

## ARTICLES

### THREATS, BLACKMAIL, EXTORTION AND ROBBERY AND OTHER BAD THINGS

Walter Block\*

In his article on threats, Steven Shavell starts off his analysis of threats reasonably enough, by defining and distinguishing between four different varieties.<sup>1</sup> To put this into table form, they are as follows:

<u>Case</u>	<u>Threat: Give me valuable consideration, or I will:</u>
1. Robbery	physically injure you or your property right now
2. Extortion	physically injure you or your property in future
3. Blackmail	reveal your secrets
4. Business	withdraw business (refuse to buy from you) <sup>2</sup>

In the first three cases the demand is that the target of the threat give the threatener money, or perhaps some other valuable consideration such as sexual services. In the latter case, typically, the demand is for a lower price, quicker delivery, or some such.

These four cases divide naturally into two subsets. In the first category, extortion and robbery, the threat is to do something that no one would deny is illegal, and should indeed be prohibited by law. Namely the threat is to engage in a physical invasion of person or property, whether now (case 1) or in the future (case 2) it matters not which. If the first two comprise a matched set, so, too, do the last. For in this pair what is being threatened, or offered, is patently legal. Gossiping about secrets constitutes no more and no less than a paradigm right of free speech.

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1. See Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion and Robbery*, 141 U. PA. L. REV. 1877 (1993).

2. See *id.*

Similarly, at least in a free society, one may refuse to patronize a supplier for any reason at all, or for no reason. This holds, that is, as long as people are free to boycott while motivated by considerations of race, sex, religion, nationality; since we are not, we as a society do not, to that extent, constitute a free society, one based on contractual rights. States Epstein:

The refusal to deal for any reason lies at the root of a system of freedom of contract, itself the centerpiece of any common law order based on the autonomy principle. The employment discrimination laws represent the antitheses of freedom of contract.... (they are) an unjustified limitation on the principle of freedom of contract, notwithstanding the overwhelming social consensus in their favor.<sup>3</sup>

And in Rothbard's view:

Discrimination, in the sense of choosing favorably or unfavorably in accordance with whatever criteria a person may employ, is an integral part of freedom of choice, and hence of a free society.<sup>4</sup>

One would expect that the four cases would break naturally along this fault line (e.g., the first pair vs the second) for the authors who deal with them. If so, one would be disappointed. Shavell, for example, applies his version of economic analysis to these threats.<sup>5</sup> For him, the philosophical dividing line amongst the four threats separates off the last one from the first three; that is, for this author, the main distinction is between extortion, robbery and blackmail on the one hand, and business threats on the other<sup>6</sup>. It does not, as in my view, break them up into two pairs (e.g., extortion and robbery vs blackmail and business threats). Unfortunately, we are given no account of how this division came to be made, nor any explicit defense of it.

Another anomaly is that for Shavell the usual line of demarcation between the normative and the positive seems almost not to exist.<sup>7</sup> Although he tells us his analysis will focus on the costs and benefits of establishing a credible threat, he talks in the same breath of the social undesirability of threats, of the social advantage of laws punishing them, and of the virtues (emphasis added) of punishing preparatory behavior versus punishing the making of threats.<sup>8</sup> Further, he sees the threatenee as a victim.<sup>9</sup> This is easy to understand in the case of extortion and robbery. After all, these are not at all mutually agreed upon contracts. But in blackmail and refusal to engage in commercial interaction, it is not clear there is or can be a victim. Shavell,

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3. RICHARD EPSTEIN, *FORBIDDEN GROUNDS* at xii. (1992).

4. MURRAY N. ROTHBARD, *FOR A NEW LIBERTY*, 206 (1973); see also Walter Block, *The Economics of Discrimination*, 11 *JOURNAL OF BUSINESS ETHICS* 241-54 (1992); RICHARD HERRNSTEIN AND CHARLES MURRAY, *THE BELL CURVE* (1994); Michael Levin, *FEMINISM AND FREEDOM* (1987); MICHAEL LEVIN, *WHY RACE MATTERS* (1997).

5. See Shavell, *supra* note 1, at 1878.

6. See *id.*

7. See generally *id.*

8. See *id.* at 1878.

9. See *id.*

in any case, sees the blackmailee<sup>10</sup> and boycottee as "victims" without giving any reasons for this choice of descriptive appellation.

## I. DESCRIPTIVE ANALYSIS OF THREATS

### A. Preparatory Behavior

Shavell treats robbery and blackmail as legal equals<sup>11</sup>. However, to carry out blackmail, a person must merely obtain information about the intended target that the latter does not want revealed. To commit robbery, an individual must find a potential victim in circumstances where he could not defend himself or secure help; then, the perpetrator must threaten or commit violence against the victim. Interestingly, commercial threats, his fourth category, continues to occupy the historical memory hole. Let us resuscitate it. The parallel statement, here, would be: To engage in demanding a lower price, the commercial threatener must seek out a low price offerer. But it is not only threateners who undertake preparatory activity. Victims do too. According to Shavell, the blackmailee can, for example, reduce the number of unfaithful acts in which he engages, and the person fearful of robbery can stay home at night more often<sup>12</sup>. To continue our parallel constructed case, the businessman worried about the threat of customers who refuse to purchase can lower his price. As should by now be clear, it is unimportant whether threats are made or preparatory behavior is undertaken. The key element is whether or not the various actors have the right to do these things. Certainly, businessman has the right to threaten to go elsewhere unless his demands are met. So too does the gossip (or blackmailer) have the right to engage in free speech, at his own discretion. But it is equally clear that the robber or extortionist has no right whatsoever to threaten bodily harm if his demands are not met. How a scholarly commentator could overlook this basic point must continue to be a puzzle.

### B. The Making of Threats

Shavell quite reasonably asserts that for the victim to accede to the threat, "it must be that T's threat will be carried out if, but only if, V rejects the demand; for then V will profit by meeting the demand."<sup>13</sup> This state of affairs will obtain if T has zero cost in carrying out the threat, or gets angry when refused, or has paid a third party to act in this way, or wishes to establish a reputation as one who carries out threats when not paid off to hold back. Based on these considerations, Shavell correctly concludes "Rules that penalize the making of threats and their execution will

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10. See Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1798 (1993). Hardin uses the more neutral, and hence more welcome word "target." For a criticism of this article, although not on that ground, see Walter Block, *Blackmailing for Mutual Good: A Reply to Russell Hardin*, forthcoming, VT. L. REV.

11. See Shavell, *supra* note 1, at 1879.

12. See *id.*

13. *Id.* at 1881.

generally increase the expected cost of making threats, and thus reduce the number of occasions in which a threatener will decide to make a threat."<sup>14</sup>

But now comes the puzzler. States our author:

A complication with regard to a discovery that T is accepting payments is that this in itself may well not be illegal. If it is not illegal, then T's acceptance of payments must be combined with other evidence for it to help in convicting T of making threats. Similarly, T's execution of a threat may not be illegal (suppose the threat is to expose information) and thus must be combined with other evidence to assist in convicting T.<sup>15</sup>

The difficulty is that it is hard to see why our author would be so intent upon convicting T, given that he is engaged in what would otherwise be construed, even by Shavell, as "not...illegal."<sup>16</sup> Since when does the law, in all its majesty, seek to punish legal behavior?

### C. Application to Different Types of Threat.

Shavell's treatment of robbery and extortion is, given his logical positivist outlook, a reasonable one, except that he seems to have only private robbers and extortionists in mind. However, as is well known, governments, also, may contain bands of extortionists and thieves, and of course far worse.<sup>17</sup> It would have been of great interest to see how Shavell would have incorporated this phenomenon into his analysis. The difficulty is that his remarks do not apply in a straightforward manner to a criminal sovereign. For example, Shavell states "Legal rules against robbery undoubtedly reduce the amount of robbery substantially, despite the incidence of this crime."<sup>18</sup> But the leaders of government make the legal rules and, presumably, do not enact any that would ensnare themselves. Similarly, our author mentions "... the legal rules against extortion are probably effective in deterring a tremendous amount of that activity; in the absence of the enforcement of legal rules against extortion, we would likely be overrun by extortionate enterprise."<sup>19</sup> But when governments threaten to jail us if we refuse to pay unjustified taxes they engage in extortion and no "legal rules" prevent them from so doing.

Two types of extortion come readily to mind, one engaged in by government itself, the other permitted by it. The first is the practice, on the part of numerous District Attorneys, of prosecuting non criminals for offenses which would not otherwise attract their attention, when their ultimate goal is to induce them to provide

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14. *Id.* at 1883.

15. *Id.* at 1883, n.15.

16. *Id.*

17. See generally ROBERT CONQUEST, *THE GREAT TERROR* (1990); ROBERT CONQUEST, *THE HARVEST OF SORROW* (1986); STEPHANE COURTOIS, NICOLAS WERTH, JEAN-LOUIS PANNE, ANDRZEJ PACZKOWSKI, KAREL BARTOSEK AND JEAN LOUIS MARGOLIN, *THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION*, (trans. from French by Jonathan Murphy and Mark Kramer), 1999; R. J. RUMMEL, *DEATH BY GOVERNMENT*, 1996.

18. See Shavell, *supra* note 1, at 1888.

19. *Id.* at 1889.

evidence against major criminals.

How often, for example, have we seen in television cop shows a tableau where the police threaten to harass an innocent businessman unless he turns on a malefactor. But this is no less than extortion. The threat is to prosecute this innocent person (an illegal act) unless he does their bidding.

The second example comes from the arena of labor relations. According to union legislation such as the Wagner Act, it is illegal to refuse to "bargain fairly" with organized labor. But shunning, or the boycott, or refusal to deal with, is part and parcel of the right of free association<sup>20</sup>. To be forced to "deal with" someone against your will is to be extorted. Prohibitionists of blackmail such as Shavell never protest such extortion, even though, unlike blackmail, here the threat is to use violence, and it is made by government.

For a third source of cases illustrating this point Russell Madden states: Extortion has always been a favorite activity of governmental agencies. Ordinarily, threatening someone with harm unless he accedes to another's demands is rightfully a crime. Whether the perpetrator is a neighbor seeking to use your lawn mower or an organized crime thug reminding you to pay your monthly 'protection fee,' such behavior is condemned and prosecuted rigorously.... Unfortunately, in today's political reality, legal extortion is the guiding principle that authorities at all levels of government practice with enthusiasm... Typically, a property owner is required to comply with government demands in return for being permitted to engage in some activity.<sup>21</sup>

Examples given include building codes, zoning, payments for new building, the IRS, constraints on tobacco and alcohol producers, etc.

This, it cannot be over emphasized, is truly a puzzle. Extortion, which is the threat of violence, and is clearly incompatible with rights, is intellectually justified by most scholars, while blackmail, which is merely the threat to take advantage of free speech rights, is denigrated by them.

In this analysis of Bolivia and Colombia, Shavell comes close to recognizing this point, but not close enough.<sup>22</sup> He shows evidence of realizing that the duly constituted governments, especially in this region of the world, are themselves robbers

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20. See generally Barry W. Poulson *Substantive Due Process and Labor Law*, 6 J. OF LIBERTARIAN STUDIES, 267 (1982); Morgan Reynolds, "An Economic Analysis of the Norris-LaGuardia Act, the Wagner Act and the Labor Representation Industry," 6 J. OF LIBERTARIAN STUDIES 227 (1982); MORGAN REYNOLDS, *POWER AND PRIVILEGE: LABOR UNIONS IN AMERICA* (1984); MORGAN REYNOLDS, *MAKING AMERICA POORER THE COST OF LABOR LAW* (1987); Richard K. Vedder and Lowell Gallaway, *The Great Depression of 1946*, 5 *Review of Austrian Economics* 3 (1991); Lowell Gallaway and Richard K. Vedder, *Wages, Prices and Employment: Von Mises and the Progressives*, 1 *REVIEW OF AUSTRIAN ECONOMICS* 33 (1987); Walter Block, *Labor Relations, Unions and Collective Bargaining: A Political Economic Analysis*, 16 J. OF SOCIAL POLITICAL AND ECONOMIC STUDIES 477 (1991); Walter Block, *Labor Market Disputes: A Comment on Albert Rees' 'Fairness in Wage Distribution'*, 7 *JOURNAL OF INTERDISCIPLINARY ECONOMICS* 217 (1996); Walter Block, *Comment on Richard B. Freeman's 'Labor Markets and Institutions in Economic Development'*, 23 *INT'L J. OF SOCIAL ECONOMICS* 6 (1996).

21. Russell Madden, *Or Else...*, 47 *THE FREEMAN* 749 (1997).

22. See Shavell, *supra* note 1, at 1889.

and thieves.<sup>23</sup> However, he contents himself with a glance at "certain guerilla and bandit groups"<sup>24</sup> which would appear not to be these officially in power.

Now consider his treatment of blackmail. Shavell certainly sees this behavior in a different light than extortion or robbery since he declares that when he "... reveal(s) his information ... this is not a crime" unlike the other two cases. Indeed, as he avers, "... it might be difficult to successfully prosecute the blackmailer in the absence of independent evidence that he had made a threat."<sup>25</sup> But how can making a threat to do something (reveal information) which is itself licit be a crime? And what are we to make of this statement "... the blackmailer can sometimes phrase the threats in a nuanced way to avoid crossing the line of criminality, even though the meaning of the threats will be clear to victims."<sup>26</sup> How can it be a crime if it avoids crossing the line of "criminality"? Yet our author characterizes such behavior, which even he believes has not crossed this line, as "blackmail" (by this term he denotes that a crime has been committed).<sup>27</sup> It is hard to avoid the conclusion that this statement constitutes a contradiction in terms.

However there is at least the seeming concession that "Unlike the victim of an extortion or robbery threat, the blackmail victim may suffer more if the threatener is brought to justice than if he is not."<sup>28</sup> If this is so, in what sense, then, can it be that the blackmailee is a "victim"? We know he is not -- certainly not when compared to the situation in which his secret is in the hands of a gossip, who will spill the beans no matter how valuable silence is to the secret holder. If we are going to incarcerate the blackmailee because he is a "victim," and his position is far worse when the gossip has power over him, then we must not only jail the gossip, we must do so for an even longer length of time. Since no one advocates criminalizing gossip, it is hard to understand why anyone would entertain this notion for blackmail, particularly if victimization is the concern.

Following Epstein<sup>29</sup>, Shavell worries that legalization would "vastly increase...the scope of blackmail."<sup>30</sup> But if this activity should be legalized, why should we worry about it as a matter of law, any more than we are concerned about the expansion of bowling, or television, or gossip, for that matter? Shavell is unhappy at the prospect that Epstein's "Blackmail Inc." would "entice people into embarrassing

23. See *id.*; see also MURRAY N. ROTHBARD, *POWER AND MARKET: GOVERNMENT AND THE ECONOMY*, (1970); MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY*, (1998); LYSANDER SPOONER, *NO TREASON* (1966); BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* (1990); HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993); Edward Stringham, *Market Chosen Law*, 14 J. OF LIBERTARIAN STUDIES 53-78 (1998); Patrick Tinsley, *Private Police: A Note*, 14 J. OF LIBERTARIAN STUDIES 95-100 (1998).

24. *Id.* at 1889, n.21.

25. *Id.* at 1889.

26. *Id.* at 1890.

27. See *id.*

28. See Shavell, *supra* note 1, at 1891.

29. See Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); but see Walter Block and David Gordon, *Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37 (1985).

30. Shavell, *supra* note 1, at 1891.

situations<sup>31</sup> and then blackmail them for so acting.<sup>32</sup> But there is already quite bit of enticement going on, with virtually none of it emanating from the private sector. The prime examples are furnished by the government so favored by Shavell, with its unwise and improper prohibition of drugs.<sup>33</sup> If he were seriously concerned about enticement<sup>34</sup> he could do worse to set his sights on that arena instead of the one at hand.

Our author probes the relationship between the legal status of blackmail and the rate of capture and degree of punishment for criminals, real criminals that is, ones with real victims, who actually suffer from the threats and invasions made upon them.<sup>35</sup> He correctly notes that prohibition of blackmail will tend to reduce the probability that criminals are punished "because people will generally have less incentive to obtain information about the commission of crimes when blackmail is illegal."<sup>36</sup> As against that, Shavell claims that people who already have information on criminal behavior will be more likely to report it to the state authorities under blackmail criminalization, which is true enough, and that "under plausible assumptions the state's punishment will be more severe than a blackmailer's."<sup>37</sup>

This doesn't seem all that plausible. First, blackmail is not the only victimless crime. Also included under this rubric must be drugs, pornography, prostitution, gambling and cigarettes. To the extent that government allocates scarce police and court manpower to such exercises of personal freedom, it incapacitates itself from retarding real crime. Second, the public sector "justice" system includes plea bargaining, "turn-em-loose-Bruce" judges, Miranda warnings, search technicalities and other ACLU inspired interferences with the just punishment of criminals. Inmates are paroled before serving sentences by boards composed of social workers,

31. *Id.*

32. *See id.*

33. *See generally* DAVID BOAZ, ED., *THE CRISIS IN DRUG PROHIBITION* (1990); Walter Block, *Drug Prohibition: A Legal and Economic Analysis*, 12 J. OF BUSINESS ETHICS 107 (1993); Walter Block, *Drug Prohibition, Individual Virtue and Positive Economics*, 8 REV. OF POLITICAL ECONOMY 433 (1996); Milton Friedman, *An Open Letter to Bill Bennett*, WALL ST. J., September 7, 1989; RON HAMOWY, ED., *DEALING WITH DRUGS CONSEQUENCES OF GOVERNMENT CONTROL* (1987); Horace F. Judson, *HEROIN ADDICTION IN BRITAIN* (1974); THOMAS SZASZ, *CEREMONIAL CHEMISTRY: THE RITUAL PERSECUTION OF DRUGS, ADDICTS AND PUSHERS* (1985); MARK THORTON, *THE ECONOMICS OF PROHIBITION* (1991).

34. Or is the proper word here, "entrapment"? After all, there is quite a lot of enticement that goes on in the market place, e.g., advertising, without anyone calling for its total elimination (apart from cigarettes). Perhaps this is next on this wish list for the would be regulators of our society.

35. *See* Shavell, *supra* note 1, at 1891.

36. *Id.* For this insight Shavell credits Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); Richard Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817 (1993); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984); Ronald Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655 (1988); Daniel Ellsberg, *The Theory and Practice of Blackmail*, in *BARGAINING: FORMAL THEORIES OF NEGOTIATION* 1975; William Landes and Richard Posner *The Private Enforcement of Law*, 4 J. OF LEGAL STUD. 1, 43 (1975). *But cf.* Walter Block, *The Blackmailer as Hero*, THE LIBERTARIAN FORUM, December 1972, 1-4; Walter Block, *DEFENDING THE UNDEFENDABLE* (1976); Walter Block, *Blackmail and 'Economic' Analysis: Reply to Ginsburg and Shechtman*, forthcoming; Walter Block and David Gordon, *Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37 (1985); Walter Block and Gary Anderson, *Posner on Blackmail: A Critique*, forthcoming; Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997).

37. *Id.* at 1892.

psychologists and "criminologists" none of whom bear any responsibility<sup>38</sup> for the recidivism they engender.<sup>39</sup> It is difficult to believe that private enterprise blackmailers could not do a better job of quelling crimes than the self enfeebled state.

On the other hand, there is a sense in which our author may be correct, although he cannot be expected to derive much comfort from it. I refer to the extra legal punishment to which prisoners (many of them guilty of only minor, or, worse, victimless crimes) are subjected in statist jails: homosexual gang rapes.<sup>40</sup> Here, the state, unable to promote justice even in its own jails, truly comes into its own as a savage agent of punishment, in a manner way beyond the scope of any mere blackmailer. However, this of course is highly illegal, and should presumably be stopped. It is remarkable, however, that Shavell can place such great faith in a public institution which has so far proven unable to stop these occurrences, to say nothing of its failure to keep its own prisons drug free. He complains of the lack of "public humiliation"<sup>41</sup> for the criminal who is made to pay for his crime by a blackmailer. This cannot be denied. However, a spell in the "pokey" is almost a rite of passage in the strata of society from which criminal behavior is most highly over represented. Far from a "public humiliation," it is almost a badge of honor. Even if, somehow, Shavell were correct in this contention, he would still have to come to grips with those who liken blackmail to a living death or hell on earth. For example, Coase<sup>42</sup> refers to it as "moral murder".<sup>43</sup>

Our author focuses attention on three "commonly made threats and other legally permissible threats. The first is to withdraw business unless price ... is favorably adjusted." The second is to threaten a lawsuit unless paid damages, and the third is to build a fence on your own property blocking your neighbor's view unless he pays you or "constrains his bothersome dog"<sup>44</sup> But the question facing Shavell, and others who advocate prohibition, is why should these threats be legal but not those made by the blackmailer? Curiously, our author seems unaware that such a question might reasonably be posed. Certainly, he does not even so much as attempt to answer it.

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38. See generally THOMAS SOWELL, *The Vision of the Anointed* (1995); THOMAS SOWELL, *A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES* (1987); THOMAS SOWELL, *INSIDE AMERICAN EDUCATION: THE DECLINE, THE DECEPTION, THE DOGMAS* (1993).

39. In a just society, surely, one dedicated to the diminution of crimes with victims, these who determine as professionals that the people they return to the street will not commit further outrages should bear responsibility for these acts when they do occur. That is, these parole officers should be made to pay the penalty for these additional crimes their parolees unleash upon the new innocent victims.

40. This was depicted most dramatically in the recent movie "Shawshank Redemption."

41. Shavell, *supra* note 1, at 1892.

42. See Ronald Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655 (1988).

43. See Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1689 (1993). For a critique of this article, see Walter Block, Hans-Hermann Hoppe and Stephan Kinsella, *The Second Paradox of Blackmail: A Reply to DeLong*, forthcoming in Q. J. BUSINESS ETHICS.

44. See Shavell, *supra* note 1, at 1893-94.

## II. NORMATIVE ANALYSIS OF THREATS

A. *Commentary on the General Effect of Threats on Social Welfare*

"... efforts expended by threateners putting themselves in a position to carry out threats is a social waste; such effort is not producing anything of value for final consumption. Similarly, precautions taken by potential victims avoiding threats reduce social welfare."<sup>45</sup>

There are several problems here. First, it is by no means obvious that nothing in threats is productive of final consumption value. What about psychic enjoyment? Suppose a person enjoys the making of the threat per se, the sheer value of not only seeing people squirm, but of actually having caused this discomfort. For such misanthropy to be ruled out of court Shavell will need far more than the value free economics he inconsistently brings to the table. Namely, he would need an ethical theory to attain this goal - one which he valiantly, but not successfully, attempts to eschew.

Second, even accepting the "nice guys don't do that" value judgment implicit in his analysis, Shavell's general theory applies only to robbery and extortion, not to blackmail, and, even by his own admission not to the three threats he discusses in his section D.<sup>46</sup> That is to say, given that we have agreed not to count malevolence as a value, we can now definitely state that robbery and extortion are wealth destroying. There is only loss, no gain (as we are now refusing to count the improved condition of the sadist as a social benefit.) Certainly, these two activities cannot pass muster under Pareto conditions, as there is at least one person, the victim of robbery or extortion, who must count himself worse off. (If the robbery victim did not consider his utility to be reduced by this event, it must be something of the sort that he was just on the point of giving the robber the money anyway, and he doesn't mind the robber jumping the gun, so to speak. In other words, it wasn't really a robbery.)

But this does not at all apply to blackmail nor Shavell's three other cases. Here, there is no need to preclude sadism from counting as a benefit -- because there need not be any such motivation involved. These examples, moreover, satisfy the Pareto criterion; there is at least one person benefitted by the contract in question, and no one who is worse off. Of course, it cannot be denied that the blackmailee, the seller, the injured party and the neighbor with a view would be better off if the blackmail had not unearthed the secret, the buyer had not found a better offer, the injured party was not contemplating a law suit and the property owner had no desire to build a fence. But all this is beside the point. The real issue is, given that these four

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45. *Id.* at 1894.

46. *See id.*

have done what they have done (all of which should be considered perfectly legal) will they now worsen the well being of their contractual partners by making an agreement with them? And the unavoidable answer is that they will not. How could it be otherwise? For if the blackmailee, (etc., ) felt that the payment for silence (etc.,) could reduce his wealth, he would simply have refused the offer (or threat.) All voluntary contracts between consenting adults (specifically concluding these four) must by definition fulfill Pareto conditions. If one partner felt the contract put him in an inferior position, he would simply have refused to sign it.

So much for Shavell's first category, preparatory behavior. The second is "the making of threats independently of whether they are eventually expected"<sup>47</sup>. These will reduce welfare, he tells us, in that they "can create fear and anxiety in victims." While there may be some psychologists who would agree with Shavell in this, there are others who disagree.<sup>48</sup> The latter reason that fear and anxiety are products of irrational thoughts people feed themselves, not of actual events which might come about. Suppose, for the sake of argument, that our author is correct in his foray into the field of psychology, and that Ellis and Edelstein are wrong in their conclusions. This still does not save his contention that since threats create fear and anxiety, they reduce economic welfare.

For again, we must set beside the minus of fear and anxiety and the plus of imposing such emotions on other people, and enjoying their discomfort. And this, again, applies to only the best of the examples Shavell can marshal, namely, robbery and extortion. When we come to blackmail, the threat to buy elsewhere, to bring suit, or to build a fence, the fear and anxiety created in the victim if any does result (remember, we are still only supposing this to be so, contrary to Ellis and Edelstein, for the sake of argument)<sup>49</sup>, can be more than offset by the contracted gains to be made: the silence, freedom from a lawsuit, the uninterrupted view, etc.

Still less does it save Shavell's claim that things which reduce economic welfare ought to be banned by law; for this, as we have seen, is an ethical conclusion, which needs support from an ethical premise--something our author refuses to vouchsafe us. Contends Rothbard in this regard:

... it is the responsibility of any scientist, indeed any intellectual, to refrain from any value judgment whatever unless he can support it on the basis of a coherent and defeasible ethical system. This means, of course, that those economists who, on whatever grounds, are not prepared to think about and advance an ethical system should strictly refrain from any value pronouncements or policy conclusions at all.<sup>50</sup>

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47. *See id.*

48. *See generally* MICHAEL R. EDELSTEIN, AND DAVID RAMSEY STEELE, *THREE MINUTE THERAPY* (1997); ALBERT ELLIS AND ROBERT A. HARPER, *A GUIDE TO RATIONAL LIVING* (1961).

49. *See generally id.*

50. Murray Rothbard, "Praxeology, Value Judgements and Public Policy", in *THE FOUNDATIONS OF MODERN AUSTRIAN ECONOMICS* (1976); *see also* Walter Block, *On Value Freedom in Economics*, 17 *THE AM. ECONOMIST* 38 (1973); Murray N. Rothbard, *Value Implications of Economic Theory*, *Am. Economist*, Spring 1973

Shavell's perspective on the matter is problematic. When I open up a competitive grocery store across the street from yours, we do not decide the legality of my action on the basis of whether or not the benefits to me and to my new customers outweigh the losses to you. Rather, we allow me to do this action because it is done with my own private property, and does not conflict with any of your rights. Why should we analyze blackmail, or any other law for that matter, differently?

Shavell seems most concerned with "repeated threats," presumably made by the blackmailer.<sup>51</sup> These are "potentially a significant detriment to social welfare." But this applies with just as much force as the buyer's threat to take his business elsewhere unless price is lowered. This, too, can be done repeatedly. Curiously, our author seems not at all concerned with the deleterious effect of these ongoing threats. Why this irrational prejudice against the ancient practice of blackmail?

### *B. Optimal Use of the Law Against Undesirable Threats*

Having established at least to his own satisfaction his claim that threats are undesirable, Shavell now moves to a consideration of how the law can optimally deal with them.<sup>52</sup> Interventions can be made at any of the four stages: preparatory behavior, the making of the threat, collection of payment and the carrying out of the threat.<sup>53</sup> Since he thinks we have already reached the limits of the "magnitudes of punishment" he advocates government action on all four margins.<sup>54</sup>

As far as preparatory behavior is concerned, such as setting eavesdropping devices in order to obtain secrets with which to blackmail people, Shavell makes an important and relevant distinction. Regarding government intervention, he sees a

"difficulty in differentiating innocent behavior from that which is preparatory to the making of threats. If, for instance, a person is prowling the halls of a motel with a camera, it will be hard to demonstrate from this alone that he was planning to take photographs for blackmail."<sup>55</sup>

This is somewhat unusual for our author since his self styled economics approach does not readily lend itself to distinguishing innocent behavior from the guilty variety.<sup>56</sup> In any case, if the prowling photographer may be "innocent" of blackmail, why may not this apply to the blackmailer himself? The difficulty is that Shavell nowhere clarifies the distinction between guilt and innocence. He holds the blackmailer guilty of criminal behavior for making threats, but not the fence builder,

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51. See Shavell, *supra* note 1, at 1894.

52. See *id.* at 1895.

53. See *id.* Shavell claims three, but I count four.

54. See *id.*

55. *Id.* at 1895-96.

56. First of all, as we have seen above, these are normative terms, and the "economic approach" is presumably a positive one. Second, did Shavell really make this distinction, he would have taken the diametric opposite stance of the one he did on the legalization of blackmail, for, as has been shown, it consists of nothing more than the juxtaposition of two acts, each of which, when carried out alone, would be deemed by all (including himself) to be innocent.

the price shopper (gouger?) and the lawsuit launcher, who are equally "guilty" of making threats. Seemingly, he does this for no other reason than that the latter are not widely considered legally objectionable, while the former is.<sup>57</sup>

He also rejects government intervention at the level of threat making on the ground that "all three types of threat," e.g., robbery, extortion and blackmail, tend to keep their behavior hidden from the eyes of the law.<sup>58</sup> This cannot be denied. But why the linkage between "all three" of these threats? Why do the lawsuit launcher, the bargain hunter and the fence builder keep slipping down the memory hole?

In like manner Shavell does not advocate capture of the presumably evil blackmailer for receiving payment or carrying out the threat. Why? Again, the malefactor will tend to avoid the light of day for his "evil" doings. Since none of the four is likely to yield results, the plan appears to be to utilize all of them. But then our author states: "... if proof of threat-making had been sufficient, a conviction would already have been obtained."<sup>59</sup> This, however, is incorrect. For blackmail consists of two legal whites, each of which, were they to occur in isolation, would be totally licit. Namely, the threat to reveal a secret and a demand for money. The peculiarity (not to say logical contradiction) of blackmail prohibitionism is that when these two take place as part of one larger act, the two legal whites somehow turn black. Thus, Shavell is incorrect in asserting that the threat, alone, when not coupled with a demand for money, is either illegal or constitutes an act of blackmail which should be prohibited. No "conviction" could be obtained merely on the strength of a threat alone. This, standing on its own, would not be blackmail but rather the issuance of a warning that a person intends to engage in malicious gossip.

### *C. Applications*

Shavell considers a socially harmless act such as taking a shower or engaging in sexual intercourse with one's own wife in private. Nevertheless, due to considerations of modesty, a man might be willing to pay to prevent circulation of pictures of such events.

It is for this reason, apparently, that he states: "In such cases blackmail is almost, but not entirely analogous to robbery or extortion and thus seems socially undesirable."<sup>60</sup> Remarkably, no further reason for this claim is given. This is difficult to understand, given that the law allows for the circulation of such pictures. Suppose a paparazzi with a long distance camera took a picture through an open window of a married couple engaged in sexual relations. Licit, so far. If a man can see it, the photographer can record it. And his viewing of this act violates no rational law. Next, this worthy shows the picture to a few friends, perhaps even to an editor. Again, no

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57. On the other hand, there are laws against price "gouging" if not shopping around for better bargains, although no one has ever explained the difference between these two economic acts (apart from the fact that one occurs on the demand side, the other on the side of supply).

58. See Shavell, *supra* note 1, at 1896.

59. *Id.*

60. *Id.* at 1897.

law worthy of the name has yet been broken. Nor will it be when a newspaper publishes it. For if the photographer owns his view of the naked people, he owns the pictured representation of that vista -- e.g., the art work in question -- and may do with it precisely as he wishes. But, if, (horrors!), the photographer has the common decency to approach the subjects of his photograph, to give them the option of regaining their privacy then, at long last for Shavell, his act finally becomes illegitimate. That this is precisely the point at which the blackmailer becomes the benefactor of the victim, whereas before he was not, matters not one whit to our author.

As long as they can be seen with the naked eye, and or with the help of technological enhancement, they have no right of privacy<sup>61</sup>. According to some primitive societies, in sharp contrast, to take someone's picture is to (somehow) steal his soul. We in the west, presumably, reject such claims as arrant superstition. However, blackmail law as presently construed would appear to be in keeping with such uncivilized understandings of causation.

Shavell gives as the reason for his stance the claim that "the efforts to undertake blackmail and the efforts to guard against it are social wastes."<sup>62</sup> He says this, but we are not required to take it at face value, since he does not apply this to the plaintiff, the fence builder, the bargain hunter. Our author also states "... if people take showers less frequently (for example, when they are in hotel rooms), they experience a loss in utility for no socially good reason."<sup>63</sup> This, too, is problematic. Any hotel which makes available to outsiders views of its showering guests who wish to retain their privacy (e.g., are willing to go to the effort of lowering blinds, closing bathroom doors, shower curtains) is a hotel which will soon have no customers. If Shavell were correct, it would be a "social waste" for hotels to install doors, blinds, shower curtains, and for guests to be "forced" to avail themselves of these accommodations if they wish privacy. Is taking and circulating pictures of people against their will conducive of "social welfare"? Shavell is an agnostic on this question:

Consider the case of photographs of a person taking a shower being sent to the person's co-workers. It could be that those who see the photographs would not enjoy viewing them in any sense; rather, they would feel awkward, especially when in the presence of the blackmail victim. Another possibility, though, is that people might enjoy seeing photographs of a person taking a shower. For example, the blackmail victim may be an extremely attractive young woman and her male co-workers may take a prurient interest in the photographs. Thus, in theory, it is not apparent how revelation of information would affect social welfare.<sup>64</sup>

This is a particularly troublesome way to do public policy analysis. The issue necessarily turns on a weighing of the utilities of one person against those of another

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61. See generally MURRAY ROTHBARD, *THE ETHICS OF LIBERTY* (1998).

62. Shavell, *supra* note 1, at 1897.

63. *Id.* at 1898.

64. *Id.*

(or others). But it is impossible to interpersonally compare utility.<sup>65</sup> This agnosticism would appear to be the inevitable conclusion of any such analysis. Judges may indeed try to rule so as to maximize wealth<sup>66</sup>, but this attempt is fatally compromised by the fatally methodology of interpersonal comparisons of utility.

Much more reasonable, and conducive to definitive conclusion, is to determine such matters on the basis of private property rights. That is, it is up to the plaintiffs "to close the doors shutters and blinds, etc." If they do so, no one can even see them in embarrassing circumstances, but alone capture their images forevermore. But if they fail to take these elementary precautions, it is open season on looking at and photographing them. And if a busybody with "prurient interests" can view those engaged in sex or showering, he can share these visions with others of like mind. As well, he can refrain from so doing, for a fee! That is one of the implications of a free society.

Shavell considers cases of blackmail where the information concerns non criminal but socially harmful activity, for example "... the wasteful but not illegal spending of church funds by a minister."<sup>67</sup> For our author, the case for blackmail under this assumption is "ambiguous"<sup>68</sup>. On the one hand there will be a reduction in undesirable "wasteful" activities.<sup>69</sup> On the other blackmail comes in a package deal: there are also search costs, and perhaps expensive efforts to guard against being uncovered. But it is more than just passing curious that this author should see "ambiguity" in so simple a scenario. After all, it is no more than a commonplace for there to be costs and benefits attached to economic activity. Markets solve such problems every day. For example, I am now sitting on a chair. It has benefits, but also costs. Is there any "ambiguity" about the transaction that brought this item into my possession? Not a bit of it. In my subjective estimation, I placed the chair higher than the price I had to pay for it. It least in the ex ante sense, all such choices must always be beneficial -- as there is no other criterion on the basis of which to judge

65. See Murray Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," Center for Libertarian Studies, Occasional Paper #3, 1977

66. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J. OF LAW AND ECONOMICS 1 (1960); see also Steven G. Medema, *The Trial of Homo Economicus: What Law and Economics Tells Us about the Development of Economic Imperialism*, NEW ECONOMICS AND ITS HISTORY: HISTORY OF POLITICAL ECONOMY ANNUAL SUPPLEMENT (1997); STEVEN G. MEDEMA, COASEAN ECONOMICS: LAW AND ECONOMICS AND THE NEW INSTITUTIONAL ECONOMICS (1997); Steven G. Medema and Warren J. Samuels, *Ronald Coase on Economic Policy Analysis: Framework and Implications*, in COASEAN ECONOMICS: LAW AND ECONOMICS AND THE NEW INSTITUTIONAL ECONOMICS (Steven G. Medema, ed.) 161-83 (1997); Steven G. Medema and Richard O. Zerbe, Jr., *Ronald Coase, the British Tradition, and the Future of Economic Method*, in COASEAN ECONOMICS: LAW AND ECONOMICS AND THE NEW INSTITUTIONAL ECONOMICS (Steven G. Medema, ed.) 209-38 (1997); Steven G. Medema, *The Coase Theorem*, in THE BLACKWELL ENCYCLOPEDIA OF MANAGERIAL ECONOMICS 31-33 (1997). For a sharply contrasting and critical view of this pro-Coasean literature, cf. Walter Block, *Coase and Demsetz on Private Property Rights*, 1 J. OF LIBERTARIAN STUDIES 111 (1977); Walter Block, *Ethics, Efficiency, Coasian Property Rights and Psychic Income: A Reply to Harold Demsetz*, 8 REVIEW OF AUSTRIAN ECONOMICS 61 (1995); Walter Block, *O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner*, 3 EUROPEAN J. OF LAW AND ECONOMICS 265 (1996); Walter Block, *Private Property Rights, Erroneous Interpretations, Morality and Economics: Reply to Demsetz*, Q. J. OF AUSTRIAN ECONOMICS, 1999;

67. Shavell, *supra* note 1, at 1898.

68. *Id.*

69. *Id.*

such matters.

A similar analysis applies in the present case. If the minister values secrecy more than the money demanded of him by the blackmailer, he will pay and we must judge that social welfare, at least from this one transaction, has increased, again in the *ex ante* sense. If the minister ranks these goods the other way around, he will not pay, and again social welfare will be enhanced (or at least not decreased) as the man of the cloth refuses to pay a greater value to achieve a lesser. In these circumstances, it will be up to the blackmailer as to whether or not to carry through in revealing the secret. Again there will be certain costs (postage, money for a telephone call, the risks of being associated with an immoral clergymen, perhaps) and benefits (an enhanced reputation for carrying through, practically required for the professional practice of blackmail.) Here, too, welfare will be promoted *ex ante*, as the blackmailer takes that course of action which seems most likely to benefit him.

Suppose "Mrs. Grundy" objects, on the ground that for her the occurrence of blackmail is a negative externality. Would we then have to renounce the claim that blackmail is wealth enhancing? Not at all. This third party simply has no way to demonstrate her preference.<sup>70</sup> She could be lying, or exaggerating. In any case, if we allow unprovable and unsupportable "neighborhood effects" into the analysis, we must, to be logical, carry through in all cases. If so, there is no warrant, then, to assume that my purchase of the chair was wealth creating. For surely, there is, somewhere, an obscure group of people who object to anyone sitting on chairs.

Shavell will undoubtedly have an objection to the foregoing. He might even agree on the micro level that each of these decisions will be welfare maximizing in the narrow individual sense. His concern, however, will be with the macro: will the value to the entire society of putting a crimp in the plans of all wastrel ministers be more, equally or less offset by the attendant costs? If this is truly his concern, he is doomed to disappointment. "Ambiguous" doesn't begin to describe this situation. To put it that way is to make it appear as if this were a mere empirical issue, one amenable to solution, at least in principle. But this is impossible to solve, depending as it does on interpersonal comparisons of utility. Another way to put the matter is to hark back to the diamonds - water paradox that so vexed Adam Smith. There is simply no economic way of telling whether all of one commodity is worth more than all of another since we never make such macro choices. (Although if we ever did, the better choice would not be too onerous a one, at least for diamonds vs. water.)

Shavell might have another objection: allowing blackmail may not sufficiently reduce ministerial wastefulness with church money. Two points need to be made in this context. First, blackmail cannot be expected to root out all incidence of such behavior; as long as it better attains this goal than the prohibition of blackmail, whether or not coupled with state activity to this end, it is salutary from a utilitarian point of view. Second, it seems an improper burden to place on the pro legalization side that blackmail has to root out such clergy misconduct, let alone do it more

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70. See Murray N. Rothbard, *Toward a Reconstruction of Utility and Welfare Economics*, San Francisco: Center for Libertarian Studies, Occasional Paper #3, 1977.

efficiently than governmental efforts. It is sufficient for the libertarian criterion that blackmail does not involve an initiation of violence against an innocent person. And it should be sufficient on utilitarian grounds that the two parties to the contract, the blackmailer and the blackmailee, both benefit from it. If it has salutary effects on third parties such as the minister, well and good. But this is hardly a requirement.

Shavell's third concern is with blackmail where the secret information concerns the commitment of a crime (e.g., a real one, that is, replete with a victim whose person or property is actually invaded). Previously he had concluded indeterminacy in criminal incentives in that with blackmail more thieves would be punished but some would receive lower monetary rather than imprisonment penalties. Now, he adds a new twist, the better and more clearly to show the social uselessness of legalized blackmail: rewards for providing information to the authorities leading to arrest and convictions. He states:

Rather than inducing individuals to obtain information by allowing them to blackmail someone, like a thief, these individuals could be equivalently induced, were that desired, by offering them a reward equal to the amount they could obtain through blackmail -- and by making blackmail illegal at the same time.<sup>71</sup>

Our author puts forth three reasons in behalf of this legal state of affairs. One, he thinks "the state can impose higher penalties."<sup>72</sup> We have already cast aspersions on this claim. Two, "presuming the judicial process has been designed to guard against errors, it is better to have this mechanism determine punishment than blackmailers"<sup>73</sup> Yes, and if horses were wishes, beggars would ride. If you pack enough heroic assumptions into your premise, you can validly conclude almost anything. By all means, let us assume into existence an all powerful, totally efficient and omni benevolent government; then, surely, it can outperform private enterprise<sup>74</sup>. And three, that old saw, the wastage (cost) of resources devoted to blackmail. There is a basic problem with Shavell's argument from reward: it violates *ceteris paribus* conditions. Here we are debating two kinds of sanctions against criminals, public and private (blackmail) ones. Things may not be evenly balanced, but at least it is a horse race. Along comes our author pressing his thumb down on one of the sides of the scale with wads of money. Why not try an infinite amount of money as a bounty, that would really highlight the inadequacy of blackmail?

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71. Shavell, *supra* note 1, at 1899- 1900.

72. *Id.* at 1900.

73. *Id.*

74. To say the least, this sentiment of Shavell's runs counter to everything with which the Public Choice School has become associated. See JAMES M. BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1971); JAMES M. BUCHANAN AND GEOFFREY BRENNAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION*, (1980); JAMES M. BUCHANAN, ROBERT D. TOLLISON, AND GORDON TULLOCK, EDs., *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY*, (1980); Robert Lloyd and Joseph P. McGarrity, *A Probit Analysis of the Senate Vote on Gramm-Rudman*, *PUBLIC CHOICE*, Nov. 1995, 81-90; Kevin B. Grier and Joseph P. McGarrity, *The Effect of Macroeconomic Fluctuations on the Electoral Fortunes of House Incumbents*, 16 *J. OF L. AND ECONOMICS* 143 (1998).

Two can play this game. I hereby propose a government subsidy for blackmailers, and a tax on all those who keep themselves aloof from this activity. That ought to win the race for this type of private crime fighting, hands down.

It may be unfair to characterize Shavell as never having met a public sector program he didn't like, but this comes perilously close to the truth where we consider penology. Coercive socialism doesn't work in any human endeavor, and the one under consideration is no exception.<sup>75</sup>

Shavell worries that if law enforcement officers themselves are allowed to blackmail criminals, this will set up misallocations of effort away from apprehending poor and toward rich criminals, and conflicts of interest with their day jobs.<sup>76</sup> In this he seems correct. But to ban blackmail on these grounds is unjustified. We can coherently legalize blackmail for everyone else apart from state employees in the penal system (and then continue to anxiously await the day the entire industry is privatized).<sup>77</sup>

### III. COMMONLY MADE THREATS

With this section, the penultimate one, Shavell has his last chance to explain the philosophical difference between blackmail and other non invasive threats (suit launching, price shopping, fence building, etc.). As before, he doesn't seem to realize this as a lacunae. Instead, he resorts to claiming that "threats to withdraw business unless price or some other term is altered are usually good things."<sup>78</sup> So, for that matter, are warnings about impending gossip, and being willing to refrain from revealing secrets. A constant refrain, here, is the claim that such threats are "socially desirable."<sup>79</sup> Forgotten in all the hyperbola are the attendant costs, something never far from central stage when it comes to robbery and extortion.

Shavell maintains that the threat to bring a civil suit does not compromise

75. See, e.g., Robert J. Bradley, *Market Socialism: A Subjectivist Evaluation*, 5 J. LIBERTARIAN STUDIES 23-40 (1981); see also Anthony Flew, *Socialism and Social Justice*, 11 J. LIBERTARIAN STUDIES 76-93 (1995); HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS AND ETHICS* (1989); LUDWIG MISES, *SOCIALISM* 1981 (1969); LUDWIG MISES, *THE ANTICAPITALIST MENTALITY* (1972); Murray N. Rothbard, *The End of Socialism and the Calculation Debate Revisited*, 5 REV. OF AUSTRIAN ECONOMICS 51 (1991); David Ramsay Steele, *Posing the Problem: The Impossibility of Economic Calculation Under Socialism*, 5 J. LIBERTARIAN STUDIES 7 (1981); Peter Boettke and Gary Anderson, *Soviet Venality: The USSR as a Mercantilist State*, PUBLIC CHOICE (1997); Joseph T. Slaerno, *Mises and Hayek Dehomogenized*, 6 REV. OF AUSTRIAN ECONOMICS 113-46 (1993); Joseph T. Slaerno, *Ludwig von Mises as Social Rationalist*, 4 REV. OF AUSTRIAN ECONOMICS 26-45 (1990); Joseph T. Slaerno, *A Final Word: Calculation, Knowledge and Appraisalment*, 9 REV. OF AUSTRIAN ECONOMICS 141-42 (1996); Hans-Hermann Hoppe, *Socialism: A Property or Knowledge Problem*, 9 REV. OF AUSTRIAN ECONOMICS 143-50 (1996).

76. See Shavell, *supra* note 1, at 1901.

77. See, e.g., MURRAY N. ROTHBARD, *POWER AND MARKET: GOVERNMENT AND THE ECONOMY* (1970); MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (1998); LYSANDER SPOONER, *NO TREASON* (1966); BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE*, (1990); HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993); Edward Stringham, *Market Chosen Law*, 14 J. LIBERTARIAN STUDIES 53-78 (1998); Patrick Tinsley, *Private Police: A Note*, 14 J. LIBERTARIAN STUDIES 95-100 (1998); MORRIS AND LINDA TANNEYHILL, *THE MARKET FOR LIBERTY* (1984); WILLIAM C. WOOLRIDGE, *UNCLE SAM THE MONOPOLY MAN* (1970).

78. Shavell, *supra* note 1, at 1901.

79. *Id.*

deterrence. Yes. But how can it be denied that it sets up fear in the heart of the defendant?<sup>80</sup> Why are these "social costs" lost sight of only here, but not in the cases of blackmail, robbery, and extortion? Our author claims that these other threats are part of the "normal bargaining process,"<sup>81</sup> and to be sure, they are. But if blackmail were legalized, it, too, would become normalized. Come to think of it, murder rape and theft are also "normal" in a statistical sense. What this has to do with what should be legal, and what not, is at best obscure. Shavell even goes so far as to admit that these other situations (e.g., fence building, etc.) can result in "social waste" without drawing the conclusion he would in the context of blackmail.<sup>82</sup>

#### IV. CONCLUSION

Shavell claims that blackmail prohibition is not paradoxical. It is thought to be so by many commentators because "... it makes punishable the threat to reveal information even though revealing information itself is not punishable."<sup>83</sup> However, thanks to the "lens of economics"<sup>84</sup> the paradox vanishes. That is to say

We know that permitting blackmail will lead potential victims to curtail innocent behavior and take other steps to avoid blackmail, and also will induce potential blackmailers to invest efforts in obtaining embarrassing information. These effects are undesirable, and warrant making blackmail illegal.<sup>85</sup>

The point seems to be that all "undesirable" things should be outlawed. I wonder what his position is on fattening foods, tobacco, hang gliding, homosexuality, interracial marriages, all of which have been deemed "undesirable" by numerous people all throughout history and some even at the present time.

Paradoxically, and I use that word advisedly, I agree with Shavell's conclusion, if not his reasoning. Blackmail does not constitute a paradox because it ought to be decriminalized, and there is nothing remarkable about two separate acts, each of which alone is licit, remaining legal even when they are taken together.

As for our author's "economic lens," it seems opaque to me. There are many things which are not conducive to economic well-being, apart from those mentioned above as being considered "undesirable." For example, watching too much TV, reading junk novels, gossip papers such as the National Enquirer, following soap operas, etc. Why narrow considerations of GDP should determine the law is hard to see.

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80. Given, of course, that they do not avail themselves of the techniques of Edelstein and Steele or Ellis and Harper. See *supra*, note 48.

81. Shavell, *supra* note 1, at 1901.

82. *Id.* at 1902.

83. *Id.*

84. *Id.*

85. *Id.*

Shavell does score a point against Lindgren<sup>86</sup> in pointing out that the adventitiously acquired embarrassing information (the workman goes up a ladder and accidentally sees someone in "awkward" circumstances) is costless. However, Shavell fails to reckon with the fact that the incentive to evade blackmail would result in precisely the same act as is required to avoid embarrassment: namely, closing the blinds or curtains. Thus, it is not clear that there is any extra incentive for doing the one over and above the other.

Nor does my own value free economic lens "suggest"<sup>87</sup> any public policy conclusion (e.g., prohibiting blackmail, offering rewards for information on criminals) whatsoever. Perhaps his lens has an admixture of normative pre suppositions ground into the glass.

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

87. Shavell, *supra* note 1, at 1903.

