

## ARTICLES

# BLACKMAIL AND ECONOMIC ANALYSIS

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### ABSTRACT

Blackmail consists of two things, each indisputably legal on their own; yet when combined in a single act, the result is considered a crime. First, one may gossip, and, provided that what is said is true, there is nothing illegal about it. Truth is an absolute defense. Second, if one may speak the truth, one may also threaten to speak the truth. Yet, if someone requests money in exchange for silence—money in exchange for giving up the right of free speech—it is a crime.

The law and economics literature takes the position that blackmail should be illegal on efficiency grounds. This author rejects the law and economics analysis. He maintains that because it is legal to gossip, it should therefore be legal to threaten to gossip, unless paid not to do so. In brief, blackmail is a victimless crime, and should be legalized if justice is to be attained. This author criticizes several other writers who take the efficiency position, focusing most of his arguments on a paper written by Douglas Ginsburg and Paul Schechtman.<sup>1</sup>

### I. INTRODUCTION

Under libertarian law,<sup>2</sup> no one may threaten, or initiate violence

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1. Douglas H. Ginsburg and Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849 (1993).

2. See MURRAY N. ROTHBARD, *POWER AND MARKET: GOVERNMENT AND THE ECONOMY* (Institute for Humane Studies 1970); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (Macmillan 1973); MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (Humanities Press 1982); HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS* (Kluwer Academic Publishers 1989); HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (Academic Publishers 1993); BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* (Pacific Institute for Public Policy Research 1990); Bruce L. Benson, *The Impetus for Recognizing Private Property and Adopting Ethical Behavior in a Market Economy: Natural Law, Government Law or Evolving Self Interest*, 6 REV. AUSTRIAN ECON. 43 (1989); Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); TIBOR MACHAN, *PRIVATE RIGHTS AND PUBLIC ILLUSIONS* (Transaction Publishers 1995); TIBOR MACHAN,

against a person or his justly acquired property. All else is open, however. That is, a man can do anything else he wishes, provided only that he respects this one axiom of liberty.

Certainly he may ask for or demand money. Certainly he may engage in his free speech rights to gossip. Certainly he may refrain from the exercise of these rights, for a fee. That is to say, blackmail would be legal in a libertarian society, for it consists of no more than this.<sup>3</sup> Of course, no one may engage in extortion, which is to be sharply distinguished from blackmail. In that case, the threat is not to gossip about other people's embarrassing secrets, or to do any other licit act, but rather to visit mayhem upon the victim. For example, the threat may be to kill or in other ways violate the victim's personal or property rights.

If blackmail law is "enigmatic,"<sup>4</sup> this is not intrinsic; it is not due

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CAPITALISM AND INDIVIDUALISM (St. Martin's Press 1990); Tibor Machan, *Law, Justice and Rights*, 14 W. ONT. L. REV. 119 (1975); Randy E. Barnett, *Pursuing Justice in a Free Society Part One: Power vs. Liberty*, 4 CRIM. JUST. ETHICS 50 (1985); Randy E. Barnett, *Toward a Theory of Legal Naturalism*, 2 J. LIBERTARIAN STUD. 97 (1978); AYN RAND, CAPITALISM: THE UNKNOWN IDEAL (Signet 1966); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (Basic Books 1974); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (Harvard University Press 1985); RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (Harvard University Press 1992); RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (Harvard University Press 1995); CHARLES MURRAY, WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL INTERPRETATION (Broadway Books 1997); DAVID BOAZ, ED., THE LIBERTARIAN READER (Free Press 1997); DAVID BOAZ, LIBERTARIANISM: A PRIMER (Free Press 1997); Stephan N. Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, 12 J. LIBERTARIAN STUD. 313 (1996).

3. Eric Mack, *In Defense of Blackmail*, 41 PHILOSOPHICAL STUDIES 274 (1982); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY, *supra* note 2; MURRAY N. ROTHBARD, MAN, ECONOMY, AND THE STATE (Mises Institute 1993); Walter Block, *The Blackmailer as Hero*, THE LIBERTARIAN FORUM 1 (December 1972); WALTER BLOCK, DEFENDING THE UNDEFENDABLE 44 (Fox and Wilkes 1976); 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, *Trading Money for Silence*, 8 U. HAW. L. REV. 57 (1986); Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997); Walter Block, *A Libertarian Theory of Blackmail*, 33 IRISH JURIST 210; Walter Block and Robert W. McGee, *Blackmail from A to Z*, 50 No. 2 MERCER LAW REVIEW 569-901 (WINTER 1999); Walter Block with Robert McGee, *Blackmail as a Victimless Crime* (forthcoming BRACTON LAW JOURNAL); Walter Block and Stephen Kinsella, *Second Paradox of Blackmail*, (forthcoming QUARTERLY JOURNAL OF BUSINESS ETHICS); Walter Block, *Let's Legalize Blackmail* (forthcoming SETON HALL L. REV.); Walter Block, *Blackmail Is Private Justice*, (forthcoming, UNIV. B.C. L. REV.); Walter Block, *The Crime of Blackmail*, (forthcoming CRIMINAL JUSTICE ETHICS); Walter Block, *Toward a Libertarian Theory of Blackmail*, (forthcoming JOURNAL OF LIBERTARIAN STUDIES).

4. As claimed by Douglas H. Ginsburg and Paul Shechtman, *supra* note 1 (hereinafter Ginsburg and Shechtman); see also Joel Feinberg, *The Paradox of Blackmail*, 1 RATIO JURIS 83 (1988); Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFF. 43 (1992); James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984). For an alternative view, see Wendy L. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741 (1993);

to the issues themselves. Rather, it is because there are many authors,<sup>5</sup> including the two now under review,<sup>6</sup> who very clearly see this difference between blackmail and extortion, and yet advocate not only prohibiting the latter, but, contrary to libertarianism, the former as well. It is worthwhile citing Ginsburg and Shechtman at some length to show just how fully, clearly, and accurately they understand this distinction:

The legal literature especially suffers from an inability to define blackmail in a way that meaningfully distinguishes it from threats of unquestioned legality made in the course of economic bargaining. All agree that a key employee may lawfully threaten to quit unless his wages are raised, and that if his threat comes at a time when his employer is particularly vulnerable, he may have engaged in sharp practices but not criminal conduct.<sup>7</sup> Many threats, such as those of a customer to take his custom elsewhere if a price is not lowered, or to enter production for his own use if suppliers are not more obliging, are actually relied upon in a competitive exchange economy to discipline the market. But despite our general ability to agree on the lawfulness of particular threats, drafting a general law that separates blackmail from bargaining has proved an elusive task.

Related to this problem of definition is an apparent paradox embedded in the law of blackmail. Consider this paradigmatic blackmail transaction: B has taken a photograph of A, a temperance advocate, drinking a whiskey; he approaches A with an offer to sell him the photograph negative, threatening disclosure to the newspapers if A fails to pay. Again, all would agree: B is guilty of blackmail. *The point to notice, however, is that B has threatened to do only what he had an undoubted right to do, namely to facilitate the publication of the photograph.* Had B not approached A but sent the photograph directly to the publishers, no liability would have attached. The paradox, then, is that of a legal system that gives B the right to reveal information, but prevents him from seeking remuneration in exchange for his forbearance.<sup>8</sup>

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Walter Block and David Gordon, *Extortion and the Exercise of Free Speech Rights*, *supra* note 3.

5. Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639 (1993); Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993); George P. Fletcher, *Blackmail: The Paradigmatic Case*, 141 U. PA. L. REV. 1617 (1993); Leo Katz, *Blackmail and Other Forms of Armtwisting*, 141 U. PA. L. REV. 1567 (1993).

6. Ginsburg and Shechtman, *supra* note 1.

7. Presumably he is not already under an employment contract incompatible with this action.

8. Ginsburg and Shechtman, *supra* note 1, at 1849-50 (emphasis added).

## II. BACKGROUND

Not only are Ginsburg and Shechtman crystal clear on the concept of blackmail, they are equally so when it comes to extortion, which they call robbery, and offer the common law definition: “taking of money or goods of any value from the person of another or in his presence and against his will by violence or putting him in fear.”<sup>9</sup>

In their historical exegesis of this law, Ginsburg and Shechtman trenchantly take cognizance of the fact that

one could not lawfully threaten another with death, arson or accusation of an infamous crime in order to gain money . . . . Thus the blackmailer . . . either threatened or offered to commit a crime, and the law rather unremarkably treated him like the blackmailer menacing death or arson. *What one could not lawfully do, one could not lawfully threaten to do in order to be paid for refraining.*<sup>10</sup>

So far, so good. Apart from Ginsburg and Shechtman characterizing what we call blackmail and what we call extortion with the same appellation, “blackmail,” there are no differences between us. For they agree that the “blackmail” which threatens “death or arson” should be illegal, and, at least thus far, call it a “paradox” that the blackmail which threatens no more than that which is indubitably legal should also be outlawed. However, although they agree that what one could not lawfully do, one could not lawfully threaten to do in order to be paid for refraining, they do not embrace the obverse: What one *could* lawfully do, one *could* lawfully threaten to do in order to be paid for refraining. Were they to have taken this logical step, they would have totally embraced the libertarian perspective on blackmail, and this article would have been unnecessary.

Instead, our authors take the opposite tack. Toward this end they analyze the English Motor Association (EMA) cases.<sup>11</sup> The

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9. *See id.* at 1850 n.2. Note, however, that the common law ordinarily made one exception to the rule that the robber (extortionist) had to place the victim in fear of “immediate personal violence,” and that involved an accusation of “unnatural acts” or “sodomitical practices.” Nowadays, this accusation would be unexceptionable. Indeed, what with the advent of the gay rights movement, the accused would wear, as it were, a badge of honor. But in the days of yore this was a serious accusation indeed. The modern equivalent might be accusations of racism, discrimination, sexual harassment, or heterosexism.

Libertarians, then, face the question of whether a false accusation of criminal behavior, whether or not coupled with a demand for money to forbear, is licit blackmail or illicit extortion. For no one else does this question even arise.

10. Ginsburg and Shechtman, *supra* note 1, at 1852 (emphasis added).

11. *See id.* at 1853-55.

EMA alliance had the legal right to fix prices for its member firms; it published a “Stop List” of automobile dealers who did not conform to these mandates, to facilitate a boycott by the Association. In 1926, Shop List Superintendent Percy Denyer offered not to include Read’s Garage on its enemies list, if Read would pay £250 to the EMA. Instead of complying, Read sued, successfully, accusing Denyer of blackmail.<sup>12</sup> State Ginsburg and Shechtman:

On appeal, Denyer’s counsel argued that ‘[a] menace implies an improper motive,’ so that ‘[w]hen a person has a lawful right to do an act for the protection of his own trade interest, he is not using menaces if he demands money as an alternative to doing such an act.’<sup>13</sup>

With one slight difference, this is precisely the libertarian viewpoint. The only thing to be changed to conform with this philosophy is to forthrightly admit that Denyer had menaced Read, but that this menace, or threat, was an entirely legitimate one, since, if one has the right to do X, then one must have the right to threaten to do X.

Report Ginsburg and Shechtman:

Lord Hewart, C.J., in response to this argument wrote . . . ‘[I]n the opinion of the Court, that proposition is not merely untrue, it is precisely the reverse of the truth. It is an excuse which might be offered by blackmailers . . .’<sup>14</sup>

Hewart is undoubtedly correct. Find in favor of Denyer *vis a vis* Read, and allow this to serve as precedent, and blackmail could not be punished. But in his *jihad* against this activity, Hewart is precluded from agreeing with the obverse of Ginsburg and Shechtman’s statement: “What one *could* lawfully do, one *could* lawfully threaten to do in order to be paid for refraining.”<sup>15</sup>

Scrutton, L.J., criticized Hewart as follows:

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

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12. *The King v. Denyer*, 2 K.B. 258, 260 (Eng. Crim. App. 1926), *cited in* Ginsburg and Shechtman, *supra* note 1, at 1853 n.3.

13. Ginsburg and Shechtman, *supra* note 1, at 1853.

14. *Id.*

15. *See id.* at 1852.

money is paid you, there being no mischief in the agreement . . . .

A. has land facing a new house of B.'s. A. proposes to build on that land a house which will spoil the view from or light to B.'s house and depreciate the value of his property. B. implores A. not to build. A. says, 'I will not build if you pay me £1000, but I shall build if you do not.' B. pays the money and A. does not build. Could it be seriously argued that B. could recover the money back as obtained by threats?<sup>16</sup>

Ginsburg and Shechtman interpret Scrutton as saying

there could be no instance in which the law of threats and the substantive law concerning the thing threatened would be out of step with each other: if it would be lawful to carry out the threat, then it is lawful so to threaten, and the converse.<sup>17</sup>

This is a misreading of Scrutton. It is a fair summary of the Hewart position, but that is very opposite of Scrutton's; rather, it is the one against which Scrutton was reacting. Both judges, along with Ginsburg and Shechtman, mistakenly wish to ban blackmail. Hewart was at least logically consistent: given that blackmail should be illegal, it should also be impermissible to threaten that which one has a right to do (because that is all that blackmail consists of). But Scrutton, with Ginsburg and Shechtman backing, wishes to have it both ways; to say that it is *legitimate* to threaten that which one has the right to do, and that blackmail, which consists of precisely that, no more and no less, should nonetheless be forbidden.

Ginsburg and Shechtman are of the opinion that Scrutton protected the "ordinary blackmailer [who] normally threatens to do what he has a perfect right to do—namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened."<sup>18</sup> But Scrutton specifically (and illogically) rejected this eminently reasonable conclusion. He spuriously distinguished this case from ordinarily doing what one has a right to do on the ground that in the case of blackmail the very agreement is illegal. Why is it illegal if both parties to the contract, the blackmailer and the blackmailee, *agree* to it?<sup>19</sup>

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16. *Hardie & Lane, Ltd. v. Chilton*, 2 K.B. 306, 320 (Eng. C.A. 1928), cited in Ginsburg and Shechtman, *supra* note 1, at 1854.

17. Ginsburg and Shechtman, *supra* note 1, at 1854.

18. *Id.*

19. Make no mistake. The blackmailee is no "victim," as is commonly charged. On the contrary, he values the blackmailer's silence more than the money he must pay. Therefore, he is a *beneficiary* of the blackmailer. This can be clearly seen by answering the following question: Suppose you were an adulterer and someone found out about your secret. Would you rather that person be a blackmailer, who would keep quiet for a fee, or

Further, Scrutton is on shaky ground, at least in terms of the libertarian axiom, in claiming that it should be against the law to “abstain from making public an accusation of crime.”<sup>20</sup> Under libertarianism, there are no positive obligations apart from those that a man brings upon himself, for example, contractually. There are only negative responsibilities, preeminently to refrain from invading other persons or their property. The philosophical difficulty with non-contractual positive obligations is that they are open-ended. For surely it is abstaining from making public an accusation of crime if I shut my eyes to crime when it occurs under my very nose, that is, if I take no interest in ferreting out criminal behavior. But there is a lot of crime going on, especially if we contemplate that which occurs in the whole world, not just in one’s own entire country, and why should we not be so inclusive? If so, we are all always and ever guilty of this crime. We should all, with no exceptions, be in jail right now, if cognizance be given to this specious doctrine.

Ginsburg and Shechtman cite Atkin, L.J., as follows:

[I]f 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.<sup>21</sup>

Now this is more than just passing curious. What other purpose of business *is* there for a person, pray tell, other than to “put[] money in his pocket”? There *is* no legitimate purpose other than the “mere acquisition of money.”<sup>22</sup> Why this gratuitous attack on earning a living?<sup>23</sup>

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a gossip, who would spill the beans no matter how much you were willing to pay for silence? Obviously, the adulterer would be far better off in the former case.

20. Yes, it should be unlawful to *suppress* knowledge of a felony, but that is an entirely different matter. There is all the world of difference between *refraining* from doing something, which is an intra-personal decision, that is when one decides for oneself what to do without invading anyone else, and *suppressing* it, which implies *interpersonal* relations, *e.g.*, when one man stops another from reporting a crime to police.

21. *Hardie & Lane, Ltd. v. Chilton*, 2 K.B. 306, 320 (Eng. C.A. 1928), *cited in* Ginsburg and Shechtman, *supra* note 1, at 1855.

22. To be sure, people have many purposes for the money they earn from business pursuits: feeding their families, engaging in charity, saving the world, etc., but none of them is possible *unless* they acquire money.

23. According to a recent newspaper headline, “Police turn[ed] a blind eye to marijuana for the sick; officers would only act if people were supplying children or selling drugs for a profit.” VANCOUVER SUN, July 22, 1997, at B1. Selling to children we can understand.

Perhaps even more seriously, this judge fails to come to grips with the idea that if it is legal to do something for no money, it should be legal to do it for money as well. For the legality or illegality of an act, at least under the libertarian code, can be found in the act itself, not in the extraneous fact of whether it was done for money. Murder and rape are wrong because they constitute invasions. Doing them for free, or at a low price, cannot alter that elemental legal fact.

Ginsburg and Shechtman see very clearly what is involved in blackmail. It is for them, as well as for us, a voluntary trade between consenting adults that will necessarily increase economic welfare, at least in the *ex ante* sense. Why, then, do they advocate the prohibition of such contracts?

It is due, it would appear, to their (partial) support for socialism. Before explicitly making their case, they give us two hints of this. First they state, “our claim is that an *economic planner*, shaping the laws to achieve economic efficiency, would include a law of blackmail in the criminal code . . . .”<sup>24</sup> And second, they favor “the rule that a *rational economic planner* would prescribe for distinguishing socially useful from socially wasteful threat activity.”<sup>25</sup>

It might be objected, at the outset, that this is not really socialism; that even under free enterprise, we must each engage in rational economic planning on our own accounts. This cannot be denied. But it is one thing to plan for ourselves; it is quite another to enact legislation with the express purpose, and effect, of planning for

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But earning a profit? And this is *Canada*, for goodness sake, not Cuba or North Vietnam.

24. Ginsburg and Shechtman, *supra* note 1, at 1850 (emphasis added).

25. *Id.* (emphasis added). On the relationship between “rational economic planning” and socialism, see LUDWIG VON MISES, HUMAN ACTION (Regnery 1966); LUDWIG VON MISES, BUREAUCRACY (Arlington House 1969); LUDWIG VON MISES, OMNIPOTENT GOVERNMENT (Arlington House 1969); LUDWIG VON MISES, SOCIALISM (Liberty Fund 1969); Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, in F.A. HAYEK, ED., COLLECTIVIST ECONOMIC PLANNING (1975); William Keizer, *Two Forgotten Articles by Ludwig von Mises on the Rationality of Socialist Economic Calculation*, 1 REV. AUSTRIAN ECON. 109 (1987); Hans-Hermann Hoppe, *Socialism: A Property or Knowledge Problem*, 9 REV. AUSTRIAN ECON. 143 (1995); HANS-HERMANN HOPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS (Kluwer Academic Publishers 1989); Jeffrey M. Herbener, *The Role of Entrepreneurship in Desocialization*, 6 REV. AUSTRIAN ECON. 79 (1992); Murray N. Rothbard, *The End of Socialism and the Calculation Debate Revisited*, 5 REV. AUSTRIAN ECON. 51 (1991); Murray N. Rothbard, *How and How Not to Desocialize*, 6 REV. AUSTRIAN ECON. 65 (1992); David Ramsay Steele, *Posing the Problem: The Impossibility of Economic Calculation Under Socialism*, 5 J. LIBERTARIAN STUD. 7 (1981); Robert Bradley, *Market Socialism: A Subjectivist Evaluation*, 5 J. LIBERTARIAN STUD. 23 (1981); Don Lavoie, *A Critique of the Standard Account of the Socialist Calculation Debate*, 5 J. LIBERTARIAN STUD. 41 (1981); Sheldon L. Richman, *War Communism to NEP: The Road From Serfdom*, 5 J. LIBERTARIAN STUD. 89 (1981); Yuri Maltsev, *Murray Rothbard as a Critic of Socialism*, 12 J. LIBERTARIAN STUD. 99 (1996).



the entire society.<sup>26</sup> And this author suggests, is not only precisely what the prohibition of blackmail does, but also what Ginsburg and Shechtman want it to do.

A second objection is that communism was typically conducted by means of directives, mandates, and economic goals, not laws such as the prohibition of blackmail. But this is a superficial distinction. Laws, directives, mandates, and goals are merely different names for the same thing. What they all have in common is that those in the know determine how the rest of us shall act, with penalties for disobedience. This is typically couched in the rhetoric of being for our own good, or in the public interest, or for wealth maximization as in the present case, or some such.

A third objection is that what Ginsburg and Shechtman are advocating is economic efficiency, not central planning. But the two are not as unrelated as might appear at first glance. Yes, economic efficiency and socialism are polar opposites. If there is one thing we have learned from recent events in Eastern Europe, Korea, Cuba, etc., it is that economic growth, wealth, well being and central planning are incompatible.<sup>27</sup> However, hope springs eternal in the hearts of some. Even though it is an unreachable quest, there would appear to be an unremitting hope that economic efficiency might one day be attained through planning from the top. This was the implicit and oftentimes explicit goal of the socialists of the 19<sup>th</sup> century, and it seems that not much has changed for those of the 20<sup>th</sup> century writing under the banner of Law and Economics.

### III. THE ECONOMICS OF BLACKMAIL

What are the specifics of Ginsburg and Shechtman's "rational planning" as regards blackmail? We are asked to contemplate the case where A will pay \$300 in blackmail to B to keep silent about A's secret, and it will cost B \$200 to unearth the requisite information. State Ginsburg and Shechtman:

If blackmail were not a crime, B presumably would proceed to research, to threaten, and to collect. On the other hand, if blackmail is a crime, B will be encouraged to seek alternative employment for his time and money. And that is precisely the

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26. F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (1989). For a critique of Hayek for being insufficiently thorough in his rejection of socialism, see Walter Block, *Hayek's Road to Serfdom*, 12 *JOURNAL OF LIBERTARIAN STUDIES: AN INTERDISCIPLINARY REVIEW* 327 (1996).

27. JAMES GWARTNEY, ROBERT LAWSON, AND WALTER BLOCK, *ECONOMIC FREEDOM OF THE WORLD 1975-1995* (The Fraser Institute 1996).

point. Without a blackmail law, \$200 of real resources would have been invested in order to produce nil output. No *rational economic planner*<sup>28</sup> would tolerate the existence of an industry dedicated to digging up dirt, at real resource cost, and then reburying it.<sup>29</sup>

First, even on the assumption that there are no other flaws in this argument, why should the law be constructed so as to maximize wealth in this way? Why should a man be prevented from engaging in activities that have nil output? Shouldn't the majesty of the law be above such pedestrian concerns? For the clear implication is that all sorts of "goofing off" would have to be declared illegal: sunning oneself, playing solitaire, watching soap operas on television, engaging in sports (other than handball, an addiction of this author), going on nature walks, sleeping more than necessary, etc.

Second, as it happens, there are defects in this contention. Thus, even if it can somehow be shown that the purpose of the law is to maximize wealth, we cannot conclude, on the basis of this argument, that blackmail should be banned in order to achieve this end.

Why is this? Sometimes secrets come for free, by accident, with no research expenditure. Ginsburg and Shechtman furnish us with no reasons to suppose that blackmail would produce nil output under these circumstances.<sup>30</sup> Therefore, according to their own argument, blackmail should be legalized in such cases. But it is extremely difficult to determine whether or not research has taken place. Or, to put it in words Ginsburg and Shechtman would appreciate, it is very expensive and resource wasting to do so. Therefore, based on Ginsburg and Shechtman's reasoning, it would appear that blackmail should again be legalized.

But let us assume away this possibility. That is, we will now suppose that embarrassing secrets can only be unearthed with the expenditure of real resources. Are there any reasons to suppose that such actions would still produce a positive output?

There are. For one thing, there is truth seeking for its own sake. Scientific research is only the tip of the iceberg in this regard, perhaps the most well known case where men seek knowledge, with no implication that it will ever be worthwhile in a strict monetary sense. There are numerous cases where people expend real resources on

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28. This is the third time (and counting) Ginsburg and Shechtman have used this phrase—too many to be merely accidental.

29. Ginsburg and Shechtman, *supra* note 1, at 1860 (emphasis added).

30. See more detailed discussion of this point below where I consider Lindgren's objections to Ginsburg and Shechtman.

information gathering that others deem of “nil” productivity. These range from gathering gossip to reading escape literature to perusing the newspaper comics to day dreaming. Presumably, Ginsburg and Shechtman’s benevolent dictator will outlaw all of this.<sup>31</sup>

If we take Ginsburg and Shechtman at their literal word, we would have to outlaw all businesses that go bankrupt, and even those that post losses. This does not mean, merely, those whose firms go belly up will be subject, as they are now, to Chapter 11 proceedings. Not at all. It means that such people will in addition be penalized by the same *criminal* code with which we punish blackmailers. And why is this? It is because both of them, the bankrupt and the blackmailer, are guilty, in Ginsburg and Shechtman’s eyes, of the *crime* of “producing nil output,” that is, of *criminally* wasting resources. If incarceration is sauce for the blackmailing goose because he wastes resources, it ought to be sauce as well for the bankrupt businessman, guilty of the same offense.

Ginsburg and Shechtman might object to this *reductio ad absurdum* on the following grounds: Yes, business failure is a waste of resources, but no one sets up shop with the *intention* of failing.<sup>32</sup> In contrast, the blackmailer has as his goal the use of money (for research) in ways that at least Ginsburg and Shechtman regard as wasteful.

Our reply is that “if wishes were horses, beggars would ride.” Reality is more important than mere intentions. So what if the rich heir who is also a blithering idiot in commerce *wants* to prosper. The sad fact is that he will in all reasonable likelihood squander his fortune. Shouldn’t the “rational economic planner” beloved of Ginsburg and Shechtman step in and stop this foolishness? The problem with the rational central planner is that he is never around

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31. Ginsburg and Shechtman, *supra* note 1, at 1860, have stated that no rational economic planner would “tolerate the existence of an industry dedicated to digging up dirt, at real resource cost, and then reburying it.” (emphasis added). If this does not imply economic czarism, what does? Who are the economic planners to “tolerate” or not to “tolerate” the actions of free men? Who appointed them to their exalted status? By what right do they impose on us, the great unwashed, their vision of a good society?

32. See, however, the fictional case of Francisco D’Aconia in AYN RAND, ATLAS SHRUGGED (Random House 1957). He deliberately sets out to lose money. Of course, to be fair to Ginsburg and Shechtman, Francisco does so for the ultimate purpose of what they might consider wealth enhancement, namely the opposition to socialism. On the other hand, since Ginsburg and Shechtman seem to prefer the latter system, at least in part, they can take scant comfort from this complication.

To return to non-fiction, there are numerous cases on record where people purposefully wreck their businesses for psychological reasons of their own: depression, manic depression, and the case of the “spite fence” erected to irritate someone (of which more below see *infra* note 40 and accompanying text).

when you need him.

This objection that is being manufactured on behalf of Ginsburg and Shechtman suffers from another difficulty: it is vulnerable to the following *reductio*. Suppose it is determined that women, or teenagers, or blacks, are poorer entrepreneurs than adults, or males, or whites. Then, using insights provided by Ginsburg and Shechtman, it would appear to follow that the central planner would be well advised to set up a program of business licenses.<sup>33</sup> No one who is not a white male adult<sup>34</sup> may set up or run a firm.<sup>35</sup>

Nor can Ginsburg and Shechtman coherently maintain that one learns from past business failures. There are many cases on record where a person went bankrupt two, three, or even more times before sometimes striking it rich. This is undoubtedly true, but the best statistical estimators of success (remember, we are talking about a *rational* central planner) is hardly previous failure. In any case, people also learn from “investigative journalism” of the sort that ends up in supermarket tabloids. If Ginsburg and Shechtman are to be consistent with their wealth maximization denigration of blackmail, they must carry through with these other activities.

Ginsburg and Shechtman place themselves on the record as opposing on wealth maximization grounds the digging up of dirt and then reburying it. Are there ever cases where such an act can have positive economic value? To be sure, there are. One example is for purposes of exercise. Digging dirt is one of the most physically intensive athletic endeavors possible to imagine. Who knows, perhaps one day this will become an Olympic sporting event.

More generally, apart from information seeking, it is an everyday occurrence for men to act in a way that others think not

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33. The author does not advocate any such policy. The only point is that if Ginsburg and Shechtman remain loyal to their socialist thesis that wealth can best be maximized by a rational economic planner, then *they* must be wedded to it; that is, *Ginsburg* and *Shechtman* must favor a law not allowing people to waste resources in this way. Declarations of incompetence for elderly people would be merely the tip of the iceberg in this regard. If the “rational economic planner” is serious, he must put a stop to the criminal waste of resources on the part of all those who, for example, do not have good collateral and would not receive bank loans. If a bank will not lend someone money, why should that person be allowed to spend his *own* money on the venture?

34. Or whichever groups are determined to be best at making profits.

35. Under socialism, of course, people are investing and risking *society's* resources. As such, they should not be given the go ahead without the imprimatur of the “rational central planner.” It is only under capitalism and private property rights, the most efficient wealth producing mechanism known to man, that people are free to invest on their own, without a by-your-leave from a central authority. But this is the only system fully compatible with blackmail *legalization*.

worthwhile.<sup>36</sup> People do this all the time: they exercise to lose weight, and eat heavily and gain it all back. As well, they play cards, gamble, drink alcohol, watch football, etc., all of which is obviously self-defeating. If the goal of the law is to ban all activities that “produce nil output” in the views of some people, the grand inquisitors will have a lot of grist for their mill.

But perhaps the most basic mistake of Ginsburg and Shechtman is their failure to reckon with subjectivity in economics. According to folk wisdom, “one man’s meat is another man’s poison.” What is nil output to the central planner need not be a zero to all. To act as if it were, is to be guilty of what Hayek called the “fatal conceit.”<sup>37</sup>

States Mises:

Some economists believe that it is the task of economics to establish how in the whole of society the greatest possible satisfaction of all people or of the greatest number could be attained. They do not realize that there is no method which would allow us to measure the state of satisfaction attained by various individuals.<sup>38</sup>

On the other hand, when objectivity does not suit Ginsburg and Shechtman, they are quick to jettison it. They explicitly take note of, and reject, yet another critique of their position. It is that legalizing blackmail will enhance the power of the blackmailers of the world to act so as to reduce the behavior of which the blackmailees are ashamed. The presumption is that even if this behavior is legal, it cannot have been too good, or they would not have consented to pay to keep it secret. The implication is, then, that the less of such activity the better for society. However, in the view of Ginsburg and Shechtman, who suddenly turn subjectivist, “avoidance of [this] conduct . . . cannot be presumed to be a gain.”<sup>39</sup>

Next, correctly noting that blackmail need not involve the threat

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36. According to Mises

[T]he ultimate ends of human action are not open to examination from any absolute standard. Ultimate ends are ultimately given, they are purely subjective, they differ with various people . . . . Praxeology and economics deal with the means for the attainment of ends chosen by the acting individuals. They do not express any opinions with regard to such problems as whether or not sybaritism is better than asceticism . . . .

The notions of abnormality and perversity therefore have no place in economics. It does not say that a man is perverse because he prefers the disagreeable, the detriment, and the painful to the agreeable, the beneficial and the pleasant. LUDWIG VON MISES, HUMAN ACTION, *supra* note 25, at 95.

37. F.A. HAYEK, *supra* note 26.

38. MISES, HUMAN ACTION, *supra* note 25, at 242.

39. Ginsburg and Shechtman, *supra* note 1, at 1860 n.41.

to convey information, Ginsburg and Shechtman turn to the example of the spite fence. This is an edifice built not to enhance the privacy of the owner, but rather to serve as a threat to the neighbor whose view is thereby disrupted, in an attempt to annoy him, or make him pay the former to forbear.

Ginsburg and Shechtman claim that an “omniscient lawgiver”<sup>40</sup> would set the maximum legal fence height at the point at which the two neighbors’ marginal utilities were equal, but that “in the real world of less than omniscient lawgivers” he would do no such thing.<sup>41</sup> This sounds reasonable, but it is not. First, what about property rights? Given that owners have a basic right to build as high as they wish, the omniscient lawgiver will be acting the part of the thief, relieving the owner of his rights against his will. Second, this determination ignores the fact that markets have alternatives to wise central planners, namely, the internalization of such externalities through restrictive covenants<sup>42</sup> and condominiums. If there is a problem of fence heights and views of distant mountains foregone, the builder of a large tract of land can sell subdivisions subject to his own best estimates of where the respective marginal utilities will equate. He will succeed or fail in earning a profit (in part) on the basis of these decisions concerning fence heights. Here, there is no socialistic violation of property rights, as each parcel of land is sold subject to these prior conditions.

At least, however, Ginsburg and Shechtman are to be congratulated for realizing that the real world does not boast of omniscient lawgivers. What are we to make, then, of their claim that the *non*-omniscient lawgiver should be empowered not to pick the optimal fence height, but rather the height at which the marginal utility of the builder approaches zero?<sup>43</sup> The only possible interpretation is that they have somehow very quickly forgotten all about the limitations to their analysis, which they themselves had previously adumbrated just a few lines of print before. The point is, without omniscience, the socialist judge is no more able to determine the one fence height than the other.

Notwithstanding these considerations, Ginsburg and Shechtman worry that

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40. First cousin, presumably, to the rational economic central planner.

41. *See id.* at 1862.

42. BERNARD SIEGAN, LAND USE WITHOUT ZONING (Heath 1972); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J. L. & ECON. (1970).

43. Ginsburg and Shechtman, *supra* note 1, at 1862-63.

solely in order to convince A of the seriousness of his threat, B may have to put up the unwanted footage only to take it down again later. Real resources are thus expended to establish the credibility of B's threat, but in the end there is nothing to show for the effort . . . . A rational economic planner[, *i.e.*, lawgiver] would simply prohibit the threat at the outset.<sup>44</sup>

God forbid real resources should ever be wasted. Let us move heaven and earth to make sure that no such horror ever comes to pass. Let us pervert the law to this end. Perhaps, conceivably, this sentiment would make (economic but not legal) sense in a world of perfect competition, full information, homogeneous goods, zero profits, continuous equilibrium and all the rest. But in the *real* world, there is no such thing. Rather, there is a process, which while continually nudging the economy in this direction, never achieves this goal. Bargaining, even wasteful bargaining from the *ex post* perspective, is necessarily part and parcel of this market groping.<sup>45</sup>

Suppose that Cletus' marginal revenue product in his present position is \$100,000. His boss, mistakenly, pays him only \$70,000. Cletus leaves for greener pastures. Cletus' boss hires a replacement, who soon has to be fired for incompetence. Cletus' boss hires him back for the higher salary. Resources, horrors!, are wasted in this scenario. "Real resources are thus expended to establish the credibility of [Cletus'] threat. [Worse,] there is nothing to show for the effort . . . ." <sup>46</sup> With Ginsburg and Shechtman in charge, the rational economic planner (wage controller, in this case) would have forced Cletus' boss immediately to pay him what he is worth. This is not serious analysis. This is an argument from the *deus ex machina*.

On the other hand, very much to the credit of Ginsburg and Shechtman, they do admit "our rational [not omniscient] economic planner . . . does not have access to the appropriate graph for each A and B."<sup>47</sup> That is to say, presumably, that the judge's decision cannot be trusted to ensure resources are not wasted. If so, then, it would appear, we are back to *laissez faire* capitalism and private property rights, where people may do whatever they wish, provided only that

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44. *See id.* at 1863.

45. LUDWIG VON MISES, HUMAN ACTION, *supra* note 25; ISRAEL M. KIRZNER, COMPETITION AND ENTREPRENEURSHIP (University of Chicago Press 1973); ISRAEL M. KIRZNER, ED., SUBJECTIVISM, INTELLIGIBILITY AND ECONOMIC UNDERSTANDING (New York University Press 1986); JOSEPH A. SCHEMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (Harper 1942); JOSEPH A. SCHEMPETER, HISTORY OF ECONOMIC ANALYSIS (Oxford University Press 1954).

46. Ginsburg and Shechtman, *supra* note 1, at 1863.

47. *See id.* at 1864.

they refrain from invasions of the persons and property rights of other persons.

However salutary, this is not at all, unfortunately, the direction in which they are heading. For Ginsburg and Shechtman reveal themselves to be Coaseans, *i.e.*, opponents of any fixed private property rights at all. In the specific case under discussion, there is no reason to assume the man had a right to build a fence as high as he wished. For the true Coasean, this is true only so long as, in the opinion of the (non-omniscient) judge, resources will be more valuable under this system of law than under the one where the man whose view will be interrupted has the right to determine fence height.<sup>48</sup>

Ginsburg and Shechtman concede that spite can have an independent value to the fence builder. This means, presumably, that on the assumption that the law favors privacy *vis a vis* “view rights,”<sup>49</sup>

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48. For critiques of the Coasean version of socialism, see Walter Block, *Coase and Demsetz on Private Property Rights*, 1 J. LIBERTARIAN STUD. 111 (1977); Walter Block, *Ethics, Efficiency, Coasian Property Rights and Psychic Income: A Reply to Demsetz*, 8 REV. AUSTRIAN ECON. 61 (1995); Walter Block, *O.J.’s Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner*, 3 EUR. J. L. & ECON. 265 (1996); Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12 HAMLIN L. REV. 229 (1989); Roy E. Cordato, *Knowledge Problems and the Problem of Social Cost*, 14 J. HIST. ECON. THOUGHT 14 (1992); ROY E. CORDATO, WELFARE ECONOMICS AND EXTERNALITIES IN AN OPEN-ENDED UNIVERSE: A MODERN AUSTRIAN PERSPECTIVE (Kluwer Academic Publishers 1992); Elisabeth Krecke, *Law and the Market Order: An Austrian Critique of the Economic Analysis of Law*, paper presented at the Ludwig von Mises Institute: Austrian Scholar’s Conference, New York City, October 9-11, (forthcoming 1 COMMENTARIES L. & ECON. (1998)); GARY NORTH, THE COASE THEOREM (Institute for Christian Economics 1992); GARY NORTH TOOLS OF DOMINION: THE CASE LAWS OF EXODUS (Institute for Christian Economics 1990).

49. Under libertarian law, there can be no such things as “view rights”. If there were, I would be able to sue you for “getting in my face,” even if you were 10 miles away, because you would be disturbing my “view.” But there is no such thing as “privacy rights” either. According to Rothbard:

But is there really such a right to privacy? How can there be? How can there be a right to prevent Smith by force from disseminating knowledge which he possesses? Surely there can be no such right. Smith owns his own body, and therefore has the property right to own the knowledge he has inside his head, including that knowledge about Jones. And therefore, he has the corollary right to print and disseminate that knowledge. In short, . . . *there is no such thing as a right to privacy except to protect one’s property from invasion.* The only right “to privacy” is the right to protect one’s property from being invaded by someone else. In brief, no one has the right to burgle someone else’s home, or to wiretap someone’s phone lines. Wiretapping is properly a crime *not* because of some vague and woolly “invasion of a ‘right to privacy,’” but because it is an invasion of the *property right* of the person being wiretapped. MURRAY ROTHBARD, THE ETHICS OF LIBERTY, *supra* note 2 (emphasis added).

What, then, of the dispute between B, the fence builder, and A, his neighbor whose view will be truncated? In the absence of any restrictive covenant between them, B can build as high as he wishes; as long as he does so on his own property, he is not guilty of an invasion of A’s legitimate property, which does not include an uninterrupted view.



that is, the right of the builder to construct a fence reaching to the heavens if he wishes, that there is not danger of the dreaded nil output. For “there would be no reason in economic theory to dishonor his preference for making A suffer.”<sup>50</sup>

However, in returning to more traditional blackmail of the embarrassing secret exposing variety, Ginsburg and Shechtman are back at the same old “nil output” lemonade stand. Why the difference? This is because one can always tear down or reduce the size of the fence, which was needed only to establish to A that B really would go ahead and build it—in order to be paid off not to do so. But in the case of threatening to gossip, *i.e.*, blackmail, how can the threatener establish his credibility apart from going ahead and revealing the secret? And if he does reveal it, the blackmailer then will have nothing further to hold over the blackmailee.

One’s first reaction to this concern might well be to dismiss it cavalierly. After all, every occupation has its problems. Why should we worry about the plight of the poor misunderstood blackmailer? Let him solve these problems for himself, or get out of the business. But for Ginsburg and Shechtman, this is important. For credibility

is an asset only insofar as B is an entrepreneur of blackmail, *i.e.*, someone who expects to engage in similar future transactions from which to realize a return on the investment in credibility. Should B succeed in his effort first to make himself credible and then to acquire information that he can threaten to disclose, the result will be an *industry, the output of which is nil*, although resources are consumed in its operation, *viz.*, for information gathering and threatening.<sup>51</sup>

But why would credibility be important only to a blackmailer continuing in business? Why not also for reasons of self-respect, or psychological well being? How can you hold your head up in the neighborhood if a blackmailee doesn’t knuckle under to a threat—even apart from future monetary considerations?

Ginsburg and Shechtman conclude this section as follows:

In short, therefore, a legal system designed to maximize allocative efficiency would penalize not only (1) threats to do an act that the threatener has no *right* to do, *i.e.*, that would occasion criminal or civil liability, but also (2) threats to do something that the threatener does have a *right* to do but that would (a) consume real resources, and (b) yield no product other than the enjoyment of

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50. Ginsburg and Shechtman, *supra* note 1, at 1864.

51. *See id.* at 1865.

spite or of an enhanced reputation as a credible issuer of threats. Reciprocally, it would not penalize the utterance of a threat to take an action that is (1) lawful in itself, i.e., neither tortious nor criminal, and (2) would confer some mutual benefit on the party making the threat.<sup>52</sup>

This author has highlighted Ginsburg and Shechtman's use of the word "right" in this quote for a reason. They use it in the traditional way, as if there were such things as "rights" apart from wealth maximization considerations. But they are not entitled to do so! In their own philosophy, "rights" mean no more than legal mandates designed (by central planners and judges) to maximize wealth. For them, there are no such things as rights apart from this. Thus, the (valid) distinction they are attempting to draw here, between blackmail and extortion, is one they are (logically) forbidden to draw.

A second problem is that this statement is incompatible with their previous one to the effect "there would be no reason in economic theory to dishonor his preference for making A suffer."<sup>53</sup> If there is nothing in economic theory distinguishing between the psychic income of spite enjoyment and material benefit, Ginsburg and Shechtman are logically precluded from drawing the conclusion they do. Again, because of subjectivist considerations, there is simply no way to objectively define material benefits. One man's material benefits are another person's nil outputs.

Let us try to make this point in another way. Suppose there were a farmer who wanted to leave some acreage idle.<sup>54</sup> Ginsburg and Shechtman, naturally, upon pain of contradiction, would have to object to this on the ground that it did not confer some material benefit on anyone. They would have to condemn it as nil output. Presumably, they would do to this waster of resources what they would do to the blackmailer (whose crime in their eyes is precisely this, wasting resources), namely, to throw him into prison. Just as they have rejected spite as a valuable contribution to the economy,<sup>55</sup> they would presumably refuse to consider the joy of contemplation of idle land as an economic benefit. Similarly with workers enjoying leisure, say, at their annual vacation. This, too, would have to be

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52. *Id.* (emphasis added).

53. *See id.* at 1864.

54. Or a worker who wished to take a vacation. Or a person who wished to leave some clothes in his closet, unworn . . . .

55. Well, strictly speaking, they did and they didn't. That is, as we have seen, they have contradicted themselves on this point.

denounced out of hand as wasteful.<sup>56</sup> Nor can Ginsburg and Shechtman object to the foregoing on the ground that neither the farmer nor the worker consumes resources.<sup>57</sup> On the contrary, both do so. The worker, obviously, will still eat food; worse, most vacationers significantly use resources for their nefarious deeds. But even the farmer utilizes scarce resources. As long as leaving the land fallow does not increase its productivity (this would be the analogue of the optimal vacation), there is an alternative cost in terms of the foodstuffs that could have been grown there which are foregone. And this is to ignore interest payments that might be due to the bank for the mortgage on the land.<sup>58</sup>

#### IV. GREENMAIL

Why, then is there a widespread revulsion toward blackmail, given that Ginsburg and Shechtman's explanation must be rejected? Goodhart explains this on the basis of "unexamined moral norms."<sup>59</sup> Ginsburg and Shechtman repudiate so reasonable an exegesis. Instead, they rely upon Campbell, who interprets blackmail law in terms of refraining from earning profits in business.<sup>60</sup> Campbell worries about the "powerful man who announces his intention of starting operations in a field in which he has hitherto shown no interest, unless those already established in that field pay him to stay out."<sup>61</sup> Instead of giving the back of the hand to this argument, Ginsburg and Shechtman liken to it their own concern with their test of material advantage.<sup>62</sup>

A moment's consideration will show, even on this rigidly narrow ground, that Campbell's greenmail has a positive productivity. Not, of course, to those mired, as are Ginsburg and Shechtman, in the

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56. A case could conceivably be made by those of the Ginsburg and Shechtman persuasion that a certain small amount of leisure is necessary for laborers in order to make them more efficient. If so, then these authors would incarcerate only those taking holidays for longer than this optimal period. On the other hand, slave owners worked their property the entire year around, giving leisure only during the evenings and on Sundays. This would imply that all those who slacken off for more than this amount of time are guilty of the non-maximization of wealth, and should be jailed.

57. Ginsburg and Shechtman, *supra* note 1, at 1866.

58. As noted by Russell Hardin, "Richard Posner says blackmail . . . has no social product and should therefore be criminalized." This is a very odd conclusion. Much of what I do has no social product (for instance, I consume, I waste time), but surely it should not be criminalized. Richard Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787, 1806 (1993).

59. Ginsburg and Shechtman, *supra* note 1, at 1867.

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

61. *See id.* at 390, *cited in* Ginsburg and Shechtman, *supra* note 1, at 1867.

62. Ginsburg and Shechtman, *supra* note 1, at 1868.

perfectly competitive model, where, paradoxically, no competition at all (in the sense of rivalry) takes place. But to those who appreciate the market process,<sup>63</sup> it is easy to see that this threat from an outside interloper might pay large dividends in terms of economic efficiency. Certainly, if we have learned anything from the life and times of Michael Milken,<sup>64</sup> it is that the possibility of such threats can keep firms lean and mean.

Ginsburg and Shechtman discuss “the general principle of the Model Penal code, which makes it unlawful to threaten a lawful act if carrying out the threat would not benefit the actor.”<sup>65</sup> The question to be posed in response is, why would the actor carry it out if it would not in some way benefit him? Indeed, can we not deduce from the fact that the actor did carry it out that it *did* at least in some way benefit him?

Mises states in this regard:

The ultimate end of action is always the satisfaction of some desires of the acting man. Since nobody is in a position to substitute his own value judgements for those of the acting individual, it is vain to pass judgment on other people’s aims and volitions. No man is qualified to declare what would make another man happier or less discontented. The critic either tells us what he believes he would aim at if he were in the place of his fellow; or, in dictatorial arrogance blithely disposing of his fellow’s will and aspirations, declares what condition of this other man would better suit himself, the critic.<sup>66</sup>

And according to Rothbard, “all [human] action aims at rendering conditions at some time in the future more satisfactory for the actor than they would have been without the intervention of the action.”<sup>67</sup>

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63. LUDWIG VON MISES, HUMAN ACTION, *supra* note 25; ISRAEL M. KIRZNER, COMPETITION AND ENTREPRENEURSHIP, *supra* note 45; ISRAEL M. KIRZNER, SUBJECTIVISM, INTELLIGIBILITY AND ECONOMIC UNDERSTANDING, *supra* note 45; JOSEPH A. SCHEMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY, *supra* note 45; JOSEPH A. SCHEMPETER, HISTORY OF ECONOMIC ANALYSIS, *supra* note 45.

64. Berle and Means warned of the power of entrenched corporate boards, but called for government control as a solution. They didn’t appreciate the role of corporate raiding as a way of promoting competition in the boardroom. See A. A. BERLE, JR. AND GARDNER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Commerce 1932). For a discussion of the economics of acquisitions and mergers, and the effect it has on getting rid of deadwood at the top, see Robert W. McGee, *Mergers and Acquisitions: an Economic and Legal Analysis*, 22 CREIGHTON L. REV. 665 (1988-89).

65. Ginsburg and Shechtman, *supra* note 1, at 1868.

66. LUDWIG VON MISES, HUMAN ACTION, *supra* note 25, at 19.

67. MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE (Mises Institute 1993).

## V. THE BENEFITS OF BLACKMAIL

In this section, Ginsburg and Shechtman comment upon the blackmail theory of Landes and Posner.<sup>68</sup> They do so for two reasons. One, in order to make good on their promise to show there are no beneficial effects to blackmailers that can offset the research and other costs of the blackmailer.<sup>69</sup> And two, to further defend their view that self-interest, which is “the general principle of the Model Penal Code,” is and should be “the touchstone of a lawful threat.”<sup>70</sup> That is, unless the blackmailer gains a value recognized by Ginsburg and Shechtman, he should be jailed.

Ginsburg and Shechtman offer the case of the “lawful bookmaker, who cannot sue to enforce a gambling debt, threatens to tell the client’s ‘aged and pious parents who consider betting sinful about their son’s activities.’”<sup>71</sup> Ginsburg and Shechtman favor legalizing what would otherwise be a blackmail threat “as lawful economic bargaining”<sup>72</sup> on the assumption that it is intended to get the parents to pay off the bookmaker. On the other hand, if the bookmaker is making the threat, not out of any benefit for himself, but, presumably, out of sheer cussedness, then Ginsburg and Shechtman are ready to pounce on him, and declare his act to be illegal blackmail.

This is difficult to understand. Even passing over the point that actions are not in effect uncaused, that in the mind of the actor *ex ante* every human action is an attempt to better his welfare, we have in this case a benefit for the actor which one would have thought would have satisfied even Ginsburg and Shechtman. Namely, the bookmaker is resorting to blackmail *in order to be paid the money rightfully due him*. Of course, as a blackmailer, he doesn’t expect the *parents* to pay the son’s gambling debts. For them to do so, it would have meant the failure of the blackmail threat. Rather, he expects the *son* to fork over the money he owes, out of a concern that his parents never hear of his

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68. William Landes and Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

69. Ginsburg and Shechtman, *supra* note 1, at 1860 n.41. However, the entire Ginsburg and Shechtman “law and economics” premise is objectionable. Central planning cannot create wealth, let alone maximize it. See LUDWIG VON MISES, *SOCIALISM*, *supra* note 25. Even if it could, it is not the function of law to penny pinch and cut costs; rather, its purpose is to protect rights and thereby promote justice. Happily, however, there is no incompatibility between the two goals. The central plan of Ginsburg and Shechtman is as unable to attain wealth as it is to foster legal legitimacy. See Walter Block and David Gordon, *Extortion and the Exercise of Free Speech Rights*, *supra* note 3.

70. Ginsburg and Shechtman, *supra* note 1, at 1870.

71. *Id.*, citing A. H. Campbell, *supra* note 60, at 395.

72. Ginsburg and Shechtman, *supra* note 1, at 1870.

dissolute ways.

But what of Ginsburg and Shechtman's first concern in this section, to denigrate the claim that the blackmailer will have some beneficial (*i.e.*, wealth enhancing) effects in reducing improper behavior? In order to make this point, they introduce another example:

Suppose that A desires to engage in an activity, such as chewing tobacco in public, but that B's report of his behavior to C would cause her to lose respect for A's character; indeed, C might lose affection for A as a result.<sup>73</sup>

For Ginsburg and Shechtman, the question of whether blackmail is wealth enhancing comes down to the issue of whether C gains from knowing A's secret. In their view:

If C is concerned with A's welfare [*e.g.*, tobacco stains on A's teeth] and not with her own [*e.g.*, it will be unpleasant to kiss A], then it is not at all clear that C is any better off when A conforms his conduct to her desires, nor that C is any worse off when A fails to do so. But it is certainly difficult to see how the welfare of an altruistic C is affected by A's behavior when that behavior is unknown to her.<sup>74</sup>

This is highly problematic.<sup>75</sup> Surely C is better off knowing that her husband or boyfriend engages in bisexual activity with multiple partners and indulges in unprotected sex or is an intravenous drug user, because the chances of his contracting AIDS is much enhanced by such behavior. She most certainly is affected by A's behavior, especially when that behavior is unknown to her. Ginsburg and Shechtman maintain that "sometimes what we know can't hurt us."<sup>76</sup> But which of us would not want to know if his spouse were acting in a way contrary to our interests? Would Ginsburg and Shechtman themselves step forward in this regard?

And what about A? Why leave him out of the economic calculation? He will presumably benefit, given the assumption that the tobacco chewing habit is harmful to him, and that legalized blackmail is more likely to deter him from such self inflicted mischief.<sup>77</sup>

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73. *See id.* at 1871.

74. Ginsburg and Shechtman, *supra* note 1, at 1872.

75. *See id.* n.71 and accompanying text.

76. *Id.*

77. The author speaks here as an advocate, for argument's sake, of the Ginsburg and Shechtman philosophy that admits of interpersonal comparisons of utility, paternalism, socialism, central planning and all the rest. Based on the Austrian welfare insights this

Ginsburg and Shechtman adopt a similar stance with regard to the aged pious parents of the gambler. They, too, it appears, are better off not knowing, given that “the blackmail victim was bound by ties of affection”<sup>78</sup> to the respective A, as opposed to self-interest. But if you don’t know of your son’s weakness, how can you help him overcome it? Surely, this would be an important motivation for altruistic parents.

In concluding this section, Ginsburg and Shechtman state the following about blackmail:

If such threats were lawful, there would be an incentive for people to expend resources to develop embarrassing information about others in the hope of then selling their silence. In that case, some people would be deterred from engaging in embarrassing (but lawful) conduct, while some others who were undeterred would find that their business or social acquaintances or family were informed of their activity.<sup>79</sup>

Two sentences, and two errors. First, Ginsburg and Shechtman have it backwards. Legalization would only give incentive for people to expend these resources as compared to prohibition. But if one assumes a system of natural liberty, where the libertarian axiom of non-invasion is followed, there would be no particular incentive to invest resources in this calling, as compared to any other legal one. It is only under prohibition that less than the optimal amount of resources will be spent on ferreting out such information. One might as well say that under legalization of alcohol “there would be an incentive for people to expend resources” in this industry, implying an over optimal expenditure. On the contrary, the presumption is that the correct amount of investment is now being made there.<sup>80</sup> And the same applies to blackmail, at least when the benchmark applied is the voluntary choices of people free to do whatever they please, as long as they do not invade the persons or property of others. This is in sharp contrast to the central planning criterion employed by Ginsburg and Shechtman.

Second mistake. It is not true, under legalization, that people’s choices would be limited to the two mentioned by Ginsburg and

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whole discussion is invalid. See LUDWIG VON MISES, *HUMAN ACTION*, *supra* note 25; MURRAY N. ROTHBARD, *Toward a Reconstruction of Utility and Welfare Economics*, Center for Libertarian Studies, Occasional Paper No. 3 (1977); MURRAY N. ROTHBARD, *MAN, ECONOMY & STATE* (Mises Institute 1993).

78. Ginsburg and Shechtman, *supra* note 1, at 1873.

79. *Id.*

80. At least in equilibrium.

Shechtman. There is a third option to being “deterred from engaging in embarrassing (but lawful) conduct, or suffering when one’s business or social acquaintances or family were informed of their activity.”<sup>81</sup> It is to pay off the blackmailer for his silence. Then, albeit for a fee, *i.e.*, this payment, one can have his cake and eat it too. Namely, a man can engage in shameful behavior, without any acquaintance or family member coming to know of it.

## VI. POSTSCRIPT

In this section Ginsburg and Shechtman attempt to refute the theories of Lindgren<sup>82</sup> and Boyle,<sup>83</sup> who, in this author’s opinion, are equally mistaken in their analysis of blackmail.

The general rule for all such debates between blackmail prohibitionists is that the critic is always right. That is, there are numerous scholars who oppose legalization. They all, with but few exceptions, offer their own separate theories. As a direct implication, each of them is critical of the views of all the others. As a result, whenever there is an intra-prohibitionist debate, the critic is invariably correct. This follows from the fact that they are all wrong in their explanations, as the truth of the matter is that the case for legalization is the only correct and logically coherent one.

One instance of this general rule occurred earlier in the paper now under review, where Ginsburg and Shechtman successfully, in this author’s view, criticize Landes-Posner.<sup>84</sup> The latter authors attempt to account for opposition to blackmail on the ground that it is a private attempt at law enforcement; and, as there are good and sufficient reasons for leaving such efforts totally in the hands of the government, private interference such as blackmail will typically lead to an over-investment in resources allotted for this purpose. Ginsburg and Shechtman write:

[I]nformation may be humiliating, but not incriminating, for any

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81. Ginsburg and Shechtman, *supra* note 1, at 1873.

82. James Lindgren, *Unraveling the Paradox of Blackmail*, *supra* note 4, at 670. For more of Lindgren’s opinions on blackmail, see James Lindgren: *More Blackmail Ink: A Critique of ‘Blackmail, Inc.,’ Epstein’s Theory of Blackmail*, 16 CT. L. REV. 909 (1984); *In Defense of Keeping Blackmail a Crime: Responding to Block and Gordon*, 20 LOY. L.A. L. REV. 35 (1986); *Secret Rights: A Comment on Campbell’s Theory of Blackmail*, 212 CT. L. REV. 407 (1989); *Kept in the Dark: Owen’s View of Blackmail*, 21 CT. L. REV. 749 (1989); *Blackmail: On Waste, Morals and Ronald Coase*, 36 UCLA L. REV. 597 (1989); James Lindgren, *The Theory, History and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993).

83. James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 CAL. L. REV. 1413 (1992).

84. Ginsburg and Shechtman, *supra* note 1, at 1870.



number of very particularized reasons. [Ginsburg and Shechtman, mention Campbell's example of the gambler with aged pious parents.] These may be quite unrelated to any "social decisions" about the economics of enforcement, and yet the prohibition upon blackmail will apply; more than concern for optimal norm enforcement is needed, therefore, to explain the law against blackmail.<sup>85</sup>

Another instance is furnished by DeLong,<sup>86</sup> who dismisses all economic justifications of prohibition<sup>87</sup> as follows:

Why does blackmail strike us as so wrongful? So wrongful that even in the midst of a transaction and cost analysis, the economist Ronald Coase would refer to it as "moral murder?" None of the foregoing [economic] theories seems to touch the nerve that the blackmailer rubs; none explains the societal abhorrence of the blackmailer's craft. *Purely economic explanations of the criminal law often produce bizarre conclusions, such as that blackmail rules are intended to reduce expenditures by blackmailers.* Such provocations are part of the charm of economic analysis. We all know that blackmail laws are meant to do more than prevent waste.<sup>88</sup>

And now, in conclusion, let me illustrate this principle once again. Lindgren, whose own defense of prohibition has been subjected to withering attack,<sup>89</sup> now has the better of Ginsburg and Shechtman, despite their replies.

Ginsburg and Shechtman's main point is, of course, that blackmail requires the improper allocation to it of scarce resources, mainly in order to ferret out secrets. Lindgren remarks, quite reasonably in the present author's view, that this theory is "unable to

85. *Id.*

86. Sidney W. DeLong, *supra* note 5, at 1689.

87. For example, Steven Shavell, *An Economic Analysis of Threats and Their Legality: Blackmail, Extortion and Robbery*, 141 U. PA. L. REV. 1877 (1993); Richard Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817 (1993); Ginsburg and Shechtman, *supra* note 1.

88. Sidney W. DeLong, *supra* note 5 (emphasis added). The present author has only one slight demurrer to this magnificent evisceration of the economic approach. As an economist, I do not at all find this to be "charming." I see it rather as a tragic misallocation of scholarly economic time and effort, and as no less than an academic perversion. I especially resent that these economists, in calling their approach one of "economics," willy nilly include such people as myself. They ought to come up with another appellation. Suggestions: Chicago economics, Chicago law and economics, utilitarian economics, pragmatic economics, legal positivism.

89. See Walter Block, *The Case for De-Criminalizing Blackmail*, *supra* note 3; Walter Block and David Gordon, *Extortion and the Exercise of Free Speech Rights*, *supra* note 3; Sidney W. DeLong, *supra* note 5, at 1689 (emphasis added).

explain why it is blackmail<sup>90</sup> to sell information that is not purposefully acquired.”<sup>91</sup> Ginsburg and Shechtman, in Lindgren’s view, may thus be able to explain “commercial research blackmail: and “entrepreneurial blackmail,” but not “participant or opportunistic blackmail.”<sup>92</sup>

Ginsburg and Shechtman reject this criticism on the ground that the gain to the blackmailer who carries through on his threat is only as “an entrepreneur of blackmail, i.e., someone who expects to engage in similar future transactions from which to realize a return on the investment in credibility.”<sup>93</sup> Even if this were true, however, it still does not obviate Lindgren’s point. Let us focus, at least for the moment, on *this* case of blackmail, the one for which the information was obtained for free. Forget about future implications, at least for the sake of argument. Or, assume that the world will abruptly end right after *this present instance* of blackmail occurs. Now is it true or untrue that *this* case of blackmail, where the information was acquired by accident, required no expenditure, at least for information gathering purposes? How can Ginsburg and Shechtman rationally deny this Lindgren point?

The Ginsburg and Shechtman contention is not necessarily true. Of course it cannot be denied that establishing credibility as a blackmailer will tend to enhance future reputation capital. On the other hand, if a person gets a reputation as a blackmailer, people with secrets to hide will certainly tend to steer clear of him. This will be a loss, not a gain, to his future career. Further, there are other “rational” motivations apart from enhancing future entrepreneurial blackmail that might explain why the blackmailer “stands to gain . . . by actually carrying through his threat to send compromising information to the newspapers.”<sup>94</sup> For one thing, he might have an “anal” personality, and be unable to bear not carrying out something to its conclusion. For another, there is always the psychic income of a job well done.

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90. That is, improper. It is blackmail, but even so, it should be lawful. In contrast, according to usage in the anti-blackmail literature, to prove something is blackmail is *per se* to show it is illicit.

91. James Lindgren, *Unraveling the Paradox of Blackmail*, *supra* note 4, at 695. However, the present author does not at all regard Lindgren’s own justification for the prohibition as reasonable. See Walter Block, *The Case for De-Criminalizing Blackmail*, *supra* note 3; Walter Block and David Gordon, *Extortion and the Exercise of Free Speech Rights*, *supra* note 3.

92. Lindgren, *supra* note 4, at 695.

93. Ginsburg and Shechtman, *supra* note 1, at 1865, 1875.

94. *Id.*

Nor do Ginsburg and Shechtman emerge unscathed from their tangle with Boyle,<sup>95</sup> who offers yet another reason, apart from future entrepreneurial blackmail, to carry through on the threat: enhanced status as a gossip. Ginsburg and Shechtman try much the same reply with Boyle as they did with Lindgren, but equally ineffectual results. Yes, Ginsburg and Shechtman cannot be denied when they assert “the lesson of his experience is that the acquisition of damaging information is a profitable enterprise,”<sup>96</sup> but this does not necessarily mean that the accidental acquirer will carry through and enter this profession. And one must agree with Ginsburg and Shechtman when they claim

[t]he prohibition of blackmail thus serves a prophylactic purpose by discouraging even the accidental acquirer of damaging information from acquiring an incentive to seek out information for use in a future blackmail attempt.<sup>97</sup>

But one must still insist that this is irrelevant to the issue under debate: whether *this present non-entrepreneurial* blackmail attempt cost any money for information retrieval. And the undeniable answer is that it did not.

## VII. CONCLUSION

At the outset of their piece, Ginsburg and Shechtman stated that “drafting a general law that separates blackmail from bargaining has proved an elusive task.”<sup>98</sup> As far as the present author is concerned, this is just as elusive as it ever was, despite their Herculean efforts. It is an elusive task because it simply cannot be done. It is and always will be just as elusive as finding a square circle or parallel lines that meet. If it is lawful to do X, it must necessarily be lawful to *threaten* to do X. If it is not lawful to do X, only then is it not lawful to threaten to do it. Wealth maximization is simply irrelevant to his basic legal premise.<sup>99</sup>

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95. Boyle, *supra* note 83.

96. Ginsburg and Shechtman, *supra* note 1, at 1876 n.92.

97. *Id.*

98. Ginsburg and Shechtman, *supra* note 1, at 1849.

99. Regarding the recent Bill Cosby case, one author commented:

Ms. Autumn Jackson was entitled, consistent with her constitutional rights, to sell the story to the press. Moreover, she, along with anyone else, was legally entitled to request money from Mr. Cosby or any other person. Why, then is it unlawful for her to threaten to sell her story if she does not receive the money?

The prosecution of Ms. Jackson is particularly difficult to justify because the legal community commonly practices the same kind of “extortion” she is accused of. A lawyer representing a client who has been injured by the conduct of an opposing party will threaten to file a complaint. Fearing public exposure

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from a suit, the opposing party settles the case before the filing, with the agreement promising confidentiality. Michael D. Rips, *To Ask is Not Always to Extort*, NEW YORK TIMES, July 18, 1997.

There is nothing in Ginsburg and Shechtman that will satisfy this plaintive cry for elemental justice.