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## Rethinking Threats

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**THE LAW SCHOOL  
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## RETHINKING THREATS

Saul Levmore & Ariel Porat\*

*Threats are not merely the dark side of promises. They impose costs on those who receive them, and are likely to be particularly destructive when credible. This Article develops the factors that make for credibility in criminal, international, and other contexts. The credibility of a threat depends on the net cost of execution, subtleties regarding repeat play, and the calculus of secondary credibility – the likelihood that a threat will be carried out by the threatener or repeated by another party if the victim capitulates to the first. It then turns to situations in which a threatener can create credibility by dividing a threat into stages. A threat is often more credible if its execution has begun, so that the cost of completion is modest and now lower than the direct benefit expected from capitulation. Law itself, though designed to discourage threats and their execution, can perversely contribute to threat-making by constituting just such a sunk cost, or first stage of a process. The implication is that in many situations law ought to focus its power on the final stage of a wrongdoer's plan.*

### Introduction

The law of threats is more difficult to understand than is the law of promises, though one might seem to be nothing more than the dark side of the other. In this Article we show that a careful analysis of a variety of threats – understood as promises to inflict costs rather than benefits – helps bring order to some areas of law and leads to suggestions in others. Counterintuitively, it is sometimes sensible not to discourage threats, and even the execution of threats. And yet there are circumstances in which threats should be penalized even though the threatener's victim prefers to hear the threat rather than to have it suppressed.

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One who waves a weapon at a crowd while making a demand for wallets and wrist-watches threatens harm in a manner that makes it all but certain that law should discourage the stated or implied threat. Even if the threatener is unsuccessful in extracting property, he might be charged with attempted robbery or extortion. There are many reasons to discourage such threatening behavior, and to penalize it even when no robbery is completed. Among these is the likelihood that if the behavior is not penalized it will become more common, and unintended violence as well as defensive, precaution costs will increase. A key feature of a successful or credible threat is that the value of what is demanded far exceeds the cost of issuing and carrying out, or executing, the threat. The relevance of this inequality, or comparison, to the law of threats is developed in Part I. In principle, law might ignore threats that are not credible because their recipients, or victims, will know to be unconcerned. In practice, threateners may have unknown motives, so that even the most incredible-sounding threats can cause anxiety in the minds of innocent persons.

From the victim's perspective virtually every threat is frightening if only because the threatener might be building a reputation for credibility. If so, carrying out a threat now may make it easier to extract something from this or another victim in the future. In the case of positive promises, where benefits are the subjects of exchange, credibility is sometimes self-executing, with law in an incidental role. If X promises to build a skyscraper for a mere \$100, Y will find the promise incredible and be disinclined to hand over the requested money. But if the parties proceed with a contract, promisors like X, unless judgment-proof, will quickly learn that it is unwise to enter into losing contracts. X has only to lose by making such incredible promises, unless the idea is to get some initial payment from Y and then disappear. In contrast, if T makes a threat that seems incredible, the victim, V, might suffer anxiety or even capitulate because the prospect of irrationality or miscalculation by T, not to mention the chance that T has a reputation to maintain, can be very unsettling. It might be sensible to pay or otherwise do as T demands in order to be rid of the more substantial threat from T. In turn, V might face this problem less often if law is designed to deter T.

Part II begins with the threatener's need to convince a victim that, if she capitulates, the threat will not simply be repeated, whether by the original threatener or another. We call this *secondary credibility* and explore its relevance to criminal threats, corporate takeovers, and other matters. One means of enhancing both primary and secondary credibility is to attain the status of a repeat player. Recipients of threats might believe that the threatener is more reliable if the latter gains by establishing a reputation for reliability. This can be unfortunate

for the victim in the sense that it will be more likely that the threatener will carry out the threat if the victim does not capitulate. But it can be good news for a victim who capitulates if it means that the threatener will not simply return and extract more with a repeat threat. Indeed, a sophisticated repeat player might even develop the means of preventing others from coming along in the wake of a successful threat in order to extract more from the identified victim.

A threatener, T, is apt to have more success if his threats are credible, whether by monopolizing the threat space or through other means. Another way to build credibility is to invest, or to begin carrying out a threat, so that when it is communicated to V the latter will have every reason to believe that the former will follow through and execute the remaining step necessary to complete the threatened action. Part III examines this route to credibility. Such multi-stage threats are common in international relations, in corporate takeovers, and in litigation. Our novel analysis suggests that the law of threats, as presently constituted, may not be reducing antisocial behavior so much as adding to threateners' credibility. Law may perversely empower the threatener even as it tries to deter him. We offer a strategy for improving the law in this regard.

## I. The Costs and Benefits of Executing Threats

### A. Threats and Collective Action

Law properly supports exchanges in which each party gives the other something of positive rather than negative value because positive exchanges are value-enhancing.<sup>1</sup> If A gives B 10 in return for a painting, we are reasonably confident that the exchange is mutually beneficial and, absent some striking third-party effect, socially desirable. A and B are both better off or they would not have entered into the agreement. But if A acquires the painting by threatening to destroy 10 of B's property, at a cost of 3 to A, it is far more likely that the painting is worth less to A than it is to B. A's cost of carrying out the threat will often be much less than the value of the painting to B, reflecting the common sense that the transfer is coercive and destructive, rather than voluntary and desirable. If, for example, the painting is worth 7 to B, B would have sold it for 10, but may also hand it over at a cost to B of 7 in order to avoid the loss of 10 that A threatens. Even apart from an argument that law should do something to

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<sup>1</sup> Law might also play a role for the noneconomic reason that promises are morally significant or important to human development. Inasmuch as these are unlikely sources for arguments in favor of law's encouraging the execution of a threat once made, we set them aside.

protect B's property because B will otherwise inefficiently expend resources to defend it, there is this likelihood that extortion, the crime we associate with many threats, brings about value-reducing transfers. To make matters worse, A can make several profitable acquisitions from a variety of potential victims with this strategy, perhaps without ever needing to carry out any threat. The parties with whom A "deals" are hardly better off after transferring property to A and receiving nothing in return. The fact that A can repeat the threat to many parties without ever expending the 3 makes it all the more likely that the transactions are value-reducing.

The lower the costs of execution to A, the more credible is A's threat and the more likely that any property transfer in the shadow of the threat is socially inefficient. Thus, a threat by A to take, rather than destroy, something belonging to B can be yet more credible because A's net cost is reduced by the value of the property to A, apart from the increased risk that a legal remedy may impose costs on A because B's property is found in his possession. Other threats are less credible. If A says: "Give me that good at a lower price or I will never do business with you again," B is unlikely to comply. Not only might A be bluffing, but also the cost of foregone exchanges might be as costly to A as it is to B.<sup>2</sup>

It is apparent why potential victims favor a rule against threats. Put differently, it is easy to see why property owners want law to add to a threatener, T's, costs of execution. If the prospect of legal intervention raises T's costs, then T will often decline to threaten a victim, V, if for no other reason than that V will capitulate with lower frequency because T's threats will more often be incredible. At the same time, some threats convey valuable information and a decline in threat-making can cause some owners, or apparent victims, to be worse off. W, an employer, might want to know whether her employee, E, cares enough about a proposed workplace rule to quit, or at least to threaten to do so. On a larger scale, Country K might want to know that if it takes a certain action against its neighbor, L, L and M will join forces go to war against K. For this reason, W and K, in disparate contexts and with different capacities to influence law and norms, will not favor a complete ban on threats, or will simply live comfortably with the fact that a "threat" is hard to define and distinguish from a signal, promise, or exchange of ideas. E and L, it should be noted, can communicate their intentions precisely because their threats are somewhat credible. W might respond to E's threat by telling E it is time to find work elsewhere, and L's drum-banging might

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<sup>2</sup> See Saul Levmore & Ariel Porat, No-Haggle Agreements, \_\_\_ (suggesting means and importance of convincing promises not to bargain further).

draw K into hostilities that would not otherwise have occurred.

The clearest and most objectionable threat is, therefore, one that imposes low costs on the threatening party and can then be repeated while retaining credibility. Potential victims are likely to see law as a means of overcoming their collective action problem in response to such threats. They need to impose costs on the threatener in order to avoid multiple uses of the same (low cost) threat.

A simple explanation of much of the criminal law regarding threats is that the prospect of punishment under law raises the cost to the threatener who would otherwise find extortion too easy and profitable. Much as laws against theft save precaution costs and allow parties to devote resources to productive rather than merely redistributive activities, so too laws against threats – especially where the communication value is low – can save resources by raising the costs of the unproductive threatener.<sup>3</sup> On a global scale, where law is often impotent, there is the familiar example of hostage-taking. The threatener's cost is likely to be much lower than the costs of capitulation (or the value of the hostage) to the targeted group. Potential victims will try to impose penalties for threat-making or hostage-taking, but they are also likely to encourage one another to resist complying with the threat-maker's demands. We return to hostage-taking below because, as might be apparent, it is often a part of a multi-stage threat. The threatener interferes with the liberty of the hostage but often threatens to do worse unless there is compliance with a specified demand. The second threat is made more credible because the penalty for hostage-taking is considerable. Thus, the cost to the threatener of carrying through on the second stage of the threat is relatively low.

In the international arena, targeted nations attempt to combat this feature with escalation. If a group kidnaps a citizen of country J, and demands the release of a prisoner held by J, J might warn the hostage-taker that it should release the innocent citizen. But if the group murders the hostage when J delays or fails to capitulate, J might well undertake airstrikes and vow to kill many members of the threat-making group. J aims to demonstrate that even though the original hostage-taking is a serious offense, the killing carries an added, substantial cost.

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<sup>3</sup> See Ronald Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655 (1988) (Ronald Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655 (1988) (arguing that blackmail does nothing more than transfer wealth and because there is no reason to think that it is a transfer to a higher valuing user, it should be prohibited by law). Cf. James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 699-700 (1984) (addressing Robert Nozick's contention that blackmail is illegal because it is an unproductive exchange).

## B. Credibility and Execution Costs

Both threats and promises are more credible when the cost of execution, which is to say completion of the promised action, is low. However, the nature of most contractual, positive exchanges is such that the cost of keeping a promise often approaches the value of the exchange to one or both parties. In contrast, unless law enters the picture, threats can be yet more credible than promises because the threatener will normally select a threat that is credible precisely because the cost of execution is low. For example, when an employer promises and then gives a promotion and raise, the employer must actually part with the money that the promisee receives. In contrast, an extortionist-arsonist needs but a can of gasoline and a few matches in order to make good on his threat. The employee might be anxious despite the good news; perhaps a misstep on the employee's part will cause the employer to change her mind. But by and large the employee's apparent value to the employer causes the employee to believe that the net cost to the employer is in fact low, or negative, and that the promotion will be forthcoming. Meanwhile, unless law and the means of its enforcement are on the scene, the extortionist's victim will be frightened by the very sight of the gasoline can, because her threatener's execution costs are extremely low.

An employer, or other positive promisor, need not normally be concerned about secondary credibility. A promise is made because it is part of an exchange that is beneficial to the promisor as well as the promisee. A threat, however, is designed to make the noncompliant recipient even worse off than if the recipient capitulates. The threatener's problem, if that is the right word, is in establishing secondary credibility, a subject addressed presently in Part II. Another problem is that the victim, V, may be able to reduce the difference between the benefits and costs faced by the threatener. Consider T's threat, "Your money or your life," and imagine that V expects that execution by T will enable T to acquire V's wallet before running off. A nimble V might take out her wallet and begin to destroy its contents so that it is not worthwhile for T to proceed. If V knows she can defend in this manner, then T's original threat is not credible. We return to this "scorched earth" strategy below in a context where it is yet clearer that it is privately and socially desirable.

T's threat implies that if V fails to capitulate, T may well take V's wallet as well as her life. In any event, if T does great harm to V, the latter will be in no position to enjoy her money. With the money in hand, T will have benefited from executing the threat. But V has reason to think that capitulation reduces the



likelihood of execution, and that V will be spared the bodily harm. If V refuses T's demand, T faces the cost of execution (apprehension and its consequences, for the most part) but stands to gain the money in V's pocket as well as the benefit of eliminating a witness. But if V capitulates, T's benefit from carrying out the full threat despite V's capitulation is much lower because the money has already been transferred. If, reputation aside, execution does not provide a benefit to T, T's threat is likely to be less credible because the net cost of execution is greater to T. Imagine that T threatens: "Give me your money or I will torch your business on Main Street." The execution of that threat produces no direct gain to T. Without repeat play, execution seems incredible because there is, let us assume, some cost to T, and yet no benefit from carrying out the threat. In contrast, even without repeat play, "Your money or your life" is more credible because T is likely to gain V's money.<sup>4</sup>

It is apparent that the credibility of a threat depends in large part on a comparison of the cost and benefit of execution, including the cost imposed by law. "Your money or your life" is not completely, or doubly, credible unless V thinks that by turning over her money, her life will be spared. But this requires some assumption about T's fear of apprehension, for that is the major cost of execution. Credibility requires only that it be greater than zero, or that T has some moral qualms about the taking of life.

In some settings the cost of execution is unrelated to law. For example, if T says "My group will boycott your business unless you do X" or "I will go on a hunger strike until you do Y," V can assess the cost of execution to T and calculate that the threat is increasingly incredible as that cost rises. V can also reason that the likelihood of execution despite capitulation also decreases; it will be expensive for T to carry out the threat after V capitulates, and there will be no direct benefit to T from doing so. In the absence of repeat play the cost-benefit calculations are straightforward. If T threatens a twenty-day hunger strike unless V volunteers for one day at the local homeless shelter, V will doubt the threat's credibility and regard the threat as a weak signal of intense feelings, to be sure, but not much more. Following the same logic, if Country T threatens to invade country V unless V ceases using chemical weapons against its own citizens, V might believe that T's cost of invasion exceeds any benefit T obtains from the

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<sup>4</sup> "Your money or I will end a stranger, W's, life" is as incredible as "Your money or I will torch your business," and less likely to motivate V. It is yet more incredible if V expects T to be angry with V (but hardly with W) once V refuses to comply. The example in the text is illustrative and ignores the fact that the penalty for murder is greater than that for arson, and this difference might make the arson threat more credible.

reduction in V's domestic horrors. If so, the threat is not credible and V should be expected to reject T's demand, and to continue its (V's) domestic policies. In turn, few such threats will be observed in the first place. Similarly, and highlighting the possibility that execution will survive capitulation, if Country T threatens instead that it would support a museum exchange with a third nation, and enemy of V, V might reason that executing this threat is of low cost or even of benefit to T, and would be carried out even if V capitulated and ceased injuring its own citizens. If so, V has no reason to give in. In short, the value and ingredients of credibility bring about a kind of proportionality in the issuing of threats.

There is a symmetrical observation to be made regarding V's capitulation. If V accedes to T's demand, then whether or not T executes anyway, there is often the possibility that V can reverse course and renew the objectionable behavior. Whether or not T supports the dreaded museum exchange, for example, V can resume the maltreatment of its own citizens. It is tempting to say that capitulation suffers from the same credibility problem as threats, or indeed that V implicitly "threatens" to reverse any capitulation. Working backward, then, we might expect that when T threatens V, T's demand is designed to ensure that capitulation by V cannot easily be reversed. Similarly, T has an interest in making its threat credible and it will therefore choose a threat such that its execution will seem unlikely in the event that V capitulates. It is in T's interest to appear credible.

Finally, execution costs, and hence credibility, may be a function of time. Consider T's threat and initiation of a hunger strike to last until V improves prison conditions. We can imagine four implicit conclusions to the transaction: T may at some point end the hunger strike because V calls his bluff and T fears for his own safety; T may perish and impose publicity costs on V as well as obvious costs on himself; V may capitulate (at which point we will assume that T dutifully ends the strike); or V may resort to force-feeding T with attendant publicity costs to V. As the hunger strike progresses, T signals an intense preference regarding the prison's conditions. As for execution costs, the risk of death or other harm increases over time, so that execution costs rise. On the other hand, the negative publicity for V increases in parallel fashion so that T might think that V is increasingly likely to capitulate. There is also the idea, irrational as it might seem, that the sunk costs incurred by T make it difficult for T to end the hunger strike without V's capitulation because the effort will appear wasted.

## II. Secondary Credibility and Repeat Play

### A. Primary and Secondary Credibility

Even when a threat by T will be inexpensive for T to carry out, it may not be credible because the victim, V, fears a second round of threats if she shows herself to be vulnerable and compliant. If T demands something worth 15 to T and threatens to destroy V's property in a way that costs T 10 and V 20, V might still not deliver the item worth 15, because V must be concerned that T will repeat the threat and aim it at some other asset V controls. In Part I we emphasized that for T's threat to succeed, T's cost of executing the threat needs to be lower than the value to T of V's capitulation. It is this inequality that normally makes T's threat credible to V. We might call this primary credibility and then attach the label of secondary credibility to T's ability to convince V that the latter's capitulation will not simply cause T (or another party) to repeat the threat. Generally speaking, capitulation by V is plausible, or at least rational, when V perceives that T's costs of execution are lower than the value to T of V's capitulation *and* V has reason to believe that T cannot or will not repeat the threat. When both these things are true, the threat is credible.

### B. Repeat Play

If T is a repeat player, or V believes that to be so, then it is elementary that T's threats are more credible if execution generates a reputation for T that makes future threats more credible and therefore more profitable. Put differently, reputation considerations often lower T's net execution costs. But the matter is complicated both by the likelihood that V is also, or is in danger of becoming, a repeat player, trying to build a reputation for non-capitulation, and the possibility that repeat play has an asymmetric impact on reputation. In particular, past reliability does not provide much information about the future, except that it is surely better than past unreliability. Neither of these points has been appreciated, and there is an unfortunate tendency to assume that repeat play dominates the analysis of promises and threats.

A threatener involved in repeat play is *not* necessarily more credible than one known to be a one-time participant. In some circumstances, the rational, and certainly the impulsive, recipient of a threat will capitulate only if there is a guarantee that the threat will not be repeated, whether by the first threatener or another, and this can be as difficult to make credible as the original threat itself. The danger is compounded where capitulation itself signals something unknown to threateners, namely the costs, benefits, and vulnerability of the recipient to the

particular threat aimed her way. This feature is at the heart of much diplomacy, corporate “greenmail,” and other threat-laden interactions.

Consider a target corporation facing a hostile acquirer and contemplating making a payment in return for an end to the takeover attempt. In order to avoid a suit for fiduciary breach, the payment to the threatening acquirer might be styled as reimbursement for the costs of identifying hidden value in the target. The target must fear that its willingness to pay will bring on other acquirers who hope to extract similar payments. Capitulation is costly, but the direct benefit to the threatening acquirer makes the threat credible. The most sanguine explanation for these greenmail payments is that the acquirer has identified something of value in the target, and is then paid for this information. A much less optimistic interpretation is that the target’s managers seek to preserve their positions by making a payment that is to their shareholders’ detriment.<sup>5</sup> Following the optimistic narrative, there is no danger of further threats (and indeed there was never really a threat but rather the offer of information) because the information is now in the target corporation’s possession. The pessimistic view of the transaction is puzzling because it would seem that other threateners will simply come forward, now that it is known that the target corporation’s managers are vulnerable and will pay, with corporate funds no less, to keep their jobs.<sup>6</sup> In turn, the target firm should be disinclined to pay because payment invites further threats. There is, in short, a problem of secondary credibility; the first acquirer must overcome this problem even though it is completely reliable with regard to its own threat.

In the international arena, the danger of follow-on threats is at least as great, and suggests that while repeat play might make a threat more credible, it greatly raises the expected cost of capitulation (viewed over multiple rounds). In turn, this leads to the observation that repeat play alone does not increase credibility and thus beget threats, unless the threatener is in a position to reduce the recipient’s fear of threats from other sources. Organized crime offers an obvious domestic analogue, or illustration. Extortion-induced protection money forms an attractive

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<sup>5</sup> Jonathan R. Macey & Fred S. McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 *YALE L.J.* 13, 14-15 (1985) (discussing greenmail, a corporate defense tactic that has been criticized as “a self-serving attempt [by management] to prevent a shift in corporate control that would threaten their jobs”).

<sup>6</sup> A hybridized story is also plausible. The target may have information about its own worth that it needs to keep secret for good business reasons. The first acquirer discovers the information and is now paid to depart and be silent. Here there is a threat (of disclosure) but no danger of copycat threats.

stream of revenue, but this business model works only where the criminal organization enhances credibility by occasionally making good on its threats *and* effectively maintaining a geographic monopoly or other means of assuring the victims that other entities will not appear and demand payments.<sup>7</sup> Similarly, a labor union's threat is often secondarily credible because no other union can call a strike, even after the company's vulnerability is revealed.<sup>8</sup> Returning to the international arena, a government that pays another country or a terrorist group to release hostages must have reason to believe that it or the rewarded threatener has the means of preventing other entities from grabbing another set of hostages.<sup>9</sup>

There are other reasons why repeat play does not guarantee credibility. Threats are like promises in this regard.<sup>10</sup> A respondent must always be skeptical of a track record, lest a sting be mistaken for reliability based on past performance. The recipient of a promise or threat needs to know about the future opportunities of the other party rather than about its past reliability. Inasmuch as the latter is more observable than the former, it is sensible to take one as a proxy for the other, but within limits. If, for example, S delivers widgets to B in return for promised payment, performance by both parties may raise the likelihood of future transactions between them because each has evidence that the other is reliable. But, of course, there is always the danger that performance costs have

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<sup>7</sup> Thomas C. Schelling, *What is the Business of Organized Crime*, 20 J. PUB. L. 71, 73 (1971) (arguing that one characteristic of organized crime is that it allows no competition and exercises a monopoly); Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877, 1882 (1993) (stating that a threatening party may want to carry out a threat when its demand has been rejected for the purpose of establishing a reputation).

<sup>8</sup> Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 996 (1984) (discussing a labor union's exclusivity with all employees included in a bargaining agreement).

<sup>9</sup> Harvey E. Lapan & Todd Sandler, *To Bargain or Not to Bargain: That is The Question*, 78 AMERICAN ECON. REV. 16 (arguing against the conventional wisdom that governments should not bargain with terrorists over hostages in order not to encourage further hostage taking).

<sup>10</sup> For the role of repeat players in enforcing contracts without formal law, but rather through social norms and reputational sanctions, see e.g., ROBERT ELLICKSON, ORDER WITHOUT LAW 55-64 (1991) (describing a case study in Shasta County, California, where "[a] measured amount of self-help . . . is the predominant and ethically preferred response to someone who has not taken adequate steps to prevent his animals from trespassing"); *Id.* at 214-15 (on using gossip as a penalty for failure to square accounts); *Id.* at 277 (stating that "[l]andlords and tenants who have reason to worry about their external reputations are likely to be even more civilized"); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (describing the diamond industry, which has "developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members"); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (describing the cotton industry, which "has almost entirely opted out of the public legal system, replacing it with one of the oldest and most complex systems of private commercial law").

been absorbed in order to encourage a subsequent round in which the strategic player will underperform, especially if the stakes are higher in the later round. The problem looms larger the fewer the time periods. One never knows whether performance is indicative of the future or, to the contrary, intentionally misleading. Past reliability is probably a modest inducement to future transactions. If it is more than that, it because we think there are “good types” and not so good ones, and as there is evidence of past performance, the observer updates until it is very likely that among those who have been repeatedly reliable, only a very few are waiting to sting.

Correspondingly, a threatener with a history of carrying out threats when a victim fails to capitulate is either identified as a bad type or is seen as credible because the victim perceives that this threatener is perfectly capable of threatening and executing again. Moreover, the threatener is not investing in reputation. Past execution may also reveal that execution costs, if unknown to the victim, are in fact relatively low, so that the threat is more credible. But the analyses of a threatener and promisor’s reputations are not identical. First, execution reveals a bad type if it concerns a wrongful act, while performance does not necessarily reveal a good type because it may be an investment in a future sting. Second, the issuance of a threat is often cheap, and its execution is often inexpensive as well, so that the margin between the threatener’s costs and its expected benefit from the victim’s capitulation can be large. In contrast, most bargains over benefits require effort or payment on both sides, and a large margin of gain is unlikely. As such, past behavior is likely less reliable for threats than for promises. Finally, but cutting in the other direction, a previous successful execution of a threat regarding a wrongful act may show that this particular threatener has no fear of the law, or is in collusion with those who enforce law. If so, its threat and execution costs are both low, and its threats are more credible.<sup>11</sup>

### C. Secondary Incredibility

We have suggested that repeat play is no guarantee of primary or even secondary credibility. On the other hand, a repeat player who has proved unreliable has an especially difficult time gaining credibility. A victim may refuse to pay a blackmailer because the latter cannot guarantee secondary credibility, but the same victim is virtually certain not to capitulate if the blackmailer is known to

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<sup>11</sup> By “threat costs” we refer to the fact that if law makes the threat illegal, then there is a cost to making the threat apart from any associated with execution. The role of law in forming threat costs is explored further in \_\_\_\_, but in most cases discussed to this point threat costs can be ignored.

be secondarily incredible. It is irrational to capitulate to the first of several expected threats unless delay is of benefit (in effecting the arrest of the blackmailer for example) or the victim would have capitulated with the larger threat – that is, the cumulative demands of the several threats -- in the first place.

It is interesting that in a variety of settings there seems to be a remarkable and seemingly irrational reaction to repeat bad players, as we might call them. In a casual commercial market, or even in the typical residential real estate market, for example, the understanding is that the seller, S, starts high and proceeds towards some middle point (if at all), while the buyer, B, starts low and increases his offer until the parties do (or fail to) agree to a sale. But the unwritten rule is that once there is nominal agreement, no further testing of the waters is acceptable.<sup>12</sup> By way of illustration, imagine that S asks 20; B responds with an offer of 12; S reacts by lowering her price to 18; B rejoins with 15; and S accepts and begins to hand over the item. If B now hesitates: “Well, on second thought, I’ll buy it for 10,” S will usually end the bargaining process and regard B as a contemptible rule-breaker. It is somehow wrongful for B to explore for S’s reservation price in this manner. The simplest explanation is that the seller recognizes that there was a meeting of the minds and that, at least in principle, law requires that the buyer go through with the transaction. Another explanation of this widespread conception of wrongdoing or etiquette is that a seller feels bound, whether by the law of contracts or by that of misrepresentation, to sell at a price she announces, so that any asymmetry seems offensive and is possible only because the buyer in these settings can walk away in asymmetrical fashion, leaving the seller no corresponding method of seeking out third-party relief. Certainly the buyer in most casual markets is in no danger of losing a valuable reputation, while the seller may have other customers waiting and watching in the wings. Yet another explanation is that if either party can change his or her mind after the other accedes to a previous offer, there is too much uncertainty around the question of when a bargain is ever reached.

We regard the convention as interesting because the setup favors the seller,

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<sup>12</sup> The convention discussed in the text is also reflected in cases where strangers pay to avoid a harm that law is unlikely to reach. For example, SaveToby.com was a website on which the creators claimed they would eat a cute rabbit unless donors collectively paid \$50,000. Deadlines were extended and there was an unverified claim that about half that amount had been collected. There followed a Save Toby book, threatening to kill Toby, who had been saved once, unless 100,000 copies were sold. At that point, the venture was understood to be humorous rather than threatening. The book might be understood as destroying any credibility attached to the first threat. See [http://en.wikipedia.org/wiki/Save\\_Toby](http://en.wikipedia.org/wiki/Save_Toby)

and the buyer's exploratory bargaining could be seen as an antidote to the initial asymmetry. The seller might begin the day, or season, with a price of 25. If no buyer materializes, the seller lowers the price to 23, and in time to 21, and so forth. The seller's true reservation price might be 13, but the seller is fishing for a high-valuing buyer. In a market where goods are unique it is especially difficult for a buyer to try the corresponding strategy. It is easier to organize eBay around sellers who offer goods than it is to begin with buyers who encourage sellers to bid in reverse for the right to sell a good specified by the buyer. The buyer in a casual market, like many one-time buyers in the market for a home, is trying to fish for a seller exactly as the seller does for a buyer. Nevertheless, any strategy that smacks of secondary incredibility is sufficiently destabilizing to doom the buyer.

Consider in this light the blackmailer who proves unreliable, or secondarily incredible, by returning for a second extraction. Without expressing sympathy for the blackmailer, we can understand his position; if credibility requires that the business be completed in a single transaction, then the blackmailer is uncertain how much to demand. If he starts high and lowers his price in the event of noncapitulation, his threat seems weak. And if he starts low and then raises the price in the event of quick capitulation, he seems unreliable. The sincere blackmailer might wish to communicate as follows: "I will reveal X about you unless you pay me 100. If you do pay me 100, I will withhold the information for one year. If you pay now, you should know that I might return in a year to demand payment for next year." The target may take precautions during the year, but the threatener may also learn that the price could be increased in the second round. If this strategy works, then it reveals that targets think in terms of good and bad types. If it does not, it may be because the parties comprehend, or even internalize, the seller's sense of convention in the face of instability. Alternatively, a blackmailer may succeed, which is to say be more credible, when there is a natural time frame to the threat, so that the fear of repeat threats is eliminated. For example, a particular threat might dissipate once the target is elected, receives an inheritance, or is protected by a statute of limitations.

### III. Credibility Through Multi-Staging

#### A. Threatening or Bullying by Sinking Costs

A threatener can enhance credibility by expending resources and, remarkably, can do so even where it would seem that no credible threat is



possible.<sup>13</sup> Imagine a Country T that threatens to invade its neighbor, V, unless the latter cedes control of disputed territory. V finds the threat incredible because it knows that the cost of invasion to T is greater than the value of the territory at stake. Imagine that the costs and benefits are known and similarly assessed by the two parties. The territory in dispute is worth 100 to each; invasion costs T 120 and would impose direct costs of 50 on V; and neither country gains anything when the other incurs costs. At the outset, T's invasion threat is not credible because it must spend 120 to gain 100. It tries to bluff because V's costs can amount to 150 (the 50 from invasion plus the loss of the territory), but V can see that from T's perspective the invasion is too expensive. Of course, T's threat might be credible if T would benefit from building a reputation for reliability – though we have suggested that reputation is not a simple game-changer. In any event, we resist adding assumptions that make the problem easier and less interesting.

But imagine further that the 120 cost to T is the sum of 30 for mobilizing troops, another 30 for amassing equipment at the border once the troops are in place, and then 60 for the expected loss of life and equipment in an actual invasion. T might now proceed with mobilization. Following this first step, V will perceive that T need only spend 90 more in order to gain 100.<sup>14</sup> Once T carries out the first step, the threat becomes credible. If V rationally capitulates after T mobilizes, T will have spent 30 to gain 100.

Yet more interesting is the possibility that mere knowledge of the preceding multi-step strategy, available to T, makes T's threat *prior* to the mobilization credible. Arguably, V will reason that a rational T will spend 30 (or 60, if necessary, to make the point yet clearer to V) in order to bring V to its knees as before, so that V will find the original threat credible even before T proceeds with the first stage. The example divides T's execution costs into three steps in order to emphasize the puzzle of backward induction, or unraveling.

If it is implausible that V will find the threat, or perhaps it should be called the prospect of a threat, credible simply because T can sink costs and thereby

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<sup>13</sup> For a similar analysis in one specific setting, see Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1 (1996) (suggesting that negative value suits exist because the defendant knows that the plaintiff can proceed in stages, spending some resources in the first stage, and credibly threatening to spend more in the next so that the suit can be credible even without actual expenditures).

<sup>14</sup> Note that T can sink costs by completing some costs or by taking steps that increase the value of the direct benefits available for success. If T puts some assets in the disputed territory, worth 30 to T only if T controls the territory, then again its threat becomes credible because it will spend 120 to gain 130 upon a successful invasion.

make future steps credible – even though the overall investment looks incredible – it is because there is or ought to be a hidden, if realistic, assumption that V benefits when T incurs costs, at least when the parties are enemies or competitors. We have tried to eliminate that from the illustration, but perhaps the startling result requires more. The example can, therefore, be improved by adding that as soon as T begins to mobilize, V must spend 5 to shore up its defenses, and then another 5 when T heads to the border in the second step. (Perhaps T can get to the border and then invade at costs of 20 plus 20, rather than 30 and 60, if V fails to take these defensive steps, or perhaps V suffers badly from internal instability and defections if V does nothing at all in the face of a mounting threat.). With this added assumption about some interaction between the adversaries' costs, the unraveling seems quite plausible. If T takes the first step at a cost of 30, V will find it worthwhile to spend 5. If it gets that far, T needs only to spend 90 to gain 100 and the threat is, again, credible. But rather than spend 5 and later capitulate, V may as well save the 5 by giving in earlier, as soon as it thinks that T has assessed the costs correctly and deduced the multi-stage threat strategy.

The situation is, in principle, symmetrical. V can influence credibility by taking steps that make capitulation impossible or at least less valuable to T. If V salts or otherwise scorches the earth, the disputed territory will be of lower value to T (as well as to V) and T's threat is made less credible. Working backward, T will not threaten because it perceives V's optimal strategy. Indeed, there should be no threats but only surprise invasions. In reality, and depending on technologies, V chooses a mix of precautions, including expenditures or sacrifices, that make it a less attractive target. In turn, T can often increase the expected gains from execution in order to enhance credibility. T might, for example, encourage its own citizens to move into the disputed territory. T and V can be understood as engaging in a game, whether we think of it as an arms' race or something quite different. But we proceed with the easier picture of T in control of the components of credibility in order to focus attention on the credibility of threats rather than on the mysteries of game theory.<sup>15</sup>

It is easy to have one of two extreme reactions to this example in which T succeeds without expending resources. The first focuses on the startling result, and reasons that the assumptions must be too strong. Perhaps the inevitability of repeat play, of perceived competitive benefits from an adversary's costs, or of

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<sup>15</sup> Note that Bebchuk, *supra* note \_\_\_, assumes that the parties cannot affect the total costs of litigation or the expected value of the suit. The parties are also assumed to be capable of settling at any stage.

miscalculations changes things in crucial ways. The opposite reaction is to observe that the unraveling may explain, if not rationalize, the success of bullies quite generally. If T is more powerful than V, and can invade, spending as much as 120 (in steps of 30, 30, and 60) while imposing costs of 50 (casualties) plus 100 (when control of the territory is transferred to T) on V, then it does not matter that T gains less than 120 itself. Virtually every threat can be divided into stages, so this strategy for making a threat appear credible is of significance. As long as T is able to divide execution costs into stages that each costs less than the benefit to T from execution, V will capitulate. V can win only if (contrary to the illustration set out here) it can raise the cost to T of the final stage, as by defeating T's invading army. If not, V will comply in an earlier stage, perhaps even saving T the need to incur any costs at all, if each stage imposes costs on V, and T's costs are of no benefit to V. Powerful bullies operate in such environments, the argument goes, and only rarely need to carry out their threats. The stronger party's threats are always credible, and something like concerted or principled reactions are required to thwart the skilled bully. In the absence of coordinated action early in the game, the victim must make the bully believe that the final stage will be costly to the latter. If T divides his costs into stages, V is normally better off concentrating his defenses, or beginning to destroy the benefits that T anticipates, in order to create a moment when T's costs of going forward are high compared to the benefits still available to T.

## B. Law as Part of Multi-Staging

### 1. Law's contribution to credibility

When actors are subject to legal rules and enforcement, law can prevent the arm's race that is bound to occur as putative bullies build up threat-making capacity and defenders invest in otherwise wasteful precautions. If a severe legal penalty attaches to an assault, for instance, then one who threatens assault will not find it worthwhile to execute and the threat itself may be incredible. T may be able to "defeat" V, but not once the law is on V's side, denying T any gain even if V capitulates, or putting T in a situation where the penalty owed to the state exceeds anything extracted from V. In turn, if a threatener can induce capitulation because the target perceives that the threatener does not attach either a high cost to the penalty meted out by law or a substantial chance of being apprehended by it, then law may be powerless. In order to add to the likelihood of apprehension, and for other reasons discussed presently, law often attaches penalties not just to

completed *malum in se* crimes, but also to attempts and threats of many such crimes.<sup>16</sup> Moreover, many serious crimes, like rape and kidnap, double as serious crimes and as threats of murder – in the event that the target fails to capitulate in the first stage. The idea is not simply that law deters the threatener but also that it works to reduce crimes by reducing the return to the criminal, who will find his threats less potent (and therefore the crimes threatened less useful as leverage) because they are less credible to the targets.<sup>17</sup>

The confounding factor is that when penalties attach to behavior leading up to crimes, law may perversely increase the potency of some threats because they become the first step in a (now familiar) multi-stage process. Imagine, for example, that T threatens to harm V unless the latter transfers property worth 7. Suppose further that the cost to T, in the form of legal penalty, is 10 for the crime he threatens to execute, and 4 for simply threatening the crime. The marginal penalty for execution is now 6 and there can be situations where law will have made the crime – and thus the threat – more credible.<sup>18</sup> A partial antidote would be a rule that the separate penalty for the threat, 4, is reduced when there is also punishment for execution. Alternatively, law could in some cases charge the threatener with both the threat and the crime, for a total penalty of 14 and a marginal penalty of 10, but this would be unusual. With respect to the most serious crimes there little room to add on to the single penalty in a meaningful

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<sup>16</sup> MODEL PENAL CODE §5 (1962) (defining attempt and conspiracy crimes). Threats are penalized directly in provisions such as §2.09 (duress), but may also be categorized as attempts by prosecutors.

<sup>17</sup> We must be careful not to lose sight of the communication value of a threat to the victim, even where the threat is about a horrible act. One might want to receive a threat of arson even if it is impossible to prevent the arson. Personal property can be relocated, and more important, the threatener's demand might supply information that makes it clear whether to accommodate the threatener or how to avoid future tangles. On the other hand, if communication could be completely quashed, then the target and most of society would be even better off. For one thing, the question is not whether the target wants the information, but whether all potential targets will be better off if such communications are allowed or better deterred. In the limiting case, if a kidnapper knew it would be impossible to communicate with the victim's family, then kidnapping itself might be pointless. But implicit threats always seem plausible, and so the question is whether the communication value of (wrongful) threats (not just to the immediate victim) is high enough to allow, and certainly not discourage, some threats. Moreover, there are other situations where an inability to communicate would make the parties worse off simply because it would negate the possibility of compromise. If a country threatens to invade another unless a hostage is turned over, for example, it is likely that an inability to communicate and threaten would often lead to casualties that could be avoided by the threat-and-capitulation prospect. But the law of threats regarding serious domestic crimes need not be the same as that aspired to for international disputes.

<sup>18</sup> See URI ZUR, ISSUES IN LAW AND GAME THEORY (doctoral dissertation in Hebrew) (demonstrating that law's punishing the attempted robbery can help the robber by making his threat more credible).

way. We might imagine 10 or 11 as the maximum penalty. In these cases, penalizing the threat probably makes the threat more credible, and indeed there will be some cases where the threat is only credible because law has made it wrongful. T would be deterred from committing the crime, but now that the marginal penalty for its commission is lower, the crime – and in turn threatening the crime – is worthwhile. Of course, there may be many more cases where making the threat an independent wrong raises the probability of apprehending the wrongdoer.<sup>19</sup> The point is that the ability of the threatener to work in stages can dramatically increase the credibility of threats, and that law itself can be a source of the sunk costs that make multi-stage threats more credible and dangerous.

## 2. Criminal Law's Focus on Threats

The danger that the law of threats can increase crime suggests some rethinking of first principles. First, perhaps the law should deter capitulation rather than focus only on threats and their execution. The approach might be especially promising where the threatener is perceived as undeterrable. It is, however, not just counterintuitive but sometimes offensive and politically impossible to penalize a victim. The strategy must be to emphasize that when a victim capitulates, threateners are encouraged to threaten other targets. There are examples of legal systems working to discourage kidnapping by making it a crime to pay kidnappers.<sup>20</sup> Similarly, there are countries that announce that they will not negotiate with terrorists.<sup>21</sup> Where kidnapping is common, governments have sought to freeze or temporarily confiscate the assets of victimized families and

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<sup>19</sup> The point can be generalized with the claim that the remedy for breach or wrongdoing affects credibility. Thus, if a party to a contract hints at a coming breach, or breaches in a minor way, in order to secure some benefit from the other party, the law might or might not provide a remedy. If it does provide a remedy, then it deters the minor breach and threat, but it leaves less of a remedy to secure the larger project.

<sup>20</sup> RICHARD P. WRIGHT, *KIDNAP FOR RANSOM: RESOLVING THE UNTHINKABLE* 23 (2009) (describing efforts made by Italy and Colombia to prevent kidnapping victims' families from paying the demanded ransoms); *The price of paying ransoms*, *THE ECONOMIST* (Aug. 31, 2000), <http://www.economist.com/node/353978> (stating that it may be necessary to punish both kidnappers and those who pay their ransom demands).

<sup>21</sup> Steven L. Myers, *Hostage Crisis Unfolds in Russia as Guerrillas Seize School*, *N.Y. TIMES* (Sept. 30, 2004), [http://www.nytimes.com/2004/09/01/international/europe/01CND-RUSS.html?\\_r=0](http://www.nytimes.com/2004/09/01/international/europe/01CND-RUSS.html?_r=0) (stating that Vladimir Putin told journalists that "Russia would never negotiate with terrorists or separatists in Chechnya"); Hassan M. Fattah, *U.S. Rejects Truce Offer From bin Laden*, *N.Y. TIMES* (Jan. 20, 2006), <http://www.nytimes.com/2006/01/20/international/middleeast/20tape.html?pagewanted=all> (reporting that then-Vice President Dick Cheney said "[w]e don't negotiate with terrorists" when asked about an Osama bin Laden audiotape).

firms, but this strategy discourages some victims from reporting kidnappings.<sup>22</sup> More generally, criminalizing both sides of a transaction runs into the risk of driving the transaction underground, rather than deterring it. There are other settings where threats might be discouraged by penalizing capitulating targets, though the strategy can be foiled by a defense of duress on the part of the threatened party. When the threat does not rise to the level of duress, it is common for law to deter both sides, and then to rely on third-party enforcement. For example, if a public official threatens a private party with regulation or another burden, the threatened party can complain that the threat was understood as a request for an illegal payment. If, instead, the threatened party bribes the official, both parties will be culpable and the one who pays will be unlikely to succeed by claiming duress.<sup>23</sup> In turn, because both parties run the risk of prosecution, both have reason to be secretive and law enforcement becomes more costly.

Another feature of criminal law worth re-examining is the tendency to punish threats in the first place. Why punish threats if to do so might generate more crimes, when it is possible to get the same deterrence by increasing the penalty at the final step? If criminal law punishes threats for the same reasons it punishes attempts, then there is nothing new to add here.<sup>24</sup> The problem is one of weighing gains to enforcement against the risk that more law (focused on threats) will increase the social costs of crime. It is likely, however, that threats are much more than a stepping-stone to (some) attempted crimes and then to serious crimes themselves. One product of the analysis in this Article, is that the best defense to multi-stage threats may involve focusing the defense on a single point, so that the threatener faces high costs. The criminal who threatens may be credible because he has little to lose from continuing with execution and, in response, law would do well to shift its resources from the threat to the execution.

Threats generate anxiety. Anxiety is for most people a function of the length of the time period from the application to the resolution of a stress. Note that the terminology is a bit confusing, or doubly interesting, because some threats are

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<sup>22</sup> Celestine Bohlen, *Italian Ban on Paying Kidnappers Stirs Anger*, N.Y. TIMES, Feb. 1, 1998, available at <http://www.nytimes.com/1998/02/01/world/italian-ban-on-paying-kidnappers-stirs-anger.html?src=pm> (stating that the number of reported kidnappings decreased dramatically after ransom payments to kidnappers were banned).

<sup>23</sup> Of course, the prosecutor might reduce the charges in return for the private citizen's assistance or simply because the crime looks less culpable. See *U.S. v. Abbey*, 560 F.3d 513 (6th Cir. 2009) (perjury and fraud charges reduced in exchange for testimony against public official).

<sup>24</sup> Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299, 331-32 (1996) (arguing that attempt is punished less severely to incentivize the perpetrator to withdraw).

contained within concrete wrongs. Thus, ransom kidnapping is itself a threat to do something worse than abduction alone unless ransom is paid. The threat of ransom kidnapping is in large part a threat of a threat; costs are imposed at each stage, and in each something can go wrong in a way that increases the chance of a fatality or serious harm. Kidnapping offers a layered example of threats and their costs, but the analysis is simplified if there are fewer stages, and for this reason we set kidnapping aside and turn to arson or physical assault, where the criminal threatens one of these crimes in the hope of extracting a payment from the target.

A straightforward observation is that law penalizes threats qua threats, because a threat followed by a physical assault, for instance, is worse than the physical assault alone. The former produces anxiety.<sup>25</sup> It must often be the case, as already noted, that the target prefers the threat, and indeed prefers a longer threat period even though it produces more anxiety, because the threat affords an opportunity for precaution taking. To be sure, the threatener is aware of this, but the point is that the threatener does not aim to make the victim as miserable as possible but rather to extract something from the victim that is of direct benefit to the threatener. In any event, criminal penalties need not be proportional to the harm the victim experiences, for they might be designed to be effective deterrents. Ironically, or even paradoxically, law might attach penalties to threats in order to deal with the extortionist who rarely if ever executes, but simply imposes anxiety in order to extract payment from victims who find these threats credible. The extortionist who dangles the target over a bridge's railing and threatens to drop her unless the target pays the threatener, might well frighten the victim into making a payment. The threatener's ability to use fright might well overwhelm credibility calculations. We have suggested that law focus more of its remedies on the final stage of the criminal's strategy, and this suggests that it penalize the dropping rather than the dangling. However, because most victims can be expected to capitulate fully when dangled, it is surely sensible to punish the threat in the first step in order to deter extortionists who specialize in dangling. The calculus of credibility does not yield simple solutions.

## Conclusion

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<sup>25</sup> We do not dwell on the infliction of this emotional distress because, as the text shows, this distress is incidental to questions of credibility. Note, however, that the distress brought on by a threat is unlikely to be entirely offset by the relief experienced when the threat is not followed by execution.

The recipient of a threat must assess not only the likelihood that the threatener can and will carry through on his threat but also that he is secondarily credible, and will not repeat the threat or execute despite capitulation by the victim. It is these calculations regarding credibility that we have emphasized in order to explore the structure of threats and the limits of law.

A threat is more credible when its cost of execution is low, the benefit of its execution to the threatener is high, compliance will not bring on additional threats against the victim, the threatener benefits from developing a reputation as a credible threatener, the threatener is able to proceed in stages so that its marginal cost of execution is eventually low, and the victim's ability to lower the threatener's benefit or raise its costs is low. Law operates most easily on the first of these several components. It can reduce threats, and the wrongs episodically committed in order to make the threatening process more profitable, by attaching penalties to them and apprehending threateners at one stage or another so that the cost of execution is, and is perceived as, high.

A paradox of threats is that attaching low penalties to them makes them more credible, by lowering the costs to threatener, but attaching high penalties also increases credibility by decreasing marginal deterrence. It seems that law ought often to focus its remedies on the final stage of the threatener's plan in order to reduce credibility and preserve marginal deterrence.



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