

INFORMATIONAL BLACKMAIL: SURVIVED BY TECHNICALITY?

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Blackmail constitutes one of the most intriguing puzzles in criminal law: How can two legal rights—i.e., a threat to disclose true but reputation-damaging information and, independently, a simple demand for money—make a legal wrong? The puzzle gets even more complicated when we take into account that it is not unlawful for one who holds embarrassing information to accept an offer of payment made by an unthreatened recipient in return for a promise not to disclose the information. In order to answer this question, this Article surveys and analyzes the development of the law of informational blackmail and criminal libel in English and American law and argues that the modern crime of blackmail is the result of an “historical accident” stemming from the historical classification of blackmail as a property offense instead of a reputation-protecting offense. The Article argues that when enacted, the prohibition on informational blackmail was meant to protect the interest of reputation as a supplement to the law of criminal libel. As the concept of reputation shifted dramatically over time—from an honor-protecting concept to a dignity- and property-protecting concept—most reputation-protecting offenses were decriminalized in the second half of the twentieth century. The crime of blackmail, however, remained unjustifiably intact due to its misclassification as a property offense. This Article, therefore, calls for the decriminalization of informational blackmail.

I. INTRODUCTION

Blackmail is an intriguing crime in the sense that it appears in every well-developed criminal code and strikes most people as wrongful, yet although many distinguished scholars have studied this crime, the rationale for it remains a puzzle.

To understand the puzzle we first have to define the problem: How can the combination of two legal rights make a legal wrong? Unlike extortion, which involves obtaining something with the threat of inflicting unlawful harm, blackmail involves a threat to do something that one has a legal right to do.¹ When B threatens to expose A’s embarrassing information unless he is paid,

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

B is guilty of blackmail, although it is legal (and in some cases even desirable) for him to expose or to threaten to expose the information and to demand compensation, if done separately. Combining these two rights, however, results in a criminal wrong.

The puzzle gets even more complicated when we take into account the existence of a second paradox of blackmail: Any argument for the criminalization of blackmail must also explain the legality of the mirror image of blackmail, i.e., the fact that it is not unlawful for one who holds embarrassing information to accept an offer of payment made by an unthreatened recipient in return for a potential blackmailer's promise not to disclose the secret.²

The current literature that supports the criminalization of blackmail can be divided into two competing views: that which focuses on the social consequences of blackmail, and that which focuses on blackmail as a wrong in itself. As will be illustrated in this Article, both views are unsuccessful in fully explaining the rationale behind the blackmail prohibition.

This Article contends that the criminalization of informational blackmail today is the result of an historical accident caused by the classification of blackmail as a property offense instead of a reputation-protecting offense. Though reputation offenses were reexamined and decriminalized in the second half of the twentieth century, blackmail remained unjustifiably intact due to its historical misclassification. The traceable history and development of blackmail in England and the United States illustrates how that misclassification came to pass.

Part II of this Article will introduce the various attempts to solve the blackmail paradox and their critiques. Part III will proceed to analyze the history of the offense, beginning with the development of blackmail in nineteenth century England, a task which will require analyzing the law of criminal libel as well. This part will then examine the development of laws governing blackmail and criminal libel in the United States. Part IV will discuss perspective shifts regarding the essence of reputation and their effects on blackmail law. This Article will demonstrate that the core of the incoherency surrounding blackmail lies in the lack of distinction between the different types of threats embodied in the extortion offense and their underlying rationales. Uncovering such rationales will lead to the conclusion that informational blackmail should be decriminalized, as it seeks to protect a notion of reputation that no longer exists.

2. *See id.*

II. THEORIES OF BLACKMAIL

The current theories on blackmail can be roughly divided into two prevalent approaches, each containing a variety of theories. The first approach explains blackmail's criminalization by focusing on the harmful consequences that would follow blackmail's legalization. The second approach explains the criminalization of blackmail by focusing on the immorality of one or more of the elements of the blackmail transaction itself, regardless of its consequences.

A. *The Consequentialist View*

1. Blackmail as Waste of Resources

Douglas H. Ginsburg and Paul Shechtman view blackmail as a deadweight loss.³ They argue that blackmail is unlawful because there is social waste in employing resources to dig up information for the purpose of reburying it.⁴ According to the authors, the blackmail transaction does nothing but redistribute wealth.⁵ The victim's payment to the blackmailer benefits the blackmailer in the same amount that it harms the victim.⁶ However, because the blackmailer incurs costs in digging up the information, his net gain is less than the victim's loss.

In order to distinguish between legal transactions and blackmail, the authors focus their attention on the question of whether the realization of the threat would result in "material benefit to the party making the threat."⁷ The authors argue that a legal system that is designed to maximize allocative efficiency would penalize, inter alia, threats to do something that the threat maker "does have a right to do but that would (a) consume real resources, and (b) yield no product other than the enjoyment of spite or of an enhanced reputation as a credible issuer of threats."⁸ Because in most instances of blackmail, except for cases of market-price blackmail,⁹ threats of disclosure

3. Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1865 (1993).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* For a game theory analysis on the efficiency of criminalizing blackmail, see Fernando Gomez & Juan-Jose Ganuza, *Civil and Criminal Sanction Against Blackmail: An Economic Analysis*, 21 INT'L REV. L. & ECON. 475 (2002).

9. I.e., instances where the information has market value and therefore the blackmailer can sell it.

would not confer material benefit on the threat maker, Ginsburg and Shechtman argue that these transactions should be illegal.¹⁰

Ronald Coase makes a similar argument about deadweight loss.¹¹ In *The Problem of Social Cost*, Coase argues that the value of production would be maximized if rights were deemed to be possessed by those who value them the most, thus eliminating the need for any transactions.¹² Applying this argument in the context of blackmail, Coase concludes that “the person who will pay the most for the right” to prevent the realization of the threat “is normally the person being blackmailed.”¹³ Therefore, “[i]f 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.”¹⁴

The deadweight loss argument encounters objections of being overly inclusive or not inclusive enough. Professor Joseph Isenbergh challenges the premise that blackmail transactions are mere redistributive activities and have no allocative effect, pointing out that in the blackmail transaction, as in any other voluntary exchange, the blackmailer transfers something of value to the victim: his right to perform the act threatened.¹⁵ In order to outweigh this critique, one must assume that but for the sake of blackmail opportunity, the blackmailer would have no incentive to disclose the information. However, this assumption does not account for the social value of information released through gossip channels. Furthermore, these waste theories are unable to explain blackmail based on information acquired independent of incentives, i.e., opportunistic and participant blackmail (hereinafter, adventitious blackmail).¹⁶

Although authors who espouse the deadweight loss theory address this critique, their answers are not satisfying. Coase deals with this critique by arguing that while it is true that in the case of adventitious blackmail no resources are used to collect the information, resources would certainly be employed in the blackmailing transaction.¹⁷ Ginsburg and Shechtman deal

10. See *id.* at 1874.

11. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

12. *Id.* at 15–16.

13. Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 673 (1988).

14. *Id.*

15. Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905, 1920 (1993).

16. See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 689–90 (1984). Participant blackmail is a threat that is based on information arising from a prior relationship with the victim. *Id.* Opportunistic blackmail is a threat that is based on unexpectedly acquired information. *Id.* at 690.

17. See Coase, *supra* note 13, at 674.

with this critique by arguing that even if the first blackmail opportunity is accidental, once the blackmailer asks for payment in order to remain silent, he has become an entrepreneur of blackmail; therefore, the decision of whether to realize the “threat to reveal the information is an investment decision, not a part of the earlier accident” of discovery.¹⁸ Ginsburg and Shechtman’s answers underestimate once again the role of gossip in society and the fact that people tend to release information even if they do not expect material benefit from such revelation.¹⁹ Furthermore, this approach disregards motives such as spite, instead assuming that people are rational and therefore not psychologically benefitted by revealing said information.

A third problem with the deadweight loss theory is its failure to explain the legality of non-criminal bribery, i.e., the case where the “victim” approaches the “blackmailer” with an offer to buy his silence. As in blackmail, non-criminal bribery simply transfers wealth from the “victim” to the information holder, while incurring some transaction cost.²⁰ No economically relevant distinction exists between blackmail and non-criminal bribery.²¹

Similarly, Steven Shavell also advocates for the criminalization of blackmail because of waste consideration.²² However, he focuses on the waste from a different angle: the victim’s angle.²³ According to Shavell, if blackmail were legal, resources would be wasted by individuals seeking to protect their privacy and innocent behavior from adventitious blackmail and subsequent blackmail.²⁴

By focusing on the victim’s behavior, Shavell seeks to avoid the inability of the previous waste theories to account for the criminalization of adventitious blackmail.²⁵ His attempt is unsuccessful, however, because his theory can explain the criminalization of adventitious blackmail that trades on socially harmless activities by the victim, but it cannot explain why we criminalize adventitious blackmail trading on socially undesirable activities.

18. Ginsburg & Shechtman, *supra* note 3, at 1875–76.

19. See generally Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237 (1996) (analyzing the role and value of gossip).

20. See DeLong, *supra* note 1, at 1673–74.

21. See *id.*

22. Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877, 1902 (1993).

23. See *id.*

24. *Id.*

25. See *id.*

Isenbergh also tries to account for the criminalization of blackmail rooted in the issue of transaction costs.²⁶ Isenbergh starts with a Coaseian analysis, arguing that criminal law shapes property rights by assigning these rights to those who value them most.²⁷ Isenbergh focuses on the nature of information as the commodity involved in the blackmail transaction.²⁸ In a frictionless world, efficiency considerations would usually lead to a result where the subject of the transaction would be transferred to A (one bargaining party) if he values it more than B (the other bargaining party) and more than a third party.²⁹ In the case where third parties value the subject of the transaction more than A, the transaction between A and B will not take place. What makes the blackmail transaction unique is that the subject of the transaction is information, and consequently, the above outcome is not necessarily achieved.³⁰ Often B, the information holder, cannot get from third parties an amount close to the full value of the information, because it is difficult to communicate to those parties the value of the information without communicating the information itself. And once the information is shared, B has nothing left to sell. Moreover, the value of the information is often diffused over a number of third parties. These complications make it more likely that the blackmailer would sell the information to the victim, even if third parties value it more. Subsequently, it is the bargaining over the disclosure of information that we seek to prevent, not the bare result of giving compensation for silence.³¹

However, Isenbergh recognizes that totally banning blackmail would not produce an optimal result.³² As he points out, a ban on blackmail might even increase the incidence of blackmail because it produces a mechanism—the threat of criminal charges—that gives incentive to the blackmailer to honor the transaction and remain silent, thus eliminating the uncertainty that was inherent to the blackmail agreement.³³ Therefore, Isenbergh concludes that we should use contract law, and not criminal law, to deal with the inefficiencies of blackmail.³⁴ He proposes a regime where contracts of

26. Isenbergh, *supra* note 15, at 1925–26.

27. *Id.* at 1910–11.

28. *Id.*

29. *See id.*

30. *See id.*

31. *Id.* at 1925–26.

32. *See id.* at 1927–28.

33. *Id.* at 1928.

34. *Id.* at 1930.

silence, except for contracts where the parties knew each other before the blackmail transaction, are void and unenforceable.³⁵

Robert Nozick introduces an explanation of blackmail on the grounds of coercion as unproductive exchange.³⁶ According to Nozick, an exchange is unproductive if prohibiting it would not make one of the parties to the potential exchange worse off.³⁷ Because in the blackmail transaction the victim would be better off if the blackmailer did not exist at all (and hence was not threatening him) and no worse off if the exchange was prohibited, blackmail should be made illegal.³⁸

The foremost problem with the theory of unproductive exchange is that it does not explain why the criminal law should have an interest in punishing unproductive exchange. Even assuming that the criminal law has an interest in prohibiting such an exchange, it cannot distinguish legitimate behavior from illegitimate behavior. Nozick limits the test of unproductive exchange to cases where the person being threatened does not deserve the threatened punishment.³⁹ He does so to justify, for example, instances where a tort victim threatens to sue the tortfeasor. In doing so, Nozick ignores the fact that there are types of blackmail where the threat is to inflict a deserved harm, for example, the threat to turn in a criminal to the police. Furthermore, this account does not explain why market-price blackmail is illegal. In the case of market-price blackmail the victim will want the opportunity to pay for the information in order to prevent it from being published.

2. Blackmail Ban Protects Privacy

Jeffrie Murphy argues that blackmail gives incentive to invasions of privacy.⁴⁰ Murphy begins his analysis with several propositions. First, he proposes that immorality is a necessary (but not sufficient) condition for criminalizing an act.⁴¹ Second, he asserts that the criteria to distinguish between immoral acts that should be criminalized and immoral acts that

35. See *id.* at 1928–30. Contract law might be a better solution to reduce the amount of blackmail transactions because of the uncertain conditions that contract law preserves: If the contract is unenforceable, the blackmailee gains no real control over disclosure. *Id.* If the blackmailer cannot assure the blackmailee of any increased control over disclosure, the blackmailer cannot extract much from the blackmailee and therefore has little reason to invest much effort in bargaining. *Id.*

36. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 84–87 (1974); see also Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 447 (S. Morgenbesser et al. eds., 1969).

37. NOZICK, ANARCHY, *supra* note 36, at 84–85.

38. See *id.*

39. See *id.* at 84–87.

40. Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 159 (1980).

41. *Id.* at 163.

should be legal can be utilitarian.⁴² Murphy argues that both blackmail and hard bargaining transactions involve taking an unfair advantage of the victim's vulnerability, and are therefore immoral.⁴³ Murphy distinguishes between private persons, public figures, and public officials as victims.⁴⁴ What distinguishes private from public persons is the lack of a market for information about the former. Without blackmail, there is no economic interest in invading a private person's privacy in an attempt to find out secret details of his life. Decriminalizing blackmail would create a potential market for secret information about private persons as well and would provide an incentive to invade their privacy. Therefore, after finding that the blackmail transaction is exploitive and hence immoral, utilitarian considerations justify the criminalization of blackmail in order to protect the privacy of nonpublic figures.

The main problem with Murphy's theory is similar to the problem that the waste-based theories face: adventitious blackmail, i.e., instances of blackmail where the information is not acquired because of any incentive for invasions of privacy.⁴⁵ Moreover, Murphy's distinction between private persons and public figures on the ground of market existence is not accurate. As Lindgren points out, "[t]here is a limited but significant market for information about private individuals."⁴⁶ The existence of such a market invalidates Murphy's grounds of justification for treating the blackmail of private persons and the blackmail of public figures differently.

3. Blackmail Ban Prevents Resort to Self-Help

Henry Smith offers a solution to the blackmail paradox based on society's concern for the victim.⁴⁷ According to Smith, we can distinguish blackmail from related legal behavior by focusing on the victim's temptation to engage in harmful self-help.⁴⁸

42. *Id.*

43. *Id.*

44. *See id.* at 163–66.

45. Lindgren was the first commentator to raise this objection. Lindgren, *supra* note 16, at 691. He claims that even if we see the significant invasion of privacy not in the acquisition of the information, but in its sale to the blackmail victim, we could not avoid the criticism. *Id.* The blackmail victim is trying to suppress the information precisely because its release would invade his privacy. *Id.* Bargaining by itself would tend to increase, not decrease, the victim's ability to preserve his privacy. *Id.*

46. *Id.* at 692.

47. Henry E. Smith, *The Harm in Blackmail*, 92 NW. U. L. REV. 861, 862 (1998).

48. *Id.*

Smith maintains that we have reason to distrust the decision-making of both the blackmailer and the victim in a blackmail negotiation.⁴⁹ On the one hand, the victim's cost-benefit analysis, which is based on his high valuation of secrecy, will be radically different from that of the ordinary person because the victim would be more tempted to commit a range of harms in order to preserve his secret.⁵⁰ On the other hand, the blackmailer does not weigh the victim's behavior costs into his cost analysis.⁵¹ Smith then concludes, "[i]f we do not trust the participants' decision-making and the activity is, on balance, generally not worth the cost, specific deterrence—including criminal prohibition—is in order."⁵²

Smith presents a cost-benefit model to show why criminalization is the most efficient way to prevent the harms of blackmail.⁵³ Through his model, Smith shows how the use of criminal sanctions would reduce the payoff from the initial choice to make a threat in comparison to the payoff from the choice to not make a threat.⁵⁴ It seems that in this very goal, Smith's theory is inconsistent. If the rationale that underlies the criminalization of blackmail is fear of the victim's actions, we have no moral basis to prefer the victim over the blackmailer, except for the fact that the victim is the cheapest cost avoider. If this is so, the model fails to explain why the mirror image of blackmail is legal.⁵⁵ If we assume, as Smith assumes, that the blackmailer will resort to self-help because he highly values secrecy, the victim's mere knowledge that someone holds his secret is the coercive trigger that makes him more willing to resort to unlawful means. If we assume that the threat of blackmail is what makes the victim resort to means of self-help, it is not clear why the threat is not feared in cases of hard bargaining, where the victim highly values the commodity subject to the bargaining.⁵⁶ If we assume that what makes the

49. *Id.* at 867.

50. *See id.*

51. *See id.*

52. *Id.*

53. *Id.* at 895–96.

54. *Id.*

55. Smith accounts for the legality of the mirror image transaction by asserting: "On the present view, by contrast, the legality of the mirror image of the blackmail transaction makes sense. If the potential victim feels secure enough to initiate the transaction, there is more reason to think the victim is not the type to undertake violent self-help." *Id.* at 908. It is not clear why Smith presumes that the victim would initiate such a transaction only if he feels secure enough.

56. Smith assumes that in these cases the victims' actions of self-help would be stealing the commodity from the one who holds it. *See id.* at 912. But this is not necessarily so because the victim may prefer to use third party resources. Moreover, it seems that under this explanation the only thing that distinguishes hard bargaining from blackmail is that in blackmail the subject of the transaction is information, and it is not stealable. Shouldn't this analysis prohibit any transaction where its subject is information?

victim resort to self-help is the uncertainty that the blackmailer would not repeat his demand, and if we assume that we have no moral grounds to favor the victim, contract and tort law can create a disincentive for the blackmailer to achieve the same goal.

4. Blackmail Breeds Fraud and Deceit

Richard Epstein argues that blackmail breeds fraud and deceit in two ways: it induces incidences of theft and fraud by victims seeking to obtain the amount required by the blackmailer, and it incentivizes the blackmailer to take an active role in defrauding third parties.⁵⁷

Epstein argues that the legalization of blackmail would result in a formation of businesses—he calls these hypothetical business ventures Blackmail, Inc.—that would seek to exploit the gains from this new form of legal activity:

Blackmail, Inc. could with impunity place advertisements in the newspaper offering to acquire for top dollar any information with the capacity to degrade or humiliate persons in the eyes of their families or business associates. Thereafter, Blackmail, Inc., as a commercial organization, could negotiate contracts with its sources to suppress the information acquired.⁵⁸

In a world where Blackmail, Inc. exists, the very existence of this corporation affects the relationship between the victim and third parties in several ways. First, by being a “full-service firm” the corporation might do more than collect money from the victim; it might actively help him conceal the information from third parties that have a legitimate interest in that information.⁵⁹ Second, Blackmail, Inc. may incur some externalities.⁶⁰ For example, in a case where the victim does not have the money to satisfy the demand, he might resort to fraud or theft because he cannot resort to his usual “financial sources, such as banks or friends, who would want to know the purpose of the loan.”⁶¹

Epstein’s analysis has serious problems. For one, if his analysis is correct, and one of the reasons to ban blackmail is to stop the blackmailer from being

57. Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 565 (1983).

58. *Id.* at 562–63.

59. *Id.* at 564.

60. *See id.*

61. *Id.*

an accomplice to the victim's scheme of fraud and deception, why shouldn't we find the victim criminally responsible for this conduct as well? Epstein, aware of this issue, tries to resolve it by suggesting that "[t]he puzzle, accordingly, is somewhat transformed, as the question might be better asked, why is it that [the victim] escapes criminal punishment for deception, not why is [the blackmailer] punished for blackmail."⁶² Moreover, the mere assumption that the victim tries to hide embarrassing information does not necessarily amount to a form of fraud and deceit.

A third problem is Epstein's premise in his analysis that force and fraud underlie the criminal law's proper reach.⁶³ This conclusion is potentially faulty considering the variety of victimless crimes such as gambling, prostitution, and drug use, as well as crimes that do not involve force or fraud.⁶⁴

It seems that all of the theories described above fail to provide adequate explanation for blackmail's criminalization due to (1) their inability to explain why we criminalize blackmail in the first place; (2) their inability to explain why certain types of blackmail are criminalized when the consequences that they seek to prevent do not exist (the common problem of most of these theories is accounting for adventitious blackmail); and (3) their inability to explain why we do not prohibit other conduct that produces similar harm.

B. *The Deontological Approach*

1. Using a Third Party's Leverage

The approach introduced by James Lindgren focuses on the triangular nature of the blackmail transaction.⁶⁵ According to Lindgren, the blackmail transaction implicitly involves not only the blackmailer and his victim, but also always a third party.⁶⁶ Unlike the case of a legitimate threat, in the blackmail transaction the blackmailer interposes himself in a dispute where he lacks a sufficiently direct interest.⁶⁷ When making the blackmail demand, the blackmailer tries to gain personal benefit by using a third party's leverage and suppressing this party's actual or potential interest.⁶⁸ In Lindgren's view,

62. *Id.* at 565.

63. *See id.*

64. *See* Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 816 (1998).

65. Lindgren, *supra* note 16, at 702.

66. *Id.* at 672.

67. *Id.*

68. *Id.* at 702.

“blackmail law is a manifestation of a core principle of our legal system, the assignment of enforcement rights to the victim.”⁶⁹

Lindgren acknowledges that the mere use of the third party chip is not enough to distinguish blackmail from other legal bargaining.⁷⁰ To complete his theory, Lindgren proposes a two-tier test.⁷¹ The first tier is the existence of a threat (although he gives no account for what constitutes a threat).⁷² Only if this tier is satisfied can we move to the second tier and examine whether the threatening party used a third party’s chip to achieve personal gains.⁷³

The main criticism of Lindgren’s theory is that while it is successful descriptively, it lacks a normative account that explains why using someone else’s leverage for individual gain should be unlawful when the law does not otherwise recognize their interest in the blackmail transaction (the law gives that person no claim for compensation against either the blackmailer or the victim). Moreover, it is not always simple to identify the specific third person whose leverage has been used.⁷⁴

Another objection was raised by DeLong.⁷⁵ As DeLong indicates, if the use of a third party’s leverage or chips is wrongful, why is it legal to use these parties’ chips when there is no threat?⁷⁶ Lindgren tries to respond to this critique by maintaining that the combination of threat or coercion with the use of third party leverage is what makes blackmail wrongful, yet he fails to define which conduct qualifies under the first requirement.⁷⁷

2. Dominance and Subordination

George Fletcher argues that “blackmail is not an anomalous crime but rather a paradigm for understanding both criminal wrongdoing and punishment.”⁷⁸ According to Fletcher, an examination of the criminal law reveals that its core is expressed in an act of achieving dominance over others.⁷⁹ To know whether a negotiation constitutes blackmail, we should

69. *Id.* at 704.

70. *See id.* at 716.

71. *See id.* at 716–17.

72. *Id.*

73. *Id.*

74. *See Smith, supra* note 47, at 885–86. However, it seems that this criticism can be avoided if we modify the theory to require an intrusion and benefit from the blackmailer and victim’s relationship.

75. DeLong, *supra* note 1, at 1673–74.

76. *Id.*

77. Lindgren, *supra* note 16, at 710.

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

79. *Id.* at 1626.

examine whether the transaction with the alleged blackmailer generates a relationship of dominance and subordination.⁸⁰ “Blackmail occurs when, by virtue of the demands and the action satisfying the demands, the blackmailer knows that she can repeat the demand in the future. Living with that knowledge puts the victim of blackmail in a permanently subordinate position.”⁸¹ Therefore, to frustrate the blackmailer’s power over the victim, the state must intervene by employing the criminal law.⁸² Fletcher maintains that in order to ensure that the blackmailer will not continue his domination over the victim, it is not enough to make the blackmailer pay damages; he must be deprived of liberty and be stigmatized.⁸³

Fletcher’s theory raises some difficulties. The main difficulty is the repetition element, which is crucial to the dominance-subordination relationship. Fletcher argues that a one-time transaction with no possibility of recurring cannot establish a wrongful domination:

When [the blackmailer’s] demand is a one-shot affair, as when [the blackmailer] threatens to sue in tort if [the victim] does not agree to the payment demanded, there is no crime. There is no way to explain this or the other cases of nonpunishable threats except to note that [the victim’s] payment effects a settlement and thus negates the possibility of repeated demands. Conversely, all the cases of punishable blackmail generate a situation that invites repeated threats and exploitation.⁸⁴

Following this reasoning, why not define the crime as occurring when the second act of blackmail takes place? Fletcher answers this question by arguing that dominance is not a state of affairs that crystallizes only as a result of repeated demands, but rather is a state of anticipation, and thus “[w]hen both parties know that the victim has submitted once and has no defense against submitting again, he is at the mercy of the blackmailer. His only hope lies in the intervention of the police or other agents of the criminal law.”⁸⁵

This answer is not satisfactory. There are mechanisms in private law to ensure that a blackmail transaction will be only a one-time transaction. For example, by making blackmail legal, we can prevent repetitive demands

80. *Id.*

81. *Id.*

82. See George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347, 354 (1996).

83. *Id.*

84. Fletcher, *supra* note 78, at 1637.

85. *Id.* at 1638.

because once there is a second demand, the victim can refuse to pay, holding a threat to sue for breach of contract as leverage against the blackmailer. In this case, the blackmailer has two options: waive the repetition of his demand or reveal the victim's secret. If he decides to disclose the secret, he will incur the victim's losses from the revelation. Another option is to add a reimbursement clause to the initial contract, which would come into effect once the information is disclosed. Employing these mechanisms, we do not have to resort to punishment to counteract the relationship of dominance because the problem is solved at an earlier stage, i.e., the stage of defining the wrongfulness of the action.

A second difficulty in Fletcher's theory lies in the fact that the legal system itself establishes relationships of dominance and subordination, such as the parent-child relationship. Fletcher acknowledges this but adds that "the blackmailer's actions are somehow intrinsically wrong and unjustified."⁸⁶ As evidence, he provides several deontological accounts as a solution to the paradox of blackmail.⁸⁷ However, as Fletcher himself asserts, these theories do not offer "a convincing account of the difference between cases of punishable and non-punishable conduct."⁸⁸

3. Blackmail and the Demanded Advantage

Leo Katz introduces a theory of blackmail as a type of robbery.⁸⁹ Katz argues that coercion can exist even in cases where we increase the victim's options.⁹⁰ Katz presents the "punishment puzzle" to show that there are areas in the law where we punish someone for the underlying wrong even when he gives the victim an alternative option.⁹¹ According to Katz, the blackmail transaction is in fact a situation where the blackmailer forces the person he is blackmailing to choose between theft (or some other criminal violation) and another minor wrong.⁹² When the blackmailer makes the victim choose between the above alternatives, the severity of the blackmailer's wrongdoing should be judged by what he sought to achieve and not by what he threatened

86. *Id.* at 1637.

87. *Id.* at 1618–21.

88. *Id.* at 1637.

89. Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567, 1595–96 (1993).

90. *See id.* at 1574.

91. *Id.* at 1582–83.

92. Katz notes that although the wrong need not be an immorality that comes anywhere close to being criminal, it must not be too minor. *Id.* at 1597. However, although the threat has to be of something more serious than garden-variety nastiness or unpleasantness, it does not have to be that much more serious. *Id.* at 1606.

to do.⁹³ That is the reason why taking money, which the victim prefers compared to the minor immorality of disclosing information, is more than the minor immorality itself.

There are some problems with Katz's theory. If the blackmailer's blameworthiness is determined by the demanded advantage, why then treat blackmail as a separate offense and not as an annex to each offense threatened? For example, if the threat demanded silence for money, then the charge should be theft; if the threat was silence for sexual favors, then the charge should be rape.

When referring to the punishment puzzle, Katz gives examples to prove his point.⁹⁴ However, in his examples, the victim has to choose between many things he is entitled to, things that are protected by law.⁹⁵ Arguably, once society determines the value of a harm under the criminal law, that harm has objective value that prevails over the value the victim assigns to it. Thus, Katz's leap to blackmail transactions is not trivial. Moreover, as Lindgren points out, by assuming that what the blackmailer threatens to do is immoral, Katz merely "assumes away the paradox."⁹⁶ For example, often what the blackmailer threatens to do is a moral right or at least an action that is not clearly wrong—for example, exposing a criminal or telling a friend that her spouse is cheating on her.⁹⁷ In these instances, we return to the question of why it is immoral to reveal the information.

4. Blackmail as Evidence of Wrongful Motives

Mitchell Berman argues that the act of blackmail has evidentiary significance: It reveals the moral character of the actor's motivation that we would be less likely to suspect had he disclosed the information without first having made demands for payment (or other favors).⁹⁸ Berman's analysis begins with the proposition that society may criminalize conduct that tends both to cause harm and to be undertaken with wrongful motives.⁹⁹ Because the blackmailer knowingly threatens to inflict harm without good motives, the transaction satisfies the two above conditions of moral blameworthiness and harm causing, and thus it may be criminalized.¹⁰⁰

93. *Id.* at 1598–99.

94. *Id.* at 1582–83.

95. *See id.*

96. James Lindgren, *Blackmail: An Afterword*, 141 U. PA. L. REV. 1975, 1977 (1993).

97. *Id.*

98. Berman, *supra* note 64, at 849.

99. *See id.* at 810.

100. *Id.* at 848.

Berman maintains that the law recognizes injury to reputation as a legally cognizable harm.¹⁰¹ The reason we do not criminalize all disclosure of information that can injure one's reputation is that people reveal embarrassing information about others due to varying moral postures.¹⁰² These various motives provide a sufficient explanation for society's refusal to criminalize all such revelations.¹⁰³ However, in blackmail, the disclosure of the information is the mere reaction to the victim's refusal to pay.¹⁰⁴ Therefore, by using the blackmail demand as evidence, we can conclude that the disclosure was driven by a morally negative motivation.¹⁰⁵

Berman's theory is problematic for several reasons. First, focusing on the bad intention of the perpetrator is not enough to establish a criminal offense. Although good will is essential to the claim that an act has moral value, it does not follow that bad will renders an action evil.¹⁰⁶ Another problem in Berman's theory lies in the assumption that the law recognizes injury to reputation as a legally cognizable harm. As will be discussed later in this Article, the law recognizes as a legally cognizable harm only injuries to reputation that are based on false statements.¹⁰⁷ Therefore, if the blackmailer

101. *Id.* at 854.

102. *Id.* at 798.

103. *Id.*

104. *See id.*

105. Berman proposes a four-step test to assess whether any given proposition that meets blackmail formal requirements should be blackmail for purposes of the criminal law:

First, assume the actor simply performed the act threatened (*y*) and ask whether that action is itself criminal. If the answer is yes, then the proposition is just a threat to perform a criminal act and is not blackmail

Second, if the act, *y*, is not itself criminal, ask whether it causes or threatens legally cognizable harm. If it does not, then it cannot be made criminal

If the act is not criminal yet causes harm that is cognizable for purposes of the criminal law, the next task is to explore whether the actor has morally bad motives. The *third* step, therefore, is to identify which particular reason(s) for action would have made the actor's harm-causing conduct morally justified. The *fourth* step is to ask whether the actor's offer not to perform *y* on condition *x* makes it materially less likely that he was actually motivated by any one of the morally justifying reasons identified in the third step. If so (and if that perceived likelihood is sufficiently low) the original proposition should be condemned as blackmail.

Id. at 853–54 (footnotes omitted).

106. George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 695 (2000). Fletcher points out that there is a "philosophical misreading [of] Kant's theory of the goodwill in morality [that leads some people] to support a concentrated focus on criminal intention as the basis of criminal liability." *Id.*

107. *See infra* Part IV.

holds truthful information, there is no legally cognizable harm, and the first prong of Berman's third criterion is not fulfilled. Furthermore, even if we assume that any injury to reputation is a legally cognizable harm, regardless of the truthfulness of the information, wouldn't we want to prevent this harm by giving the victim an option to avoid it?

Most of the theories in the deontological section try to account for the criminalization of blackmail either by focusing on the immorality of the harm threatened or by focusing on the threat itself as a morally aggravating factor. However, it appears that most of these theories just assume away the paradox instead of solving it.

My thesis is that the criminalization of blackmail today is the result of an historical accident caused by the classification of blackmail as a property offense. That is the reason why, as was illustrated in this section, no satisfactory explanation for the criminalization of blackmail exists in the academic community to date.

When originally enacted, blackmail was part of a group of offenses seeking to protect reputation, a mere supplement to the law of criminal libel. However, the concept of reputation the offense sought to protect was not the same concept of reputation that prevails today. When acts of blackmail were criminalized it was for the purpose of protecting one's honor and social role, a concept of reputation that ceased to exist as cultural understandings shifted.

This Article will illustrate, through examination of the development of blackmail law, that the reason the offense survived is due to a pure technicality, i.e., the historic classification of the offense as a property offense and not as an offense threatening to injure a reputation. Therefore, when "reputation offenses" were reexamined and decriminalized in the second half of the twentieth century, the offense of blackmail was simply forgotten and thus unjustifiably remained intact. This Article asserts that if blackmail were reexamined with the rest of the "reputation offenses," it would have led to its decriminalization. This is not to say that today the act of blackmail should be viewed as moral; it is to say only that it should not be dealt with in the criminal law.

III. THE DEVELOPMENT OF BLACKMAIL

To see how this accident came about, we first must examine the origins, history, and development of blackmail law in England and the United States. This Part will begin by looking into English law and then will proceed to review American law.

A. *Blackmail in English Law*

To best understand the source of the blackmail anomalies, our point of reference should be the year 1916, when the Larceny Act was enacted.¹⁰⁸ The Act categorized three separate offenses into three provisions: Section 29, Section 30, and Section 31, all of which were later interpreted to penalize the behavior of informational blackmail.¹⁰⁹ Examination of the origins and wordings of these provisions reveals that only Section 31 was intended to deal with informational blackmail,¹¹⁰ whereas Sections 29 and 30 were intended to deal only with extortion (i.e., a threat to perform a criminal act).

The following section will look at the history and the development of each provision of the Larceny Act, supporting the argument that only Section 31 was intended to deal with informational blackmail. This will bring us to the further conclusion that the law of informational blackmail was in fact an integral part of the law of criminal libel.

Section 31 reads as follows:

Every person who with intent—

- a) to extort any valuable thing from any person, or
- b) to induce any person to confer or procure for any person any appointment or office of profit or trust,
 1. publishes or threatens to publish any libel upon any other person (whether living or dead); or
 2. directly or indirectly threatens to print or publish, or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or things touching any other person (whether living or dead);

108. Larceny Act, 1916, 6 & 7 Geo. 5, c. 50, §§ 29–31 (Eng.).

109. See, e.g., W.H.D. Winder, *The Development of Blackmail*, 5 MOD. L. REV. 21, 21 (1941).

110. Larceny Act §§ 29–31. Informational blackmail can be defined as a threat to expose information coupled with a demand for money. However, in this Article, informational blackmail will not include a threat to accuse a person of a crime because, as will be shown in this Article, the rationale for prohibiting such threats is not derived from the same rationale of informational blackmail: In a threat to accuse a person of a crime, if the allegations were true then the blackmailer had a duty to disclose the information under the rule of misprision of felony. See JOEL FEINBERG, HARMLESS WRONGDOING 243 (1988). Even in the absence of such a rule it can be argued that the integrity of the legal system requires that such a threat be made only within the system itself.

shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment, with or without hard labour, for any term not exceeding two years.¹¹¹

The origin of this provision, in which informational blackmail was first penalized, is Section 3 of the Libel Act of 1843.¹¹² Before 1843, the ordinary behavior of blackmail was legal.¹¹³

The Victorian era, during which the Libel Act was passed, was characterized as the “heyday of blackmail.”¹¹⁴ The prosperity of the blackmail “industry” was attributed to the Victorian social structure, which attached an exceptionally high value to respectability and hence to a good reputation.¹¹⁵

The importance of respectability in those times led to the creation of a special committee led by Lord Campbell to examine and recommend amendments to the law of libel. The committee recommended the criminalization of informational blackmail, unprecedented at the time. The decision to criminalize informational blackmail was consistent with the existing law of criminal libel and in fact supplemented it, as both offenses sought to protect the interest of reputation.

The common law of criminal libel included four categories: private defamation, seditious libel, blasphemy, and obscenity.¹¹⁶ All four categories were designed to guarantee that speech did not violate established norms of respect and propriety.¹¹⁷ Under these rules, private defamation could be treated either as a crime or a tort at the option of the injured person, as long as the defamation consisted of the publication of writing that held him up to hatred, contempt, or ridicule.¹¹⁸ There were two major considerations, besides of course the remedy issue, that differentiated the crime of libel from the tort of libel.¹¹⁹ One consideration was that in order to initiate a civil action, the

111. Larceny Act § 31.

112. Libel Act of 1843, 6 & 7 Vict., c. 96, §§ 3, 6 (Eng.).

113. Peter Alldridge, *'Attempted Murder of the Soul': Blackmail, Privacy and Secrets*, 13 OXFORD J. LEGAL STUD. 368, 372 (1993). Blackmail was legal, except when a person threatened to accuse another of committing a crime. *See id.* at 372–73.

114. *Id.* at 374.

115. *Id.*

116. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 279 (2003). In this Article the term “criminal libel” will refer to private defamation only.

117. *Id.* at 278.

118. *Id.* at 316–17.

119. *Id.*

defamatory statement had to be made to a person other than the one defamed.¹²⁰ This was not so in criminal libel. Another difference was that truth was an absolute defense in civil defamation suits, whereas it was not a defense in criminal libel prosecutions.¹²¹ Thus, truth was no defense for an indictment for libel. Not only was it immaterial whether the insult was true or false, but also a true utterance was regarded even more severely than a false one, and thus Lord Mansfield's famous maxim, "the greater the truth the greater the libel."¹²²

In the seventeenth century, the common view was that certain publications could provoke a breach of the peace.¹²³ At that time, private libels would often result in a challenge and a duel, and therefore, the state had an interest in criminalizing such behavior.¹²⁴ Identifying libel as an offense was intended to provide the victim with the means of securing his defamer's punishment via the peaceful process of the law as opposed to resorting to personal violence to obtain revenge.¹²⁵

This view of breach of the peace as the rationale for criminal libel may have been compelling in the seventeenth century; however, as far as the Libel Act of 1843 is concerned, that was not necessarily valid anymore. As noted above, the Libel Act of 1843 was based on a report by Lord Campbell's special committee. In its recommendation, the committee did not follow the breach of the peace rationale, but rather chose to see the Act as a means to protect one's reputation and nothing more. In Lord Campbell's words:

It seems to me that the Ground upon which it is said that private Defamation is criminal, is wholly fallacious. The Ground generally alleged is that it leads to a Breach of the Peace. I do not think that that is so either on Principle or in

120. *Id.* at 317.

121. *Id.* at 316–17.

122. See Roy Robert Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 43 n.1 (1931).

123. See *Case de Libellis Famosis*, (1605) 5 Co. Rep. 125a, 125a, 77 Eng. Rep. 250, 251 (Star Ch. Ca.).

124. *Id.* According to Sir Edward Coke, the principal points resolved in *de Libellis Famosis*, a case which is regarded as the beginning of the modern law of criminal libel, are:

Every libel . . . is made either against a private man, or against a magistrate or public person. If it be against a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred, or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood and of great inconvenience

Id. (emphasis omitted).

125. Brenner, *supra* note 116, at 316.

Practice. On Principle, I think that Defamation is a Crime like Theft or Battery of the Person; it is doing an Injury to a Member of Society, who is entitled to the Protection of the Law, and the Person who perpetrates that Injury ought to be punished as an Example to others, to prevent a Repetition of the Offence. In Practice Prosecutions for Libel are uniformly instituted and conducted by the Party injured, and merely with a View of vindicating the Character of the Party injured, or of having Revenge upon the Libeler, and not in the remotest Degree with any View to the Protection of the public Peace.¹²⁶

The function of the references to tendency to disturb the peace was no more than to illustrate the various factors that either alone or in combination contributed to the gravity of the libel.

One of the committee's recommendations was to change the law regarding truth as a defense in criminal libel cases. The committee recommended allowing the truth to be introduced as a defense in criminal libel proceedings as well, though it recommended that it ought not to amount to an absolute defense; the committee believed the truth should be introduced only when the publication is justifiable.

The recommendation of the committee, therefore, was that the proof of truth should in no case be excluded, but that it should not be an absolute bar in criminal, any more than in civil proceedings. This would leave the jury, under the direction of the judge, the power of deciding (the plea of truth being proved) whether there was or was not proper occasion

126. SELECT COMM. OF THE HOUSE OF LORDS APPOINTED TO CONSIDER THE LAW OF DEFAMATION AND LIBEL, MINUTES OF EVIDENCE, 1843, at 177, in 5 REPORTS FROM COMMITTEES: SEVEN VOLUMES, ADMIRALTY COURTS, ALIENS, DEFAMATION AND LIBEL 443 (London, Her Majesty's Stationery Office 1843) [hereinafter SELECT COMM.] (statement of Lord Campbell). The modern English definition of criminal libel seems to follow this line. In *Goldsmith v. Sperrings Ltd.*, (1977) 1 W.L.R. 478, 485 (A.C.) (Eng.), Lord Denning defined criminal libel as a case where the

libel is so serious that the offender should be punished for it by the state itself. He should either be sent to prison or made to pay a fine to the state itself. Whereas a civil libel does not come up to that degree of enormity. The wrongdoer has to pay full compensation in money to the person who is libelled and pay his costs: and he can be ordered not to do it again. But he is not to be sent to prison for it or pay a fine to the state. When a man is charged with criminal libel, it is for the jury to say on which side of the line it falls. That is to say, whether or not it is so serious as to be a crime.

Id. at 485.

to publish it; and if the jury felt that the object of the party publishing was a malicious one—was that of raking up what ought to be forgotten, and of making notorious personal infirmities in which the public has no interest—*of attacking the feelings of a family by publishing what may be true, but ought to be forgotten, concerning any member of it*—if this were the opinion of the jury, they would find the defendant guilty, and he would be punished accordingly.¹²⁷

In the committee's eyes, the publication of true facts should not be justifiable if an "attempt was made to extort money by the threat of libelling an individual or a member of his family, and the [information] was published because the money was not paid."¹²⁸ This view caused blackmail to be considered the most serious form of libel.¹²⁹

In the Libel Act of 1843, the legislature adopted, with slight modifications, Lord Campbell's recommendations regarding truth as a defense in criminal libel.¹³⁰ The Act enabled such defense to be introduced if the publication was made with good motives and justifiable ends.¹³¹ Thus, publishing truthful information due only to a refusal to pay money, the typical response of a blackmailer whose demands are not met, could not satisfy the requirements of good motives in the defense of truth and therefore amounted to libel. The requirement of good motives prevented blackmailers from realizing their threats. Section 3 of the Libel Act of 1843, which prohibited informational blackmail directly, functioned in fact as a rough outline of the law of criminal libel:

1. If the information published is false, then the publisher published libel and therefore is guilty of criminal libel.
2. If the information published is true but was made as a realization of a threat, the publisher is guilty under common law libel and does not deserve to enjoy the new statutory modification of the defense of truth because he did not act with good motives.

127. 69 PARL. DEB., H.L. (3rd ser.) (1843) 1231–32 (emphasis added) (statement of Lord Campbell). Note: The legislature accepted the committee recommendations regarding truth as a defense to only criminal libel. 70 PARL. DEB., H.L. (3rd ser.) (1843) 1252–53. The role of truth in civil libel was unchanged. *Id.*

128. 69 PARL. DEB., H.L. (3rd ser.) (1843) 1232.

129. *Id.*

130. Libel Act of 1843, 6 & 7 Vict., c. 96, § 6 (Eng.).

131. *Id.*

3. It is unlawful to threaten what a person does not have a legal right to do.¹³²

As evidenced above, the rationale underlying the criminalization of informational blackmail was simply the protection of the interest of reputation, and as such, was not regarded as a serious crime but only as a misdemeanor.

As previously noted, there were two other sections in the Larceny Act of 1916 that were later interpreted to join Section 31 in penalizing the behavior of informational blackmail. We will now proceed to examine the development of these provisions.

Section 29(1)(i) reads as follows:

Every person who—

i. 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 life¹³³

The origins of this provision are in the Black Act of 1722.¹³⁴ The Black Act was intended to deal with incidents of stealing and destroying deer, robbing warrens and other illegal practices carried out either by thieves with their faces blackened or by thieves sending anonymous demands.¹³⁵ To

132. *See id.* § 3.

133. Larceny Act, 1916, 6 & 7 Geo. 5, c. 50, § 29 (Eng.).

134. Black Act, 1722, 9 Geo. 1, c. 22, § 1 (Eng.). In 1754, the same penalty as in the Black Act was provided for the sending of any letter threatening to kill or murder any other persons or to burn their houses. 1754, 27 Geo. 2, c.15 (Eng.). In 1757 it was made a misdemeanor to send a letter threatening to accuse another of any crime punishable by death, transportation, or the pillory, with a view or intent to extort money or property from that person. 1757, 30 Geo. 2, c. 24, § 1 (Eng.). It should be noted that at common law, threatening destruction to life and property for the purpose of extorting money was a high misdemeanor punishable by fine and imprisonment. *See* 2 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 1829 (1824). Section 29(1)(i) in its current form was first introduced in the Consolidating and Amending Act of 1827, 7 & 8 Geo. 4, c. 29, § 8 (Eng.). This provision replaced a similar provision that prohibited demanding money or other valuable things, but did require the existence of menace. *Cf.* 1823, 4 Geo. 4, c. 54, § 3 (Eng.).

135. *See* 1722, 9 Geo. 1, c. 22 (Eng.), *repealed by* 1827, 7 & 8 Geo. 4, c. 27, § 1 (Eng.); *see also* R v. Robinson, (1796) 2 Leach 749, 765; Winder, *supra* note 109, at 34.

combat these activities, the legislature included in the Black Act, *inter alia*, a provision that banned the sending of letters written under anonymous or fictitious names demanding money, venison, or other valuable things.¹³⁶

Both the background that led to the enactment of the statute and the preamble of the statute indicate that the intention of this provision was to prohibit demands coupled with threats of violence to a person or property.¹³⁷ However, in *R v. Robinson*,¹³⁸ the first case in which the courts used the Black Act to punish a defendant who sent a letter demanding property with a threat to accuse a person of murder, the court pointed out that a threat is not a necessary element of the offense, stating: “The statute speaks of a demand generally, without requiring any particular circumstances, other than by a letter without any name subscribed thereto, or signed with a fictitious name”¹³⁹ As a result of this court’s interpretation, any demand, even if not coupled with a threat, could have been viewed as criminal behavior. The Consolidating and Amending Act of 1827 corrected this defect by adding two elements to the offense: the requirement of menace and the requirement that the demand was made without reasonable cause.¹⁴⁰ The addition of the element of menace was to restrict the applicability of the offense only to threats of personal injury or damage to property.¹⁴¹ This offense was not intended to apply to threats to publish embarrassing information about a person, *i.e.*, informational blackmail.¹⁴²

Until 1895, there were almost no cases that dealt with interpreting the element of menace.¹⁴³ In 1895, *R v. Tomlinson* was brought before the court.¹⁴⁴ In *Tomlinson*, the defendant had threatened to disclose his former

136. Black Act, 1722, 9 Geo. 1, c. 22, § 1 (Eng.). The offense reads: “if any Person or Persons [whether armed, disguised, or neither] shall knowingly send any Letter without any Name subscribed thereto, or signed with a Fictitious Name, demanding Money, [ransom], or other valuable Thing[s], [they] shall be adjudged guilty of Felony, and shall suffer Death.” *Id.*

137. The 1722 statute was amended in 1754 to include situations where no express demand for money, venison, or other valuable things has been made. *See* 1754, 27 Geo. 2, c. 15. In 1757, the prohibition was extended to include the use of anonymous letters threatening to accuse any person of an infamous crime “with a View or Intent to extort or gain Money.” *See* 1757, 30 Geo. 2, c. 24, § 1. Later, Parliament made it illegal for a person to maliciously threaten another with an accusation of an infamous crime, even if done without using a letter. *See* 1823, 4 Geo. 4, c. 54, § 5 (Eng.).

138. (1796) 2 Leach 749.

139. *Id.* at 764.

140. 7 & 8 Geo. 4, c. 29, § 8.

141. CRIMINAL LAW REVISION COMM., EIGHTH REPORT, THEFT AND RELATED OFFENCES, 1966, Cmnd. 2977, at 54; *see also* Winder, *supra* note 109, at 36–41.

142. With the exception of threats to accuse a person of serious crimes. *See* 1827, 7 & 8 Geo. 4, c. 29, § 8.

143. Winder, *supra* note 109, at 37–38.

144. *R v. Tomlinson*, (1895) 1 Q.B. 706 (Eng.).

employer's allegedly indecent behavior to the employer's wife.¹⁴⁵ Although the facts of this case were most suitable to be subject to an action under Section 3 of the Libel Act of 1843, Tomlinson was indicted under Section 44 of the Larceny Act 1861 (the predecessor to Section 29).¹⁴⁶ The most significant impact of the section charged is that it determines the punishment attached to each offense. Whereas Section 3 of the Libel Act of 1834 was a misdemeanor offense, Section 44 was a felonious one.

The *Tomlinson* court, in trying to reach what seemed to it to be a just result, unnecessarily interpreted the element of menace in an expansive way. The court held that the menace element in Section 44 does not require a threat of injury to the person or property of the victim, or a threat to accuse him of a crime: "[I]t may well be held (though I am laying down no exhaustive definition of the word) to include menaces or threats of a danger by an accusation of misconduct, though of misconduct not amounting to a crime."¹⁴⁷ The offense may be committed if there be a threat to accuse him of misconduct not amounting to an offense against the criminal law.

This case marked the emergence of blended rationale of the Libel Act with the statutory extortion rationales, and the beginning of the view that the extortion offenses criminalize all threats to do a non-criminal act as long as the threats have been made "without any reasonable or probable cause."¹⁴⁸

Until the *Tomlinson* case, a criminal threat to inform a third party of the victim's non-criminal behavior, with intent to extort money from the victim, was only a misdemeanor. The *Tomlinson* case made such a threat a felony for the first time. Forty-two years later, in *Thorne v. Motor Trade Ass'n*,¹⁴⁹ Lord Atkins recognized the difficulties in the *Tomlinson* holding. However, after the Larceny Act of 1916 was enacted, he felt that he must follow the old ruling.

145. *Id.*

146. Larceny Act, 1861, 24 & 25 Vict., c. 96, § 44 (Eng.).

147. *Tomlinson*, (1895) 1 Q.B. at 708–09.

148. Larceny Act, 1861, 24 & 25 Vict., c. 96, § 44. In subsequent years, after the enactment of the Larceny Act of 1916, this broad interpretation brought confusion and incoherence in cases involving blackmail and extortion offenses. *See, e.g., Thorne v. Motor Trade Ass'n*, [1937] A.C. 797, 797 (H.L.) (appeal taken from Eng.) (holding that under Section 29(1)(i) of the 1916 Larceny Act it is blackmail for one to threaten to do what normally he has a legal right to do, but not when "his cause is not reasonably capable of being associated with the promotion of lawful business interests."); *Hardie & Lane, Ltd. v. Chilton*, (1928) 2 K.B. 306, 308–09 (A.C.); *R v. Denyer*, (1926) 2 K.B. 258, 260 (Ct. Crim. App.); *Ware & De Freville, Ltd. v. Motor Trade Ass'n*, (1921) 3 K.B. 40, 40 (A.C.).

149. *Thorne*, [1937] A.C. at 797.

If the matter came to us for decision for the first time I think there would be something to be said for a construction of “menace” which connoted threats of violence and injury to person or property, and a contrast might be made between “menaces” and “threats” as used in other sections of the various statutes. But in several cases it has been decided that “menace” in this subsection and its predecessors is simply equivalent to threat: The Larceny Act, 1916, was passed after these decisions and I think they must be accepted: though possibly some of the expressions in some of the judgments are open to criticism.¹⁵⁰

Section 29(1)(ii) and Section 29(1)(iii) read as follows:

1. Every person who—

ii. utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead) of any crime to which this section applies, with intent to extort or gain thereby any property or valuable thing from any person;

iii. with intent to extort or gain any property or valuable thing from any person accuses or threatens to accuse either that person or any other person (whether living or dead) of any such crime;

. . . shall be guilty of felony, and on conviction thereof liable to penal servitude for life

. . . .

3. This section applies to any crime punishable with death, or penal servitude for not less than seven years, or any assault with intent to commit any rape, or any attempt to commit any rape, or any solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or permit the abominable crime of buggery, either with mankind or with any animal.¹⁵¹

150. *Id.* at 806.

151. Larceny Act, 1916, 6 & 7 Geo. 5, c. 50, § 29 (Eng.).

These provisions embody, with modifications, the common law rules of robbery and extortion regarding a threat to accuse a person of a crime.¹⁵²

The development of this offense began within the law of robbery. At common law, the classic definition of robbery was obtaining property from another by a present and immediate threat of personal violence.¹⁵³ During these years, the courts interpreted this offense broadly, such that it included the threat of future violence and threats to accuse a person of an unnatural crime.¹⁵⁴

At the end of the eighteenth century, courts began to expand the definition of robbery to include present threats to accuse a person of an unnatural crime. The guilt or innocence of the party accused was regarded as immaterial.¹⁵⁵ At that time, a sodomy conviction carried a death sentence. “[S]odomy was regarded as such an unspeakable crime that Blackstone literally refused to refer to it by name, speaking of it as ‘the infamous crime against nature . . . the very mention of which is a disgrace to human nature . . . a crime not fit to be named.’”¹⁵⁶ Consequently, accusing a person of committing an unnatural crime could have resulted in a danger to the accused’s life and safety and therefore was viewed as “a coercion which men cannot resist.”¹⁵⁷

The early cases that dealt with a threat to accuse a person of sodomy as robbery all involved aggravating circumstances in which the victims had been in fear for their lives, and therefore, the facts could have supported a conviction for plain robbery.¹⁵⁸ It was only in 1784, in *R v. Hickman*,¹⁵⁹ that the court applied the offense of robbery to a case where the facts suggested no threat of personal violence and no aggravating circumstances.¹⁶⁰ *Hickman*

152. 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 149 (MacMillan 1883).

153. ROLLIN M. PERKINS, CRIMINAL LAW 372 (2d ed. 1957).

154. *Id.*

155. *See R v. Richards*, (1868) 11 COX 43; *R v. Cracknell*, (1866) 10 COX 408.

156. PERKINS, *supra* note 153, at 372.

157. *Long v. State*, 12 Ga. 293, 319 (1852).

158. *See, e.g., R v. Donnally*, (1779) 1 Leach 193; *R v. Jones*, (1776) 1 Leach 139. In *Jones*, the defendant threatened to accuse the victim of sodomitical practices and applied actual force as well. 1 Leach at 140–41. The defendant forcibly held the victim’s arm in a way that prevented the victim from getting away. *Id.* at 140. At trial, the victim declared that he was in great fear for his personal safety. *Id.* In *Donnally*, the victim testified that he thought that not complying with the defendant’s demands would cost him his life. 1 Leach at 194. It should also be noted that in both cases the courts implied that the allegations were false. *Jones*, 1 Leach at 141; *Donnally*, 1 Leach at 196.

159. (1784) 1 Leach 278.

160. *Id.* at 279.

was a guard in the complex where the victim lived.¹⁶¹ The victim invited Hickman to his apartment.¹⁶² A few days after their meeting, Hickman threatened to accuse the victim of sodomy unless the victim paid him.¹⁶³ The victim testified in court that when he parted with his money he did not fear any violence and was under no apprehension of personal danger, but rather, he feared for his character.¹⁶⁴ Although the victim did not fear for his life, the court convicted Hickman of robbery, holding that “to most men the idea of losing their fame and reputation was equally if not more terrific than the dread of personal injury.”¹⁶⁵ Twelve years later, in *R v. Knewland*,¹⁶⁶ the court placed the fear of being accused of committing an unnatural offense on equal standing with the fear of losing life itself, “a punishment more terrible, both in apprehension and reality, than even death itself.”¹⁶⁷

Subsequent to *Hickman*, the courts, when referring to the law of robbery, declared that the force and terror required for the completion of the crime is of two kinds: a terror that leads the victim “to apprehend an injury to his person,” and a terror that leads him “to apprehend an injury to his character” or an injury to his property.¹⁶⁸ Although the courts extensively used the terminology of “injury to a character,” only one type of threat to cause such injury was recognized—a threat to accuse someone of sodomitical practices.¹⁶⁹ A threat of injury to character other than the accusation of sodomitical practices has never been deemed sufficient for convictions of robbery.¹⁷⁰ Therefore, threats to prosecute for any other offense, or accusations of other crimes, although they may have the effect of extorting money or property from a person, did not make the transaction a robbery. For example, obtaining money by a threat to take the party before the magistrate and from there to prison did not qualify as a threat sufficient to constitute robbery.¹⁷¹

There were two major constraints to the common law rule that viewed a threat to accuse a person of unnatural crimes as robbery. One constraint was

161. *Id.* at 278.

162. *Id.*

163. *Id.*

164. *Id.* at 279.

165. Perkins, *supra* note 153, at 372 (quoting *Hickman*, 1 Leach at 280).

166. [1796] 2 Leach 721.

167. *Id.* at 731.

168. *See id.* at 730. Threats to property were confined to threats of burning houses. *Id.* at 730 n.1.

169. *Id.* at 730; *see also* *R v. Egerton*, [1819] Russ & Ry. 375; *R v. Cannon*, [1809] Russ & Ry. 146, 146–47.

170. *See generally Knewland*, 2 Leach 721.

171. *Id.* at 731.

the requirement that the money must be taken immediately after the threat was made.¹⁷² Therefore, in cases where the blackmailer gave the victim time to respond to his demand, the demand was no longer viewed as robbery. This constraint arose from the notion that in the time that elapsed between the demand and the tendering of the money, the victim could procure assistance and not surrender to the blackmailer's demands.¹⁷³ The other constraint was that the common law rule applied only when the threat was uttered to the one who was about to be accused of committing an unnatural crime. Therefore, in *R v. Edwards*,¹⁷⁴ the court held that a threat uttered to a wife accusing her husband of committing an unnatural crime did not amount to robbery.¹⁷⁵

In 1827, this common law rule was granted a statutory recognition as a simple robbery, and in 1837, it became a separate felony.¹⁷⁶ However, the statutory recognition was only temporary, because the statute of 1837 was abolished by the 1861 Larceny Act.¹⁷⁷

As for threatening to accuse a person of committing a serious crime, not only an unnatural one, a 1757 law made the sending of a letter threatening to accuse a person of certain crimes with a view or intent to extort or gain money a misdemeanor crime, punishable with seven years' transportation, a punishment significantly lighter than the death sentence attached to a threat to accuse a person of an unnatural crime.¹⁷⁸

These statutory provisions dealing with threats to accuse a person of a crime sought to abolish the common law constraints of the law of robbery. Therefore, unlike the common law rule, the provisions did not require the threat to be successful, nor did they require it to be made in the presence of the victim or for the immediate transfer of the property.

After showing that Section 29 was never intended to deal with instances of informational blackmail (except for threats to accuse a person of a crime), this Part will now continue to examine the last provision in the Larceny Act of 1916, which was applied to informational blackmail behaviors.

172. *R v. Jackson*, (1803) 1 East P.C. add. 21, 23–24; Winder, *supra* note 109, at 28.

173. *Jackson*, 1 East P.C. add. at 21–24. Furthermore, if at the time of the payment the victim parted with his money for the only purpose of bringing the offender to justice, even if at the beginning of the negotiations he apprehended injury to his person or character, it is not a robbery. See *R v. Reane*, (1794) 2 Leach 616; Winder, *supra* note 109, at 28.

174. (1833) 1 M. & Rob. 257.

175. *Id.*; Winder, *supra* note 109, at 28.

176. 7 Will. 4 & 1 Vict., c. 87, § 4 (Eng.); 7 & 8 Geo. 4, c. 29, § 7 (Eng.).

177. 24 & 25 Vict., c. 96, § 47 (Eng.)

178. 1757, 30 Geo. 2, c. 24, § 1 (Eng.); 1823, 4 Geo. 4, c. 54, § 3 (Eng.); 1827, 7 & 8 Geo. 4, c. 29, § 8 (Eng.); Larceny Act, 1861, § 46. In *R v. Robinson*, (1796) Leach 749, 756, the court held that the 1757 statute did not repeal the Black Act of 1722 because the latter applies to cases that include sending letters with a view to extort money though no demand is made. *Id.* at 483.

Section 30 of the Larceny Act of 1916 reads as follows: “Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding five years.”¹⁷⁹

The origins of this provision can be traced to the Act of 1734, which dealt with attempted robbery.¹⁸⁰ In those days, an attempt to commit a crime was treated as a misdemeanor. The 1734 Act was enacted in order to punish attempted robbery more severely.¹⁸¹ According to the 1734 Act, any person who assaulted another with any offensive weapon or who, by menace or in any forcible or violent manner, demanded money or chattels from another person with intent to rob that person was guilty of a felony.¹⁸² Therefore, the menace requirement in the Act was of such nature that its existence would amount to robbery, i.e., present a threat of immediate personal violence, an accusation of unnatural crime, or threats to burn houses.¹⁸³ Section 5 of the criminal statute of 1823¹⁸⁴ repealed the 1734 provision and changed its wording from prohibiting demands with “intent to rob or commit robbery” to prohibiting demands by menace or by force with “intent to steal.”¹⁸⁵

*R v. Walton*¹⁸⁶ was one of the first cases to interpret the requirement of “intent to steal” within the statute. Walton and his co-defendant were indicted and convicted under Section 45 of the Larceny Act of 1861 (the predecessor of Section 30) for obtaining money from their victim by false presentation that they held a distress warrant authorizing them to seize the victim’s goods for overdue rent.¹⁸⁷ The trial court instructed the jury as a matter of law that Walton’s conduct “(if believed) constituted a menace within the statute.”¹⁸⁸ The Court of Criminal Appeals overturned the conviction, holding that the threat was not inherently coercive, and therefore, there was a need to show circumstances of intimidation in order to claim the existence of a coercive effect.

179. 6 & 7 Geo. 5, c. 50, § 30 (Eng.).

180. 7 Geo. 2, c. 21 (Eng.).

181. XI SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 532 (1938).

182. *Id.*

183. Winder, *supra* note 109, at 42–43.

184. 4 Geo. 4, c. 54 (Eng.).

185. Winder, *supra* note 109, at 42–43. The section was reenacted in Section 6 of the Consolidating Act of 1827, which was later reenacted in the 1837 Act to Amend the Laws Relating to Robbery and Stealing from the Person. See 7 Will. 4 & 1 Vict., c. 87 (Eng.).

186. [1863] Le. & Ca. 288.

187. *Id.* at 289.

188. *Id.* at 298.

The question then arises what are the incidents attending the procurement of money or property by menace or threat necessary to constitute stealing [I]f a man is induced to part with property through fear or alarm, he is no longer acting as a free agent, and is no longer capable of the consent above referred to. And accordingly, in the cases cited in argument, the threatened violence, whether to persons or property, was of a character to produce in a reasonable man some degree of alarm or bodily fear The essential matter is that it be of a nature and extent to unsettle the mind of a person on whom it operates, and take away from his acts that element of free, voluntary action which alone constitutes consent [A] threat or menace to execute a distress warrant is not necessarily of a character to excite fear or alarm. *On the other hand, the menace may be made with such gesture and demeanour, or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect.*¹⁸⁹

In its holding, the court ruled that to satisfy the “intent to steal” element, a threat must negate the owner’s consent, and for a consent to be negated, personal intimidation must exist.¹⁹⁰

This view was repealed in 1914 in *R v. Boyle*.¹⁹¹ Boyle threatened a company chairman with printed attacks that would reduce the market price of the company’s shares.¹⁹² He demanded payment for refraining from such publication.¹⁹³ Boyle was indicted under Section 45 of the Larceny Act of 1861.¹⁹⁴ In upholding Boyle’s conviction, the appellate court rationalized its decision by referring to the holdings in *Walton* and *Tomlinson*. The court inferred from these cases that the word “menace” should be liberally construed to include not only threats of physical violence or intimidation but also threats of injury to property or character, asserting:

We do not think that the meaning of the word “menaces” in the section is so restricted. . . . [A] wider meaning has been

189. *Id.* at 297 (emphasis added).

190. *Id.*; see also *R v. Robertson*, [1864] Le. & Ca. 483, 487–89; WILLIAM OLDALL RUSSELL, *RUSSELL ON CRIME* 876 (J.W. Cecil Turner ed., 11th ed. 1958); Winder, *supra* note 109, at 44.

191. [1914] 3 K.B. 339.

192. *Id.* at 340.

193. *Id.*

194. *Id.*

given to the word by later decisions, beginning with *Reg. v. Walton* If the threat was of a character to produce in an ordinary man such a degree of fear or alarm as would “unsettle his mind and take away from his acts that element of free voluntary action which alone constitutes consent,” and was made with that intent, it would constitute the offence under the section now under consideration notwithstanding that the threat was not of physical violence or of injury to character. A similar view was taken of the meaning of the word as used in the previous section (s. 44) of the Larceny Act, 1861, by the Court for Crown Cases Reserved in *Reg. v. Tomlinson*. Lord Russell of Killowen C.J. delivered a judgment wherein he held that the word “menaces” must be construed in a wide sense, and moreover that it was not confined to a threat of injury to the person or property of the person threatened. Some of the expressions used by Wills J. in that case may have gone too far, but we agree with him that the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind should receive a liberal construction in practice. We think it would be unwise to attempt to lay down any exhaustive definition of the words of the section. The degree of fear or alarm which a threat may be calculated to produce upon the mind of the person on whom it is intended to operate may vary in different cases and in different circumstances. A threat to injure a man’s property may be more serious to him and have greater effect upon his mind than a threat of physical violence.¹⁹⁵

A close reading of *Walton* suggests that the court in *Boyle* misread the *Walton* holding in inferring that in order to satisfy the requirement of “intent to steal,” no personal intimidation was required.¹⁹⁶ As we have seen, the *Walton* court held that the requirement of lack of consent, which constitutes an essential element in theft offenses, must be accompanied, for purposes of extortion, by personal intimidation.¹⁹⁷ It seems that the *Boyle* court ignored this additional element. This conclusion is reinforced by the fact that the court referred to the *Tomlinson* case to support its holding. As mentioned above, the *Tomlinson* case interpreted Section 44 of the Larceny Act (the

195. *Id.* at 343–44.

196. Winder, *supra* note 109, at 46.

197. *R v. Walton*, [1863] Le. & Ca. 288, 297.

predecessor of Section 29(1)(i), which had no requirement of “intent to steal” and therefore could include wider varieties of threats.

While the *Boyle* case dealt with a threat to injure property, its expansive interpretation of “intent to steal” included informational blackmail as well by rejecting the requirement of personal intimidation. During subsequent years, courts extended the interpretation of menace to include almost any threat and turned this offense from an attempted theft offense into an oral blackmail.¹⁹⁸

The requirement of negation of consent in Sections 29 and 30, as shown above, and the fact that the coercion element is almost immaterial for Section 31 violations, support the assertion that Section 31 of the Larceny Act is not a property offense but rather a libel one in its essence. The difference in the weight attached to the element of coercion in each of the offenses demonstrates the different purposes of these sections: the protection of one’s character versus the protection of one’s property. Therefore, unlike the common view that informational blackmail is a theft offense, its origins stemmed from a different rationale, i.e., the protection of reputation. Furthermore, the menace requirement that appeared in Section 29(1)(i) and Section 30, as compared to the requirement of “intent to extort” that appeared in Section 31 and Sections 29(1)(ii) and (iii), supports the assertion that Section 29(1)(i) and Section 30 were not intended to deal with informational blackmail but rather with blackmail as extortion, i.e., a threat to use illegal force. Any other interpretation would make Sections 29(1)(ii) and (iii) redundant.¹⁹⁹

The broad interpretation that the courts have given to Section 29, to include “threats of any action detrimental to or unpleasant to the person addressed,”²⁰⁰ made the threat of informational blackmail punishable with imprisonment for life, provided the threat was in writing.²⁰¹ In cases where the threats were only oral, the automatic alternative was indictment under Section 30. Section 31 was rarely used, although it was the only section that was originally designed to combat informational blackmail.

In summary, the history of English law regarding informational blackmail reveals two important points:

1. Informational blackmail was intended to protect reputation, not property, and should be seen as part of the law of criminal libel.

198. CRIMINAL LAW REVISION COMM., *supra* note 141, at 55. The court extended the interpretation of Section 30 as well because Section 29 does not cover oral threats. *Id.*

199. Winder, *supra* note 109, at 22.

200. Thorne v. Motor Trade Ass’n, [1937] A.C. 797, 817 (H.L.) (appeal taken from Eng.).

201. CRIMINAL LAW REVISION COMM., *supra* note 141, at 55.

2. Because information blackmail protects reputation, it should not have amounted to a felonious offense.

With these points in mind, we will now proceed to examine the development of the law of informational blackmail and criminal libel in the United States.

B. Defamation in the United States

The crime of libel and the tort of defamation, as they evolved in English law, were adopted in America by the colonists.²⁰² The common law rule regarding truth as a defense to criminal libel was adopted as well.²⁰³ However, this rule gradually changed due to controversies regarding seditious libel. In 1805, the New York Legislature passed a law providing that in prosecutions of libel it should be lawful for the defendant to give in evidence the truth of the publication if the matter was “published with good motives and for justifiable ends.”²⁰⁴ In 1872, Massachusetts enacted a similar statute.²⁰⁵ By 1930, thirty-five American jurisdictions had express constitutional or statutory provisions allowing for truth as a defense in libel cases if the information was “published with good motives and for justifiable ends.”²⁰⁶ Therefore, in most U.S. states, in order to prevail in a criminal libel suit, the defendant had to show both that his utterance stated the facts and that the publication was made “with good motives and for justifiable ends.”

The adoption of the U.S. Constitution and the early interpretation by the courts of the First Amendment did not change the rules regarding criminal libel.²⁰⁷ The notion was that there were certain classes of speech whose prevention and punishment had never been thought to raise constitutional problems.²⁰⁸ The United States Supreme Court repeatedly upheld criminal libel statutes as constitutional.²⁰⁹ However, unlike English courts, the Court in its rhetoric did not abandon the old breach of the peace rationale.

202. Roy Robert Ray, *Truth: A Defense to Libel*, 16 MINN. L. REV. 43, 46 (1931).

203. *Commonwealth v. Snelling*, 32 Mass. (15 Pick.) 321, 327 (1834); *Commonwealth v. Morris*, 3 Va. (1 Va. Cas.) 176, 179–80 (1811).

204. Law of April 6, 1805, ch. 90, 1805 N.Y. Laws, ch. 90.

205. 1827 Mass. Acts ch. 107.

206. Ray, *supra* note 202, at 47. It should be noted that seven other jurisdictions made truth a complete defense. *Id.* at 48; *see, e.g.*, *Beauharnais v. Illinois*, 343 U.S. 250, 265 (1952).

207. *See* Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 791 (1964).

208. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

209. *See Beauharnais*, 343 U.S. at 265; *Chaplinsky*, 315 U.S. at 571–72.

In *Chaplinsky v. New Hampshire*,²¹⁰ the Supreme Court sustained a conviction under a New Hampshire criminal libel statute.²¹¹ Chaplinsky challenged the constitutionality of the statute as violating his First Amendment right of expression.²¹² The Supreme Court rejected this claim, holding:

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.²¹³

In *Beauharnais v. Illinois*,²¹⁴ the Supreme Court upheld a conviction for violating Illinois’s criminal group libel statute, which prohibited publishing or presenting any publication that “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion” and that “exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy.”²¹⁵ The Supreme Court, following the *Chaplinsky* holding, rejected Beauharnais’s claim that the statute violated his First Amendment rights, noting that nowhere at the time of the adoption of the Constitution “was there any suggestion that the crime of libel be abolished.”²¹⁶

As to the defense of truth, the court upheld the constitutionality of the restriction of good motives and justifiable ends as a condition for introducing such a defense in criminal cases, stating:

Illinois in common with many States requires a showing not only that the utterance state the facts, but also that the publication be made “with good motives and for justifiable ends.” Ill. Const. Art. II, s 4. Both elements are necessary if the defense is to prevail. What has been called “the common

210. 315 U.S. 568.

211. *Id.* at 574.

212. *Id.* at 570–71.

213. *Id.* at 571–72.

214. 343 U.S. 250 (1952).

215. *Id.* at 251.

216. *Id.* at 254–55.

sense of American criminal law,” as formulated, with regard to necessary safeguards in criminal libel prosecutions, in the New York Constitution of 1821, Art. VII, s 8, has been adopted in terms by Illinois. The teaching of a century and a half of criminal libel prosecutions in this country would go by the board if we were to hold that Illinois was not within her rights in making this combined requirement.²¹⁷

Both the *Chaplinsky* and *Beauharnais* holdings referred to the historical criminal libel rationale of breach of the peace as the justification for denying constitutional protection. Although at the time, it was acknowledged that while recognizing the common law breach of the peace theory, the Court had not required a factual showing of violence, either actual or potential.

A new approach to criminal libel emerged in 1964 in *Garrison v. Louisiana*.²¹⁸ Louisiana had a criminal libel statute that prohibited, inter alia, punishment for true statements made without actual malice.²¹⁹ Garrison was convicted of criminal libel for his comments about a local judge.²²⁰ The Supreme Court accepted Garrison’s claim that the statute unconstitutionally abridged his freedom of expression.²²¹ The Court held that despite the different history and purposes of criminal libel and civil defamation statutes, the rule stated in *New York Times Co. v. Sullivan*²²² applying to civil defamation suits should apply to criminal libel indictments.²²³ Consequently, the Court extended the civil defamation standard of actual malice to criminal libel whenever criticism of public officials is concerned.²²⁴ The Court held that the First Amendment limits state power to impose criminal sanctions for criticism of the official conduct of public officials.²²⁵ According to the Court, “Louisiana’s rejection of the clear-and-present-danger standard as irrelevant to the application of its [criminal defamation] statute,” and the lack of limitation in the statute itself to speech calculated to cause breaches of the

217. *Id.* at 265–66.

218. 379 U.S. 64 (1964).

219. *Id.* at 66 n.1.

220. *Id.* at 66–67.

221. *Id.* at 77–78.

222. 376 U.S. 254 (1964).

223. *Garrison*, 379 U.S. at 74–76.

224. *Id.* The Supreme Court held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement made with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.* at 74, 78–79.

225. *Id.* at 78.

peace, begged the conclusion that the statute was not narrowly drawn.²²⁶ In its reasoning, the Court acknowledged that the rationale for criminal libel as preventing breach of the peace had ceased to exist.²²⁷ The Court referred to Thomas Emerson's view of criminal libel and cited with concurrence the comments of the drafters of the Model Penal Code as to the suitability of libel law in the criminal system:

“[U]nder modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation.” Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L.J.* 877, 924 (1963). The absence in the Proposed Official Draft of the Model Penal Code of the American Law Institute of any criminal libel statute on the Louisiana pattern reflects this modern consensus. The ALI Reporters, in explaining the omission, gave cogent evidence of the obsolescence of Livingston's justification: “It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.”²²⁸

226. *Id.* at 70.

227. *Id.* at 69; *see also* John H. Kelly, *Criminal Libel and Free Speech*, 6 *U. KAN. L. REV.* 295, 320 (1958).

As dueling yielded to the civil suit, libel ceased to result in breaches of the peace, and in an effort to preserve criminal prosecution, in an age without significant private violence, most states defined the crime according to the definitions accepted in the more common civil cases. The emphasis was no longer on the effect of the public peace but on the tendency of the publication to damage the individual, and the case law following the statutes broadened the definition so that the crime became practically indistinguishable from the tort.

Id.

228. *Garrison*, 379 U.S. at 69–70. In most modern criminal libel statutes, the element of breach of the peace was omitted. The trend shifted the focus from breach of the peace to the tendency of the publication to damage one's reputation regardless of its effect upon the public. *See State v. Browne*, 206 A.2d 591, 595 (N.J. Super. Ct. App. Div. 1965); 2 RONALD A. ANDERSON,

The Court in fact rejected the interest of having a good reputation as a valid justification for criminalizing libel, holding that only the historical rationale, i.e., breach of the peace, could justify such criminalization.²²⁹

With respect to the defense of truth when public officials are involved, the Court departed from its previous recognition of the defense as a qualified one, holding that it would be unconstitutional to negate the defense of truth on a showing of malice in the sense of ill will.²³⁰ The Court held that when the criticism is of public officials and of public business, the public interest in the dissemination of truth triumphs over the interest in private reputation.²³¹ Therefore, as maintained by the Court, if there is a legal right to make a publication and the statement is true, the end is justifiable.²³² For that reason, a finding of malice based on intent merely to inflict harm is not enough; intent to inflict harm through falsehood is required.²³³ Nevertheless, the *Garrison* Court expressly reserved its judgment on the question of whether the defense of truth could require good motives and justifiable ends in purely private libels, while recognizing that different interests may be involved when purely private libels totally unrelated to public affairs are concerned.²³⁴

The *Garrison* case represents the beginning of a merger between the standards required in civil defamation cases and the standards required in criminal libel cases. Although the Court in *Garrison* limited its holding to libel of public officials and reserved its holding regarding private persons, the merger between the standards required in civil suits and criminal cases derived, in later cases, the element of falsity to be an essential requirement in “private persons” criminal libel cases.²³⁵ Furthermore after the *Garrison*

WHARTON'S CRIMINAL LAW AND PROCEDURE 748–50 (1957); W. BLAKE ODGERS & ROBERT RITSON, A DIGEST OF THE LAW OF LIBEL AND SLANDER 131 (6th ed. 1929); H.C. UNDERHILL, 3 UNDERHILL'S CRIMINAL EVIDENCE 1637–38 (5th ed. 1956); Annotation, *Character of Libel or Slander for Which Prosecution Will Lie*, 19 A.L.R. 1470, 1470–71 (1922).

229. See *Garrison*, 379 U.S. at 69–70.

230. *Id.* at 72–73.

231. *Id.*

232. See *id.*

233. See *id.* at 73.

234. *Id.* at 72.

235. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974). This conclusion is implicit in the Court's articulation of a standard of recovery that prohibits states from imposing strict liability for publication of allegedly false statements that are claimed to defame private individuals. Cf. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495–96 (1975) (holding that the First and Fourth Amendments bar states from sanctioning the “publication of truthful information contained in official court records open to public inspection”); *Illinois v. Heinrich*, 470 N.E.2d 966, 972 (Ill. 1984) (holding that the “guarantees of the First and Fourteenth Amendments have never required that truth be an absolute defense in a prosecution for criminal [libel] of a private person”).

decision, most criminal libel statutes were held unconstitutional, even in matters that concerned purely private libel, due to lack of distinction in the statutes between the law as applied to public officials and the law as applied to private persons.²³⁶

C. *Blackmail in the United States*

In 1796, New Jersey enacted the first state statute prohibiting sending letters containing threats to accuse a person of a crime with intent to extort money, goods, and chattel.²³⁷ In 1816, Georgia enacted a similar provision.²³⁸ By the mid-twentieth century, almost all states had such provisions in their criminal codes.²³⁹

As demonstrated earlier, although the prohibition of a threat to accuse a person of a crime is a type of informational blackmail, it was penalized long before the classic informational blackmail was introduced into the criminal law.²⁴⁰ The rationale for prohibiting threats to accuse a person of a crime was not the protection of reputation.²⁴¹ Originally, in cases where the allegations of criminal activity were true, the blackmailer had a duty to disclose the information under the rule of misprision of felony.²⁴² Therefore, a transaction to conceal knowledge of a crime was illegal. Furthermore, even in the absence of such a law, the criminalization of threats to accuse a person of a crime was (and still is) essential for the protection of the integrity of the legal system. Allowing private justice in these cases might have distorted the criminal system by impairing its ability to shape social norms by means of publicly condemning those who deviate from them:

236. See *Tollett v. United States*, 485 F.2d 1087, 1096 (8th Cir. 1973); *Gottschalk v. State*, 575 P.2d 289, 290 (Alaska 1978); *Weston v. State*, 528 S.W.2d 412, 416 (Ark. 1975); *Eberle v. Mun. Ct.*, 127 Cal. Rptr. 594, 600 (Cal. Ct. App. 1976); *State v. Helfrich*, 922 P.2d 1159, 1162 (Mont. 1996); *State v. Powell*, 839 P.2d 139, 143 (N.M. Ct. App. 1992); *State v. Armao*, 286 A.2d 626, 632 (Pa. 1972).

237. 1796 N.J. Laws ch. 108, § 57.

238. 1816 Ga. Laws ch. 178, § 27.

239. See, e.g., CAL. PENAL CODE 242, § 110 (1872); FLA. REV. STAT. § 2420 (1892); ILL. REV. STAT. ch. 30, § 111 (1845); 1873 Ind. Acts 139, ch. 49; 1873 Iowa Laws § 3871; 1802 Ky. Acts 115, § 14; 1884 La. Acts. 63; ME. REV. STAT. tit. 12, § 26 (1841); 1835 Mass. Acts 718, § 17; 1816 Mich. Pub. Acts 128, § 48; 1839 Miss. Laws 138, § 58; 1825 Mo. Laws 308, § 82; MO. REV. STAT. § 1526 (1879); N.Y. REV. STAT. tit. 3, § 58 (1828); 1831 Ohio Laws 430, § 23; S.D. PENAL CODE § 613 (1877); TENN. CODE § 4633 (1858); TEX. PENAL CODE art. 727 (1895); VT. REV. STAT. ch. 103, § 23 (1851); VA. CODE tit. 54, § 14 (1873); WIS. STAT. § 38 (1849). The only state that did not have such provision is New Mexico. See Alice Kramer Griep, Comment, *Criminal Law—A Study of Statutory Blackmail and Extortion in the Several States*, 44 MICH. L. REV. 461, 464–65 (1945).

240. See *supra* Part III.A.

241. See *supra* Part III.A.

242. See *supra* Part III.A.

The moral turpitude of threatening, for the purpose of obtaining money, to accuse a guilty person of the crime which he has committed, is as great as it is to threaten, for a like purpose, an innocent person of having committed a crime. The intent is the same in both cases,—to acquire money without legal right, by threatening a criminal prosecution. But threatening a guilty person for such a purpose is a greater injury to the public than to threaten an innocent one, for the reason that the object is likely to be attained, and the result is the concealment and compounding of felonies, to the injury of the state.²⁴³

Moreover, allowing private justice would have denied the offender's rights to due process and to procedural protection. It also ran the risk of leading to a state of affairs where only indigents were subject to public justice, because resource disparities would result in monetary penalties (i.e., blackmail money) for the rich and imprisonment for the poor, who could not afford to pay hush money.²⁴⁴ The reliability of the legal system required that such threats be made only within the system itself.

Expanding the law to include informational blackmail other than threats to accuse a person of a crime was first introduced in the United States in 1827 in Illinois's penal code.²⁴⁵ Illinois's blackmail provision can be divided into two parts: The first part prohibited sending or delivering any letter threatening to accuse another of a crime or misdemeanor, or of exposing and publishing any of his or her infirmities or failings, with intent to extort; the second part prohibited, *inter alia*, threatening to accuse another of a crime or misdemeanor, or of exposing and publishing any of his or her infirmities or failings, though no money or valuable things were demanded.²⁴⁶ This two-part reading begs the conclusion that the main focus of this law was neither on the coercion element nor on the property that was demanded, but rather the statute's main focus was on reputation, i.e., on the threats to expose information regardless of the threat maker's intentions.

It was only after England's Libel Act of 1843 was enacted that other states followed Illinois and criminalized informational blackmail. By the midpoint

243. *People v. Eichler*, 26 N.Y.S. 998, 999 (N.Y. Gen. Term. 1894) (footnotes omitted).

244. See Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1970 (1993).

245. 1827 Ill. Laws ch. 145, § 108.

246. *Id.*

of the twentieth century, about thirty states had criminalized informational blackmail.²⁴⁷

IV. REPUTATION AS AN INTEREST PROTECTED BY THE CRIMINAL LAW

A. *Three Concepts of Reputation*

There have been no attempts to define reputation in common law. In fact, such an attempt would be futile, because reputation is a concept that keeps evolving and hence evades a single, static definition. In protecting the interest of reputation, we protect “an image of how people are tied together, or should be tied together, in a social setting.”²⁴⁸ This image varies over time.²⁴⁹ As we examine the history of defamation law, we can identify the three concepts of reputation it was designed to uphold: “reputation as property, as honor, and as dignity.”²⁵⁰

Reputation as property focuses on reputation in the marketplace and “can be understood as a form of intangible property akin to goodwill.”²⁵¹ This concept of reputation “presupposes that individuals are connected to each other through the institution of the market,” where no person has the right to a reputation other than that created by the evaluative processes of the market.²⁵² An individual can acquire such a reputation through efforts and labor, and the reputation’s value is determined by the same marketplace mechanism that determines the value of any other property.²⁵³ Therefore, an injury to such a reputation without justification merits pecuniary compensation for the destruction of the results of an individual’s labor and efforts.²⁵⁴ However, compensation will be given only to loss that the market can measure, i.e., pecuniary loss, and not to mere hurt feelings.²⁵⁵

247. Griep, *supra* note 239, at 465; *see also* Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1111–12 (2002). It should be noted that in some states like California and New York, informational blackmail appeared twice in the penal code: under the extortion and oppression chapter and under the libel section. CAL. PENAL CODE §§ 518–24 (1872); N.Y. PENAL LAW §§ 552–561 (1880); *see also* ARIZ. PENAL CODE §§ 808–815, § 413 (1887); GA. CODE §§ 116–117 (1895); 1884 La. Laws 63–64.

248. *See* Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 692–93 (1986).

249. *Id.* at 693.

250. *Id.*

251. *Id.*

252. *Id.* at 695.

253. *Id.*

254. *Id.*

255. *Id.*

Reputation as honor considers an individual's reputation to be a "personal reflection of the status which society ascribes to his social position."²⁵⁶ In this form of reputation, individuals are unequal, because they occupy different social roles, which are hierarchically arranged.²⁵⁷ Because honor is attached to one's social role, it is fixed and cannot be earned, bought, or exchanged. Unlike reputation as property, in which a man can always create a new reputation for himself, in reputation as honor one's identity is indistinguishable from his reputation. Because honor is a shared social perception that goes beyond the behavior of particular individuals, it is viewed as a public good and thus requires more than the protection of merely individual interests.²⁵⁸

Injury to one's reputation is in fact injury to the societal status structure, and hence to the social system.²⁵⁹ Therefore, an assault on a person's reputation is considered an assault on the entire community, and as a consequence, the society's interest in protecting such reputation is viewed as equally important to the interest of the individual.²⁶⁰ Moreover, because an injury to one's reputation is an injury to one's status and personal identity, the remedy of compensation does not suffice, and restoration of identity is required.²⁶¹ For that reason, reputation as honor is linked most closely to criminal libel, where the truth of the statement is immaterial and the plaintiff's redress is vindication. Criminal libel statutes help the victim, through the state, to achieve vindication by focusing on the punishment of the libeler rather than on refuting the libel.

Reputation as dignity refers to the "relationship between the private and public aspects of the self."²⁶² The concept of reputation as dignity assumes that the identity of an individual is the product of the social connections by which he is embedded in and attached to a community.²⁶³ Dignity is therefore the respect of others and of self that arises from full membership in society. In reputation as dignity, individuals have dual interests: maintaining social respect and "defining and maintaining the contours of [their own] social constitution."²⁶⁴ In reputation as dignity, a reputation is not the result of individual achievement and cannot be valued in the marketplace; rather, it is

256. *Id.* at 700.

257. *Id.*

258. *Id.* at 702.

259. *Id.*

260. *Id.* at 703-04.

261. *Id.* at 703-05.

262. *Id.* at 708.

263. *Id.*

264. *Id.* at 711.

simply essential and intrinsic in every human being.²⁶⁵ It is not a result of social roles and status: “[H]onor is concerned with attributes of personal identity that stem from the characteristics of particular social roles, whereas dignity is concerned with the aspects of personal identity that stem from membership in the general community.”²⁶⁶ As a result, the remedy for injuring reputation as dignity is rehabilitation, i.e., confirming the membership of the individual in the community through a declaratory judgment.²⁶⁷

Each of the three concepts of reputation discussed above presupposes a different image of social order. In the last fifty years, our social world has been dominated by images of both market and communitarian societies, reinforcing a view of reputation as a concept of property and dignity. The value of egalitarianism caused our view of society as hierarchical to gradually decline and all but disappear, and in turn, our concept of reputation as honor declined as well. As previously noted, the criminalization of the law of defamation functioned as a means to vindicate honor. Under this system, a defamation victim “achieved vindication not by disproving the libel, but rather by punishing the libeller.”²⁶⁸ Once reputation was no longer viewed as an interest in protecting one’s honor, the law of criminal libel had to change.

265. *Id.* at 715.

266. *Id.*

267. *See id.*

268. *Id.* at 704. According to Post,

There is a clear analogy between the traditional common law of criminal libel and the “Code of Honor” under which gentlemen duelists sought to “avenge insults” and thereby achieve “the restoration of wounded honor.” As the old saw would have it, “The laundry of honor is only bleached with blood.”

Id. at 704–05 (footnotes omitted). A study conducted by Professor Leflar on criminal libel cases supports the function of criminal libel as a means to protect reputation as honor. Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984, 985–86 (1956). Leflar concluded that

Modern criminal defamation prosecutions appear on analysis to serve pretty much the same function as the early prosecutions for libel of “great men.” The usual pattern in the political cases, which are more numerous than any other type of case from 1920 on, is one of the “ins” prosecuting the “outs,” of the winner prosecuting the loser. Even the nonpolitical cases have overtones of the same character. The successful prosecutions were, for the most part, for statements of a sort likely to have been unpopular at the time and place they were made.

Since jury sympathy with the position of complaining witnesses was almost a prerequisite to conviction, the appellate cases give little or no evidence that the criminal rule was used as a means of protecting politically powerless persons from defamations that might have appealed to mass prejudice. It was

The changes in the jurisprudence of the law of defamation indeed represented this shift in views of our social order, i.e., the movement from reputation as honor to reputation as property and reputation as dignity. The acknowledgement that reputation does not protect social hierarchy transformed defamation into a purely private matter where the public has no interest of its own that requires protection by the criminal law.

In addition, under both theories of reputation as property and reputation as dignity, falsity is an essential element in defamation law. Under the first theory, if the publication is correct, there is no injury to one's reputation, because the market reflects value based on truthful information.²⁶⁹ Under the latter theory, one has a right to reputation only to the extent that it accurately reflects the self.

B. Case Law and Reputation

Although the developments in defamation law jurisprudence were made on behalf of constitutional protections that are external to the criminal law, they actually reflect the change in the images of social life described above. Therefore, they apply to pure criminal law considerations as well, i.e., to the validity of reputation as an interest worth protecting by the criminal law, First Amendment considerations aside. The view that the criminal law has no interest in protecting the harm caused to individuals' reputations was expressed in the Model Penal Code by the absence of a criminal libel provision in the proposed code and was later embraced by the Supreme Court in *Garrison*.²⁷⁰ In explaining the omission of such provision, the drafters of the Model Penal Code stated:

One of the hardest questions we confront in drafting a Model Penal Code is whether to penalize anything like libel. It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior

not much used as a sanction against irresponsible newspaper reports or editorials, though these have often been extremely damaging to libeled persons. In general it was not used against persons or groups in positions of influence or power, and practically could not have been; rather, it was used on behalf of such persons and groups against their detractors who were less fortunately situated.

Id. at 1032 (footnotes omitted).

269. See Richard A. Posner, *The Economics of Privacy*, 71 AM. ECON. REV. 405, 406 (1981); Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1, 30-35 (1979); Richard A. Posner, *The Right to Privacy*, 12 GA. L. REV. 393, 397-401 (1978).

270. See *supra* notes 218-29 and accompanying text.

which exceptionally disturbs the community's sense of security. This may be because the harm done is very grave, as in rape or murder, so that even the remote possibility of being similarly victimized terrifies us. Or our alarm may, as in the case of petty theft or malicious mischief, derive from the higher likelihood that such lesser harm will be inflicted upon us by those who manifest disregard of other people's ownership. It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.²⁷¹

To sum up thus far: Since the second half of the twentieth century, the common view has been that reputation is not an interest worthy of protection by the criminal law. Furthermore, reputation as an interest justifies protection only from false statements. Truthful statements will not be sanctioned. The law will not protect one's reputation from truthful statements, not only because of First Amendment considerations but also because the very concept of reputation cannot allow it.

V. THE UNAVOIDABLE CONNECTION BETWEEN BLACKMAIL AND THE LAW OF DEFAMATION

This Article has shown that blackmail was an offense defined in the nineteenth century. At that time the criminal codes reflected the norms of the moral code. The criminal justice system had dual functions: protecting and maintaining the traditional code by punishing those who violated it and protecting the very people who violated the code in a particular way.

The law, in other words, did two things at once. First of all, it defined what a good reputation consisted of, what respectability and virtue meant; and what sorts of behaviors would forfeit that reputation (and, perhaps, forfeit one's freedom as well). Yet at the same time, the law contained doctrines and institutions whose purpose was to preserve and protect the reputation of at least some of the people who

271. MODEL PENAL CODE § 250.7 cmt., at 44 (Tentative Draft No. 13, 1961). A question that will not be dealt with in this Article is if we view reputation as property, why shouldn't we view defamation like petty theft, i.e., taking another property without a claim of right?

belonged to respectable society—even when that person (man or woman) slipped and deviated, in certain common ways.

....

. . . The system protected bourgeois respectability, and reinforced it, both by punishing (gross) deviations; but also by shielding some of those who lapsed, from the worst consequences of their misbehavior.²⁷²

Lawrence Friedman described this period as the “Victorian compromise,” when the criminal law and its enforcement were tools used for monitoring and limiting behavior, as well as for protecting the reputations of reputable men who deviated quietly from the straight and narrow path of law and morality.²⁷³ Rooted in the Victorian compromise was a system of class preference and hierarchy, “the more high-class the gentleman, the more immunity.”²⁷⁴

This function of the criminal law reflected the concept of reputation as honor and the normative order of a status system. Although in England this status hierarchy was more explicit than in the United States, it dominated both countries.²⁷⁵ It was important to protect the reputation of those who deviated from their proper social roles to preserve both these roles and the system as a whole.²⁷⁶ Exposing the faults of the upper statuses would have weakened the faith of the people in the honesty and decency of those who possessed such status.²⁷⁷ Furthermore, those who made the laws belonged to the class of people who were more vulnerable to attacks on their reputation, as they had more to lose if their infirmities and failings were made public. Therefore, in enacting laws that protected reputation, the lawmakers were first and foremost protecting themselves.²⁷⁸

Blackmail threatened the immunity of those individuals in the upper class; it threatened their ability to deviate from the straight and narrow path without losing their reputation and their standing in society. “[T]he more respectable and virtuous the Individual, the more [blackmailers] would . . . drag him

272. Friedman, *supra* note 247, at 1098–99.

273. *Id.* at 1102; *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 127 (1993).

274. Friedman, *supra* note 247, at 1102.

275. *See id.* at 1096.

276. *Id.* at 1106.

277. *Id.*

278. *See generally* MIKE HEPWORTH, BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE (1975).

before the Public, for the sake of extorting from the timid the Price of Silence.”²⁷⁹ Thus, the law against informational blackmail was essential in order to protect reputation effectively. Making the publication of information unlawful was insufficient to achieve the goal sought by the criminal libel prohibitions. Threats to publish such information had to be banned as well. Threats were particularly disliked because they involved a shift of control and power, empowering the powerless and turning the hierarchy on its head. This concern also explains the reason behind not criminalizing private bribery, which is the blackmail mirror image transaction. When the victim approaches the information holder and offers to pay him for his silence, there is no shift of power, as the victim is still in control of the situation, and therefore, no crime has taken place.

The question then, assuming this argument is correct, centers on why we need the construction of blackmail to protect reputation. Why not just ban any threat to publish libel? That is to say, why do we require the showing of “intent to extort”? The answer to this question becomes clearer once we examine the Libel Act of 1843. As mentioned above, the Act recognized, for the first time, truth as a defense upon showing both good motives and public interest. Penalizing the mere threat to publish libel does not take into account the development in libel law regarding truth as a qualified defense; the requirement of intent to extort does. The requirement of intent to extort casts away any doubts as to the motives of the threat maker in publishing the information. In fact, all it does is penalize a threat to do an unlawful act, i.e., publishing information without satisfying the requirements of the defense of truth. In the words of Lord Campbell:

The committee proposed to divide [libels] into three classes. The first and most aggravated was a class of offences so heinous and atrocious that, morally speaking transportation itself would be no inadequate punishment for them: he meant where an attempt was made to extort money by the threat of libelling an individual or a member of his family, and the libel was published because the money was not paid.²⁸⁰

Therefore, as long as criminal libel existed and as long as the defense of truth was not absolute, there was no paradox in the law of informational blackmail.

In the last half of the twentieth century, the rationales underlying the protection of reputation changed and the notion became that the public has a

279. SELECT COMM., *supra* note 126, at 168.

280. 69 PARL. DEB., H.L. (3rd ser.) (1843) 1232.

right to know about certain behaviors. The shift in the concept of reputation, along with constitutional jurisprudence, changed the perception of the amount of protection that the law ought to grant to the interest of reputation. Whereas in the past, the concept of reputation as honor sought to protect the upper class, today the higher one's status, the less protected he is. As noted earlier in this Article, *New York Times v. Sullivan* was the first case to begin this transformation by setting more rigid standards for public official plaintiffs in civil defamation suits.²⁸¹ *Garrison v. Louisiana*²⁸² applied these standards to criminal libel cases, and *Philadelphia Newspapers, Inc. v. Hepps*²⁸³ completed the process by applying these rules to all matters of public concern, even if the plaintiff is a private figure.²⁸⁴ Today, not only does the First Amendment require that truth be an absolute defense regardless of the motive of the publisher, but also false defamations are protected, with the exception of those that are knowingly false or made with reckless disregard as to if they are true or false.²⁸⁵

This change of concept should have affected all laws regarding the protection of reputation, but in fact it did not. The law of informational blackmail was left behind. From that point on, the "paradox of blackmail" began to appear. Although informational blackmail penalizes threats to expose truthful information, it has remained untouched both from a First Amendment perspective and from a criminal law perspective.

Because blackmail protects views of reputation that are no longer valid in our society, the above account of blackmail law's development should have prompted reexamination of the possibility of legalizing informational blackmail.

As for how informational blackmail escaped reexamination, my opinion is that the offense got away on a technicality by being historically classified as a property offense instead of a reputation-protecting offense. This explanation is supported by the above exploration of English law regarding blackmail and by taking into consideration that the major First Amendment jurisprudential developments of criminal libel law occurred after the publication of the Model Penal Code, which classified the blackmail provision as a theft offense.²⁸⁶

281. See *supra* notes 222–24 and accompanying text.

282. See *supra* notes 218–34 and accompanying text.

283. 475 U.S. 767, 777 (1986).

284. It should be noted that a similar transformation occurred in the law of privacy. See Friedman, *supra* note 247, at 1114–16.

285. See Franklin, *supra* note 207.

286. See MODEL PENAL CODE § 206.3 cmt. (Tentative Draft No. 2, 1954).

As mentioned above, informational blackmail was first penalized in England under Section 3 of the Libel Act of 1843.²⁸⁷ Only in 1916 under the Larceny Act was the offense consolidated with other forms of blackmail and extortion.²⁸⁸ This consolidation, which appeared in U.S. state penal codes as well,²⁸⁹ was intended to bring together all the provisions that prohibited the obtaining of property using a threat to perform an unlawful act. Because libel was then penalized, informational blackmail fell within this category. The consolidation of the different provisions shifted the focus from their original rationales and the different interests they sought to protect to one common denominator—obtaining property. As long as the offense of blackmail completed the offense of libel, the classification of blackmail as a property offense was consistent.

In the United States this tendency was prominent in 1954 when the American Law Institute published a tentative draft of the Model Penal Code containing a proposed blackmail/extortion provision titled “Theft by Intimidation.”²⁹⁰ Informational blackmail was not regarded as unique or distinct from other types of threats but was viewed as one threat in a “list of particular harms which must be threatened in order to come within the offense of extortion.”²⁹¹ Therefore eight years later, when criminal reputation-protecting laws were reexamined, informational blackmail was classified as a property offense under the law of theft and thus was overlooked.²⁹²

We can therefore conclude that the classification of informational blackmail as a property offense instead of a reputation-protecting offense saved this criminal prohibition from abolishment and resulted in what we now call the “blackmail paradox.”

VI. CONCLUSION

Delving into the history of criminal libel sheds light on the paradox of blackmail. When first introduced, informational blackmail was intended to protect the interest of reputation and to serve as a supplement to the law of criminal libel. At that time, reputation was regarded as an interest worth protecting by the criminal law because it protected a wider interest—the

287. *See supra* Part III.A.

288. *See supra* Part III.A.

289. It should be noted that generally in the United States there was no process of consolidating different provisions because in most states the different threats appeared in one provision from the beginning.

290. MODEL PENAL CODE § 206.3 cmt. (Tentative Draft No. 2, 1954); *see also* MODEL PENAL CODE § 223.4 (Proposed Official Draft 1962)

291. MODEL PENAL CODE § 206.3 cmt.

292. *See* MODEL PENAL CODE § 223.4.

preservation of social roles and social hierarchy. Informational blackmail was just a type of threat to perform unlawful acts.

During the years, most state statutes consolidated the different threats to perform unlawful acts into one provision. Informational blackmail appeared as one item in the list of forbidden behaviors and therefore was viewed as extortion. This consolidation shifted the focus from the original rationale and the different interests each prohibition sought to protect to one common denominator—obtaining property. Therefore when reputation was reexamined as an interest worth protection by the criminal law, informational blackmail was left behind because it was classified as a theft offense and its reputation origins were overlooked.

It is my conclusion that in light of the above, the considerations that led to the criminalization of informational blackmail are no longer compelling, and therefore, as long as there is no change in the perception of defamation law, blackmail should be decriminalized.

Decriminalizing informational blackmail should not be confused with morally embracing this kind of behavior. The publication of private information to hurt a person, where there are no other benefits (except for the publisher's pleasure in seeing the other person hurt), is immoral but should still be legal, as are many other immoral behaviors. Demanding money for silence will still be immoral; however, immorality alone is not sufficient to justify penalizing such behavior.