



2006

Saving Toby: Extortion, Blackmail, and the Right To Destroy

Stephen E. Sachs

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylpr>



Part of the [Law Commons](#)

Recommended Citation

Stephen E. Sachs, *Saving Toby: Extortion, Blackmail, and the Right To Destroy*, 24 *YALE L. & POL'Y REV.* (2006).
Available at: <https://digitalcommons.law.yale.edu/ylpr/vol24/iss1/9>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law & Policy Review* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Saving Toby: Extortion, Blackmail, and the Right To Destroy

Stephen E. Sachs[†]

I. INTRODUCTION

In the Spring of 2005, on the website savetoby.com, one could find many endearing pictures of Toby, “the cutest little bunny on the planet.” Unfortunately, Toby’s owner announced, on June 30 “Toby will die. I am going to eat him. I am going to take Toby to a butcher to have him slaughter this cute bunny.” Unless, that is, the website’s readers sent \$50,000 to spare Toby’s life.¹

By early May, Toby’s owner (using the name “James McEahly”) claimed to have raised more than \$28,000,² and the bunny’s plight had attracted substantial news coverage.³ When the fateful day arrived, Toby was apparently spared, but with a new price upon his furry head—100,000 purchases of McEahly’s book⁴ by November 6, 2006.⁵

Regardless of Toby’s actual fate, the website raises a fascinating issue of law. The threat to kill Toby will strike many readers as a form of extortion.⁶ Current extortion statutes, however, generally do not prohibit the threatened

[†] Yale Law School, J.D. expected 2007; B.A. (Hons), University of Oxford, 2004; A.B., Harvard University, 2002. I am grateful to Will Baude, Josh Chafetz, John Gardner, Geneva McDaniel, Alan Sachs, David Sachs, Amanda Schwoerke, and Ari Weinstein for advice and comments on earlier drafts.

1. [Savetoby.com](http://www.savetoby.com), <http://www.savetoby.com>, *cached at* <http://web.archive.org/web/20050314102104/http://savetoby.com> (cached Mar. 14, 2005).

2. [Savetoby.com](http://www.savetoby.com), <http://www.savetoby.com> (visited May 15, 2005) (on file with author). This figure does not include revenue from sales of “Save Toby” T-shirts, coffee mugs, and other merchandise.

3. *See, e.g.*, David Segal, “*Save Toby*” Site Draws Rabbit Reactions, WASH. POST, Mar. 18, 2005, at C1; *Countdown*, 2005 WLNR 5668633 (NBC television broadcast Apr. 11, 2005). Some, however, believed the entire project to be a hoax. *E.g.*, Barbara Mikkelson, *Save Toby*, Snopes.com Urban Legends Reference Pages, <http://www.snopes.com/critters/crusader/savetoby.asp> (last visited Oct. 15, 2005).

4. JAMES & BRIAN, ONLY YOU HAVE THE POWER TO SAVE TOBY: BUY THIS BOOK OR THE BUNNY DIES (2005).

5. [Savetoby.com](http://www.savetoby.com), <http://www.savetoby.com> (visited June 30, 2005). The delay was caused by the refusal of the PayPal Internet service to process additional payments on moral grounds. *See* Save Toby Changes, <http://savetoby.com/updates/13.php> (last visited Oct. 19, 2005).

6. Indeed, extortionate threats to animals are a recurring theme in literature. *See, e.g.*, *If You Don't Buy This Magazine, We'll Kill This Dog*, NAT'L LAMPOON, Jan. 1973 (cover); *Kitten Guilty of Murder! Sign the Petition Inside or Fluffy Dies!*, WKLY. WORLD NEWS, Aug. 29, 2005, at 1.

destruction of one's *own* property, even if they prohibit endangering property owned by someone else. The law thus provides insufficient protection to a variety of resources on which others might place value, including historic buildings, treasured paintings, and adorable bunny rabbits.

This Comment proposes that rabbits like Toby be protected under a new criminal offense of "extortionate destruction." As Part II will demonstrate, current extortion statutes are too narrow to protect Toby, or, if given a broader interpretation, could do so only at the cost of criminalizing what is generally considered innocent conduct.

Part III then presents the moral objection to McEahly's conduct through an analogy to blackmail. Although destruction of property, like telling others' secrets, may be lawful in most instances, it is rendered wrongful by the unjustified use of a coercive threat.⁷ Unlike a legitimate commercial offer, which may happen to be made under circumstances that are unpleasant to the offeree, a coercive threat specifically *aims* at causing such unpleasantness: McEahly has committed to killing Toby only because he hopes that someone else will pay him not to.

Part IV argues that extortionate destruction shares not only the moral wrongness of blackmail, but also its suitability for criminal prohibition. Although individuals may possess a legal right to destroy property under certain circumstances, it is doubtful that the right extends so far as to support threats motivated solely by the hope of extorting property from others. McEahly's threats cannot be justified by the economic benefits of a right to destroy; as in the case of blackmail, where the owner has no pre-existing reason to perform the threatened act, the exchange ceases to promote allocative efficiency and becomes an unproductive transfer. Nor can current law be defended by reference to the economic liberties of the owner, or the expressive value served by the right to destroy;⁸ the malicious exercise of such a right may still be prohibited, just as blackmail laws prohibit unjustified threats to undertake legal acts. The case of Toby thus sheds some light on the ongoing debate over the nature and wrongness of blackmail.

Finally, in Part V, this Comment will propose model statutory language for an offense of "extortionate destruction." Such an offense would appropriately criminalize extortionate threats on Toby's life, while protecting the legitimate interests owners might have in destroying their property.

II. TOBY'S FATE UNDER CURRENT LAW

Extortion laws are currently designed to punish those who threaten the

7. See Grant Lamond, *Coercion, Threats, and the Puzzle of Blackmail*, in HARM AND CULPABILITY 215 (A.P. Simester & A.T.H. Smith eds., 1996).

8. See Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781 (2005).

property of others. They do not, by and large, criminalize threats to one's own property. Federal law, for example, prohibits interstate communications containing threats "to kidnap any person or . . . injure the person of another," or "to injure the property or reputation of the addressee or of another"; threats to one's own person, property, or reputation are left undisturbed.⁹ California law similarly defines extortion as including threats "[t]o do an unlawful injury to the person or property of the individual threatened or of a third person," which clearly excludes injuries to the perpetrator himself.¹⁰ Likewise, the first definition of extortion under the Model Penal Code criminalizes threats to "inflict bodily injury on anyone or commit any other criminal offense,"¹¹ but excludes actions (such as humanely butchering a rabbit) that violate no criminal law.

Since extortion takes many forms, some jurisdictions have enacted general "catch-all" provisions to prohibit wrongful threats. These provisions, however, were presumably not written with extortionate destruction in mind. As a result, were they read broadly enough to include the case of Toby, their terms would be too general to differentiate between criminal threats and otherwise legitimate conduct.

Perhaps the broadest catch-all provision is found in the Model Penal Code, which includes in its definition of extortion a threat to "inflict any other harm which would not benefit the actor."¹² Interpreting this provision to include the emotional harm inflicted on Toby's supporters would expand it far beyond its current scope.¹³ Those who donated to save Toby are surely upset by his danger, but not *everything* felt as harmful is the subject of criminal prohibition. A valued employee who threatens to quit her job if she is not given a raise, even when she has no equivalent prospects elsewhere, is not treated as a criminal—nor should she be.

This over-inclusiveness would not be cured by adding a criterion of "wrongfulness." The federal Hobbs Act defines extortion as the consensual

9. 18 U.S.C. § 875(b), (d) (2000). A separate federal statute forbids use of the mails to send threats "to injure the person of the addressee or of another," or "to injure the property or reputation of the addressee or of another," neither of which would address the case of Toby. 18 U.S.C. § 876(b), (d) (2000 & Supp. 2005).

10. CAL. PENAL CODE § 519(1) (West 1972); see also FLA. STAT. § 836.05 (1991) (prohibiting extortionate threats of "injury to the person, property or reputation of another"); TEX. PENAL CODE ANN. § 1.07(a)(9)(B) (Vernon 1994) (including within the definition of "coercion" threats "to inflict bodily injury in the future on the person threatened or another").

11. MODEL PENAL CODE § 223.4(1) (1980).

12. *Id.* § 223.4(7).

13. The official commentary to the Code describes the following paradigmatic cases of "harm": (1) a plant foreman who threatens to recommend a worker's dismissal; (2) a friend of a corporate purchasing agent who threatens suppliers that he will influence his friend to divert purchases elsewhere; and (3) a law professor who threatens to fail a student unless he is paid. *Id.* § 223.4 cmt. 2(k). All of these cases involve harms quite distinct from the sentimental harm caused by Toby's death.

obtaining of property from another “induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”¹⁴ Although courts have afforded the word “fear” a broad construction,¹⁵ it has generally been limited to cases of direct physical violence or economic harm.¹⁶ Few courts would read “fear” so broadly as to prohibit threats of any action an ordinary person might wish to prevent—since some actions, such as filing a lawsuit,¹⁷ are considered to be protected exercises of personal rights.

Even statutes specific to property destruction may be similarly overbroad. New York law defines extortion as “induc[ing]” another to deliver property “by means of instilling in him a fear that . . . the actor or another will,” among other things, “[c]ause damage to property.”¹⁸ This clause is not limited by its text to damaging others’ property, but a search of New York case law reveals no application of the clause to cases like Toby’s.¹⁹ Moreover, if it *were* applied generally to any threatened destruction of property, the clause would be substantially over-inclusive. Suppose that a developer, having planned to replace a beloved old house with high-priced condos, charitably offered to sell the house to a historic preservation society at a sizeable discount. The developer might then be accused of “induc[ing]” the payment by “instilling” a “fear” that the house would otherwise be destroyed. Yet surely this conduct should be viewed as a legitimate offer rather than a case of criminal extortion.

14. 18 U.S.C. § 1951(a), (b)(2) (2000).

15. *See* United States v. Lisinski, 728 F.2d 887, 890 (7th Cir. 1984) (“[T]he term ‘fear’ in the Hobbs Act . . . ‘should be given its ordinary meaning and consequently . . . would include fear of economic loss.’”) (quoting United States v. Dale, 223 F.2d 181, 183 (7th Cir. 1955)); *see also* United States v. Flynt, 15 F.3d 1002, 1007 (11th Cir. 1994) (“An offense occurs when a defendant exploits a victim’s reasonable fear of economic loss.”); United States v. Cusmano, 659 F.2d 714, 715 (6th Cir. 1981) (“[I]t is well settled that fear of economic loss is sufficient to support a conviction under the Act.”).

16. *See* United States v. Sturm, 870 F.2d 769, 773 (1st Cir. 1989) (distinguishing between economic and physical harm); Howard J. Alperin, *Elements of Offense Proscribed by the Hobbs Act (18 U.S.C.A. § 1951) Against Racketeering in Interstate or Foreign Commerce*, 4 A.L.R. FED. 888 § 2(a) (2005) (“Even though there is no threat of physical violence by the defendant, an offense under the extortion provisions of the Hobbs Act may be committed . . . where the defendant’s conduct causes an employer or other party to fear economic loss.”). In the analogous definition of robbery under § 1951, the word “fear” is specifically limited to fear “of injury . . . to his person or property, . . . or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.” 18 U.S.C. § 1951(b)(1) (2000 & Supp. 2005).

17. *Cf.* I.S. Joseph Co. v. J. Lauritzen A/S, 751 F.2d 265, 267-68 (8th Cir. 1984) (holding that threats to sue, even if groundless and made in bad faith, do not violate the Hobbs Act).

18. N.Y. PENAL LAW § 155.05(2)(e), (e)(ii) (McKinney 1965); *see also* N.Y. PENAL LAW § 135.60(2) (McKinney 1965) (setting out similar conditions for criminal coercion statute); CONN. GEN. STAT. ANN. § 53a-119(5) (West 2001) (modeled on New York extortion statute).

19. Like the Model Penal Code, the New York statute also contains a catchall provision, prohibiting threats to “[p]erform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.” N.Y. PENAL LAW § 155.05(2)(e)(ix) (McKinney 1965). Killing Toby would not inflict any of these material harms.

III. WHY TOBY DESERVES PROTECTION

Today's law does not adequately protect against threats on Toby's life. Specific extortion statutes are too narrow to address the case, and their various "catch-all" provisions cannot easily be applied with sufficient breadth. Unfortunately, McEahly's entirely lawful technique could soon be applied to property of far greater monetary value than bunnies. An extortionist might target for destruction a historic landmark, threaten to burn a Picasso, or hold rare manuscripts or historic documents for ransom, without any fear of legal sanction.²⁰

The very reason, however, why existing statutes were not designed for this case helps inform the moral argument for Toby's protection. Unlike most instances of extortion, the act of killing one's own rabbit is not necessarily unlawful. Instead, the proper analogue to McEahly is the blackmailer, who threatens an act (communicating facts to the public) that might have been entirely legal on its own. It is even lawful to accept compensation for keeping certain facts secret (as in a standard non-disclosure agreement), or for keeping a rabbit alive. Demanding this compensation as part of a coercive threat, however, violates widespread moral norms and might legitimately be the subject of criminal prohibition.²¹

The line between legitimate conduct and extortion can be illuminated by Grant Lamond's categorization of warnings, offers, and threats.²² Suppose, to use Lamond's example, I know that mowing my lawn in the early morning is unpleasant to my neighbors. If I intend to mow the lawn early one Sunday for acceptable reasons of my own (say, afternoon errands), I might *warn* my neighbors of this in advance, so they can plan accordingly. This warning would not represent a coercive threat. Nor, necessarily, would coupling that warning with an *offer* to mow in the afternoon, even for financial compensation. Such compensation, though certainly uncommon among neighbors, could be rendered legitimate by the sacrifice of my pre-existing reasons to mow early.

What would represent a coercive threat, however, would be to commit to mowing early precisely *because* it is unwelcome to my neighbors—perhaps to spite them, or in the hopes that they will pay me to stop. In these circumstances, the act's unpleasantness would be part of my aim. Were

20. The destruction of such objects by their owners is generally legal, in the absence of specific historic preservation laws. The Visual Artists Rights Act of 1990, 17 U.S.C. §106A (2000), for example, prohibits the destruction of certain works within their creators' lifetimes, but allows the destruction of the works of old masters. See Strahilevitz, *supra* note 8, at 828. Given the power of electronic communications to assemble communities who care about these objects (and to facilitate the transfer of funds), this type of extortion may soon become all too easy.

21. This seeming inconsistency is sometimes called "the paradox of blackmail." See generally Symposium, *Blackmail*, 141 U. PA. L. REV. 1567, 1567-1989 (1993).

22. See Lamond, *supra* note 7, at 219-30; see also Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741 (1993).

mowing no longer unwelcome, or were my neighbors to realize they *enjoyed* the sound of the lawnmower, it would represent a failure in my plan.²³ The same cannot be said of the warning-and-offer, in which case a positive reaction from my neighbors would in no way diminish my pre-existing reasons to mow early. The central distinction between an offer and a coercive threat is not *when* I mow, but *why*.²⁴

This is not to say that all coercive threats are immoral. (If fines and prison terms were no longer unpleasant, the legal system would have to find other deterrents.) But such threats require justification, and where the threat is merely intended to enrich the extortionist at others' expense—as seems clear in the case of Toby²⁵—that moral justification is lacking.

IV. RABBITS AND THE RIGHT TO DESTROY

The extortionate destruction practiced by McEahly, like blackmail, represents an unjustified use of a coercive threat. The fact that a practice is immoral and coercive, however, does not necessarily imply that it ought to be regulated by the criminal law. Many personal acts of coercion are tolerated by the law, even when others might morally disapprove of them. (Consider, for example, a threat by religious parents to disinherit any child who leaves the faith.)

Without providing a general theory of acceptable coercion, it seems possible to distinguish extortionate destruction from other coercive acts by asking why an owner might claim a legally protected right to destroy her property in the first place—by looking, in other words, to the foundations of

23. See generally John Finnis, *Intention and Side-Effects*, in *LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS* 32 (R. Frey & C. Morris eds., 1991). The crucial role of intent helps explain why the same agreement may be outlawed as blackmail but protected as bribery. Suppose that Bob learns an embarrassing fact about Alice, which he plans to keep secret out of respect for her. If Alice on her own initiative contacts Bob and offers a payment for him to keep silent, Bob can legally accept the payment, and the contract will even be enforced in court, just as non-disclosure agreements or confidential settlements would. If, however, Bob initially approached Alice with the same offer, he may be guilty of blackmail. The distinction is that by accepting the bribe, Bob never commits himself to a course of conduct with its unwelcomeness to Alice as part of his aim; he has made no threat, explicit or implicit, to reveal the information. See Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663 (1993) (describing the blackmail/bribery distinction).

The focus on motive also helps explain the moral ambiguity surrounding “market-price blackmail.” Suppose Bob, a magazine publisher, possesses a legitimate financial incentive to reveal the fact about Alice. His offer to keep the fact secret would resemble to some extent an innocent offer to mow in the afternoon, with payment from Alice compensating for his foregone revenue.

24. As Judge Douglas Ginsburg and Paul Shechtman note, at least two sorts of pre-existing reasons must be regarded as illegitimate in this context: one’s own sadistic enjoyment of causing others harm, and a desire to prove one’s credibility to make additional illegitimate threats in the future. Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1865 (1993).

25. See Savetoby.com, *supra* note 1 (“I don’t want to eat Toby, he is my friend, and he has always been the most loving, adorable pet. However, God as my witness, I will devour this little guy unless I receive 50,000\$ [sic] USD into my account . . .”).

the right to destroy. The act of destruction is generally seen as *prima facie* wasteful, and often requires justification on its own. While owners do possess some right to dispose of their property as they see fit, none of the common justifications for the right to destroy—as a requirement of economic efficiency, a species of economic liberty, or a method of free expression²⁶—provide a sufficient reason to protect its malicious exercise for self-enrichment at others' expense. In other words, the right to destroy might sometimes be exercised wrongly, and in a way that the law may legitimately prohibit.

A. *Economic Efficiency*

The economic efficiency argument for a right to destroy is relatively simple. Owners sometimes have good economic reason to destroy their property: as Lior Jacob Strahilevitz notes, “[i]t is difficult to imagine how a modern capitalist economy would function if owners were barred from destroying obsolete refrigerators, unfashionable clothes, or rough drafts of written work.”²⁷ The charitable developer referred to in Part II might therefore legitimately seek to replace his historic building with profitable high-rise condos.²⁸ Moreover, allowing the developer to solicit offers for the building's preservation would be efficiency-enhancing: because the payment compensates for the developer's foregone profits, such offers lead to productive exchanges that allocate the resource to its highest-value use. If the public places greater value on the building's continued existence than the developer places on its replacement, the building will be preserved.

The argument from economic efficiency fails, however, to defend extortionate destruction, for the same reason that it fails to defend blackmail. The economic objection to extortion laws has occasionally been characterized as follows: “there are always gains from trade, and blackmail involves a trade.”²⁹ This analysis ignores the crucial role of intent, and the accompanying distinction between offers and threats. Where the threatened act (the revelation of a secret, or the destruction of property) would be of no substantial benefit to the owner, the only purpose of the exchange is to shift the value created by the object's existence from one pocket to another. Like the mugger who announces “your money or your life,” McEahly himself creates a danger, and the only gains from trade are those obtained by avoiding it. Such “unproductive exchange” ceases to promote allocative efficiency.³⁰ Even worse, it may

26. See Strahilevitz, *supra* note 8, at 824-30.

27. *Id.* at 783.

28. See Strahilevitz, *supra* note 8, at 815 (“[I]ncentives for the creation of valuable property might depend on the presence of a robust right to destroy.”).

29. Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 668 (1988) (criticizing such a view).

30. Cf. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 84-86 (1974) (describing unproductive

encourage individuals to make unproductive investments in Picassos, manuscripts, or rabbits with the sole intent of threatening their destruction. As Judge Douglas Ginsburg and Paul Shechtman note, legalizing blackmail would encourage individuals to dig up dirt, at real economic cost, in order to be paid to bury it again.³¹ A law against extortionate destruction would prevent such wasteful investments, while preserving the possibility of legitimate commercial offers.

B. *Economic Liberty*

An economic liberty to destroy one's possessions is assumed by James Lindgren in his famous work on blackmail.³² Lindgren argues that a theory of coercive threats cannot explain blackmail's wrongness, for such coercion may be found in ordinary business transactions: "a farmer may threaten to destroy his crop unless buyers pay a higher price for it."³³ Such conduct, Lindgren argues, is an entirely legitimate aspect of the bargaining process, and adds that "almost everyone would agree that [such practices] constitute legitimate bargaining behavior."³⁴

Lindgren, however, does not address the question at length, so it is unclear why he believes such practices are legitimate, or on what grounds he would defend the right to destroy. Indeed, given the traditional Lockean prohibition of waste, one would expect the default conclusion of such natural-economic-rights reasoning to point the other way.³⁵

Nor would the fact that such threats might be made in ordinary business transactions necessarily render them acceptable. Deception is also frequently employed in ordinary bargaining, yet when it rises to the level of fraud, it is prohibited by law. An extortion statute should surely be drafted to avoid punishing *innocent* bargaining—involving, perhaps, disagreements and uncertainties regarding the value of destruction. It might even, in an excess of caution, incorporate a requirement that the destruction be of no substantial benefit to the owner.³⁶ Yet were the owner to derive no substantial benefit from

exchange).

31. Ginsburg & Shechtman, *supra* note 24, at 1860.

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

33. *Id.* at 712. Note that such threats require market power to be effective, since destroying crops in a competitive market would have little effect on the going price.

34. *Id.*

35. See JOHN LOCKE, *Second Treatise of Civil Government*, in THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 3, 17 (J.W. Gough ed., Blackwell 1946) (1690) ("Nothing was made by God for Man to spoil or destroy."), *quoted in* Strahilevitz, *supra* note 8, at 789.

36. *Cf.* MODEL PENAL CODE § 223.4(7) (1980) (requiring that the threatened harm "not benefit the actor"). The statute could, of course, prohibit demanding any sum that unreasonably exceeds the benefit of destruction—for example, knowingly demanding five million dollars in ransom to preserve a building whose destruction would only bring in one million dollars. Such an approach, however, may pose the

Saving Toby

the destruction, and were the proposed exercise of the right purely malicious, there would seem to be no substantial justification for allowing the threat as a bargaining chip.³⁷

C. *Expressive Value*

An alternative justification of the right to destroy is advanced by Strahilevitz, who discusses at length the possibility that destruction may serve expressive values. For example, a great deal of expressive value might be derived from acts such as burning a flag, or being buried with one's wedding ring.³⁸ This justification, however, does not explain why the right to destroy should be regarded as so fundamental as to protect even its extortionate use. Perhaps those who wish to destroy their wedding rings should be allowed to do so; where the destruction would be of substantial expressive benefit, perhaps they should even be allowed to solicit offers for the rings' preservation. However, a recognition of expressive values does not justify a right to destroy where the owner's intent is not expressive, but extortionate. Toby's owner does not commit himself to destruction to achieve a legitimate pre-existing expressive goal; rather, he does so in order to obtain property from others.³⁹ Courts have traditionally taken a dim view of the expressive value of extortionate threats.⁴⁰

D. *Destruction and Blackmail*

The argument here could be put more generally. The motive with which a right is exercised can affect both its moral and its legal standing. A natural comparison is with the law of "spite fences": the owner of property may

danger in some cases of mistaking well-intentioned but unrealistic offers for malicious threats. *See id.* § 223.4 cmt. 2(k) (noting that the actor ought to "escape criminal conviction if he shows a legitimate interest even though his demand be excessive or unreasonable").

37. To paraphrase Henry E. Smith's article on blackmail, the question of who possesses the right to threaten destruction raises the question of "how fine-grained the rules of original entitlement should be." Certain areas of immoral coercion might be tolerated, since "[r]esulting transactions of which we disapprove may be very hard to separate as a class from those which are useful." Henry E. Smith, *The Harm in Blackmail*, 92 NW. U. L. REV. 861, 886 n.78 (1998). There is little reason, however, to think that particular cases of coercion—including those of extortionate destruction—cannot be distinguished in this way. *Cf.* NOZICK, *supra* note 30, at 171 ("My property rights in my knife allow me to leave it where I will, but not in your chest").

38. *See* Strahilevitz, *supra* note 8, at 800-03, 824.

39. *See supra* note 25. Because it does not take sufficient account of the destroyer's motive, Strahilevitz's proposed safe harbor mechanism for testamentary destruction might inadvertently provide a legal shield for extortion. Strahilevitz proposes that testators be allowed to order the destruction of property after their death, so long as they have marketed (and refused offers for) a future interest in the property during their lifetimes. Strahilevitz, *supra* note 8, at 848-51. However, by securing the testator's legal position, this safe harbor mechanism would help guarantee the credibility even of malicious threats to have valuable property destroyed.

40. *Cf.* *Virginia v. Black*, 538 U.S. 343, 359 (2003) (discussing the limited First Amendment protection of a "true threat").

possess a legal right to build a fence that blocks his neighbor's view, but building such a fence *maliciously* may be unlawful.⁴¹ Although not every malicious act is (or ought to be) against the law, the above discussion indicates that in the particular case of extortionate destruction, the nature of the threat eliminates any general presumption that might otherwise support a legal right to destroy. In the absence of such a presumption against government interference, the law may legitimately hold that it is unlawful to threaten maliciously what would, under other circumstances, be entirely lawful to do. This is, again, precisely what happens in the case of blackmail.

Toby's predicament may thus have important implications for the ongoing debate over the wrongness of blackmail. Most theoretical discussion of blackmail has focused too intently on the specific contours of the existing law, a deficit that the unusual case of a threatened rabbit throws into stark relief. Some scholars, such as Lindgren, argue that the problem with blackmail consists in its misuse of third-party leverage: the blackmailer threatens the victim with a diminished reputation in the eyes of *others*.⁴² The threat to kill Toby, however, if properly analogized to blackmail, is inconsistent with this approach; the threat might have been made to a single person, and involves no abuse of third-party leverage. Other theorists, like George Fletcher, claim that the wrongness of blackmail stems from the ongoing relationship of dominance over the victim;⁴³ but had McEahly offered to *sell* Toby to his supporters for \$50,000, their relationship would have ceased after the sale. Still others, like Henry Smith, justify the prohibition of blackmail by the danger that victims will cause harm to maintain their secrecy;⁴⁴ yet there was little risk of extralegal action by Toby's supporters, whether by committing theft to pay the ransom or by violently retaliating against the rabbit's initially anonymous owner.⁴⁵ None of these theories seem to capture precisely what is *wrong* with the threat on Toby. Instead, the case of Toby so well fits our intuitions about the wrongness of blackmail that it suggests an alternative approach, focused on the blackmailer's malicious intent and willingness to inflict unnecessary harm.

41. See, e.g., MASS. GEN. LAWS ANN. ch. 49, § 21 (West 2005) ("A fence or other structure in the nature of a fence which unnecessarily exceeds six feet in height and is maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance."); RESTATEMENT (SECOND) OF TORTS § 829 (defining a private nuisance by noting that "[a]n intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant and the actor's conduct is (a) for the sole purpose of causing harm to the other; or (b) contrary to common standards of decency"). See generally *Wilson v. Handley*, 119 Cal. Rptr. 2d 263, 267-68 (Cal. Ct. App. 2002) (discussing the history of spite fence laws).

42. See Lindgren, *supra* note 32.

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

44. Smith, *supra* note 37.

45. More fundamentally, such a view does not explain why the victims of blackmail are left feeling *wronged*, even if they meekly pay what the blackmailer demands. The wrong of blackmail seems to explain a victim's willingness to cause harm to prevent it, rather than vice versa.

Indeed, the law of blackmail in the United Kingdom places near-conclusive weight on such factors.⁴⁶

V. CONCLUSION

The above discussion suggests that legislatures consider a criminal offense of extortionate destruction, known perhaps as “Toby’s Law.” The following language might serve as an example for such offenses:

“A person is guilty of extortionate destruction if, with wrongful intent to obtain property of another, he threatens to destroy property, where such destruction under the circumstances would not substantially benefit the owner.”

The offense, as drafted, has three crucial features. First, it is limited to threats to destroy property, rather than attempting to address coercive threats generally.⁴⁷ Second, the intent must be wrongful; the actor must seek illegitimately to obtain property to which he has no rightful claim. Third, the destruction must not be of substantial benefit to the owner; the offense thereby excludes cases in which the owner derives substantial expressive or economic value from destroying the property, and provides a safe harbor for legitimate offers stemming from disagreements about the value of such destruction.⁴⁸

This model text should not be taken as the final word, but rather as a template for future reform. The threat to kill Toby does not merely betray a depraved indifference to leporine life, but identifies a dangerous oversight in the law of extortion. Legislatures should act to close this loophole, lest future artworks, antiques, and bunny rabbits come to suffer Toby’s fate.

46. Under § 21(1) of the Theft Act 1968, a person commits blackmail “if, with a view to gain for himself . . . he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—(a) that he has reasonable grounds for making the demand; and (b) that the use of the menaces is a proper means of reinforcing the demand.” See *R. v. Garwood*, (1987) 1 All E.R. 1032 (A.C.) (Eng.); Lamond, *supra* note 7, at 216 n.2.

47. Like Strahilevitz, I will not attempt here to give a complete account of the meaning of “destroy.” See Strahilevitz, *supra* note 8, at 792-94.

48. The benefit must also be judged “under the circumstances”: a hearty rabbit stew might sometimes be a substantial benefit, but not at the price of \$50,000. If the legislature chose, a minimum value could be established for the amount demanded, so as to avoid entangling the law in minor cases. Alternatively, following the United Kingdom’s example, see *supra* note 46, a further element of *mens rea* might be introduced to excuse those who make threats “in the good-faith belief” that the destruction would be of substantial benefit. Such an element would do much to reduce *ex post* judicial review of the bargaining process, while still allowing for the prosecution of explicit extortion.

