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The Dumont Institute for Public Policy Research

236 Johnson Avenue, Dumont, NJ 07628 USA info@dumontinst.com

Telephone: (201) 501-8574

Blackmail and "Economic" Analysis: Reply to Ginsburg and Shechtman

Walter Block

Professor of Economics and Finance

University of Central Arkansas

Conway AR 72035

wblock@mail.uca.edu

and

Robert W. McGee

Seton Hall University

bob@dumontinst.com

(201) 501-8574

JEL Code: D63, K14

Contact Information: For all correspondence regarding this manuscript, contact Walter Block.

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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. The present authors reject this law and economics analysis. They maintain that since it is legal to gossip, it should therefore not be against the law to threaten to gossip, unless paid off not to do so. In a word, blackmail is a victimless crime, and must be legalized, if justice is to be attained. The authors criticize several authors who take the efficiency position, but focus their argument on a paper written by Douglas Ginsburg and Paul Shechtman.

Introduction

Under libertarian law², no one may threaten, or initiate violence 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 respect 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 this³. Of

course, no one may engage in extortion, which is to be sharply distinguished from blackmail. For here 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; e.g., the threat is to kill or in other ways violate his personal or property rights.

If blackmail law is "enigmatic,"⁴ this is not intrinsic; it is not due to the issues themselves. Rather, it is because there are many authors⁵, including the two now under review,⁶ 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 will be worthwhile citing G&S 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 conduct⁷. 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 photographic negative, threatening disclosure to the newspapers if A fails to pay. Again, all would agree: B is guilty of blackmail. The point to notice, however, is that B has threatened to do only what he had an undoubted right to do, namely to facilitate 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 (emphasis added)."⁸

I.

Not only are G&S 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."⁹

A. English Origins

In their historical exegesis of this law, our authors 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 (emphasis added)."¹⁰

So far, so good. Apart from G&S 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 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 made this logical leap, they would have totally embraced the libertarian perspective on blackmail.

Instead, our authors take the opposite tack. Toward this end they analyze the English Motor Association (EMA) cases.¹¹ This 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 he would pay 250L to the EMA. Instead of complying, Read sued, successfully, accusing Denyer of blackmail¹². State G&S:

"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.'"¹³

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. And obversly, if one has no right to do X, then one has not right to threaten, or to menace, to do X.

Report G&S:

"Lord Hewart, C.J., in response to this argument wrote ...
'In the opinion of the Court, that proposition is not merely untrue; it is precisely the reverse of the truth. It is an excuse which might be offered by blackmailers...'"¹⁴

Hewart is undoubtedly correct. Find in favor of Denyer vis a vis Read, and allow this to serve as a precedent, and blackmail could not be punished. But in his jihad against this activity, Hewart is precluded from agreeing with the obverse of G&S' statement: "What one could lawfully do, one could lawfully threaten to do in order to be paid for refraining."

Scrutton, L.J., criticized Hewart as follows¹⁵:

"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 money is paid you, there being no public 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 1000L., 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?"

G&S interpret Scrutton as saying that

"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."¹⁶

We claim 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 G&S, 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 (since that is all that blackmail consists of). But Scrutton, with G&S backing, wishes to have it both ways: to say that it is legitimate to threaten that which one has a right to do, and that blackmail, which consists of precisely that, no more and no less, should nonetheless be forbidden.

G&S 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."¹⁷ But Scrutton

specifically (and illogically) rejected this 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?¹⁸

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."¹⁹ Under libertarianism, there are no positive obligations apart from those which 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.

G&S cite Atkin, L.J., as follows:

"... if a man may lawfully, in the furtherance of business interests, do acts which will seriously injure another in his business he may also lawfully, if he is still acting in the furtherance of his business interests, offer that other to accept a sum of money as an alternative to doing the injurious acts. He must no doubt be acting not for the mere purpose of putting money in his pocket, but for some legitimate purpose other than the mere acquisition of money."²⁰

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 of business other than the "mere" acquisition of money.²¹ Why this gratuitous attack on earning a living?²²

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 legal rightness or wrongness 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.

G&S see very clearly what is involved in blackmail. It is for them as well as for us a voluntary trade between consenting adults which 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 two hints of this. First: "... our claim is that an economic planner, shaping the laws to achieve economic efficiency, would include a law of blackmail in the criminal code ... (emphasis added)."²³ And second²⁴ they favor: "... the rule that a rational economic planner would prescribe for distinguishing socially useful from socially wasteful threat activity (emphasis added)."²⁵

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 the entire society.²⁶ And this, we claim, is not only precisely what the prohibition of blackmail does, but also what G&S explicitly want it to.

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 G&S 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.²⁷ However, hope springs eternal. 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 19th century, and it seems that not much has changed for those of the 20th century writing under the banner of Law and Economics.

II.

What are the specifics of G&S'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 G&S:

"If blackmail were not a crime, B presumably would proceed to research, to threaten, and to collect. On the other hand, if blackmail is a crime, B will be encouraged to seek alternative employment for his time and money. And that is precisely the point. Without a blackmail law, \$200 of real resources would have been invested in order to produce nil output. No rational economic planner²⁸ would tolerate the existence of an industry dedicated to digging up dirt, at real resource cost, and then reburying it (emphasis added)."²⁹

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?

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 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. G&S furnish us with no reasons to suppose that blackmail would "produce nil output" under these circumstances³⁰. 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 this in words G&S would appreciate, it is very expensive and resource wasting to do so. Therefore, based on their own 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 information gathering that others deem of "nil" productivity. These range from gathering gossip to reading the bible to perusing the newspaper comics to watching soap operas. Presumably, all of this will be outlawed by the G&S's benevolent dictator³¹.

If we take G&S at their literal word, we would have to outlaw all businesses which go bankrupt, and even those that post losses. This does not mean, merely, that those whose firms go belly up will be subject, as they now are, 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 G&S eyes of the crime of "produc(ing) 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.

G&S 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 failing³². In contrast, the blackmailer has as his goal the use of money (for research) in ways that at least G&S regard as wasteful.

Our reply is that "If wishes were horses, then 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 G&S step in and stop this foolishness? The problem with the rational central planner is that he is never around when you need him.

This objection that we are manufacturing on behalf of G&S suffers from another difficulty: it is vulnerable to the following reductio³³. Suppose it is determined that women, or teenagers, or blacks, are poorer entrepreneurs than males, or adults, or whites. Then, using insights provided by G&S, it would appear to follow that the central planner would be well advised to set up a program of business licenses. No one who is not a white male adult³⁴ may set up or run a firm³⁵.

Nor can G&S coherently maintain that one learns from past business failures; that there are many cases on record where a person went bankrupt two, three or even more times before 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 G&S are to be consistent with their wealth maximization denigration of blackmail, they must carry through with these other activities.

G&S 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 worthwhile³⁶. People do this all the time: they exercise to lose weight, and then 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 G&S is to fail 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 is, is to be guilty of what Hayek³⁷ (1989) called the "fatal conceit."

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."³⁸

On the other hand, when objectivity does not suit our authors, 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 G&S, who suddenly turn subjectivist, "avoidance of (this) conduct ... cannot be presumed to be a gain."³⁹

Next, correctly noting that blackmail need not involve the threat to convey information, G&S 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 have the latter pay the former to forbear.

G&S⁴⁰ claim that an "omniscient lawgiver"⁴¹ 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. 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 externalities through restrictive covenants⁴² 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, G&S are to be congratulated for realizing that the real world does not boast of omniscient lawgivers. What are we to make, then, of their claim⁴³ that the non omniscient lawgiver should be empowered not to pick the optimal fence height (x, in their diagram), but rather the height at which the marginal utility of the builder approaches zero (z, in

their diagram)? 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, G&S worry that

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

God forbid that 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.⁴⁵

Suppose that Jack's marginal revenue product in his present position is \$100,000. His boss, mistakenly, pays him only \$70,000. Jack leaves for greener pastures. Jack's boss hires a replacement, who soon has to be fired for incompetence. Jack's 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 (Jack's) threat. Worse, "there is nothing to show for the effort." With G&S in charge, the rational economic planner (wage controller, in this case) would have forced Jack's boss immediately to pay him what he is worth. This is not serious analysis. This is argument from the deus ex machina.

On the other hand, very much to the credit of G&S, they do admit that "Our rational (not omniscient) economic planner ... does not have access to the appropriate graph for each A and B."⁴⁶ 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 they refrain from invasions of the persons and property rights of other men.

However salutary, this is not at all, unfortunately, the direction in which they are heading. For G&S⁴⁷ reveal themselves to be Coaseans, e.g., opponents of any fixed private property rights at all. In the specific case under discussion, there is no reason to assume that the man had a right to build a fence as high as he wished. For the true Coasean, this is only true 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 height⁴⁸.

G&S⁴⁹ 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"⁵⁰, that is, the right of the builder to construct a fence reaching to the heavens if he wishes, that there is no danger of the dreaded "nil output." For "... there would be no reason in economic theory to dishonor his preference for making A suffer."⁵¹

However, in returning to more traditional blackmail of the embarrassing secret exposing variety, these authors⁵² 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 only needed 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 blackmail, in contrast, how can the threatener establish his credibility apart from going ahead and revealing the secret? However, once he does that he will have nothing 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 G&S 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 efforts first to make himself credible and then to acquire information that he can threaten to disclose, the result will be an industry the output of which is nil, although resources are consumed in its operation, viz. for information gathering and threatening."⁵³

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?

G&S 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 spite or of an enhanced reputation as a credible issuer of threats. Reciprocally, it would not penalize the utterance of a threat to take an action that is (1) lawful in itself, i.e., neither tortious nor criminal, and (2) would confer some material benefit on the party making the threat (emphasis added)."⁵⁴

We have underlined G&S'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) 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 that "... there would be no reason in economic theory to dishonor his preference for making A suffer."⁵⁵ If there is nothing in economic theory which can distinguish between the psychic income of spite enjoyment and "material benefit," G&S 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 idle⁵⁶. G&S, 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 a "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, throw him into prison. Just as they have rejected "spite" as a valuable contribution to the economy⁵⁷, 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 denounced out of hand as "wasteful."⁵⁸ Nor can G&S object to the foregoing on the ground that neither the farmer nor the worker "consumes resources."⁵⁹ 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 land⁶⁰.

III.

Why, then, is there a widespread revulsion toward blackmail, given that G&S's explanation must be rejected? Goodhard explains this on the basis of "unexamined moral norms;"⁶¹ naturally, G&S repudiate so reasonable an exegesis. Instead, our authors rely upon Campbell,⁶² who interprets blackmail law in terms of refraining from earning profits in business. He 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."⁶³ Instead of giving the back of the hand to this argument, G&S liken it to their own concern with the "test of material advantage."⁶⁴

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 G&S, in the perfectly competitive model, where, paradoxically, no competition at all in its rivalistic sense takes place. But to those who appreciate the market process,⁶⁵ 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 Milken⁶⁶, it is that the possibility of such threats can keep firms lean and mean.

G&S 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."⁶⁷ 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?

States Mises 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 judgments 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."⁶⁸

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."⁶⁹

IV.

In this section G&S comment upon the blackmail theory of Landes and Posner.⁷⁰ They do so for two reasons. One, in order to make good on their promise⁷¹ to show that there are no beneficial effects to blackmailees which can offset the research and other costs of the blackmailer.⁷² 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."⁷³ That is, unless the blackmailer gains a value recognized by G&S, he should be jailed.

G&S⁷⁴ offer the case of the "lawful bookmaker, who cannot sue to enforce a gambling debt, (who) threatens to tell the client's 'aged and pious parents who consider betting sinful about their son's activities.'"⁷⁵ Our authors favor legalizing what would otherwise be a blackmail threat "as lawful economic bargaining"⁷⁶ 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 G&S 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 G&S. 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 concern that his parents never hear of his dissolute ways.

But what of G&S's first concern in this section, to denigrate the claim that the blackmailer will have some beneficial (e.g., 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 a B's report of his behavior to C would cause her to lose respect for A's character; indeed, C might lose affection for A as a result."⁷⁷

For G&S, the question of whether blackmail is wealth enhancing comes down to the issue of whether C gains from knowing A's secret. In the view of these authors:

"If C is concerned with A's welfare (e.g., tobacco stains A's teeth) and not with her own (e.g., it will be unpleasant to kiss A), then it is not at all clear that C is any better off when A conforms his conduct to her desires, nor that C is any worse off when A fails to do so. But it is certainly difficult to see how the welfare of an altruistic C is affected by A's behavior when that behavior is unknown to her."⁷⁸

This is highly problematic⁷⁹. Surely a 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 (even, if anything, especially) when that behavior is unknown to her." G&S maintain that "Sometimes what we don't know can't hurt us."⁸⁰ To this we say, which of us would not like to know if his spouse were acting in a way contrary to our interests? Would G&S themselves step forward in this regard?

And what about A? Why leave him out of the economic calculation? He will presumably⁸¹ benefit given the assumption that the tobacco chewing habit is harmful to himself, and that legalized blackmail is more likely to deter him from such self inflicted mischief.

G&S 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"⁸² 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, G&S 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."⁸³

Two sentences, and two errors. First, G&S have it backwards. Legalization would only give incentive for people to expend these resources compared to prohibition. But assume a system of natural liberty, where the libertarian axiom of non invasion is followed. Here, there would be no particular incentive to invest resources in this calling 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 presumption⁸⁴ is that the correct amount of investment is now being made there. And the same applies to blackmail, at least when the bench mark 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, in sharp contrast to the central planning criterion employed by G&S.

Second mistake. It is not true, under legalization, that people's choices would be limited to the two mentioned by G&S. 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." It is to pay off the blackmailer for his silence. Then, albeit for a fee (e.g., 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.

V. Postscript

In this section G&S attempt to refute the theories of Lindgren⁸⁵ and Boyle,⁸⁶ who, in our own 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. Each of them, 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 G&S successfully in our view criticize Landes-Posner.⁸⁷ 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 interferences such as blackmail will typically lead to an over investment in resources allotted for this purpose. State G&S:

"... information may be humiliating, but not incriminating, for any number of very particularized reasons (G&S mention Campbell's (1939) 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."⁸⁸

Another instance is furnished by DeLong⁸⁹ who dismisses all "economic" justifications of prohibition⁹⁰, as follows:

"Why does blackmail strike us as so wrongful? So wrongful that even in the midst of a transaction 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 (material in brackets and emphasis added)."⁹¹

And now, in conclusion, let us illustrate this principle once again. Lindgren, whose own defense of prohibitionism has been subjected to withering attack,⁹² now has the better of G&S, despite the replies of the latter.

G&S's main point is of course that blackmail requires the improper allocation to it of scarce resources, mainly in order to ferret out secrets. Lindgren⁹³ remarks, quite reasonably in our view⁹⁴, that this theory is "unable to explain why it is blackmail⁹⁵ to sell information that is not purposefully acquired." G&S, in Lindgren's view, may thus be able to explain "commercial research blackmail" and "entrepreneurial blackmail" but not "participant or opportunistic blackmail."

G&S⁹⁶ 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." 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 or is it not true, G&S, that this case of blackmail, where the information was acquired by accident,

required no expenditure, at least for information gathering purposes? We cannot see how G&S can rationally deny this Lindgren point.

The G&S contention is not necessarily true. Of course it cannot be denied that establishing credibility as a blackmailer will tend to enhance future reputational 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 "B stands to gain ... by actually carrying through his threat to send compromising information to the newspapers."⁹⁷ 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.

Nor do G&S emerge unscathed from their tangle with Boyle,⁹⁸ who offers yet another reason, apart from future entrepreneurial blackmail, to carry through on the threat: enhanced status as a gossip. G&S try much the same reply with Boyle as they did with Lindgren, but with equal ineffectual results. Yes, G&S⁹⁹ cannot be denied when they assert that "the lesson of his experience is that the acquisition of damaging information is a profitable enterprise," but this does not necessarily mean that the accidental acquirer will carry through and enter this profession. And one must agree with G&S when they claim

"The prohibition of blackmail thus serves a prophylactic purpose by discouraging even the accidental acquirer of damaging information from acquiring an incentive to seek out information for use in a future blackmail attempt."¹⁰⁰

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.

Conclusion

At the outset of their piece, G&S stated that "drafting a general law that separates blackmail from bargaining has proved an elusive task."¹⁰¹ As far as we are concerned, this is just as elusive as it ever was, despite the herculean efforts of these authors. It is an elusive task because it simply cannot be done. It is and always will be, we suggest, 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 this basic legal premise¹⁰².

Endnotes

¹ We wish to express gratitude to David Kennedy, Antony Sullivan and their colleagues on the board of the Earhart Foundation, for the financial support necessary to write this paper. Needless to say, only we bear responsibility for the views expressed therein.

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 (Kluwer 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 (1992); 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, CAPITALISM AND INDIVIDUALISM (St. Martin's Press 1990); Tibor Machan, *Law, Justice and Rights* 14 W. ONT. L. REV. 119 (1975); Randy 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 See MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (Humanities Press 1982); MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE (Mises Institute 1993); Eric Mack, *In Defense of*

Blackmail, 41 PHILOSOPHICAL STUD. 274 (1982); WALTER BLOCK, DEFENDING THE UNDEFENDABLE (Fox and Wilkes 1976); Walter Block, *Trading Money for Silence*, 8 U. HAWAII 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: Reply to Leo Katz*, forthcoming; Walter Block, *Toward a Libertarian Theory of Blackmail: Reply to George Fletcher*, forthcoming; Walter Block, *The Second Paradox of Blackmail: A Reply to DeLong*, forthcoming; Walter Block and Robert W. McGee, *Blackmail as a Victimless Crime: Reply to Altman*, forthcoming; Walter Block and David Gordon, *Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A.L. REV. 37 (1985).

⁴ As claimed by Douglas H. Ginsburg and Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849 (1993), hereinafter referred to as G & S; 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); 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).

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 G&S, supra note _____.

⁷ A friendly amendment: presumably, he is not already under an employment contract incompatible with this action.

⁸ G&S, supra note _____, at 1849-1850.

⁹ G&S, supra note _____, 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 this was the accusation of "unnatural acts" or "sodomitical practices." Nowadays, this accusation would be unexceptionable. Indeed, what with advent of the gay rights movement, the accusee 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 to be accused 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 G&S, supra note _____, at 1852.

¹¹ G&S, supra note _____, at 1853-1855.

¹² The King v. Denyer, (1926) 2 K.B. 258, 260 (Eng. Crim. App.), cited in G&S, supra note _____, at 1853, n. 13.

¹³ G&S, supra note _____, at 1853.

¹⁴ G&S, supra note _____, at 1853.

¹⁵ In Hardie & Lane, Ltd. v. Chilton, (1928) 2 K.B. 306, 320, 331 (Eng. C.A.), cited in G&S, supra note _____, at 1854.

¹⁶ G&S, supra note _____, at 1854.

¹⁷ G&S, supra note _____, at 1854.

¹⁸ 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.

¹⁹ 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, one decides for oneself what to do without invading anyone else, and suppressing it, which implies inter personal relations, that is, one man stops another from telling the police of a crime.

²⁰ G&S, supra note _____, at 1855.

²¹ 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 are possible unless they acquire money.

²² According to a Vancouver Sun newspaper headline (22 July 1997, p. B1), "Police turn blind eye to marijuana for the sick; officers would only act if people were supplying children or selling drugs for a profit." Selling to children we can understand. But earning a profit? And this is Canada, for goodness sake, not Cuba or North Viet Nam.

²³ G&S, supra note _____, at 1850.

²⁴ Id.

²⁵ 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, THE ANTI-CAPITALIST MENTALITY (Libertarian Press 1972); Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, in F.A. HAYEK, ED., COLLECTIVIST ECONOMIC PLANNING (Kelley 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 HOPPE, 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 N. Rothbard as a Critic of Socialism*, 12 J. LIBERTARIAN STUD. 99 (1996).

²⁶ F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (University of Chicago Press 1989); F. A. HAYEK, *NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS* (University of Chicago Press 1978).

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

²⁸ This is the third time (and counting) G&S have used this phrase; too many to be merely accidental.

²⁹ G&S, supra note _____, at 1860.

³⁰ See more detailed discussion of this point below, when we consider Lindgren's (supra n. _____) objections to G&S (supra n. _____).

³¹ G&S, supra n. _____, 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 czardom, we are not sure what does. Who are the economic planners to "tolerate," or to not "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 version of the good society?

³² See, however, the fictional but realistic case of Francisco D'Anconia in Rand [AYN RAND, ATLAS SHRUGGED (Random House 1957)]. He deliberately sets out to lose money. Of course, to be fair to G&S, Francisco does so for the ultimate purpose of what they might consider wealth enhancement, namely the opposition to socialism. On the other hand, since G&S seem to favor 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 depressiveness, and, closer to the case of the "spite fence," in order to irritate someone.

³³ We do not advocate any such policy. Our only point is that if G&S 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, G&S 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 of those, for example, who 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.

³⁶ States Mises (1966, supra note _____, at 95): "... the 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 opinion 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 detrimental, and the painful to the agreeable, the beneficial and the pleasant."

³⁷ F.A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM (University of Chicago Press 1989).

³⁸ LUDWIG VON MISES, HUMAN ACTION 242 (Regnery 1966).

³⁹ G&S, supra note _____, at 1860, n. 41.

⁴⁰ G&S, supra note _____, at 1862.

⁴¹ First cousin, presumably, to the rational economic central planner.

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

⁴³ G&S, *supra* note _____, at 1862-1863.

⁴⁴ G&S, *supra* note _____, at 1863.

⁴⁵ LUDWIG VON MISES, *HUMAN ACTION* (Regnery 1966); 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. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (Harper 1942); JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* (Oxford University Press 1954).

⁴⁶ G&S, *supra* note _____, at 1864.

⁴⁷ G&S, *supra* note _____, at 1862.

⁴⁸ For critiques of Coasean 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 HAMLINE 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's Austrian Scholar's Conference, New York City, October 9-11, 1992, forthcoming in 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 G&S, supra note _____, at 1864.

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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, since you would be disturbing my "view." But there is no such thing as "privacy" rights either. States Rothbard (1982, supra note _____, at 121-122): "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 his 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 the right 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 wooly 'invasion of a "right to privacy"', but because it is an invasion of the property right of the person being wiretapped."

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.

⁵¹ G&S, supra note _____, at 1864.

⁵² G&S, supra note _____, at 1865.

⁵³ G&S, supra note _____, at 1865.

⁵⁴ G&S, supra note _____, at 1865.

⁵⁵ G&S, supra note _____, at 1864.

⁵⁶ Or a worker who wished to take a vacation. Or a person who wished to leave some clothes in his closet, unworn...

⁵⁷ Well, strictly speaking, they did and then they didn't. That is, as we have seen, they have contradicted themselves on this point.

⁵⁸ A case could conceivably be made by those of the G&S 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 only incarcerate 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.

⁵⁹ G&S, supra note _____, at 1866.

⁶⁰ Hardin [Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787 (1993) at 1806] states: "Richard Posner (1986) 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.

⁶¹ G&S, supra note _____, at 1867.

⁶² Campbell, *The Anomalies of Blackmail*, 55 LEGAL Q. REV. 382 (1939).

⁶³ Campbell, at 390, cited in G&S, supra note _____, at 1867.

⁶⁴ G&S, supra note _____, at 1868.

⁶⁵ Mises (1966); Kirzner (1973, 1986); Schumpeter (1942, 1954), supra note _____.

⁶⁶ 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 board room. 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).

⁶⁷ G&S, supra note _____, at 1868.

⁶⁸ LUDWIG VON MISES, HUMAN ACTION 19 (Regnery 1966).

⁶⁹ MURRAY N. ROTHBARD, MAN, ECONOMY AND STATE 3 (Mises Institute 1993).

⁷⁰ William Landes and Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

⁷¹ G&S, supra note _____, at 1860, n. 41.

⁷² We again reiterate our objection to the whole G&S "Law and Economics" premise. Central planning cannot create wealth, let alone maximize it. See LUDWIG VON MISES, SOCIALISM (1969). 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 G&S is as unable to attain wealth as it is to foster legal legitimacy. See Block and Gordon (1985), supra note _____.

⁷³ G&S, supra note _____, at 1870.

⁷⁴ G&S, supra note _____, at 1870.

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G&S cite Campbell, *The Anomalies of Blackmail*, 55 LEGAL Q. REV. 382 (1939) at 395.

⁷⁶ G&S, supra note _____, at 1870.

⁷⁷ G&S, supra note _____, at 1871.

⁷⁸ G&S, supra note _____, at 1872.

⁷⁹ G&S, supra note _____, at 1872 text, and n. 71.

⁸⁰ G&S, supra note _____, at 1872, n. 72.

⁸¹ We speak here as advocates, for argument's sake, of the G&S philosophy which admits of interpersonal comparisons of utility, paternalism, socialism, central planning and all the rest. Based on the Austrian welfare insights this whole discussion is invalid. See LUDWIG VON MISES, *HUMAN ACTION* (Regnery 1966); 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).

⁸² G&S, supra note _____, at 1873.

⁸³ G&S, supra note _____, at 1873.

⁸⁴ At least in equilibrium.

⁸⁵ James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984). 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*, 21 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); *Blackmail: An Afterward*, 141 U. PA. L. REV. 1975 (1993); *The Theory, History and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993).

⁸⁶ James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail and Insider Trading*, 80 CAL. L. REV. 1413 (1992).

⁸⁷ Supra note _____.

⁸⁸ G&S, supra note _____, at 1870.

⁸⁹ Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, at 1689 (1993).

⁹⁰ E.g., Steven Shavell, *An Economic Analysis of Threats and Their legality: Blackmail, Extortion and Robbery*, 141 (1993); Richard Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817 (1993); and G&S, *supra* note _____.

⁹¹ We have only one slight demur to this magnificent evisceration of the "economic" approach. As economists, we do not at all find this to be "charming." We see it rather as a tragic misallocation of scholarly economic time and effort, and as no less than an academic perversion. We especially resent that these economists, in calling their approach one of "economics," willy nilly include people such as ourselves. They ought to come up with another appellation. Suggestions: Chicago economics, Chicago law and economics, utilitarian economics, pragmatic economics, legal positivism.

⁹² Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225 (1997); 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); Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993).

⁹³ James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, at 695 (1984).

⁹⁴ As can be seen from Block (1997), and Block and Gordon (1985), we do not at all regard Lindgren's own justification for the prohibition as reasonable. See Walter Block, *The Case for*

De-Criminalizing Blackmail: A Reply to Lindgren and Campbell, 24 W. ST. U. L. REV. 225 (1997); 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).

⁹⁵ That is, improper. In our view, it is blackmail all right, but even so it should be lawful. In contrast, according to usage in the anti blackmail literature, to prove that something is blackmail is per se to have succeeded in showing it to be illicit.

⁹⁶ G&S, supra note _____, at 1865, 1875.

⁹⁷ G&S, supra note _____, at 1865, 1875.

⁹⁸ Supra note _____.

⁹⁹ G&S, supra note _____, at 1876, n. 92.

¹⁰⁰ G&S, supra note _____, at 1876, n. 92.

¹⁰¹ G&S, supra note _____, at 1849.

102 States Rips of the Bill Cosby case, "Ms. Autumn Jackson was entitled, consistent with her constitutional rights, to sell her 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 it is unlawful for her to threaten to sell her story if she does not receive the money?" See Michael D. Rips, *To Ask is Not Always to Extort*, NEW YORK TIMES, July 18, 1997.

"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 from a suit, the opposing party settles the case before the filing, with the agreement promising confidentiality."

There is nothing in G&S, supra note _____, that will satisfy this plaintive cry for elemental justice.
