

## Theft by Coercion: Extortion, Blackmail, and Hard Bargaining

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Despite, or more likely because of, the many harms it has inflicted on its employees, investors, and the economy generally, the demise of Enron—once the world's largest energy trading company, now a bankrupt shell of its former self—has proved a bonanza for legal scholars.<sup>1</sup> For white collar crime specialists in particular, the Enron scandal provides a nearly endless source of alleged fraudulent accounting practices, self-dealing, obstructions of justice, corruption, insider trading, and other violations of law and ethics to ponder.

The particular strand of the Enron scandal I intend to focus on here involves an Enron spin-off investment partnership known as LJM-2. Starting in October 1999, Enron Vice President and Chief Financial Officer Andrew Fastow began to look for investors in LJM-2 by soliciting various banks that had been doing business with his firm.<sup>2</sup> According to media reports, there were two things Fastow allegedly did that were potentially criminal: (1) he gave investors false information about the state of Enron's and LJM-2's finances; and (2) he threatened the investors that unless they agreed to invest in LJM-2, Enron would no longer do business with them.<sup>3</sup> These techniques apparently worked: In the course of only a few months, Fastow managed to raise approximately \$349 million in equity.<sup>4</sup>

To the extent that he deceived investors about the state of Enron's finances, it seems likely that Fastow committed fraud. Because I have discussed that offense elsewhere,<sup>5</sup> however, I will not do so here. Instead, the focus of this article will be on the significance, both moral

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1. See, e.g., NANCY B. RAPAPORT & BALA G. DHARAN, *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* (2004).

2. The solicitations are described in a Memorandum from Max Hendrick, III, outside counsel for Enron at Vinson & Elkins law firm, to James V. Derrick, Jr., Enron General Counsel (Oct. 15, 2001) (<http://news.findlaw.com/hdocs/docs/enron/veenron101501ltr.pdf>) (last visited Apr. 10, 2005) [hereinafter Hendrick Memo].

3. David Ivanovich, *Bankers Believed Deals Hinged on Investments*, HOUSTON CHRON., Feb. 19, 2002, at A9, <http://www.chron.com/cs/CDA/ssistory.mpl/special/enron/1262132>; *Top Former Enron Executive "to Plead Guilty"*, THE GUARDIAN, Jan. 8, 2004, <http://www.guardian.co.uk/enron/story/0,11337,1118744,00.html>; see also Press Release, SEC Charges Jeffrey K. Skilling, Enron's Former President, Chief Executive Officer and Chief Operating Officer, with Fraud (Feb. 19, 2004), <http://www.sec.gov/news/press/2004-18.htm>.

4. Hendrick Memo, *supra* note 2.

5. E.g., Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001).

and legal, of Fastow's alleged threats. Such threats seem to have constituted coercion: They deprived investors of their autonomy by forcing them to choose between doing what was demanded or opting instead for the consequences threatened. But, as morally noxious as such conduct might have been, it is unclear whether it constituted a crime; and, if it did, which one.

Had Fastow threatened the bankers with some unambiguously criminal act unless they paid him—say, if he had told them that he would “break their knees” unless they invested in LJM-2—it seems obvious that he would have committed extortion. But what Fastow allegedly did threaten the investors with—namely, no longer doing business with their banks—was something that seems, on first sight, to be perfectly lawful. So, unless we are prepared to treat as a crime every threat of *X*'s to do some unwanted but putatively lawful action unless *Y* pays him to forgo it, we have a problem. And it is a problem that is likely to arise in any context in which people attempt to obtain money by threatening to engage in unwanted but putatively lawful action—such as litigation (threatened lawsuits), labor negotiations (threatened strikes), and tender offers (threatened corporate takeovers).

Whether our system is justified in criminalizing threats to do an otherwise lawful act unless one is paid is a question that has bedeviled criminal law theorists for more than a generation. Under the rubric of the blackmail paradox, scholars have sought to explain why it should be a crime to seek to obtain money by threatening to do any one of a number of lawful acts, including, most prominently, exposing lawfully obtained embarrassing information. Unfortunately, as I argue in my brief review of this literature in Part I, no adequate test has been developed that would allow us to make a clear distinction between those threats that should be treated as mere hard bargaining and those that should be treated as a crime.

Thus, in Part II, we turn to a theoretically more modest, but nevertheless doctrinally significant, project. Even if it is not possible to say which threats to do what is putatively lawful should be treated as a crime generally, we should still be able to say which, if any, such threats should be treated specifically as extortion. To that end, the analysis offered here consists of two basic steps: The first is to conceptualize extortion as theft by coercion. When *X* “wrongfully” threatens to commit some act unless *V* pays *X*'s demand, *X* “steals” from *V* by charging him money for something he has no right to charge him for. The second is to say that a threat should be regarded as “wrongful” for purposes of extortion law if and only if the conduct threatened would be unlawful under the relevant governing law. Under this ap-

proach, we ask whether threatened conduct that is *putatively* lawful is, on further inspection, *in fact* lawful. If the conduct does turn out to be lawful, then it would not on this account constitute extortion, although it might constitute some other crime. Only if such conduct proved in fact to be unlawful would we be justified in saying that it is extortionate.

## I. THE DIFFICULTY OF DISTINGUISHING BETWEEN CRIMINAL AND NON-CRIMINAL THREATS

After a brief review of the elements of three basic “threat crimes”—extortion, blackmail, and criminal coercion—this Part considers some of the leading works on the blackmail paradox to see if they offer any help in attempting to distinguish between those threats to do what is lawful that should be treated as a crime and those that should be regarded as non-criminal, mere “hard bargaining.”

### A. Three “Threat Crimes”

As noted at the outset, Enron’s Andrew Fastow is alleged to have obtained substantial investments of money from various banks by telling the banks that, unless they invested in LJM-2, Enron would no longer do business with them. The question I want to consider is whether such conduct constituted a crime, and, if so, which one? More generally, under what circumstances should it be a crime to threaten to do a putatively lawful act unless one is paid to forgo it? In this section, we briefly consider the elements of three offenses that could conceivably provide the basis for a charge in such a case: extortion, blackmail, and criminal coercion.

#### 1. Extortion Under the Hobbs Act

Under the Hobbs Act, extortion is defined as the “obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”<sup>6</sup> The Act thus identifies two principal kinds of extortion: (1) obtaining property through wrongful threats; and (2) obtaining property under color of official right. The moral content of the second kind of extortion is in many cases similar to that of soliciting a bribe, an offense that I have discussed extensively elsewhere, and will not, therefore, consider here.<sup>7</sup> It is the first kind of extortion that will be the focus of our analysis.

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6. 18 U.S.C. § 1951(b)(2) (2000).

7. Stuart P. Green, *What’s Wrong with Bribery*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* (R.A. Duff & Stuart P. Green eds., forthcoming 2005); see also generally James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Dis-*

We can begin by observing five preliminary points about the Hobbs Act definition of extortion by threat (which I shall henceforth refer to simply as extortion), each of which will be considered in greater detail below: First, extortion requires that the defendant use a threat to obtain “property.” As such, extortion is a species of theft. Making a threat to obtain something other than property, such as sexual favors or political endorsements, is not extortion, although it might constitute the separate offense of criminal coercion. Second, such property must be obtained with what is referred to as the victim’s (admittedly invalid) “consent.” This requirement distinguishes extortion (and fraud) from other forms of theft, such as larceny and embezzlement, in which the victim’s property is taken without the victim’s acquiescing in the act, or even necessarily being aware that the property is being taken. Third, the victim’s so-called consent must be obtained by means of a “threat,” which is described below as a promise to bring about some unwanted state of affairs unless the victim pays up. Fourth, what the extortionist threatens the victim with, at least in the kinds of cases dealt with here, is future economic harm. Extortion of this sort is thus distinguishable from robbery, in which property is obtained through threats of immediate physical harm. Finally, the extortionist’s threat must be a “wrongful” one. Note that the Hobbs Act does not explicitly require that the defendant threaten to do an “unlawful” act. Thus, a threat to do a lawful act could theoretically constitute extortion. Nevertheless, as I shall suggest below, a better construction of the statute is that the term “wrongfulness” should be understood as meaning “unlawfulness,” and that a threat should be viewed as extortionate only if the act threatened would violate some underlying provision of positive law.

## 2. Three Senses of Blackmail

The term “blackmail” is used in three distinct senses: a narrow sense, a broad sense, and an in-between sense. In the first, mostly American, narrow sense, the term refers to cases in which an offender threatens to do one particular kind of unwanted but putatively lawful act unless paid money—namely, revealing true embarrassing information about another.<sup>8</sup> We can also refer to this as “informational blackmail.” A somewhat specialized example of this kind of blackmail can be found in the federal blackmail statute, which makes it a crime to

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*inction*, 141 U. PA. L. REV. 1695 (1993); James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988).

8. E.g., Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFF. 43, 46 (1992).

demand money or other valuable things from a person in return for not informing on the person's violation of federal law.<sup>9</sup>

Informational blackmail has several elements in common with extortion under the Hobbs Act: (1) like the extortionist, the blackmailer must use a threat to obtain "property"; (2) the property must be obtained with the victim's "consent"; and (3) the victim's consent must be obtained by means of a "threat." The difference between extortion and informational blackmail is that, whereas extortion can potentially involve a threat to do anything that is deemed to be wrongful, blackmail involves one particular kind of threat—namely, to expose information that would be embarrassing to the one threatened.

A much broader use of the term "blackmail" occurs under British law, which has no separate offense of extortion. Under Section 21 of the U.K. Theft Act of 1968, a person is guilty of blackmail if, "with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces."<sup>10</sup> This kind of blackmail is broader than informational blackmail in two significant ways: First, the "view to gain . . . or intent to cause loss" language encompasses both demands for money and demands for something other than money, such as that the victim give the blackmailer a job, that the victim permit the blackmailer to take indecent photographs of her, or that the victim destroy letters written by the blackmailer to her.<sup>11</sup> Second, the "any unwarranted demand with menaces" language is—at least on its face—broad enough to encompass threats of a very wide range of conduct, both lawful and unlawful.<sup>12</sup>

There is also a third, "in-between" sense of the term blackmail. Unlike blackmail under the Theft Act, this kind of blackmail is limited to demands for money, as opposed to other kinds of compelled conduct. But, unlike blackmail in the narrow sense, such blackmail is not limited to threats to expose embarrassing information; it also includes threats to do other putatively lawful acts, such as filing a lawsuit, stag-

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9. 18 U.S.C. § 873 (2000); see also Stuart P. Green, *Federal Blackmail Statute*, in ENCYCLOPEDIA OF MAJOR ACTS OF CONGRESS 24 (2003).

10. Theft Act, 1968, c. 60, § 21 (Eng.).

11. See cases cited in EDWARD GRIEW, *THE THEFT ACTS 1968 & 1978* 220 (1990); Grant Lamond, *Coercion, Threats, and the Puzzle of Blackmail*, in HARM AND CULPABILITY 216 (A.P. Simester & A.T.H. Smith eds., 1996) (using the term in the broad sense).

12. A threatened course of conduct will be viewed as violative of the Theft Act's blackmail provision only if it is deemed an "improper" means of reinforcing a demand. GRIEW, *supra* note 11, at 216-19. In *Harvey*, 72 Crim. App. R. 139, 142 (1980), the court held that no act known by the defendant to be *unlawful* can be deemed to be proper. What is much less clear under British law is when, if ever, threats to do what is *lawful* will be regarded as improper, and therefore extortionate. See GRIEW, *supra* note 11, at 214-19; 2 GERALD H. GORDON, *THE CRIMINAL LAW OF SCOTLAND* 247-54 (Michael Christie ed., 3d ed. 2001). Thus, British blackmail law reflects an ambiguity similar to that seen under American extortion law. Suffice it to say that British courts might wish to consider the possibility of interpreting the terms "unwarranted" or "improper" under the Theft Act in a manner similar to that recommended for interpreting the term "wrongful" under the Hobbs Act.

ing a work stoppage, or even going on a hunger strike.<sup>13</sup> As we shall see below, however, the problem is that blackmail both in this in-between sense and under the broad “unwarranted demand with menaces” language of the Theft Act offers no clear basis for distinguishing between those threats to do what is lawful that should be treated as a crime and those that should not.

### 3. The Offense of Criminal Coercion

A third possible offense with which Fastow could conceivably be charged is the state law crime of criminal coercion. As defined in the Model Penal Code, the offense of criminal coercion consists of “unlawfully . . . restrict[ing] another’s freedom of action to his detriment” by threatening to: (1) commit a criminal offense; (2) “accuse anyone of a criminal offense”; (3) “expose any secret tending to subject any person to hatred, contempt, or ridicule, or to impair his credit or business repute”; or (4) “take or withhold action as an official, or cause an official to take or withhold action.”<sup>14</sup> Criminal coercion is thus distinguishable from extortion and from blackmail (at least in the narrow, informational sense of the term) in two important ways. First, as noted, it does not involve obtaining any property from the victim. Second, it can involve threats to engage in either lawful or unlawful conduct, so long as it is intended to be detrimental to the victim. For example, a teacher who demands sexual favors in return for not flunking a student presumably would have committed the offense of criminal coercion.

#### B. *The Blackmail Paradox and Mere “Hard Bargaining”*

Had Fastow threatened the LJM-2 investors with an act that was obviously criminal (e.g., breaking their knees) unless they met his demands, it is uncontroversial that he would have committed extortion. But Fastow did not threaten to break anyone’s knees, or do anything else that was obviously unlawful. Instead, what he allegedly threatened to do was the putatively lawful act (or omission) of having Enron stop doing business with the potential investors. The case thus raises the question when, if ever, a threat to engage in putatively lawful conduct unless one is paid should be treated as a crime, and, if so, which one.

At the outset, we can see that a charge of criminal coercion would not apply here, since what Fastow was seeking from the LJM-2 investors was money, rather than some other restriction on their freedom.

13. See, e.g., Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567, 1567-68 (1993) (also using “blackmail” in broad sense).

14. MODEL PENAL CODE § 212.5(1) (1980).

It is also clear that Fastow's threat did not constitute the narrow, informational kind of blackmail, since it did not involve a threat to expose embarrassing information.<sup>15</sup>

If Fastow's threat constituted any crime at all, it was either blackmail in the broader sense of the term or extortion. I will talk more below about the distinction between these two offenses. In the present section, however, I want to address a separate question—namely, whether it is possible to draw any conceptually clear distinction between those threats to do what is putatively lawful that should be treated as a crime (whatever specific offense that may turn out to be) and those threats to do what is putatively lawful that should be treated as mere hard bargaining.

The most obvious place to look for an answer to this question is in the voluminous literature on the blackmail paradox. As legions of legal theorists have pointed out, the act of exposing another's lawfully obtained private information is generally not a crime; nor is it generally illegal to ask another for money. But combine the two acts and you get a crime. The challenge of the blackmail paradox is thus to offer a justification for making it a crime to demand money to refrain from doing acts that would otherwise be lawful—or at least to demand money to refrain from doing the particular act of exposing embarrassing information. My goal here is not to assess the overall validity of the arguments offered in favor of, or in opposition to, the criminalization of such threats. Rather, I want to see if such literature can shed any light on the more practical problem of distinguishing criminalizable threats to do what is lawful from non-criminalizable ones.

For present purposes, the arguments offered in favor of the criminalization of blackmail can be grouped into two basic categories. The first group, which is discussed in the next section, consists of theories that focus on justifying the criminalization of informational blackmail specifically. As such, they are too narrow to be of much help in determining whether threats to engage in other kinds of putatively lawful activity, not involving the exposure of embarrassing information, should also be criminalized. The second group, discussed in the section that follows, consists of theories that seem intended to justify the criminalization of threats to do a much broader range of putatively lawful acts than in the first group. These theories, however, ultimately offer no satisfactory criteria for making a practical distinction between those threats that should be criminalized and those that should not.

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15. Interestingly, however, "blackmail" was the term that Enron whistleblower Sherron Watkins used to characterize Fastow's conduct in connection with the LJM-2 solicitation. Ivanovich, *supra* note 3, at A9 (according to Watkins, "Fastow was in effect blackmailing banks to become investors in LJM").

### 1. Theories That Are Underinclusive

Consider the argument for criminalizing blackmail offered by Richard Epstein.<sup>16</sup> Epstein argued that the reason we need to criminalize informational blackmail is that legalizing it would produce at least two undesirable consequences: First, it would lead to more blackmail victims and, consequently, more thefts and frauds committed by those desperate to raise the funds necessary to pay off their blackmailers.<sup>17</sup> Second, it would encourage victims to commit various frauds against the third parties to whom the disclosure would otherwise be made.<sup>18</sup> In other words, Epstein argues, the best reason for criminalizing informational blackmail is that legalizing it would lead to additional forms of corruption and deceit. Unfortunately, Epstein's theory, even if it were adequate to justify the criminalization of informational blackmail itself, offers little practical help where we need it. The theory is so narrowly focused on offering a justification for informational blackmail that it fails to explain whether any other kinds of threats to do lawful acts should be treated as a crime. In answering such a question, Epstein would presumably have us consider whether legalization of such threats would lead to the kind of chain of criminal activity that he foresees in the case of informational blackmail. But his work leaves unclear how we should evaluate such threats, and what he thinks the outcome would be.

Like Epstein, Jeffrie Murphy offers a theory of blackmail that focuses primarily on the criminalization of threats to expose embarrassing information, and on the negative social consequences that would result from the legalization of such acts.<sup>19</sup> According to Murphy, legalizing blackmail would, at least in the case of non-public figures, create economic incentives for invasions of privacy with no identifiable social value.<sup>20</sup> Unfortunately, like Epstein, Murphy is so focused on threats to expose embarrassing information that he is unable to explain whether, and if so which, other kinds of "hard economic transactions"<sup>21</sup> should be subject to criminal sanctions.

A third influential theory of blackmail, offered by James Lindgren,<sup>22</sup> is similarly inadequate for our purposes. Once again, the focus is almost exclusively on informational blackmail. According to Lindgren, what characterizes such conduct is that the informational blackmailer attempts to gain an advantage for himself (typically,

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16. Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983).

17. *Id.* at 562.

18. *Id.* at 564.

19. Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 THE MONIST 156 (1980).

20. *Id.* at 163-64.

21. The term is Murphy's. See *id.* at 163.

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

money from his victim) by using leverage that properly belongs to another.<sup>23</sup> For example, when a blackmailer threatens to expose *V*'s marital infidelities unless *V* pays him money, the blackmailer is using, for his own advantage, “bargaining chips” that properly belong to someone else—in this case, *V*'s spouse.<sup>24</sup> While Lindgren's account does offer a useful description of the dynamic involved in many cases of informational blackmail, it tells us little about what other kinds of threats, if any, he believes should be subject to criminal sanctions. Indeed, it fails to explain not only whether other kinds of threats to engage in putatively lawful conduct, such as filing a lawsuit or withholding found property, should be criminalized,<sup>25</sup> but, more fundamentally, why it should be a crime to engage in even *unlawful* conduct that does not involve the “triangular” kind of relationship involved in informational blackmail.<sup>26</sup>

## 2. Theories That Are Overinclusive

The second group of theories intended to justify the criminalization of blackmail also fails to offer a basis for deciding which kinds of threats to do what is lawful, if any, should be treated as a crime, though they fail for a converse reason—namely, *overinclusiveness*. Consider the argument offered by George Fletcher, which can be summarized as follows: (1) the central concern of the criminal law is to deter conditions of “dominance and subordination”; (2) blackmail, through the prospect of repeated demands, creates a serious potential for a continuing relation of this sort; (3) therefore, blackmail should be criminalized.<sup>27</sup> Even if his rationale could justify the criminalization of threats to expose embarrassing information,<sup>28</sup> however, it is unclear where Fletcher would have us draw the line: To the extent that most, or even all, hard bargaining involves relationships of domination and submission, Fletcher's theory offers no identifiable rationale for distinguishing those threats that should be criminalized from those that should not.

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23. *Id.* at 702.

24. *Id.*

25. Leo Katz offers a similar critique of Lindgren. Katz, *supra* note 13, at 1581.

26. Interestingly, though, as I suggest below, something like Lindgren's “triangular” analysis may help provide an argument for criminalizing cases in which a union leader threatens that his union will go out on strike unless management pays a kickback to him personally. *See infra* text accompanying note 83.

27. George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1629-35 (1993).

28. And even this is doubtful, since many acts of informational blackmail present no reasonable apprehension of repeated demands, as in the case of the nominee who on the eve of his confirmation hearings is threatened with the exposure of embarrassing secrets. *See* Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 825 (1998). Therefore, Fletcher's theory is also underinclusive.

Leo Katz's theory of blackmail reflects the same shortcoming.<sup>29</sup> Katz conceptualizes blackmail in the following way: He begins by imagining a case in which *BI*, a burglar, breaks into *V*'s house to commit larceny.<sup>30</sup> Inside, *BI* threatens *V* that unless he divulges the combination to his safe, he will be beaten severely. *V* declares that he would prefer to submit to the beating rather than lose the contents of the safe. *BI* then beats *V* savagely. In a separate case, a different burglar, *B2*, breaks into *V*'s house and the same scenario ensues. But, this time, just as the burglar is about to strike *V*, he notices a scrap of paper containing the combination to the safe. Despite *V*'s plea that he would prefer to be beaten than lose the safe's contents, *B2* opens the safe and takes off with the contents. Katz then asks, why should the law punish the defendant in scenario 1 more severely than the defendant in scenario 2 (as it surely would), notwithstanding the fact that the victim in scenario 1 obtained his preference while the victim in scenario 2 did not?<sup>31</sup> The answer, says Katz, is that when the defendant "has the victim choose between either of two immoralities which he must endure, the gravity of the defendant's wrongdoing is to be judged by what he actually did (or sought to achieve), not by what he threatened to do."<sup>32</sup> Thus, *BI* should be punished more severely than *B2* because battery is morally worse than theft. And what does all of this have to do with blackmail? Well, says Katz, we need to think about the wrongfulness of blackmail not in terms of what the blackmailer threatens to do (i.e., expose *V*'s embarrassing information), but rather in terms of what the blackmailer actually does (i.e., steal money from *V*).<sup>33</sup>

Unfortunately, Katz's approach provides little help for the doctrinal issue being considered here. Although I am sympathetic to the idea of asking whether *X* has "stolen" from *V*, it seems that Katz takes this idea too far. For the question remains, should we really say that *X* "steals" from *V* every time *X* threatens *V* with bad consequences unless *V* pays up? If so, such an approach would invalidate, and indeed criminalize, a vast range of conduct that currently passes for hard bargaining in our commercial world. In short, Katz's approach seems—at least for present purposes—overly inclusive.<sup>34</sup>

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29. See Katz, *supra* note 13.

30. *Id.* at 1582.

31. *Id.* at 1582-83.

32. *Id.* at 1598 (emphasis omitted).

33. *Id.* at 1597.

34. Katz does concede that "[t]he mere threat to be nasty or unpleasant won't suffice" to justify criminalization. *Id.* But this concession seems too little too late, particularly as he fails to explain why it would not be "stealing" to obtain money by threatening to be nasty or unpleasant.

Finally, there is Mitchell Berman's theory.<sup>35</sup> Berman begins by identifying two conditions that are presumptively sufficient to justify criminalization: an act must be harmful and it must be undertaken by a morally blameworthy actor. Berman believes that blackmail meets this test. The harm condition requires that the conduct at issue cause or threaten identifiable harm—a condition that, he suggests, is met in the case of informational blackmail (where what is threatened is harm to *V*'s reputation). As for impermissible motive, Berman argues that “conditional threats can offer powerful (albeit not conclusive) circumstantial evidence of impermissible motive.”<sup>36</sup> In other words, evidence that *X* has offered to withhold disclosure in exchange for a fee is “probative” of the impermissible motive needed to justify criminalization. But since such an offer is only probative of bad motives, not conclusive, more justification is needed. Where the threat is to engage in criminal activity, we have no problem in concluding that there is an impermissible motive, and that the act is extortionate: People usually threaten to commit crimes out of bad motives. But where the threat is to engage in lawful activity, the task is more difficult: People threaten to disclose embarrassing information (and engage in other kinds of lawful acts) out of all kinds of motives, both good and bad (think, for example, of investigative reporters). But people who threaten to disclose embarrassing information *only if they are paid money not to do so* are significantly more likely to be driven by bad motives than those who impose no such conditions. Therefore, according to Berman, criminalization of informational blackmail is justified.

Once again, Berman's theory, even if it did provide an adequate justification for criminalizing the core case of informational blackmail, would be incapable of providing a clear test for distinguishing between other kinds of threats that should be criminalized and mere hard bargaining. First, it is hard to see why the notoriously slippery requirement of “harm” could not be met every time *X* threatens *Y* with a lawsuit, a strike, a tender offer, or the like. Berman offers the hypothetical of an antiques dealer who seeks to charge an eccentric millionaire an exorbitant price for a cheap and ugly vase that the millionaire needs to complete his collection.<sup>37</sup> He reaches the quite sensible conclusion that the dealer's conduct should not be subject to criminal sanctions, but his rationale for doing so is problematic. Berman argues that the millionaire has no “legally protected interest in the vase” and hence cannot be “harmed.”<sup>38</sup> But if the millionaire

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35. Berman, *supra* note 28. For an alternative critique of Berman, see Ronald Joseph Scalise, Jr., Note, *Blackmail, Legality, and Liberalism*, 74 *TUL. L. REV.* 1483, 1491-1501 (2000).

36. Berman, *supra* note 28, at 877-78.

37. *Id.* at 856.

38. *Id.*

has no legally protected interest in the vase, why exactly should the victim of informational blackmail have a legally protected interest in not having embarrassing information exposed? Such legal interest exists only if there is some law independent of blackmail and extortion law that creates it. And it is precisely the lack of any such independent legal protection in the case of embarrassing information that gives rise to the blackmail paradox.

Equally problematic is Berman's requirement of bad motives. According to Berman, an actor has

morally bad motives . . . when he acts with the knowledge that his conduct will cause, threaten, or risk harm to others, unless: (1) he actually believes that his action will produce more good than evil; (2) [such] belief is a but-for cause of his action; and (3) the standards the actor employs for measuring and evaluating "evil" and "good" in [the] case are defensible under common moral standards.<sup>39</sup>

While such definition seems on its face unobjectionable, in application it is likely to be, at best, subjective, and, at worst, to apply to so broad a range of hard-bargaining-type conduct that it would have the effect of putting undue additional weight on the already problematic requirement of harm.

## II. CONCEPTUALLY ISOLATING EXTORTION

The conclusion of the previous Part was that the literature on the blackmail paradox contains no clearly defined basis for distinguishing between those threats to do what is putatively lawful that should be treated as a crime and those that should not. Having in some sense given up on this more ambitious goal, I now want to pursue the more modest aim of seeing if it is possible at least to distinguish between those threats that should be treated specifically as extortion and those that should be treated either as some other crime or as no crime at all.

### A. *The Elements of Extortion*

The first order of business will be to reexamine the four basic elements of extortion mentioned above: obtaining property, threats, consent, and wrongful use.

#### 1. Obtaining Property: Extortion as a Form of Theft

One of the keys to understanding the moral content of extortion is to think about the offense as a form of theft. My claim here is that *X*, by threatening to do an unlawful act to *V* unless *V* pays up, "steals" from *V* by charging him money for something for which she has no

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39. *Id.* at 839-40 (emphasis omitted).

right to charge him. A separate question is whether there might also be cases in which *X* “steals” from *V* by threatening to do some unwanted but *lawful* act unless *V* pays up. To put it another way, we might ask not only whether *extortion* should be thought of as a form of theft, but also whether *blackmail* (in either the narrow or broad sense) should be so conceptualized. For present purposes, we need not resolve this issue. My claim is not that extortion is necessarily the only form of stealing through coercion, but merely that it is a core case of stealing through coercion.

Theft is typically defined as the unlawful taking of or exercising “unlawful control over movable property of another” with the intent to deprive the owner of such property thereof.<sup>40</sup> Theft can be committed in a variety of ways: Larceny is theft by stealth; embezzlement is theft by breach of trust; robbery is theft by force; fraud is theft by deception; extortion (and possibly blackmail) should be understood as theft by threat or coercion.<sup>41</sup> Despite the feature of property-misappropriation common to each of these offenses, there are nevertheless some important differences among them. For example, while the Model Penal Code-inspired trend in the United States has been toward the consolidation of larceny, embezzlement, and false pretenses into a single offense of “Theft by Unlawful Taking,” neither extortion nor robbery has been part of that consolidation.<sup>42</sup> Moreover, while the core theft offenses are typically graded on the basis of how much property is stolen, extortion and robbery are not.<sup>43</sup> On the other hand, while robbery is classified as an offense involving danger to the person, extortion resembles the other theft offenses in that it is classified as an offense against property.<sup>44</sup>

Because extortion, like theft generally, requires that the defendant seek to obtain property, using a threat to obtain something other than property is not generally recognized as extortion.<sup>45</sup> For example, if *X* threatens to terminate *V* from *V*'s job unless she consents to hav-

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40. MODEL PENAL CODE § 223.2(1) (1980) (“Theft by Unlawful Taking or Disposition [of] Movable Property”). For a useful discussion of the underlying moral structure of theft, see A.P. Simester & G.R. Sullivan, *On the Nature and Rationale of Property Offences*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* (R.A. Duff & Stuart P. Green, eds., forthcoming, 2005).

41. There is an interesting question—which, for present purposes, need not be resolved—whether robbery (involving the threat of immediate physical harm) should properly be viewed as a subset of extortion.

42. Compare MODEL PENAL CODE § 223.2 (1980) (Theft by Unlawful Taking, expressly consolidating the common law offenses of larceny, embezzlement, and fraud), with MODEL PENAL CODE § 223.4 (Theft by Extortion, consolidating the traditional offenses of extortion and blackmail).

43. See MODEL PENAL CODE §§ 223.2, 223.4.

44. *Id.*

45. It should be noted, however, that a handful of states define extortion to consist of threats to obtain property or compel action. See Craig M. Bradley, *Now v. Scheidler: RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129, 144 (1994) (citing 2 WAYNE LAFAVE & AUSTIN SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 8.12 (1986)).

ing sex with him, *X* has not committed extortion, since sexual favors are not considered property.<sup>46</sup> Moreover, as the U.S. Supreme Court recently recognized in the case of *Scheidler v. National Organization for Women*, the extortionist must use a threat to “obtain” or “acquire” such property, rather than merely divest the victim of it.<sup>47</sup> In the case of Andrew Fastow, in any event, the “obtaining property” requirement would easily be satisfied: The allegations are clear that he used threats to obtain from the LJM-2 investors nearly \$350 million in equity.

## 2. Threats and Coercion

The second element of extortion that needs to be considered is obtaining property from another, with his consent, induced by wrongful use of “threats” or “coercion.”<sup>48</sup> When *X* “threatens” *V*, *X* is promising *V* that he will bring about some unwanted state of affairs for *V*. Often, but not always, threats are conditional: in such cases, *V* is given a choice between doing what is demanded or opting instead for the consequences threatened. When *X* threatens *V*, she is promising to make *V* worse off in relation to some relevant baseline position than if *V* does not accept her proposal. This is in contrast to *X*’s making an “offer” to *V*, in which *V* is given an inducement to action: if *V* accepts *X*’s proposal, *V* will be made better off in relation to some relevant baseline position.<sup>49</sup>

46. As I have noted elsewhere, what constitutes “property” for purposes of theft law is not necessarily the same as what constitutes “property” for purposes of bribery or intellectual property law. STUART P. GREEN, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 211-21 (2002). Even if property is not what the defendant has obtained, however, he might still be charged with: (1) criminal coercion, see, e.g., MODEL PENAL CODE § 212.5(1) (1980); (2) the civil wrong of sexual harassment, see Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352 (codified in scattered sections of 28 U.S.C. and 42 U.S.C.); or (3) rape, see Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998). See also Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213, 238-44 (1994) (acknowledging that traditional extortion statutes do not apply to such cases, but arguing for creation of new offense of “quid pro quo sexual harassment”).

47. 537 U.S. 393 (2003). In *Scheidler*, the Court was called upon to determine whether it was extortion for a collection of anti-abortion groups to use fear and intimidation to shut down various abortion clinics throughout the nation. Because the plaintiffs had failed to show that the defendants had “obtained” or “acquired” any of the plaintiffs’ property, the Court held that no extortion had been committed (though it noted that the protesters may have committed the misdemeanor crime of coercion). *Id.* at 397.

48. There is an extensive, and quite sophisticated, literature on coercion and threats, of which only the surface is even scratched here. See, e.g., JOEL FEINBERG, HARM TO SELF 189-268 (1986); ALAN WERTHEIMER, COERCION 204 (1987); COERCION: NOMOS XIV (J. Roland Pennock & John W. Chapman eds., 1972); Harry Frankfurt, *Coercion and Moral Responsibility*, in ESSAYS ON FREEDOM OF ACTION 63-84 (Ted Honderich ed., 1973, corrected reprint ed. 1978); Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45 (2002); Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081 (1983); ROBERT NOZICK, *Coercion*, in SOCRATIC PUZZLES 15 (1997).

49. Sometimes, of course, what we call an offer is really a threat. Consider Don Corleone’s famous boast to his godson, Johnny Fontane, in the *Godfather*: “I’m gonna make him an offer he can’t refuse.” THE GODFATHER (Paramount Pictures 1972).

Assuming that this distinction between threats and offers is valid, the key to determining whether *B* is subject to *A*'s threat is determining *B*'s baseline or benchmark, so as to know whether *B* will be made better or worse off. Baselines are usually defined with respect to what the late Robert Nozick referred to as the "normal or natural or expected course of events."<sup>50</sup> Thus, if *A* proposes to kill *B* if *B* does not hand over all his money, *A* is making a threat, because if *B* does not accept the proposal he will be worse off than in his baseline situation, in which he keeps his money and remains alive. But contrast a case in which *B* is drowning and *A* offers to save him in return for a million dollars. Here, *A* has made an offer, since if *B* does not accept the proposal he will be no worse off than in the baseline situation (for which, I am assuming, *A* bears no responsibility).

As Nozick and others have recognized, however, the term "normal or natural or expected course of events" is ambiguous.<sup>51</sup> It can refer either to the outcome that, as an empirical matter, would likely occur absent the acceptance of the proposal, or it can refer to the action that is morally required. To give one of Nozick's examples, imagine that *A*, a slave owner, beats *B*, his slave, each morning, for no reason connected to *B*'s behavior. One day, *A* says to *B*, "Tomorrow I will not beat you if and only if you . . . do [some act]."<sup>52</sup> Under the empirical approach, *A*'s proposal is an offer, since *B* expects to be beaten each morning, and relative to that expectation, his acceptance of *A*'s proposal would make him better off. Under the moral approach, however, *A*'s proposal should be viewed as a threat, for *A* is morally prohibited from beating *B* every morning (indeed, he is morally prohibited from having a slave in the first place), and relative to that baseline, *A* is proposing to make *B* worse off than he has a right to be.<sup>53</sup>

Such ambiguity in defining the baseline, in turn, reflects a broader debate that runs through the scholarly literature on coercion. Some scholars maintain that coercion is an essentially empirical concept, that the question whether *X* has coerced *V* can be answered based on facts alone, without reference to moral concepts.<sup>54</sup> Others say that the question whether *X* has coerced *V* cannot be answered

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50. NOZICK, *supra* note 48, at 24.

51. *Id.*; FEINBERG, *supra* note 48, at 219; *see also* WERTHEIMER, *supra* note 48, at 208-09.

52. NOZICK, *supra* note 48, at 27.

53. *Id.* Nozick's slave case is also discussed by David Zimmerman. David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981) (offering alternative theory of baselines that allows some offers to be viewed as coercive).

54. *E.g.*, Frankfurt, *supra* note 48; Dennis G. Arnold, *Coercion and Moral Responsibility*, 38 AM. PHIL. Q. 53 (2001).

without reference to moral judgments, such as whether *X* had a right to treat *V* in such manner.<sup>55</sup>

So, did Enron's Fastow coerce the bankers into investing in LJM-2? Not surprisingly, the answer to that question turns, first, on whether Fastow was promising to make the bankers worse off in relation to some relevant baseline than if they did not accept his proposal, and, second, whether that baseline is defined empirically or morally. According to the *Houston Chronicle*, Fastow approached two kinds of potential investors in LJM-2: those who had not previously done business with Enron, but hoped to do so; and those who were already doing business with the firm.<sup>56</sup> Fastow allegedly told those in the first group that they would have an opportunity to do business with Enron, but only if they first invested in LJM-2. This was an offer, not a threat, since such investors were given a chance to be made *better off* in relation to some relevant baseline position. Thus, with respect to this first group of investors, Fastow's behavior was not coercive, and their consent was not thereby invalidated (whether such consent was obtained fraudulently, of course, is another question). The investors in the second group, by contrast, were allegedly told that if they wanted to continue doing business with Enron, they would have to invest in LJM-2. By threatening to make such investors *worse off* in relation to their relevant baseline position, it would seem that Fastow was acting coercively, at least in the empirical sense of the term.

### 3. Invalid Consent

The next element of extortion that needs to be considered is that of obtaining property from another "with his consent" induced by wrongful use of threats. What exactly is meant by the concept of "consent"?<sup>57</sup> Consent is said to be an "act in which one person alters the normative relations in which others stand with respect to what they may do."<sup>58</sup> An act of consent has the power to transform an act that otherwise would be wrong into something that is right (or at least legal). As Heidi Hurd has put it, "consent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of

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55. WERTHEIMER, *supra* note 48; NOZICK, *supra* note 48.

56. See Ivanovich, *supra* note 3.

57. Once again, I must acknowledge the range and complexity of the literature surrounding the concept of consent, and plead the limited aims of my discussion here. See, e.g., FEINBERG, *supra* note 48, at 143-71, 316-43; ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* (2003); PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* (2004); Heidi M. Hurd, *The Moral Magic of Consent*, 2 *LEGAL THEORY* 121 (1996); Larry Alexander, *The Moral Magic of Consent (II)*, 2 *LEGAL THEORY* 165 (1996).

58. JOHN KLEINIG, *Consent*, in 1 *ENCYCLOPEDIA OF ETHICS* 330 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001).

privacy into an intimate moment; a commercial appropriation of name and likeness into a biography.”<sup>59</sup>

But such transformations occur, of course, only if the consent is valid. And consent is said to be valid only if it meets certain conditions: It must be uncoerced, informed, and competent. Consent is coerced when it is obtained by threat or force; it is uninformed when it is (among other things) obtained through deception; and it is incompetent when the consent is for one reason or another said to be incapable of giving consent (for example, because he is too young, or mentally defective).<sup>60</sup>

The requirement that a transfer of property be uncoerced, informed, and competent in order for it to be valid raises two interesting issues. First, given that the kind of consent obtained by the extortionist will, by definition, be invalid, why should “consent” be included as an element of extortion in the first place? Why not say simply that the defendant must wrongfully appropriate the victim’s property? The answer seems to be that the law implicitly views the obtaining of property through *invalid* consent (as in the case of extortion and fraud) as distinguishable—at least formally, and perhaps morally as well—from the obtaining of property *without* consent (as in the case of larceny and embezzlement).<sup>61</sup> And, indeed, intuitively, the fact that Fastow obtained money from the LJM-2 investors by persuading each of them to write a check makes his act qualitatively different from what it would have been had he obtained such money by, say, sneaking into their homes and taking it without their knowledge.

Second, although extortion and fraud both involve the obtaining of property through invalid consent, the two offenses differ in a striking way. When property is obtained by means of consent gained through *deception*, such consent will almost invariably be held to be invalid, and the obtaining fraudulent. But when property is obtained by means of consent gained through *coercion*, such consent will only sometimes be viewed as invalid, and the obtaining extortionate. Before we turn to the question of which kinds of coercion should be considered extortion, it is worth asking why the effects of deception and coercion diverge in this manner. The most straightforward answer is simply that we as a society are more tolerant of coercion than we are of deception, at least in the sphere of commercial life. We

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59. See Hurd, *supra* note 57, at 123. As with “coercion,” there is considerable variation in how the concept of “consent” is defined. Sometimes it refers to “factual consent,” or mere acquiescence. Other times, it is used to refer to “prescriptive consent,” which requires that such acquiescence be competent, free, and informed. For a highly nuanced discussion of the various meanings of consent, see WESTEN, *supra* note 57.

60. See generally FEINBERG, *supra* note 48, at 189-228, 316-43.

61. An analogous distinction might be pursued in the context of rape law. See WERTHEIMER, *supra* note 57.

recognize that people use threats to achieve commercial aims all the time, and we are unwilling to make such conduct criminal except in the most egregious of circumstances. By contrast, for reasons that obviously call for further investigation, we are considerably less willing to validate commercial transactions conducted by means of deception.

#### 4. When Are Threats “Wrongful” for Purposes of Extortion Law?

Having determined that Fastow allegedly “obtained property” from others, with their “consent,” induced by “threats” of economic harm, we are finally in a position to ask whether such threats should be viewed as “wrongful” (and therefore extortionate) within the meaning of the Hobbs Act. Unfortunately, the Act does not say what it means for a threat to be “wrongful.” In particular, it makes no distinction between threats to do what is lawful and threats to do what is unlawful.

When *X* threatens *V* with an act that is itself criminal (e.g., breaking *V*'s knees) unless *V* pays *X*'s demand, it seems uncontroversial that *X*'s threat is wrongful and therefore extortionate. In such cases, *X* “steals” from *V* by charging him money for something he has no right to charge him for—namely, being free from unjustified physical harm.<sup>62</sup> The more interesting question, though, is under what circumstances, if any, it is wrongful within the meaning of the Hobbs Act for *X* to threaten to do a putatively *lawful* act. It is to this question that we now turn.

#### B. *Finding Extortion*

This final section takes the following form: First, I identify eight contexts, in addition to Fastovian-like threats to cease doing business, in which persons regularly make threats to engage in unwanted but putatively lawful conduct unless they receive money to forgo it. Second, I offer a test for determining when such threats should be regarded as “wrongful” within the meaning of the Hobbs Act. Third, I apply the test to the eight contexts in determining which cases, if any, should be treated as extortion.

##### 1. Eight Kinds of Threats to Do What Is Putatively Lawful

**Threats to File, or Fail to Settle, a Lawsuit:** Two closely analogous stories recently in the news are illustrative. In the first, Andrea Mackris, a former producer at Fox News, allegedly threatened to sue Fox News television host Bill O'Reilly for sexual harassment unless O'Reilly paid her \$60 million.<sup>63</sup> In the second, Golan Cipel,

62. A similar point is made in Katz, *supra* note 13, at 1576.

63. HOWARD KURTZ, *Bill O'Reilly, Producer Settle Harassment Suit: Fox Host Agrees to Drop Extortion Claim*, WASH. POST, Oct. 29, 2004, at C01, <http://www.washingtonpost.com/wp->

a former New Jersey state official, allegedly threatened to sue then-New Jersey Governor James McGreevey, also for sexual harassment, unless McGreevey paid him as much as \$50 million.<sup>64</sup>

**Threats to Withhold Political Support:** Two other cases recently in the news illustrate this kind of case. First, Clarence Norman, chairman of the Brooklyn Democratic Party, and Jeffrey Feldman, the party's Executive Director, allegedly told candidates running for civil court judge that they would not receive the party's wholehearted support unless they used certain selected vendors and consultants.<sup>65</sup> Second, Republican leaders in the U.S. House of Representatives allegedly told retiring Congressman Nick Smith that unless he supported the Bush Administration's Medicare bill, they would make sure that his son, Brad, who was running to take over his father's seat, would never win his race for Congress.<sup>66</sup>

**Threats to Withhold Found Property from Its Rightful Owner:** In *United States v. Taglione*, the defendant, who had found a box containing \$100,000 worth of credit card invoices belonging to the Shell Oil Company, allegedly told Shell that he would not return the invoices unless he received a "finder's fee" of \$25,000.<sup>67</sup>

**Threats to Engage in Union Work Stoppages:** In *United States v. Clemente*, the defendants, part of an enterprise that controlled various waterfront businesses in New York and New Jersey, allegedly demanded money from various shipping companies in return for agreeing not to stage labor stoppages and interruptions.<sup>68</sup>

**Threats to Take Over Another Company Unless Stock Is Bought at a Premium Price (Greenmail):** In the case of *Viacom International, Inc. v. Icahn*, corporate raider Carl Icahn and his associates acquired approximately seventeen percent of Viacom International and then threatened to issue a tender offer unless the company agreed to repurchase his shares at a price well above the market price—a practice popularly known as "greenmail."<sup>69</sup>

**Threats to Fire, or Fail to Hire, an Employee:** In *United States v. Capo*, an employment counselor at Eastman Kodak allegedly told a job-seeker at one of the company's manufacturing plants that unless

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dyn/articles/A7578-2004Oct28.html; Bill Carter, *Accused of Harassment, Fox Star Sues and Is Sued*, N.Y. TIMES, Oct. 14, 2004, at C10.

64. *Former McGreevey Official Sought \$50 Million, Aides Say*, Aug. 14, 2004, [http://handelonthelaw.com/news\\_details.aspx?News=121&Date=8/1/2004](http://handelonthelaw.com/news_details.aspx?News=121&Date=8/1/2004).

65. Andy Newman, *Case Turns on Whether Usual Politics Is a Felony*, N.Y. TIMES, Nov. 19, 2003, at B1.

66. Timothy Noah, *Nick Smith Recants: Did the Pressure Get to Him?*, SLATE, Dec. 5, 2003, <http://www.slate.com/Default.aspx?id=2092054>; Robert Novak, *GOP Pulled No Punches in Struggle for Medicare Bill*, CHI. SUN TIMES, Nov. 27, 2003, [http://www.independent-media.tv/item.cfm?media\\_id=4025&category\\_desc=health](http://www.independent-media.tv/item.cfm?media_id=4025&category_desc=health); Editorial, *Bribery, Extortion*, ROLL CALL, Jan. 5, 2004, [http://www.rollcall.com/pub/49\\_62/editorial/3901-1.html](http://www.rollcall.com/pub/49_62/editorial/3901-1.html) ("If ever there was a case that cried out for investigation by the House ethics committee and the Justice Department, it is the evident bribery and extortion attempts applied to Rep. Nick Smith (R-Mich.) to get him to support the House leadership and the Bush administration on the Medicare conference vote."); see also Timothy Noah, *Defendant DeLay? Nick Smith's Bribery Accusations Land in the Majority Leader's Lap*, SLATE, Oct. 1, 2004, <http://slate.msn.com/id/2107623/>.

67. 546 F.2d 194, 196 (5th Cir. 1977).

68. 640 F.2d 1069 (2d Cir. 1981).

69. 747 F. Supp. 205 (S.D.N.Y. 1990).

he paid the counselor a “kickback” of \$500, he would not get the job for which he had applied.<sup>70</sup>

**Threats to Disclose Embarrassing Information:** In *Flatley v. Mauro*, Mauro and Robertson threatened to “go public” with allegedly false and defamatory statements (to the effect that Flatley, a well-known entertainment entrepreneur, had sexually assaulted Robertson) unless Flatley made a “sufficient” payment to them.<sup>71</sup> Contrast this to a case in which *D* threatens to publish true, innocently obtained, but nevertheless embarrassing information about *V* unless *V* pays up.

**Leo Katz’s Hypotheticals:** Consider three hypotheticals offered by Leo Katz: (a) “Pay me \$10,000, or I will persuade your son that it is his patriotic duty to volunteer for combat in Vietnam”; (b) “Pay me \$10,000, or I will give your high-spirited, risk-addicted 19-year-old daughter a motorcycle for Christmas”; (c) “Pay me \$10,000 or I will hasten our ailing father’s death by leaving the Catholic Church.”<sup>72</sup>

## 2. “Wrongfulness” as Unlawfulness: A Test for Distinguishing Extortion from Blackmail

As noted previously, while the Hobbs Act says that property must be obtained through threats that are “wrongful,” it does not say what wrongfulness is. The suggestion offered here is that we should understand extortion to be limited to those threats to engage in conduct that is in fact unlawful. More precisely, we should say that a threat to do a putatively lawful act should be regarded as wrongful for purposes of the Hobbs Act if and only if the threatened conduct turns out, upon further analysis, to be unlawful. And in order to determine if such conduct is in fact unlawful, we should look to the relevant law governing the conduct threatened. For example, if *X* threatens to go out on strike unless *V* pays him money, we need to look to labor law to determine if it is lawful for *X* to go out on strike. Similarly, if *X* threatens to file a lawsuit unless *V* pays him to forgo it, we should look to the law governing what constitutes a frivolous lawsuit to determine if *X* has the right to file such a suit. If, upon examining such independent sources of law, we determine that *X* has no such right, then we should say that *X*’s putatively lawful threat was not in fact lawful, and should, for purposes of extortion law, be regarded as “wrongful.” If, on the other hand, it turns out that the putatively lawful conduct threatened by *X* was *actually* lawful, then the threat should not be regarded as wrongful for purposes of the Hobbs Act, and should not be understood as constituting extortion (although, as I explain below, such a threat might constitute a different crime altogether).

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70. 817 F.2d 947, 950 (2d Cir. 1987).

71. 18 Cal. Rptr. 3d 472 (Ct. App.), *review granted*, 102 P.3d 904 (Cal. 2004).

72. Katz, *supra* note 13, at 1568.

Such an approach would reflect three significant advantages over the uncertainty that now reigns in this area: First, by referring to the relevant underlying law governing the conduct threatened, it would provide an objective, independent, relatively easy-to-understand set of criteria for distinguishing between threats that should be regarded as extortionate and those that should not, thereby promoting the principle of legality. Prosecutors, judges, and juries—not to mention business people and others who wish to engage in various forms of hard bargaining—would no longer have to guess as to which conduct is permissible and which is not. Second, the results obtained under the test recommended here would more or less track the results already reached by courts in a range of specific factual contexts, but would do so under a generalizable test of law. Thus, such an approach would represent no dramatic break with traditional practice. Third, the test would do a good job of placing extortion within the context of theft law more generally. For example, in a case in which *X* threatens to file a frivolous lawsuit against *V* unless *V* pays up, it would make sense to say that *X* “steals” from *V* by charging him money for something for which he has no right to charge him.

### 3. Applying the “Unlawfulness” Test

With the above-described approach in mind, let us now return to each of the various kinds of cases in which *X* threatens to do a putatively lawful act unless paid, and ask whether such threats are appropriately characterized as unlawful and therefore extortionate:

#### a. *Threats to File, or Fail to Settle, a Lawsuit*

When, if ever, should it be extortion for *P* to threaten that, unless *D* pays him a “settlement,” he will file, or refuse to settle, a lawsuit against her? The case law is divided on this question. Some cases have held that a threat to file a lawsuit, even if made in bad faith, can never constitute extortion.<sup>73</sup> Other courts have allowed an extortion charge to lie if the threatened lawsuit is shown to be frivolous.<sup>74</sup> Which is the better view?

One possible argument against treating threatened frivolous litigation as extortion is that prosecuting plaintiffs who bring such lawsuits might result in overdeterrence, causing even plaintiffs with legitimate, though perhaps novel, kinds of legal claims to forgo fil-

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73. See *United States v. Pendergraft*, 297 F.3d 1198, 1205 (11th Cir. 2002); *First Pac. Bancorp, Inc. v. Bro*, 847 F.2d 542, 547 (9th Cir. 1988).

74. *E.g.*, *State v. Roth*, 673 A.2d 285 (N.J. Super. Ct. App. Div. 1996).

ing.<sup>75</sup> In response to this, there are at least four counter-arguments: First, the main effect of such prosecutions would be to chill not the *filing* of lawsuits, but rather attempts to reach settlement prior to the filing of lawsuits—an arguably less serious problem. Second, lawyers who engage in certain kinds of egregiously frivolous litigation behavior are already subject to the prospect of criminal prosecution for obstruction of justice and related offenses, and such prosecutions do not seem to have had an undue chilling effect.<sup>76</sup> Third, to hold, as some courts have done, that threats to file a lawsuit could never constitute extortion would be to invite potential blackmailers to evade the law by couching their threats to expose private embarrassing information in the form of a threatened lawsuit, as Golan Cipel and Andrea Mackris allegedly did. Fourth, and most importantly, it appears that threatening to file a frivolous lawsuit unless the potential defendant pays one's demand involves an "unlawful taking" and violation of the threatened party's property rights of precisely the sort that extortion law is meant to prevent and punish. In my judgment, therefore, the better view is that there should be no *per se* bar against treating as extortion certain egregious cases of threatening to bring a frivolous lawsuit unless "settlement" is paid; but that, in order to minimize the chilling effect of such a doctrine, where the legitimacy of such a suit is ambiguous, courts should err on the side of finding such threats non-extortionate.<sup>77</sup>

b. *Threats to Withhold Political Endorsement*

We saw two cases above in which powerful political leaders allegedly threatened to withhold political endorsements unless certain conditions were met. One case involved Brooklyn Democratic leaders and a civil court judicial election; the other, Republican House leaders and the Medicare bill.

For two reasons, it seems unlikely that there was any extortion committed in the Brooklyn case. First, it appears that what the party bosses made was an offer, rather than a threat. They allegedly promised candidates an opportunity to be in a better position relative to the "natural or expected course of events" than they otherwise would be. If they committed any crime at all under this scenario, it was most

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75. For a related discussion involving the claim that class action litigation has the effect of putting "blackmail"-like pressure on defendants to settle, see Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

76. See generally Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. (forthcoming 2005).

77. For example, the fact that Bill O'Reilly has reportedly agreed to pay Mackris a multi-million dollar amount to settle her lawsuit against him would seem to suggest that her lawsuit did have at least some merit and that she was not in fact committing extortion. See Kurtz, *supra* note 63. It is less clear, on the evidence currently available publicly, whether Cipel's threat against McGreevey would satisfy the proffered test.

likely soliciting a bribe (but even this seems doubtful, since endorsing a candidate for civil court judge probably does not constitute the sort of “official act” to which bribery law is meant to apply).<sup>78</sup> Second, even if the bosses had threatened the candidates with worse treatment than they had a right to expect, it still appears that they were not threatening to do anything unlawful. In the absence of some separate provision of election or anti-corruption law saying that one who receives a political endorsement shall not be required to give property in return, I would argue that no extortion has been committed.

The Smith case also escapes characterization as extortion. First, what the House Republican leaders allegedly demanded of Smith was not money but rather his vote for the Medicare bill. Thus, the case would not satisfy the “obtaining property” requirement of the Hobbs Act, although it could conceivably constitute solicitation of a bribe and perhaps criminal coercion.<sup>79</sup> Second, it is doubtful that working to defeat a candidate for political office could, by itself, properly be characterized as unlawful.

The Smith case also presents another important issue that we have so far avoided. All of the other cases we have been considering involve threats to cause harm to the person threatened. But how should we deal with cases in which *X* threatens to harm some *third party* unless *V* meets his demand? In other words, should it matter that House Republican leaders allegedly threatened harm not to Nick Smith himself but rather to his son Brad?

To the extent that I have analyzed extortion in terms of theft law, such cases might at first seem problematic. One might think that *X*'s property rights would be violated only if *X* himself was threatened. However, this view would be mistaken. The Hobbs Act requires only that one obtain property through wrongful use of a threat. I have argued that “wrongful” should be understood as meaning “unlawful.” There is nothing in my analysis, however, that requires that *X* threaten *V* with unlawful conduct that would directly harm *V* in order for *X*'s threat to be wrongful. Under my theft-law approach to extortion, the key is not that *V* would suffer the threatened harm, but that *V* suffers loss of property. The fact that the threat is against some third party does not seem to change this analysis.

### *c. Threats to Withhold Found Property*

Should it be extortion to promise to withhold found property from its rightful owner unless the owner pays the finder a “reward”? Note that such a promise should be viewed as a threat rather than an

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78. See Green, *supra* note 7.

79. *Id.* (dealing with the bribery aspects of the Nick Smith case).

offer (at least in the normative sense of the terms) because the finder of the property is promising to make the rightful owner worse off in relation to his baseline than he has a right to be. Once again, we need to look to the relevant applicable law—here, the law of found property—to determine if such a threat should be regarded as “wrongful” for purposes of the Hobbs Act. In most jurisdictions, “[i]t is the duty of a finder of lost goods to return them to the owner if he is known. The finder of goods is entitled to recover from the owner only the necessary and reasonable expenses incurred in the successful recovery and preservation of the goods.”<sup>80</sup> Merely asking for more than that is no crime, of course, so long as the finder does not threaten to withhold the property entirely unless the higher fee is paid.<sup>81</sup> But where such a demand is made, then it would seem that an unlawful taking is threatened, and that the charge of extortion would be proper.

#### d. *Threats to Strike*

Should it be extortion for a union leader to threaten to have his union strike or engage in other putatively lawful job actions unless management meets some demand? Here, we can identify two distinct scenarios: In the first, the leader threatens to have the union strike unless management makes a concession to the union, such as higher wages, shorter hours, or better benefits. In the second scenario, the union leader threatens to have the rank-and-file strike unless he, the leader, is given some personal economic benefit.

Under the first scenario, the concession demanded would accrue to the benefit of the union itself. There is nothing improper in this. It is well established that workers have the right to strike and to demand concessions in return for not striking, so long as they do not use illegal techniques such as violence against persons or property, taking possession of the employer’s property, or illegal work slowdowns.<sup>82</sup> Where workers use legal methods to extract a concession from management, there is no violation of management’s property rights, and no extortion.

A different result, however, is reached in the second scenario, in which the labor boss uses the threat of a work stoppage to enrich himself personally. Here, the boss is, to use a phrase that James Lindgren

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80. *United States v. Taglione*, 546 F.2d 194, 198 (5th Cir. 1977); *see also* *Ganter v. Kapiloff*, 516 A.2d 611 (Md. 1986) (original owner of stamps prevails against finder); *Armory v. Delamire*, 1 Strange 505 (K.B. 1722). In some jurisdictions, in some circumstances, the finder is entitled to a finder’s fee, but such a fee is determined by statute rather than by negotiation.

81. This is the import of the court’s holding in *Taglione*, 546 F.2d 194.

82. Section 7 of the National Labor Relations Act gives workers the right to engage in concerted activities relating to collective bargaining and the mutual aid and protection of employees. 29 U.S.C. § 157 (2000). *See generally* DOUGLAS E. RAY ET AL., *Prerequisites to and Limits on Strike*, LABOR-MANAGEMENT RELATIONS: STRIKES, LOCKOUTS AND BOYCOTTS (1997).

has employed in the context of informational blackmail, using leverage or “bargaining chips” that properly belong not to him but to the union members he is supposed to represent.<sup>83</sup> Labor law gives him no right to use the threat of a strike in this way. Accordingly, management’s property rights would be violated and the union leader would properly be charged with extortion, as the court in the *Clemente* case in fact held.<sup>84</sup>

e. *Threats of Greenmail*

Do corporate raiders who threaten to take over another’s company unless their stock is repurchased from them at a premium price commit extortion? The term “greenmail,” which has been used to describe such transactions, is of course intended to suggest that they do.<sup>85</sup> But should such conduct really be viewed as criminal? My approach suggests that it should not, and the case law would seem to agree. For example, in the *Viacom International* case, Carl Icahn and his associates, after acquiring approximately seventeen percent of Viacom International, threatened to take control of the company unless it agreed to buy out their shares for well above the market price.<sup>86</sup> In holding that the defendants had not committed extortion, the court stated that they “did not obtain property from plaintiff to which they had no lawful claim.”<sup>87</sup> “At this point in history,” the court said, “the plaintiff does not have a pre-existing right to be free from the problems and fears of a takeover threat.”<sup>88</sup> In other words, in determining whether a defendant has committed extortion in such circumstances, a court should ask whether the defendant has threatened to violate any of the plaintiff’s rights. Assuming he has not, there is no extortion.

f. *Threats to Fire, or Fail to Hire, an Employee*

Is it extortion for a company official to threaten to fire, or not to hire, an employee or prospective employee unless such person pays the official a “kickback”? Once again, we need to ask whether the official is threatening to do anything it is unlawful for him to do.

The general rule in the United States is that employees serve their employers “at will,” meaning that, absent an employment contract of specified length, such employees may be fired (or may quit

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83. Lindgren, *supra* note 22, at 702.

84. *United States v. Clemente*, 640 F.2d 1069 (2d Cir. 1981).

85. *See, e.g.*, Tracy Greer, Note, *The Hobbs Act and RICO: A Remedy for Greenmail?*, 66 TEX. L. REV. 647 (1988) (suggesting that greenmail be prosecuted as extortion).

86. *Viacom Int’l, Inc. v. Icahn*, 747 F. Supp. 205 (S.D.N.Y. 1990).

87. *Id.* at 213-14.

88. *Id.* at 213; *see also* *Dan River, Inc. v. Icahn*, 701 F.2d 278 (4th Cir. 1983); *Chock Full O’Nuts Corp. v. Finkelstein*, 548 F. Supp. 212 (S.D.N.Y. 1982).

their jobs) at any time, for any reason or lack of reason, without legal liability.<sup>89</sup> Thus, it does not seem that an employee's property rights would be violated if he was required to pay a kickback in order to keep his job—as odious as such a practice would undoubtedly be. Nor, *a fortiori*, would such rights be violated if he was required to pay a kickback in order to obtain the job in the first place. The company official who engaged in such conduct might well have committed fraud against his employer or, as the court recognized in *Capo*, have taken a commercial bribe<sup>90</sup>—but he would not have committed extortion.

g. *Threats to Disclose Embarrassing Information*

Was it extortion for Mauro and Robertson to threaten to go public with allegedly false information about Flatley's sexual liaison with Robertson? The answer is surely yes.<sup>91</sup> Defamation consists of harming another's reputation through false statements. By threatening to publish falsely embarrassing information about *V*, *D* would be threatening to commit an unlawful act. The same would be true if *D* threatened to expose *V*'s trade secrets. Such cases are clearly distinguishable from those in which *D* threatens to publish true, innocently obtained, embarrassing information about *V* unless *V* pays up—the paradigm of informational blackmail. Absent violation of some free-standing, statutorily-created privacy right of *V*'s through the publication of such information, it seems clear that such a threat would not constitute extortion.

h. *Leo Katz's Hypotheticals*

There is a seemingly endless list of other kinds of putatively lawful conduct *X* might threaten to engage in unless *V* pays him money to desist. In addition to those imagined by Leo Katz (unless *V* gives *X* \$10,000, *X* will persuade *V*'s son that he should sign up for the army; give *V*'s daughter a motorcycle; or tell *V* and *X*'s dying father that *V* is leaving the church), we can think of examples such as a teacher's threatening to flunk a student unless the student pays him money, or an employee's threatening to quit unless his wage demands are met. Would any of these cases constitute extortion? On first glance, it

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89. See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 885 (Mich. 1980). There are of course exceptions to this general rule. For example, an employee may not be fired because of his race, gender, religion, or ethnic origin; and he may not be fired for refusing to do some illegal act or, generally, in retaliation for asserting some legally protected right. See, e.g., *Petermann v. Int'l. Bd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am., Local 396*, 344 P.2d 25 (Cal. Ct. App. 1959). Nor may an otherwise qualified prospective employee be refused employment on account of such illegitimate considerations.

90. *United States v. Capo*, 817 F.2d 947, 951 (2d Cir. 1987).

91. This was in fact what the court in *Flatley* assumed. See *Flatley v. Mauro*, 18 Cal. Rptr. 3d 472, 485-86 (Ct. App. 2004).

seems unlikely, but in each case, we would have to look to the relevant law concerning the underlying conduct threatened, and ask whether such conduct was itself unlawful.

i. *Threats to Withhold Business*

Finally, we need to consider the question with which this paper began: Was it extortion for Andrew Fastow to threaten various banks that Enron would no longer do business with them unless they invested in LJM-2? More generally, is it extortion for *X* to threaten that he will no longer do business with *V* unless *V* pays *X* money or invests in some venture of *X*'s?

Here, we need to distinguish between two kinds of cases: In the first, *X* and *V* have been doing business with each other without any specific contract, and *X* threatens to stop doing business with *V* in the future unless *V* meets his demand. Under my approach, such cases clearly would not constitute extortion. Given that *V*, *ex hypothesi*, has no existing contractual agreement with *X*, he cannot claim that his rights have been violated or that *X* has threatened anything unlawful. As in the *Viacom* greenmail case, it cannot be said that *X* was seeking to obtain property to which he had no lawful claim. And, in fact, as far as I have been able to ascertain, Fastow did not threaten to breach any contracts when soliciting investments in the LJM-2 partnership. Accordingly, as coercive as his alleged conduct undoubtedly was, it did not constitute extortion.

The more difficult case is that in which *X* and *V* do have a contract, and in which *X* threatens to breach such contract unless *V* pays up. The question is whether a threat to breach a contract should be understood as constituting a threat to engage in "unlawful," therefore "wrongful," therefore "extortionate," conduct. This seems to me a close case. On the one hand, the notion of the so-called "efficient breach" may make us uncomfortable with thinking of contractual breaches as "unlawful."<sup>92</sup> On the other hand, there is no obvious reason to say that breaching a contract is any less "unlawful" than filing a frivolous lawsuit, withholding found property, or making defamatory statements. On balance, I am inclined to say that threatening to breach a contract unless the victim pays up probably should be treated as extortionate, at least in some particularly egregious cases.

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92. The *locus classicus* is Oliver Wendell Holmes's *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, and nothing else."). See also, e.g., RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 4.9 (2d ed. 1977).

### III. CONCLUSION

Under the approach developed above, a threat should be regarded as “wrongful,” and therefore extortionate, if and only if the act threatened would violate some provision of underlying positive law. Such an approach would create a sharp conceptual and doctrinal distinction between threats that constitute extortion and threats that do not. As such, it could help clarify a currently muddled area of the law and thereby promote the principle of legality.

But it is important to recognize what this approach would not do. It makes no claim to having solved the admittedly more difficult problem of distinguishing between threats to do what is lawful that should be regarded as a crime and threats to do what is lawful that should be regarded as mere hard bargaining. Instead, it makes the more modest point simply that such threats should not be treated as “extortion.”

So, under what circumstances, if any, should it be a crime to threaten to do a lawful act unless one is paid to forgo it? Well, threats to expose embarrassing true information are an obvious candidate for criminalization, if only because of the cultural understanding traditionally associated with the offense of blackmail. Beyond that, the question becomes more difficult. Let me mention two possible approaches to its solution.

The first approach would focus on the concept of theft. I argued above that, where *X* threatens that she will perform some unlawful and unwanted act affecting *V* unless *V* pays up, *X* “steals” from *V* by charging him money for something for which she has no right to charge him. The question we would need to ask, then, is whether it is also “stealing” for *X* to threaten to do an unwanted but *lawful* act to *V* unless *V* pays up. To put it another way, assuming that extortion is properly thought of as a form of theft, we would want to ask whether blackmail should also be regarded as such. Framing the question this way obviously would not solve the underlying conceptual problem, but it might at least allow us to see it in a different, and possibly useful, light.

Alternatively, we could decide to depart from the theft paradigm, and instead pursue a more direct path to criminality. Under such an approach, we would ask whether threatening to do an otherwise lawful act unless paid was so anti-social, wrongful, and harmful that criminal penalties would be called for. Such an approach would focus not on the wrongfulness of using coercion to obtain property (as under the theft paradigm), but, rather, on the harms and wrongs of coercion itself. This is just the sort of approach that seems to have been used in connection with the offense of criminal coercion, as well as with “exploitation”-type offenses such as price gouging and ticket scalping.

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Under such an approach, we would ask whether threatening to fire an employee, breach a contract, or withhold political support, unless one is paid, is so harmful an act in and of itself that criminal penalties would be justified.

