interest. *The real point is not whether X had an interest which he could legitimately* enjoy *but whether he had an interest which he could legitimately* surrender, *or offer to surrender, in return for money.* There may well be interests which a man can legitimately enjoy himself, and rights and liberties which he can legitimately exercise in furtherance of these interests, but which he cannot legitimately transfer to another, *e.g.* his interest in and right to the consortium of his wife, and there may well be interests and rights and liberties which he can enjoy and exercise himself but which he cannot legitimately covenant not to enjoy or exercise, *e.g.* he has an interest in pursuing his trade and a liberty to pursue his trade or not as he pleases, but he cannot validly covenant, save within certain limits, to refrain from pursuing his trade. *And in most cases of blackmail we are dealing with interests which may be legitimately enjoyed and liberties which may be legitimately exercised but whose surrender, or attempted surrender, for money is not only void but is a crime. The question we have to answer is not: Had the accused an interest which he could legitimately enjoy? but: Had the accused an interest which he could legitimately surrender for money?*[37]

This statement is based on the premise that one can own or enjoy a right but cannot sell or transfer it. The argument stands or falls with this questionable premise. Campbell, unfortunately, provides no reasons or justification for this basic assumption. He merely asserts it.

The one example he vouchsafes us, that a man cannot legitimately transfer interest in and rights to the consortium of his wife,[38] does not prove Campbell's basic premise. The issue in the debate over blackmail is not whether the right

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[36] To the extent that the businessman acts in any other way, for example by renting a more plush office than strict considerations for bottom line, profit maximizing would require, to that degree he is acting as a consumer, not a businessman.

[37] Campbell, *supra* note 6, at 388-89 (emphasis added).

[38] *Id.* at 389.

to disclose information can be transferred to another, but rather whether one can seek money in exchange for not exercising the right. Thus in the context of marital rights, the question is not whether the right to consortium can be transferred to another, but rather whether one can take money in exchange for not exercising the right. The question is unresolved to our knowledge.

At least the example of the consortium of the wife had a certain shock value. But what are we to make of the assertion that a person "has an interest in pursuing his trade and a liberty interest to pursue his trade or not, as he pleases, but he cannot validly covenant, save with certain limits, to refrain from pursuing his trade?" If a person really has a right to pursue his trade, why can he not accept a payment not to pursue it?

IV. Blackmail Cases

Having outlined the rudiments of the case in favour of legalizing blackmail, one may apply this analysis to a series of cases to contrast this position with the more orthodox one on this subject.

A. *Victim Approaches Blackmailer*

Let us first consider several cases where it is not the blackmailer who approaches the "victim," but rather the "victim" who approaches the blackmailer.[39] In these cases, the victims clearly prefer to pay money rather than have their "blackmailers" exercise some legal right. In *People v. Dioguardi*[40] a stationery business was struck by four unions in an attempt to organize the employees. The labour pickets made it impossible for the firm to conduct business. The owner approached McNamara, a teamster official, and offered him money to end the labour troubles. McNamara agreed, making a proposition for payment. After he and his codefendant Dioguardi were paid off, the pickets vanished and labour peace ensued.[41]

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[39] See Ethics, *supra* note 7, at 125, where Rothbard raises this point in opposition to the outlawry of a blackmail contract:

> Suppose that. . .instead of Smith going to Jones with an offer of silence, Jones had heard of Smith's knowledge and his intent to print it, and went to Smith to offer to purchase the latter's silence? Should that contract be illegal? And if so, why? But if Jones' offer should be legal while Smith's is illegal, should it be illegal for Smith to turn down Jones' offer, and then ask for *more* money as the price of his silence?

See also Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 Seton Hall L. Rev. 1, 7 (1971) (concerning businessman (victim) who "himself makes the solicitation").

[40] 8 N.Y.2d 260, 168 N.E.2d 683, 203 N.Y.S.2d 870 (1960).

[41] *Id.* at 266-67, 168 N.E.2d at 687-88, 203 N.Y.S.2d at 875-76. For a discussion of this

As a result, McNamara and Dioguardi were indicted, tried and convicted of extortion under a then current New York statute which defined extortion as the "obtaining the property of a corporation from an officer. . .thereof, with his consent, induced by a wrongful use of. . .fear."[42] The defendants argued that their behaviour did not constitute a threat to do an unlawful injury because if their proposition had been rejected they would have done absolutely nothing. In the view of a student commentator: "Clearly, defendants failed to consider § 858 of the Penal Law which expressly brings a threat 'not to do something' within the scope of extortion."[43] The commentator further stated:

> Might not any refusal to act unless paid (as with doctors, lawyers and plumbers) in response to a request for help be extortion? A doctor or lawyer says simply "I will not remove your troubles unless I am paid." There is no implication of power to continue the victim's troubles and the victim knows it. But when a labor official says, "I will not remove the pickets unless I am paid," a logical inference arises (which in the instant case was encouraged by the defendant) that he has the power to maintain the picket—the very thing the victim fears. The two situations are distinguished by the presence in the latter of power and a threat, express or implied, to use it wrongfully. Therein lies the wrongful use which turns an otherwise lawful act into extortion.[44]

But this analysis overlooks the fact that the union pickets were entirely legal. It is of course true that the doctor or lawyer was not the cause of the victim's troubles in the first place, and has not the power to continue them. It is also true that the union officials were the cause of the victim's difficulties in the first place, and can cause them to continue, merely by refraining from any further activity. Yet their conduct during the labour dispute was within their powers under the various United States labour laws and their power to continue these labour problems merely by doing nothing was also lawful.[45]

Suppose that the unionists, when approached by the businessmen, had recoiled in horror from any suggestion that they relinquish their lawful picketing in return for anything so gross as money. Suppose, that is, they had realized that by falling in with the businessman's suggestion, they would be themselves subject to charges of extortion. Under these conditions, would the position of the unionists have been illegal? Certainly not. They would have been completely

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case, see Decision, *Criminal Law-Extortion-Defendant Need Not Initiate the Fear*, 27 BROOKLYN L. REV. 346, 346-51 (1961).

[42] 8 N.Y.2d at 275, 168 N.E.2d at 693, 203 N.Y.S.2d at 883 (quoting N.Y. PENAL LAW § 850).

[43] *Criminal Law-Extortion*, *supra* note 41, at 349.

[44] *Id.* at 349 n.13.

[45] It may be true that the power given them by the labour legislation is improper, but that is beyond the scope of this article.

within their rights to continue the picketing activities permitted them by law. Would the businessman have been better or worse off? To ask this question is to answer it. Obviously, the businessman would have been *worse* off—how else to explain the fact that *he* approached the unionists, and agreed to pay for labour peace? How can this power of the unionist be used "wrongfully," if, as a result of its use, the supposed victim of extortion is made better off?

In the arena of labour relations, threats to engage in legal protest are either forbidden outright or at the very least highly suspect. We have found only two English blackmail cases where labour threats were found to be unequivocally legitimate. In *Hardie & Lane v. Chilton*[46] it was stated in dicta that a cook may ask for a rise in wages in exchange for not giving notice of termination. And as Lord Wright stated in *Thorne v. Motor Trade Association*: "[A] valued servant may threaten to go to other employment unless he is paid a bonus or increased wages."[47]

It is not possible to reconcile these two statements with the findings of extortion in *Dioguardi*.[48] The cook or the "valued servant" who threatens to leave for greener pastures does no more wrong than do the picketing unionists. If the unionists have the right to strike, but not to surrender this right for money, why should the cook or servant with a right to quit be able to surrender it for money? Suppose the cook's employer approaches her and asks that she return to his employ for money considerations. If she agrees, logic demands that she too be considered an extortionist. Of course, the quitting cook and striking union engage in vastly different behaviour. But the point is, *both* their activities should be lawful.

B. *Victimless Crimes*

We now turn to a consideration of several extortion cases which fall under the rubric of victimless crimes. The first grouping to be considered features a demand for money on the part of the accused blackmailer, and a threat to expose the "victim" of a contravention of heterosexual mores. Charges of blackmail have been made for threats to reveal a brothel visit,[49] a clergyman's sexual activities,[50] a husband's infidelity,[51] and threats to make a criminal complaint

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[46] [1928] 2 K.B. 306.

[47] 1937 A.C. 797, 820.

[48] That is, it is not possible for those who maintain the legitimacy of labour legislation which allows picketing and other forcible violations of human and property rights.

[49] *See, e.g.*, Regina v. Hamilton, 174 Eng. Rep. 779 (N.P. 1843) (threats to tell father, brothers, friends and newspaper that woman visited the brothels).

[50] *See, e.g.*, The Queen v. Miard, 1 Cox C.C. 22 (Midland Cir. 1844) (threats to tell the Archbishop of Canterbury, other bishops, and the newspapers of clergyman's sexual indiscretions).

[51] *See, e.g.*, Rex v. Tomlinson, [1895] 1 Q.B. 706 (threats to tell wife and friends); Rex v.

for allegedly indecent assault.[52]

The general analysis used by the courts in these cases focused not on the question of whether accused had threatened some illegal conduct but rather on the question of whether he or she was entitled in law to the money demanded or at least that were thought so in good faith.[53] This approach misses the important issues that were raised in these cases. The model developed in this paper presents a quite different view. Under this model, it is immaterial what the accused demanded, let alone whether the accused felt justified in making this demand. The only issue is whether the threatened conduct was legal. "[T]he threat is to do an act that is itself lawful. Nor is there any wrong merely in demanding payment of a sum of money. A man is at perfect liberty to importune a gift. The demand made is therefore lawful in itself."[54] Two legal rights do *not* make a legal wrong. The accused in all these cases are indeed guilty of blackmail—which should not be criminal. They are innocent of extortion—which should alone be a crime.

The analysis should be the same for cases related to threats concerning homosexuality and other allegedly deviant acts. Because of the social ramifications of charges of such behavior, the cases have generally held that threats of this type are illegal when in conjunction with demands for money.[55]

The decisions in these homosexual cases are flawed in the same way as the previous cases. Is it or is it not lawful to actually accuse someone of sodomy and other "unnatural" practices? It is lawful. If so, there is no crime, for, as we have seen, there is no reason to reject the view that what may be legally threatened also may legally be kept silent—for a fee.[56] Certainly, the "victim" is better off by having this option. With blackmail, he has a choice: to allow his secret to be told, or to pay up, and be spared the embarrassment.

The orthodox theory, upon which these cases are based, comes in for some sharp criticism. In the view of Professor C. R. Williams, relying on the belief of the perpetrator in the rightness of his act is entirely subjective in nature:

Bernhard, [1938] 2 K.B. 264 (threats to tell wife and newspaper).

[52] *See, e.g.*, Rex v. Dymond [1920] 2 K.B. 260 (threats to bring charges against a mayor for allegedly placing his hands up a woman's clothes in a public park).

[53] *See, e.g.*, *Miard*, 1 Cox C.C. at 24 (jury instructed to determine whether the demand "was made at a time when the party making it really and honestly believed that she had good and probable cause for so doing"); *Dymond*, [1925] 2 K.B. at 265 ("It is for the jury to decide whether there was reasonable or probable cause for making the demand and it is not for them to decide whether the accused believed that she had reasonable or probable cause for making it.").

[54] *Dymond*, [1925] 2 K.B. 260.

[55] For a review of early cases finding such threats to be sufficient basis for conviction, see Winder, *supra* note 1, at 26.

[56] *See* Williams, *Blackmail* (pt. 1), *supra* note 5, at 80. *But see* Hogan, *Blackmail: Another View*, [1966] CRIM. L. REV. 474, 474 ("[A] demand against a threat to expose. . .sexual deviance [is] every bit as bad as a demand against a threat to do bodily harm.").

> The adoption of a wholly subjective test, making the accused's criminality depend upon his own view of the propriety of his actions, is a surprising departure from the approach taken in other offences contained in the Crimes (Theft) Act. It is a requirement of offences such as theft, obtaining property by deception and robbery, that the accused be shown to have acted "dishonestly." The standard to be taken for determining what constitutes dishonesty is objective. Whether the accused has acted dishonestly is a question to be determined by the jury, applying "the current standards of ordinary decent people." Thus a modern Robin Hood who asserted quite sincerely that he believed he was acting honestly in robbing from the rich to give to the poor would have no defence to a charge of theft or of robbery. This is because "ordinary decent people" do not believe it to be honest to rob from the rich to give to the poor. However, if Robin were to be charged with blackmail, it would seem that his beliefs would give him a defence. The subjective nature of the test is well illustrated by the case of *R. v. Lambert*. . . .
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> The acquittal of the accused in *R. v. Lambert* because he subjectively believed he was entitled to demand money in such circumstances seems surprising and unsatisfactory. More extreme examples can easily be imagined. We live in times when members of terrorist organizations often act in the name of some higher morality which they assert, quite sincerely, justifies both their aims and any methods they choose to adopt to achieve those aims. If such people were to engage in activities which would, viewed objectively, be said to constitute blackmail, could their own beliefs, however, extreme, afford them a defence? One commentator has described the view that they could as "scarcely conceivable," yet such a result seems to follow with remorseless logic from the wording of the section. In his book, *The Law of Theft*, Professor J. C. Smith has suggested that such a result may be avoided by saying that a person can only believe he has reasonable grounds for making a demand when he believes that reasonable men would regard the grounds as reasonable. However attractive on policy grounds such a view may be, it is submitted that the words of the section are clear, and no objective requirement can be spelt out of them.[57]

The final set of cases that can be grouped under the rubric of victimless crimes involve demands for the repayment of debts arising out of gambling. And here, there is happily almost a unanimous belief in the proposition that one may threaten public posting, or other such negative publicity, in order to recover a gambling debt—without being held guilty of extortion.[58]

Any time the law treats demands accompanied by menaces and threats as noncriminal, that is an advance for the cause of liberty. But it will not do to make too much of this rare unanimity in celebration of the rights of free speech. These cases are only very limited support for the concept of legal black-

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[57] *See Demanding with Menaces*, *supra* note 1, at 142-43. *See also* MacKenna, *The Theft Bill-II, Blackmail: A Criticism*, [1966] CRIM. L. REV. 467, 468-69.

[58] *See generally* Campbell, *supra* note 6, at 388-96; *Demanding with Menaces*, *supra* note 1, at 129-30.

mail. The would-be blackmailer is hemmed in by a welter of restrictions: This threat must arise out of a "legitimate business interest" and might well not apply to "a casual bet made between two private persons."[59] No more than the amount actually owed may be demanded and he cannot make any threats other than posting. The blackmailer can only enforce debts owed to himself which arise out of a "merely void and not illegal transaction."[60] All in all, this is hardly a stirring victory for the forces of reason and justice to blackmailers.

C. *Accusations of Real Crimes*

We now turn to blackmail attempts in which the "victim" is threatened with a charge of criminal behaviour. This is serious business because if the threat is carried out, the "victim" faces a potential term in prison, in some cases for many years. But there is no difference in principle between being threatened with exposure as a real criminal, and as a perpetrator of a victimless "crime." Acts such as sodomy carried stiff penalties, at least in bygone eras. And in the modern day, drug-related "criminals" can receive large fines and lengthy jail sentences.

Threatening to accuse someone of a crime is considered legitimate on all sides. We are analyzing rather the propriety of refraining from accusing someone of a crime for a fee. And this is an entirely different matter. It is certainly legal to threaten to accuse someone of a crime—provided it is not motivated by being paid off for one's silence. If the accused is actually guilty, then the accusor is considered a public benefactor, not an extortionist. But if the threat is made in order to elicit a payment from the guilty party, then the preponderance of legal opinion is that the accusor is indeed guilty of extortion.[61]

There is also some legal precedent and support for the view that one may threaten to prosecute for a crime, and offer the "victim" the option of paying him off for withdrawing without being considered guilty of menacing (extortion).[62] Most commentators have drawn a sharp distinction between the threat

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[59] *See* Campbell, *supra* note 6, at 394-95.

[60] *Id.* at 393.

[61] *Id.* at 388 ("[S]urely my liberty to inform the police that I know or suspect a crime to have been committed is a moral liberty—what is immoral, and what I have no liberty to do, is to sell or attempt to sell it for money."). *See, e.g.*, Regina v. Woodward, 88 Eng. Rep. 949, 949 (K.B. 1707) ("Every extortion is an actual trespass, and an action of trespass will lie against a man for frighting another out of his money."). *See* Comment, *Extortion-Collection of Debts by Threat of Criminal Prosecution*, 13 BAYLOR L. REV. 383, 388 (1961) ("The threat of a criminal prosecution though possibly a very efficient collection tool could be misused by the unscrupulous, for under the guise of the collection of a just debt such a threat could be used to fleece persons not owing debts who would rather pay than be troubled with the matter.").

[62] *See, e.g.*, State v. Burns, 161 Wash. 362, 297 P. 212 (1931) (demand can not exceed the

of a civil and a criminal suit. Although the mainstream opposition to the threat of criminal prosecution is very strong, most commentators advocate the legitimacy of a threat of civil suit for recovery of owed money.[63]

In our view, this distinction should have no legal relevance whatsoever. Since it is entirely legitimate to bring suit in civil court or to assist in the prosecution of a crime, it ought to be legal to threaten to do so. And if this be so, it ought to be lawful to offer the "victim" the option of payment for the dropping of a suit—of *either* type.[64]

Moreover, one cannot overlook the indirect effect of the blackmailer in reducing crime.[65] Not that it was ever necessarily any part of the intention of the blackmailer to play so public-spirited a role. But as Adam Smith concluded, it is "not from benevolence" that many economic actors accomplish beneficial, but unintended goals. And so it is with the blackmailer.

How does this work? Consider the following example:

> A writes to B saying "Pay me $100 or I will tell the police I saw you shoplifting." Assuming A saw B shoplifting he is not only legally entitled to inform the police, but he has a moral duty to do so. Nonetheless, A commits an offence because although the action threatened is justifiable the demand as an alternative to it is not.[66]

Let us assume that the effect, at least marginally, of declaring A's blackmailing behaviour criminal will be that he is less likely to engage in it. If so, there will be *less* pressure placed upon the real criminal, B, the shoplifter. A has two motives for opposing B: financial considerations (the blackmail) and public spiritedness (turning B over to the police purely for the emotional satisfaction of stopping crime). If blackmail were illegal, A might act against B out of public

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amount actually owed).

[63] *See* Winder, *supra* note 1, at 31 ("It was held to be no offence at common law to obtain money by means of a threat to bring a penal action and the *ratio decidendi* would apply also to a threat to prosecute for any crime.").

[64] *See Demanding with Menaces*, *supra* note 1, at 128:

> [T]he effect upon the recipient [of a threat of civil suit] would be much the same as a threat of criminal proceedings. In such a case what the victim generally fears most is public exposure of his improper conduct, and such exposure takes place equally in civil as in criminal proceedings.

See also Williams, *Blackmail* (pt. 2), *supra* note 13, at 166:

> It may also be pointed out that the distinction between threatening civil proceedings (which is allowable) and threatening criminal proceedings (which is not) is somewhat artificial when what the victim most dreads is exposure. Exposure follows as much from the bringing of civil proceedings as from the launching of a criminal prosecution.

[65] For the argument that blackmailers indirectly benefit society, see Nadelmann, *The Newspaper Privilege and Extortion by Abuse of Legal Process*, 54 COLUM. L. REV. 359, 360-61 (1962).

[66] *Demanding with Menaces*, *supra* note 1, at 127.

spiritedness, but presumably he would not blackmail B. If blackmail were legalized, however, there will arguably be *more* pressure placed upon the real criminal. While it is true that some of the formerly public-spirited might lose their sense of civic responsibility, and take up the profession of blackmail, this too would tend to reduce the activity of real criminals. It might be less effective in that the blackmailer might offer the criminal a "lighter sentence," i.e., an option preferable to incarceration. On the other hand it might be more effective in crime prevention if the blackmailers are more efficient at ferretting out such crimes.

The point is, the blackmailer is like a parasite on the criminal. In this case A preys on B. And the more he does so, the less shoplifting and other such crime there will be. The law of economic incentive applies to shoplifters as well as blackmailers.

V. CONCLUSION

Let nothing said above be interpreted as affirming the propriety or morality of blackmail.[67] This practice has not been claimed to be ethical. The thesis of this article is merely that blackmail is not akin to theft, not an invasive act, nor threat thereof, nor an initiation of violence, nor a violation of rights—and that therefore it should not be prohibited through force of law.

Our present blackmail statutes do not protect the persons or property of the so-called victims of blackmail. Society would be better off, and human rights more secure, if our blackmail legislation were terminated.[68]

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[67] *See* ETHICS, *supra* note 7, at 127:

> When I first [articulated a] right to blackmail. . .I was met with a storm of abuse by critics who apparently believed that I was advocating the morality of blackmail. Again—a failure to make the crucial distinction between the legitimacy of a right and the morality or esthetics of exercising that right!

[68] For a reply to objections to the theory of blackmail defended above, see Block & Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A.L. REV. 37 (1985).