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THE 1987 McCORKLE LECTURE*

BLACKMAIL

*Ronald H. Coase***

AN economist venturing to speak on a legal question must tread delicately. He finds himself dealing with institutions the detailed workings of which are largely unknown to him. He encounters a literature in which the doctrines, concepts, and vocabulary are completely unfamiliar. An economist wishing to understand how the legal system operates inevitably faces formidable obstacles, at any rate if he is without legal training, as most economists are. And yet, having said this, any economist interested in understanding the real economic world rather than those imaginary worlds the analysis of which fills the pages of the economic journals, cannot ignore the influence of the legal system on the working of the economic system. Here I am not mainly thinking of the law relating to regulation, antitrust, and taxation where, even if the exact effect of the law may not be easy to discover, that it has an important influence is not likely to be overlooked. What I have in mind is that more general relationship between the legal and economic systems which I discussed in "The

* The McCorkle Lectureship has been established at the University of Virginia in memory of the late Claiborne Ross McCorkle (Law Class of 1910). In giving shape to the lectureship, the faculty committee responsible for selection of the lecturer seeks to bring to the platform lecturers whose themes will reflect Ross McCorkle's intense devotion to the law and to its inner integrity.

This lecture was delivered at the University of Virginia School of Law on November 10, 1987.

** Clifton R. Musser Professor of Economics Emeritus and Senior Fellow in Law and Economics, University of Chicago Law School.

Problem of Social Cost.”¹ Economists commonly assume that what is traded on the market is a physical entity, an ounce of gold, a ton of coal. But, as lawyers know, what are traded on the market are bundles of rights, rights to perform certain actions. Trade, the dominant activity in the economic system, its amount and character, consequently depend on what rights and duties individuals and organizations are deemed to possess—and these are established by the legal system. An economist, as I see it, cannot avoid taking the legal system into account. It is a burden we have to bear. Economists cannot be expected to pronounce on the detailed arrangements of the legal system, but we may be able to contribute something to our understanding of how the legal system affects the economic system and thus to the development of those general principles which should govern the delimitation of rights.

In “The Problem of Social Cost” I thought I was able to contribute something to the analysis of the law of nuisance. Today I turn to the problem of blackmail. I am emboldened to do this because of the lack of any consensus among lawyers about the nature of blackmail or about how it should be handled. Professor A.H. Campbell, writing in 1939 in the *Law Quarterly Review* on “The Anomalies of Blackmail,” starts his article by saying: “The law of blackmail has something in common with the blackmailer: it allows its student no peace of mind.”² And Professor James Lindgren, writing in 1984 in the *Columbia Law Review*, starts his article, “Unraveling the Paradox of Blackmail,” by saying: “Most crimes do not need theories to explain why the behavior is criminal. The wrongdoing is self-evident. But blackmail is unique among major crimes: no one has yet figured out why it ought to be illegal.”³

Whether an economist can contribute to what is clearly a difficult legal question is problematical, but I will try. And I am the more willing to do so because the question of blackmail came up at a very early stage when I was developing the ideas which were later to appear in “The Problem of Social Cost.” I was then at the Center for Advanced Study in the Behavioral Sciences at Stanford, and that year another fellow at the Center was David Cavers of the Harvard Law

¹ Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

² Campbell, *The Anomalies of Blackmail*, 55 *Law Q. Rev.* 382, 382 (1939).

³ Lindgren, *Unraveling the Paradox of Blackmail*, 84 *Colum. L. Rev.* 670, 670 (1984).

School. When I discussed my ideas with him he pointed out, correctly, that if someone had a right to commit a nuisance, he might threaten to create that nuisance simply to extract money from those who would be harmed by it, in return of course for agreeing not to do so. In effect, Cavers felt that what I was advocating would lead to blackmail or something analogous to it. Some economists made the same point after I used this approach in my article on the Federal Communications Commission.⁴ This led me to include some passages in "The Problem of Social Cost" which were intended to deal with this objection. I explained, using the example of the cattle raiser and the crop farmer, that if the cattle raiser was liable for the damage brought about by his cattle, the crop farmer might plant crops which otherwise would not be profitable because the resulting crop damage would be such that the cattle raiser, to avoid having to pay for the damage, would be willing to pay the crop farmer not to plant these crops. However, if the situation were reversed and the cattle raiser were not liable for the damage brought about by his cattle, he might increase the size of his herd above what it would otherwise be, thereby increasing crop damage, in order to induce the crop farmer to pay him for agreeing to reduce the size of the herd. My purpose in pointing this out was to show that actions which were undertaken solely for the purpose of being paid not to engage in them, actions which could be called blackmail, would arise whatever the rule of liability or, if you like, the system of rights. I did this not to initiate a discussion of blackmail, but rather to avoid having to do so. In any case, had I wanted to discuss the subject of blackmail, a regime of zero transaction costs would have provided a poor setting in which to do so.

Of course, it would not be necessary actually to plant the crops or increase the herd before agreeing not to do so. All that need be done would be to threaten to take such actions—and for most people payment for not carrying out a *threat* is the essence of blackmail. Of course, it is reasonable to suppose that someone wishing to obtain money for agreeing not to engage in an activity would normally not engage in it before negotiating, but would threaten to do so since this would be less costly. And when money or some other advantage is to be extracted for not revealing unsavory information about someone

⁴ Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959).

(the case most people have in mind when they speak of blackmail) the only way to proceed is to threaten, since, once the information has been disclosed, no blackmail is possible. Although I did not examine blackmail in "The Problem of Social Cost," my attitude to the problem raised by Cavers and others was clearly complacent. I pointed out that such activities or threats were a preliminary to an agreement and did not affect the long-run equilibrium. I accepted the fact that bluff and threats were a normal part of business bargaining, and I spoke of the terms of the agreement depending on the shrewdness of the parties. Later, Harold Demsetz pointed out that if there are many cattle raisers and crop farmers and there is competition among them, since refraining from this blackmailing behavior costs nothing, the amount that would have to be paid to obtain an agreement not to engage in it would tend towards zero.⁵ Blackmail incidental to a business relationship did not appear normally to be a serious problem. In any case, since bargaining is an inevitable feature of an exchange economy, there is not a great deal that can be done about it. This complacent attitude tends to be reinforced for an economist by the belief that there are no losers in an exchange—it is beneficial to both parties. But is this also true of a transaction in which the object is to suppress information, as is the case in many blackmailing transactions?

No doubt there are economists who think that it is. An illustration of this point of view can be found in a work of fiction written by two economists, both of whom were professors at the University of Virginia and one of whom still is. I am referring to the book, *The Fatal Equilibrium*, written by Professors Breit and Elzinga, using the pseudonym Marshall Jevons.⁶ In that book, a young economist is being considered for promotion to a tenured position at Harvard. He discovers that one of the members of the promotion and tenure committee is a fraud. Speaking to his fiancée, the young economist, Dennis Gossen, says: "The culprit has as much as confessed it to me, although not in so many words, and has promised to support my promotion if I'll keep quiet."⁷ His fiancée replies: "Dennis, that sounds like blackmail."⁸ Dennis, however, does not agree. He responds, "I

⁵ Demsetz, *When Does the Rule of Liability Matter?*, 1 J. Legal Stud. 13, 23-24 (1972).

⁶ M. Jevons, *The Fatal Equilibrium* (1985).

⁷ *Id.* at 102.

⁸ *Id.*

wouldn't call it blackmail. It's like gains from trade in a way. Support my promotion and keep your reputation. I keep quiet and you help me get tenure."⁹ His fiancée is not reassured and most people would share her feeling. Unlike the agreements made as a result of business negotiations, the attempt to obtain money or some other advantage for not disclosing unsavory information about someone is disliked by most people. Why is this so?

Ordinary people have a fairly clear idea of what blackmail involves and do not like it. As an example which fits very well the ordinary person's view of blackmail I have chosen a case of which there is a full account in the Old Bailey Trial Series. Mr. Bechhofer Roberts, the editor, in his foreword, has this to say:

Blackmail is by many people considered the foulest of crimes—far crueller than most murders, because of its cold-blooded premeditation and repeated torture of the victim; incomparably more offensive to the public conscience than the vast majority of other offences which the law seeks to punish—but there is on record one case of blackmail, perhaps the only one, which is redeemed to some extent from baseness by the circumstances in which it arose, by the personalities of its participants, and by certain elements of high comedy which accompanied its development.¹⁰

This was "The Mr. A Case." I remember reading about it as a schoolboy, since it attracted a great deal of attention in the British newspapers.

In 1919, in the morning of Christmas night, in the St. James and Albany Hotel, in Paris, a bedroom door was opened and an Englishman entered who discovered Mrs. Robinson in bed with Mr. A, whose real name I need hardly say was not Robinson. It was, after all, the season of goodwill. There is a conflict in the testimony about what happened next. According to the Englishman, Mrs. Robinson jumped out of bed and attacked him, saying "My brute of a husband." According to Mrs. Robinson, the words she uttered were addressed to Mr. A and were "I must get back tonight before that brute reaches my husband." Mr. A was not present at the trial to straighten out the contradiction. That Mrs. Robinson should so testify was understandable given that the Englishman who entered the

⁹ *Id.* at 102-03.

¹⁰ *The Mr. A Case* 9 (C.E. Bechhofer Roberts ed., *The Old Bailey Trial Series*, No. 7, 1950).

bedroom was not Mr. Robinson but a Mr. Newton whose occupations are given by Mr. Bechhofer Roberts as “[c]onfidence-trickster, black-mailer, cardsharp, forger,”¹¹ an impressive list on any resumé. Whatever was really said in that bedroom in Paris, Mr. A seems to have believed that Newton was Mrs. Robinson’s husband.

At this point I should disclose that Mr. A was Prince Sir Hari Singh, the heir presumptive to his uncle, the Maharajah of Kashmir, the pseudonym Mr. A being used at the trial at the request of the India Office. After the intrusion of this unexpected visitor, Prince Hari Singh apparently sought the advice of his aide-de-camp, Captain Arthur, who, according to Mr. Bechhofer Roberts, had been recommended for this position by the India Office and whose views were therefore to be taken seriously. Captain Arthur seems to have warned the Prince that Robinson would sue for divorce in England naming him as co-respondent and that heavy damages could be exacted. This of itself would not have disturbed the Prince. The vast majority of the inhabitants of Kashmir were polygamists who presumably would not have found his conduct shocking. And the Prince’s wealth was such that he could pay any sum an English court was likely to award (without noticing it). But Captain Arthur apparently also told the Prince that the scandal which would accompany such divorce proceedings would lead the India Office to veto his accession to his uncle’s throne. The Prince then drew up two cheques for £150,000 or £300,000 in total (equivalent in real terms to five or six million dollars today). Captain Arthur left for London with the cheques, his mission being to pay Mr. Robinson not to sue for divorce. On arrival in London, however, Captain Arthur went to see Hobbs, a man specialising in the shady side of the law. Hobbs opened a banking account in the name of Robinson, paid in one cheque, furnished the bank with a specimen signature, and proceeded to draw out the whole of the £150,000 with cheques signed “C. Robinson.” The second cheque was not cashed since the Prince’s solicitors in London, on learning of the matter, insisted on payment being stopped. You will by now have guessed that what I have been describing was an ingenious blackmailing scheme devised by Captain Arthur. The Prince was not the first, and will not be the last, to regret that he trusted a government department’s recommendation. Hobbs paid about £40,000 each to Newton

¹¹ *Id.* at 27.

and to Captain Arthur. But what of Mr. and Mrs. Robinson? Hobbs told Robinson that Mr. A was willing to pay £20,000 to stop divorce proceedings. Robinson balked at first, but finally agreed to accept £25,000, out of which Hobbs, who knew how a lawyer ought to behave, took £4,000 as his professional fee. He gave Robinson banknotes totalling £21,000 (worth perhaps \$400,000 today). Robinson testified that he handed the banknotes to his wife. According to his counsel, Robinson did this "to protect [his wife] from any temptation to lead an immoral life in [the] future,"¹² although one would have thought the effect would have been the exact opposite. Newton proceeded to India with the second cheque (the Prince's solicitors having been told falsely that it had been destroyed) with a view to obtaining more money, but the Prince's Indian wife died and the Prince was obliged, for religious reasons, to go into seclusion. Newton returned empty-handed. The Prince took no further action.

That the scheme came to light was the result of a disagreement between Captain Arthur and Hobbs, from whom Arthur tried, without success, to get more money. Captain Arthur then imprudently told Robinson that it was not £25,000, but £150,000 that Mr. A had paid for the concealment of what the judge called "the defilement" of Robinson's wife, but the judge, Lord Darling, was noted for his witticisms. Robinson, on learning how he had been deceived, was, of course, appalled by this dishonesty. He consulted his solicitors, and it was finally decided to claim £150,000 from the bank in which Hobbs had deposited the cheque for negligently paying to Hobbs what should have been paid to him. Although the jury decided that Mr. and Mrs. Robinson were not parties to the blackmailing scheme, this action failed, mainly because the judge held that Robinson was laying claim to the proceeds of a theft. However, the exposure of the blackmail at the trial resulted in Hobbs being tried and sentenced to a term of imprisonment. Captain Arthur, who was in France and could not be extradited to England, was tried in France (where the offense occurred) and found guilty. Newton, who had been paid £3,000 (equivalent to fifty- or sixty-thousand dollars today) by the bank to appear as a witness in the first trial, turned King's evidence in the trial of Hobbs, and thus avoided prosecution and made a profit out of the affair. He was a very talented confidence-trickster. Mr. Robinson,

¹² *Id.* at 20.

who was described by counsel as an "intermittent husband," no doubt resumed his previous relationship with his wife. Notwithstanding the jury's finding, it seems probable that the Robinsons were involved in the blackmailing scheme along with Hobbs, Newton, and Arthur, but even if they were, it is clear that they were completely outclassed. Mr. A, who by this time had come out of seclusion, succeeded in due course to his uncle's throne without any objection from the India Office. I have not told all the twists and turns of this strange tale, but this case embodies the main elements of what the ordinary person thinks of as blackmail. A person is trapped acting in a way which he believes would harm his reputation if disclosed. He pays a sum of money to prevent disclosure. The victim takes no action to bring the blackmailer to justice, because to do so would lead to that disclosure which he was anxious to avoid.

I have said that blackmail is not likely to arise out of business relationships. It is most likely to be found where there is a desire to conceal disreputable personal behaviour (or what is regarded as such). It is therefore somewhat unexpected that what are considered to be the leading cases on the law of blackmail in England are concerned with business relationships. I will start with the case of *The King v. Percy Ingram Denyer*.¹³ This case is commonly referred to as *Rex v. Denyer* and I will just refer to it as *Denyer*.

The Motor Trade Association, composed of manufacturers, wholesalers, retailers, and users of what were termed "motor goods," was empowered by its by-laws to put on its "stop list" the name of anyone selling an automobile or associated products above or below the manufacturer's list price. For someone to be on the stop list meant that no member of the Association would trade with him. Mr. Read, who operated a garage in Devon, was visited at the end of 1925 by a representative of the Association, who posed as someone who had come from abroad and was going to buy a house and wanted a car. Mr. Read was induced by this man to sell a tire and to offer to sell an automobile below list price. In January 1926, Mr. Read received a letter, signed by Mr. Denyer, the stop list superintendent, saying that unless he paid £257 to the Association, he would be put on the stop list, a step which Mr. Read testified would put him out of business. Mr. Read took the letter to the police, and Mr. Denyer was indicted

¹³ *The King v. Denyer* [1926] 2 K.B. 258.

for blackmail. The offense was described in the Larceny Act, 1916, as follows: "Every person who . . . utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property or valuable thing . . . shall be guilty of felony and on conviction thereof liable to penal servitude for life."¹⁴ Mr. Denyer was tried at Exeter, found guilty and he was sentenced to six days in prison, which must have been a relief, given that he could have received penal servitude for life. Note that the offense was not that the Association induced Mr. Read to sell below the list price, nor that they threatened to put Mr. Read on the stop list. The Association was registered as a trade union and it was legal for them to do these things. The offense was that Mr. Denyer demanded a sum of money for refraining from putting Mr. Read on the stop list. The case was taken to the Court of Criminal Appeal, and the verdict of the lower court was upheld. The Lord Chief Justice had this to say:

It has been said again and again, that because this Trade Protection Association had the legal right to put the name of Mr. Read upon the stop list, it therefore had a legal right to demand money from him as the price of abstaining from putting his name upon the stop list. 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 to an indefinite extent. There is not the remotest nexus or relationship between a right to put the name of Mr. Read upon the stop list, and a right to demand from him 257*l.* as the price of abstaining from that course.¹⁵

It will have been noticed that this case is similar to the "Mr. A Case" in that both Mr. A and Mr. Read were set up to commit an act on the basis of which the demand for money was made. But it would not have been possible to use the Lord Chief Justice's criteria in the "Mr. A Case." Mr. Robinson had a perfect right to bring divorce proceedings against his wife on the grounds of her adultery with Mr. A, and it was certainly legal for Mr. A to settle the case by a payment to Mr. Robinson. And yet there is no question in anyone's mind that the "Mr. A Case" involved blackmail. The English courts soon had an occasion to reexamine the question.

¹⁴ *Id.* at 261 n.1.

¹⁵ *Id.* at 268.

An automobile dealer, Hardie and Lane, had been led to sell an automobile below list price in the same way as had Mr. Read. Hardie and Lane were then offered the same proposition—stop list or fine—and they elected to pay the fine. An agreement was made under which the fine was to be paid in two installments. However, before the second installment was paid, *Denyer* was decided. Thereupon, Hardie and Lane refused to pay the second installment and sued for the return of the money that they had already paid. They won their case in the lower court based on the argument in *Denyer*, but in 1928 this decision was appealed. In the Court of Appeals, Hardie and Lane lost. The argument of *Denyer* was rejected.¹⁶

I will quote to you some passages from the opinion of Lord Justice Scrutton which will indicate why he disagreed with *Denyer*.

I am quite unable to understand how it can be illegal to say "I could lawfully put you on the stop list, but if you will do something which is not illegal, and is less burdensome to you than the stop list, I will not exercise my power." . . . A member of a club after dinner in a row damages some club property. He is told he is liable to expulsion, but that the committee will not enforce it if he makes good the damage. Are the committee conspirators who have obtained money, or money's worth, by threats, which can be recovered by the member? . . . [T]here is nothing illegal in agreeing to do a legal act, to avoid action which the other party may legally take. . . . 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 1,000*l.*, 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? A valued cook comes to her mistress and says: "Raise my wages by 20*l.* a year or I shall give you notice." The mistress foreseeing, and much disturbed in mind by, the tragedy that the loss of the cook would involve, pays the money. Can she recover it as obtained by threats?¹⁷

Later, Lord Justice Scrutton dealt directly with the Lord Chief Justice's rejection of the proposition that because the Association had the right to put Mr. Read on the stop list it also had the right to demand money for not doing so. He said this:

¹⁶ *Hardie & Lane, Ltd. v. Chilton*, [1928] 2 K.B. 306.

¹⁷ *Id.* at 315-17.

The Lord Chief Justice says it is an excuse which might be offered by blackmailers to an indefinite extent. 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 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 a legal right to do, if money is paid you, there being no public mischief in the agreement?¹⁸

It will have been noticed that while making some telling points Lord Justice Scrutton's response does not meet the problem of the "Mr. A Case," since he appears to assume that blackmail involves suppression of knowledge of a felony. Adultery, at least in England, is not a crime.

As a student taking the Bachelor of Commerce degree at the London School of Economics I took a law course in either 1929 or 1930 in which these cases, which had only recently been decided, were discussed. The purpose was to acquaint us with the law relating to trade associations, although our teachers did not fail to draw our attention to the interesting situation arising out of this conflict between the criminal and the civil sides of the court system, particularly as the Lord Chief Justice issued a statement after the case of *Hardie & Lane, Ltd. v. Chilton* had been decided in which he said that unless and until the decision in *Denyer* was reversed by the House of Lords, it will be binding for the purpose of the administration of the criminal law. Although these two cases were presented to us in connection with the law of trade associations, what appealed to the economist in me was the question: when is it right and when wrong to pay someone not to do something? I retained the memory of these cases over the years, and I often wondered how the conflict between these two decisions was ultimately resolved. But it was not until I went to the University of Chicago Law School in 1964, some 35 years after I had been taught about these cases, that I learned what had happened. This is what I found.

In 1937, a friendly action, *Thorne v. Motor Trade Ass'n*, presumably arranged by the Motor Trade Association, was taken to the House of Lords.¹⁹ The question to be decided was whether the opinion of the

¹⁸ Id. at 322.

¹⁹ *Thorne v. Motor Trade Ass'n*, 1937 App. Cas. 797.

Court of Criminal Appeal or that of the Court of Appeals was correct. I need not leave you in suspense. The opinion in *Denyer* was disapproved. The law lords particularly objected to the statement of the trial judge that "a person has no right to demand money, according to the Act of Parliament as a price of abstaining from inflicting unpleasant consequences upon a man."²⁰ As Lord Wright said:

There are many possible circumstances under which a man may say to another that he will abstain from conduct unpleasant to the other only if he is paid a sum of money. Thus he may offer not to build on his plot of land if he is compensated for abstaining. . . . Or a man may offer to abstain from prosecuting for a common assault or infringement of his trade mark if he is paid compensation²¹

However, having disapproved of the basic proposition underlying the opinion in *Denyer*, they also expressed their disapproval of Lord Justice Scrutton's opinion that if one has a legal right to do something, one also has a legal right to demand money for abstaining from doing it. Lord Atkin said this:

Scrutton L.J. appeared to indicate that if a man merely threatened to do that which he had a right to do the threat could not be a menace within the Act. . . . [T]his seems to me to be plainly wrong: and I entirely agree with the criticism of this proposition made by the Lord Chief Justice in *Rex v. Denyer*. The ordinary blackmailer 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. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money. . . . [T]he only question is whether the demand would be without reasonable or probable cause. It is here that I am unable to agree with the decision in *Denyer's* case. It appears to me that if a man may lawfully, in the furtherance of business interests, do acts which will seriously injure another in his business he may also lawfully, if he is still acting in 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.²²

²⁰ Id. at 812.

²¹ Id. at 820.

²² Id. at 806-07 (citations omitted).

Lord Wright continued:

[T]here are many cases where a man who has a “right,” in the sense of a liberty or capacity of doing an act which is not unlawful, but which is calculated seriously to injure another, will be liable to a charge of blackmail if he demands money from that other as the price of abstaining. Such instances indeed are very typical cases of blackmail Thus a man may be possessed of knowledge of discreditable incidents in the victim’s life and may seek to extort money by threatening, if he is not paid, to disclose the knowledge to a wife or husband or employer, though the disclosure may not be libellous. . . . Again a legal liberty (that is something that a man may do with legal justification) may form the basis of blackmail. Thus a husband who has proof of his wife’s adultery, may threaten the paramour that he will petition in the Divorce Court unless he is bought off. Though it is possible that the facts of such a case might show merely the legitimate compromise of a claim to damages, on the other hand, the facts might be such as to constitute extortion and blackmail of a serious type.²³

And other law lords expressed themselves to the same effect.

All this brings us to what Professor Lindgren has termed the “paradox of blackmail”—that although it may be lawful to do something, it may be unlawful to demand money for refraining from doing it.²⁴ But when is it unlawful? The law lords leave this obscure. “The facts may show,” said Lord Wright. But what facts, and how do they show it? The Motor Trade Association really presented them with a relatively easy case. Once it was agreed that Parliament had granted it the power, because it was a trade union, to put someone’s name on a stop list, a procedure which could ruin a business (for I gather that the stop list at that time in England would be effective), it becomes hard to object to an action which merely reduced somewhat the profits of that business. As Lord Russell said:

Having it in their power to place the plaintiffs on the Stop List, but being desirous of taking a more lenient course, they gave the plaintiffs the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do.²⁵

²³ *Id.* at 822.

²⁴ See Lindgren, *supra* note 3, at 670-71.

²⁵ *Thorne v. Motor Trade Ass’n*, 1937 App. Cas. 797, 812.

The problem is, as Dennis Gossen of *The Fatal Equilibrium* would have explained, there are always gains from trade, and blackmail involves a trade. It is in the interest of the blackmailer to make payment of the money more attractive than the alternative. In this limited sense, he also will want to be lenient. Dennis Gossen, I imagine, would have regarded the demand, "your money or your life," as the offer of a bargain. Of course, murder is a crime and there is no problem in characterising this particular offer as blackmail. But suppose the offer had been: "Your money or I will tell your wife." To be murdered might well seem a preferred alternative. And yet telling his wife would certainly not be a crime. However, demanding money for abstaining from telling her would very likely be blackmail and therefore a crime. Why? The law lords threw little light on this question. Lord Atkin admitted that the rules of the Association were capable of being abused.²⁶ Lord Wright said that the money demanded must be "reasonable and not extortionate."²⁷ And Lord Roche said:

A demand of a sum extortionate in amount would, I think, clearly be evidence fit to be left to a jury in a civil case of an intent to injure as opposed to an intent to protect trade interests and in a criminal case of the fact that the sum was demanded without reasonable or probable cause. . . . It would, in my opinion, be both erroneous and mischievous to give colour to the opinion that because a demand of money [by the Association] is not necessarily unlawful or a crime it cannot under any circumstances be either the one or the other.²⁸

This is not really helpful. As you know, extortion is often used as a synonym for blackmail, and to say that there is no extortion unless the demand is extortionate does not aid us in identifying blackmail. One has the impression that the law lords failed to get a handle on the problem.

It is not, therefore, surprising to learn that when, in 1966, the Criminal Law Revision Committee came to examine the law relating to blackmail in the United Kingdom, it found the position very unsatisfactory.²⁹ The Committee in their report point out that though there is no offence called "blackmail," the name is commonly applied

²⁶ Id. at 808.

²⁷ Id. at 818.

²⁸ Id. at 824-25.

²⁹ Criminal Law Revision Committee, Eighth Report, Theft and Related Offences, 1966, Cmnd. No. 2977, at 54-61.

to "the group of offences of demanding property with menaces and similar conduct."³⁰ The law is, however, as they say, "obscure" and "very complicated."³¹ Nonetheless, in practice things have not worked out too badly, "but this is due rather to restraint and common sense of prosecutors in limiting prosecutions to what is clearly recognizable as blackmail in the ordinary sense than to any merits in the [law itself]."³² It seems that blackmail, like pornography, is difficult to define, but you know it when you see it.

Faced with the problem of defining blackmail, the Committee felt that it had to go back to "first principles." They say:

In general terms it seems reasonably clear that the offence should include at least making an improper demand of a financial character accompanied by threats. Further, on any view it should apply to a threat to injure a person or to damage his property unless he pays something to which the person who makes the demand does not pretend to be entitled. . . . Equally there is no doubt that it should be blackmail for a person to demand something merely as the price of not revealing some discreditable conduct of which he happens to know.³³

Having said this, the Committee noted that there were serious difficulties in applying these general propositions. When is a demand improper, and when is it permissible to make a threat to reinforce a demand? The Committee finally decided that the test of illegality in making a demand should be "whether the person in question honestly believes that he has the right to make the demand."³⁴ Similarly, when dealing with the threat, they argue "that the only satisfactory course would be to adopt a subjective test and to make criminal liability depend on whether the person who utters the threat believes in the propriety of doing so."³⁵

As a result of the deliberations of this Committee, a section of the Theft Act, passed in 1968 in England, defined blackmail:

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 unwar-

³⁰ Id. at 54.

³¹ Id.

³² Id.

³³ Id. at 56-57.

³⁴ Id. at 57.

³⁵ Id. at 59.

ranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—

- (a) that he has reasonable grounds for making the demand; and
- (b) that the use of the menaces is a proper means of reinforcing the demand.³⁶

This, although more definite than the old law, clearly requires a good deal of interpretation. Nonetheless, there is no reason to suppose that this will lead to serious difficulties in the administration of the law. The old law was even more obscure and yet, as we have seen, there seems to have been few problems in its administration. There is in effect an unstated law of blackmail which cannot be discovered from the statutes, but which is based on the common sense of prosecutors, juries, and judges and which it might be possible to infer from a detailed study of the cases. Some economists, and perhaps some lawyers, would expect that such an investigation would show that the decisions in the cases were those that led to the value of production (in its widest sense) being maximised. Whether this would be the result of such an investigation I do not know. But what I will now do is to consider what I think the decisions would be if in fact they had this character.

Let us therefore return to the analysis of "The Problem of Social Cost" and examine an example, not the cattle raisers and crop farmers of that article, but one used by the judges in the Motor Trade Association cases. *A* threatens to build a house which will spoil the view from, and block the light to, *B*'s house. My understanding of the legal situation in England is that *A* would normally be entitled to build, even though it had these consequences. Suppose that, as in Lord Justice Scrutton's example, *A* demands £1,000 as the price of agreeing not to build and that *B* pays this. Is this blackmail? Suppose that *A* would not have built, whether *B* made this payment or not, because the cost of building a house on this site exceeded the price at which it could be sold. In these circumstances, the demand for £1,000 could be regarded as blackmail or something akin to it. It is a payment to *A* for agreeing not to do something which he has no interest in doing. The £1,000 does not represent what *A* would have lost by

³⁶ Theft Act, 1968, ch. 60, § 21; see E. Griew, *The Theft Acts 1968 & 1978*, §§ 12-01 to -34 (1986).

not building—the threat to build is made simply to extract money from *B*. Of course, if *A* would have gained £600 by building the house, only £400 of the £1,000 would represent a blackmailing demand. But if blackmail is paid, it is because the value to *B* of preserving his amenities is greater than the additional value that would be created by the construction of the house. The payment of blackmail leaves the allocation of resources unaffected and the value of production is maximised. The only effect is to transfer money from *B* to *A*. Since we cannot assume that *B* is more worthy than *A*, what is wrong with it?

When I referred to the problem of blackmail in “The Problem of Social Cost,” it was simply to show that, however rights were defined, there would always be opportunities for this type of blackmail. I pointed this out in the section of the article in which it was assumed that transactions were costless and in which therefore no resources were absorbed in bargaining. In such a world, it is not clear what the objection would be to this type of blackmail. The position is, however, very different if we make the realistic assumption that transaction costs are positive. It is obviously undesirable that resources should be devoted to bargaining which produces a situation no better than it was previously.

Economists discuss exchange, but until recently have been very little interested in the process of exchange, and have certainly not devoted much attention to the problem of blackmail. Normally, when they notice something which appears to be wrong in the working of the economic system, they follow the prescriptions of Pigou and advocate government action, usually some form of taxation, but sometimes regulation. Pigou does not discuss blackmail as such, but his attitude to it can be inferred from his discussion, in *The Economics of Welfare*, of the situation in which “the relations between individual buyers and sellers are not rigidly fixed by a surrounding market,”³⁷ a condition which is, of course, extremely common. Pigou then says that “it is plain that activities and resources devoted to manipulating the ratio of exchange may yield a positive private net product; but they cannot . . . yield a positive social net product”³⁸ These activities are

³⁷ A.C. Pigou, *The Economics of Welfare* 200 (4th ed. 1932).

³⁸ *Id.*

described by Pigou as “bargaining” and “deception.” This is what he says of bargaining:

Of bargaining proper there is little that need be said. It is obvious that intelligence and resources devoted to this purpose . . . yield no net product to the community as a whole. . . . These activities are wasted. They contribute to private, but not to social, net product. . . . [W]here their clients, be they customers or workpeople, can be squeezed, employers tend to expend their energy in accomplishing this, rather than in improving the organisation of their factories. When they act thus, the social net product even of the earliest dose of resources devoted to bargaining may be, not merely zero, but negative. Whenever that happens, no tax that yields a revenue, though it may effect an improvement, can provide a complete remedy. For that absolute prohibition is required. But absolute prohibition of bargaining is hardly feasible except where prices and conditions of sale are imposed upon private industry by some organ of State authority.³⁹

Pigou evidently feels that there is nothing more to be said on this subject. He therefore turns to “deception” and reaches a similar conclusion: “[T]he social net product of any dose of resources invested in a deceptive activity is negative. Consequently, as with bargaining, no tax that yields a revenue, though it may effect an improvement, can provide a complete remedy, and absolute prohibition of the activity is required.”⁴⁰

“The Problem of Social Cost” was intended to influence the thinking, not of lawyers, but of economists and its main purpose was to demonstrate the inadequacies of the Pigovian approach and to put forward what the author hoped was something better. The Pigovian approach, as I have just said, sets up an ideal world and then by government action, usually some form of taxation or less commonly government regulation, endeavors to reproduce that ideal state in the real world. We can see what it leads to in the case we are discussing. Bargaining, which involves bluff, threats, and, to some degree, deception, should apparently be eliminated by a prohibitive tax imposed, I suppose, “per unit of bargaining” or “per unit of deceit,” an operation which can be carried out on a blackboard but nowhere else. But since elimination is what is wanted, the right tax would be one which yielded no revenue, and Pigou apparently concludes that this is not a

³⁹ Id. at 201 (footnotes omitted).

⁴⁰ Id. at 203.

practical solution. He then states that "absolute prohibition is required . . . [but this] is hardly feasible except where prices and conditions of sale are imposed upon private industry by some organ of State authority."⁴¹ As Pigou does not discuss the subject further, the significance of this statement is not evident. To me, it demonstrates the bankruptcy of the Pigovian approach, but this could hardly have been Pigou's purpose. Pigou's solution would require the State to fix the terms of every transaction, a procedure which would paralyse the working of the economic system. I argued in "The Problem of Social Cost" that in deciding on economic policy, we should not concern ourselves with the ideal (whatever that may be) but should start with the available alternatives and should endeavor to discover which among them produces, in total, the best result.

Furthermore, I argued that the available alternatives were not confined to the imposition of taxes or direct governmental regulation, as most economists seem to have thought, but included changes in the law governing the rights and duties of individuals and organizations. The definition of the rights that individuals and organizations are deemed to possess is important because, by setting the starting point, it determines what transactions have to be carried out to achieve any other constellation of rights, and therefore the costs of so doing. People will wish to negotiate to change the initial constellation whenever this would increase the value of production—but only after deducting the costs of the necessary transactions. And these costs depend on the initial legal position. It is therefore easy to see that the final outcome is affected by the law. I concluded in "The Problem of Social Cost" that the value of production would be maximised if rights were deemed to be possessed by those to whom they were most valuable, thus eliminating the need for any transactions.

In a blackmailing scheme, the person who will pay the most for the right to stop the action threatened is normally the person being blackmailed. If the right to stop this action is denied to others, that is, blackmail is made illegal, transaction costs are reduced, factors of production are released for other purposes and the value of production is increased. This is an approach which comes quite naturally to an economist and was certainly the way in which I first analysed the problem of blackmail.

⁴¹ *Id.* at 201 (footnote omitted).

Blackmail involves the expenditure of resources in the collection of information which, on payment of blackmail, will be suppressed. It would be better if this information were not collected and the resources were used to produce something of value. Professor Lindgren has objected to this rationale for making blackmail illegal on the ground that it does not explain why it is illegal to demand money for not revealing information accidentally acquired.⁴² He gives as an example the case of a workman on a ladder who blackmailed a clergyman after observing him engaged in paying attention to a member of his flock which apparently went well beyond the call of duty.⁴³ While it is true that in such a case no resources were used to collect the information, resources would certainly be employed in the blackmailing transaction. Furthermore, it is difficult for me to believe that, were blackmail made legal, such accidental sightings would not occur more frequently.

Nonetheless, I believe that Professor Lindgren is right in sensing that this objection to blackmail, correct though it may be, does not explain why there is such general support for making blackmail not merely illegal, but a crime. After all, in public life we often observe great tolerance of, and indeed encouragement for, policies which waste resources on a grand scale. It is not because blackmail involves a misallocation of resources that the Criminal Law Revision Committee considers as "entirely justified" the "detestation with which blackmail is now commonly regarded."⁴⁴ In a passage I have already quoted Mr. Bechhofer Roberts says that "[b]lackmail is by many people considered the foulest of crimes—far crueller than most murders, because of its cold-blooded premeditation and repeated torture of the victim."⁴⁵ The Criminal Law Revision Committee comments that blackmail "can be an extremely cruel offence, causing endless misery."⁴⁶

It is not difficult to understand why people feel this way. A blackmailer threatens to do something which will harm his victim unless he is paid a sum of money or receives some other benefit, and by emphasizing the unpleasant consequences for the victim of not meeting his

⁴² Lindgren, *supra* note 3, at 690, 695.

⁴³ *Id.* at 690.

⁴⁴ Criminal Law Revision Committee, *supra* note 29, at 61.

⁴⁵ The *Mr. A Case*, *supra* note 10, at 9.

⁴⁶ Criminal Law Revision Committee, *supra* note 29, at 61.

demands (or even inventing them, as in the "Mr. A. Case"), he endeavours to extract as much as he can from him. It may be objected that this is exactly what happens in business negotiations. And this is correct. But the situations are not identical. The demands made by a businessman are constrained by the competition of other businessmen, by the fact that the party threatened is likely to have a good idea of whether the threat has to be taken seriously and by the adverse effects on future business of being difficult in negotiating. None of this applies in the ordinary blackmail case. There is no competition. The victim *has* to deal with the blackmailer. The victim is also likely to be uncertain about the blackmailer's real intentions. And concern for future business will not moderate a blackmailer's demands. If this factor has any influence, it pays the blackmailer to be unreasonable and even to carry out his threat, since this would make future victims take his threats more seriously. And there are even more important differences. The blackmailer's actions generate fear and anxiety—blackmailing involves more than the employment of resources which leave the value of production unchanged—it causes real harm which reduces the value of production just as with Pigou's railway whose sparks cause fires in the adjoining woods. The position is, however, much worse for the blackmail victim than the owner of the woods. He cannot appeal to the law, since this would involve that disclosure of facts which he is anxious to avoid. But there is, I believe, another difference, even more important than the others. Business negotiations (which may also cause anxiety) either lead to a breakdown of the negotiations or they lead to a contract. There is, at any rate, an end. But in the ordinary blackmail case there is no end. The victim, once he succumbs to the blackmailer, remains in his grip for an indefinite period. It is moral murder. And, as the Criminal Law Revision Committee says, "it is certain that a great deal of it goes on which never comes to light."⁴⁷

The problem is that all trade involves threatening not to do something unless certain demands are met. Furthermore, negotiations about the terms of trade are likely to involve the making of threats which it would be better if they were not made (and in this Pigou is right). But it is only certain threats in certain situations which cause harm on balance and in which the harm is sufficiently great as to

⁴⁷ Id.

make it desirable that those making them should be prosecuted and punished. I think it is clear what is wrong with blackmail. The problem is to know how to deal with it. The British solution seems to have been to pass a statute defining blackmail which makes no clear distinction between these cases but leaves it up to the prosecutors, juries, and judges to be sensible. Whether this is the best that can be done is a question for lawyers to decide. It would be a sad day if all the answers had to be provided by economists.