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Diritto Penale Contemporaneo

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REVISTA TRIMESTRAL DE DERECHO PENAL
A QUARTERLY REVIEW FOR CRIMINAL JUSTICE



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The Market for Gossip: Punish Paparazzi and You Will Produce Inefficiency*

El mercado de chismes: castiga a los paparazzi y producirás ineficiencia

Il mercato del gossip: punisci i paparazzi e produrrà inefficienza

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EXTORSION

ABSTRACTS

What do you call the action of digging up dirt that otherwise would remain buried, and then reburying it after being paid? *Blackmail* is probably the most intuitive answer. *Unproductive activity* is the most bizarre, unless you are an economist. *Business* is the answer that springs out when the dirt at stake is a piece of gossip regarding very famous people. Yet, in Italy, none of these answers is correct. In Italy, the act of digging up dirt to rebury it once paid is called *extortion*, and it is a criminal offence that is harshly punished. Starting from a case that made a stir in Italy – the case of Fabrizio Corona – the paper analyses Italian criminal law on extortion, discussing the values justifying its harsh punishment as well as the consequences that the lack of a crime of blackmail produces. Then, the paper explores the economics of the mere act of “digging up dirt, to rebury it in exchange for money”, so as to show that, within the market for gossip, this conduct may be an efficient behaviour. Next, the paper discusses the conflict between right of image and social welfare as the values underpinning the (Italian) criminal law and the law and economics approach respectively. Finally, on the bases of these insights, the paper suggests how to optimally reform the criminal law about the act of “digging up dirt to rebury it in exchange for money”.

¿Cómo llamas a la acción de desenterrar información que de otra manera permanecería enterrada y luego volver a enterrarla después de recibir dinero? *Chantaje* es probablemente la respuesta más intuitiva. *Actividad improductiva* es la más extraña, a menos que sea economista. *Business* es la respuesta que surge cuando lo que está en juego es un chisme sobre personajes famosos. Sin embargo, en Italia, ninguna de estas respuestas es correcta. En Italia, el acto de desenterrar información para volver a enterrarla una vez pagada se llama *extorsión*, un tipo penal que se castiga con dureza. Partiendo de un caso que causó revuelo en Italia, el caso de Fabrizio Corona, el trabajo analiza el tipo penal italiano de extorsión, discutiendo los valores que justifican su severo castigo, así como las consecuencias que produce la falta de un delito de chantaje. Luego, el trabajo explora la economía del mero hecho de “desenterrar información para volver a enterrarla a cambio de dinero”, para mostrar que, dentro del mercado del chisme, esta conducta puede ser eficiente. A continuación, el artículo analiza el conflicto entre el derecho a la imagen y el bienestar social como los valores que sustentan, respectivamente, el derecho penal (italiano) y el análisis económico del derecho. Finalmente, sobre la base de estos asuntos, el artículo sugiere cómo reformar de manera óptima el derecho penal italiano sobre el acto de “desenterrar información para volver a enterrarla a cambio de dinero”.

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Come chiamare la condotta di chi rivela informazione che altrimenti rimarrebbe sepolta, per poi seppellirla di nuovo dopo essere stati pagati? *Ricatto* è probabilmente la risposta più intuitiva. *Attività improduttiva* è la più bizzarra, a meno di essere un economista. *Business* è la risposta quando è in gioco un pettegolezzo che riguarda persone famose. Eppure, in Italia, nessuna di queste risposte è corretta. In Italia, l'atto di rivelare informazione per poi risepellirla una volta pagati si chiama *estorsione*, ed è un reato che prevede una sanzione severa. Partendo da un caso che ha fatto scalpore – il caso di Fabrizio Corona – l'articolo analizza il diritto penale italiano in materia di estorsione, discutendo i valori che ne giustificano la severa punizione e le conseguenze che produce l'assenza di un reato di ricatto. Quindi, il lavoro esplora gli aspetti economici di tale condotta e mostra che, con un mercato del gossip, essa può essere un comportamento efficiente. Successivamente, l'articolo discute il conflitto tra diritto all'immagine e benessere sociale come valori alla base, rispettivamente, del diritto penale (italiano) e dell'analisi economica del diritto. Infine, sulla base di tali assunti, il lavoro suggerisce come riformare in modo ottimale il diritto penale italiano a proposito di tale condotta.

SOMMARIO

1. Introduction. – 2. The Case of Fabrizio Corona in the Action. – 3. Italian Criminal Law: Crackdown and Serious Gaps. – 4. The Economics of Digging up Dirt. – 5. A Clash of Values. – 6. What Solution to Undertake? A Possible Reform of Italian Criminal Law.

1. Introduction.

In 2011 Fabrizio Corona, the manager of a group of paparazzi who took embarrassing pictures of some very important people, was found guilty of extortion because he threatened those celebrities with selling their pictures to gossip magazines unless they paid him.

The case caused quite a stir — and not only because of the peculiar personality of Fabrizio Corona. Many people found his offer to bargain nothing more than an immoral tool for extorting money from celebrities. Moreover, they argued that, because of the low quality of the pictures at stake, Corona's real intent was not to inform the public about celebrities' lives but was to blackmail celebrities. Others, though, deemed Corona's actions as falling under one of various usages that Corona could have made of the pictures that he had lawfully obtained. In addition, they argued that celebrities were well aware of the value of those pictures and, hence, of the possible benefits of bidding to get them reburied. Indeed, during the many trials that were carried out, some celebrities testified that they appreciated Corona's conduct because it gave them a way out — even a quite cheap one — from potential scandals or, better, from what Corona portrayed to his customers/victims as potential scandals.

Corona's judicial affair has gone beyond his conviction by the Italian Cassazione in 2011, for various aspects of his conduct and detention called for judicial determinations. However, these further aspects go beyond the scope of the present paper, which is about the main point of the whole story, namely the legal and economic rationale of criminally punishing a conduct like Corona's with respect to pictures of that sort.

The paper moves from those facts to discuss whether and how the mere act of 'digging up dirt to rebury it in exchange for money' should be (harshly) punished. Sections II and III take inspiration from the Italian criminal law to examine, from a criminal policy perspective, whether the crime of extortion is appropriate for the case of paparazzi who sell hot information back to their famous victims. It concludes that, indeed, in the case of paparazzi extortion is nothing more than a symbolic measure. Section IV takes distance from the way in which Italian criminal law characterizes the act of 'digging up dirt to rebury it in exchange for money' to discuss the economics of this behaviour. It concludes that, under some conditions, within the market for gossip, punishing paparazzi may be inefficient. Section V focuses on the clash between the different values underpinning the Italian criminal law and the law and economics approach. Finally (Section VI), the paper considers whether and how Italian criminal law should change in relation to the teachings coming from both criminal policy and the economic analysis of law.

2. The Case of Fabrizio Corona in the Action.

The so-called "Corona case" occupied the Italian magazines, newspapers and gossip media for many years, since 10th December 2009. The Court of first instance¹ found Fabrizio Corona guilty of the crime of extortion for the act of, as we put it, "digging up dirt to rebury it in exchange for money".

The facts at stake were the following: the defendant was the owner of a photographic agency; in his professional activities he obtained potentially harmful, or considered as such, images of very important persons, sportsmen, businessmen and celebrities. He then made an offer to these people to rebury the images in exchange for money as an alternative to disclosing them to newspapers. The Court of first instance, in affirming the criminal responsibility of the defendant, held that such conduct had the typical features of the *threat* involved in the

¹ Tribunale di Milano, December 10, 2009 (dep. March 4, 2010), searchable in www.penalecontemporaneo.it (last visited on October 23, 2019).

crime of extortion, although the accused had the right to sell the pictures of those celebrities. Indeed, according to the Court, Corona misused his right by pursuing a goal different from the journalistic one – the only goal that the law protects when the sale of pictures and other hot information is at stake. Therefore, Corona’s victims had legal reasons to fear damage to their image and to complain about Corona’s conduct.

The Court of appeal² reformed the decision of the Court of first instance and partially acquitted the accused, holding that the offence was not fulfilled in two of the four episodes disputed. Specifically, in the Court’s opinion the images appeared harmless to the reputation of the alleged victims and, therefore, the threat of publication was deemed unfit to coerce their will and to exert serious pressure on their freedom of self-determination.

The counsel for the defendant appealed against the judgment to the Cassazione.³ In a nutshell, the counsel for the defendant complained about the absence of unjust profit, as the pictures had been taken in fulfilment of the conditions that made them publishable and, therefore, were considered to be marketable. In addition, according to counsel, a real offensive potential was absent from the images offered to interested parties – a circumstance which would have resulted in the loss of the essential features of the threat to coerce the will of the offended people.

The Cassazione⁴ held that one commits the crime of extortion if, having lawfully acquired images relating to the private life of a person – even of a very important person – one offers to rebury those pictures in exchange for money. In particular, the Court argued that, because of the rules for the protection of personal data, the right to sell pictures to newspapers cannot be invoked in order to legitimize other forms of commercial exploitation. In other words, the Cassazione dismissed the appeal by affirming the principle that even the exercise of an option or of a right (such as the right to sell hot information) becomes *contra ius* and, hence, may also constitute a crime, if such an exercise is aimed at achieving purposes not permitted by the law (such as the goal of having that information reburied in exchange for money), or if the results are not fitting and correct.

3. Italian Criminal Law: Crackdown and Serious Gaps.

Starting from the case of Fabrizio Corona, this part of the paper describes the Italian crime of extortion so as to discuss whether the criminal offence is well-structured to both protect the interests at stake and give fair punishment to the offender. The question we ask is whether the act of “digging up dirt to rebury it in exchange for money” can be traced back to the crime of extortion and then punished with a penalty as high as that provided for extortion.⁵

Article 629 of the Italian Criminal Code defines the crime of extortion by punishing the conduct of one who, by violence or *threat*, forces another person to do or omit something, thus procuring for himself or others an unjust profit and causing a loss to the victim. The crime of extortion is punished with imprisonment from 5 to 10 years and a fine running from € 1,000 to € 4,000. It belongs to the category of crimes which require the victim’s cooperation,

² Court of Appeal of Milan, December 2, 2010, searchable in www.penalecontemporaneo.it (last visited on October 23, 2019).

³ Cassazione is the highest Italian Criminal (and Civil) Court.

⁴ Cassazione, Section II, October 20, 2011, no. 43317, Corona, in *Cassazione penale*, 2012, pp. 4092ff. Also searchable in www.penalecontemporaneo.it (last visited on October 23, 2019). See NOTARGIACOMO (2012) and TARANTINO (2012) as notes on the decision.

⁵ For brevity’s sake, the research question of this work addresses the sole crime of extortion, that is, the one the accused was charged with in the case at stake. Thus, we neglected to investigate other relevant issues. Consider, first of all, the debate that revolves around balancing the conditions which justify, by virtue of the exercise of the right to press, the commission of an objectively defamatory act. This issue has received scholarly attention: see, in the handbooks, MANTOVANI (2019), p. 221; FIANDACA and MUSCO (2013), p. 118; see also, *ex multis*, BONANNO (1985), BURZI (2007), GULLO (2013), PACE and PETRANGELI (2001), PEZZELLA (2009), TESAURO (2005), TURCHETTI (2014). That issue has also been subjected to judicial review several times. Finally, the question relating to the balance between freedom of expression of thought and protection of reputation was addressed by the Italian Constitutional Court. The Court, with ordinance no. 132, filed on June 26, 2020 (Red. Francesco Viganò), has postponed to the hearing of June 22, 2021 the decision on the issues of constitutional legitimacy – raised by the Courts of Salerno and Bari – of the prison sentence provided for in case of defamation by means of press, in order to allow the legislature to amend the existing law. The Constitutional Court has underlined how the balance expressed by the current legislation has become inadequate also in the light of the jurisprudence of the ECtHR. The new balance will have to “combine the requirements of guaranteeing journalistic freedom ... with the equally pressing reasons for the effective protection, from any abuse of those freedoms by journalists, of the victims’ individual reputation, victims who are now exposed to even greater risks than in the past. Suffice it to think, in this regard, of the very rapid and lasting amplification of the defamatory accusations caused by social networks and internet search engines” (Constitutional Court, ord. June 26, 2020, no. 132, Pres. Cartabia, Red. Viganò).

as opposed to that of crimes of unilateral aggression, because extortion also focuses on the behaviour of the victim who, under violence or threat, consciously and voluntarily collaborates with the offender. The crime is multi-offensive as the legal value protected is twofold: the personal assets of the victim and his freedom of self-determination in relation to the act of disposing of his assets. In the crime of extortion the threat appears to be the means by which the agent coerces the will of the victim in order to achieve a further result, offending the above legal values. The offender places the victim in face of a choice: either suffer the evil threatened or comply with the demands of the offender. In other words, in case of extortion, the criminal conduct results in the use of threat (to publish pictures that are represented as compromising on gossip magazines and other media) directed, first, to create a state of mental duress and, therefore, to obtain unjust profit and loss (payment of a sum of money for the purchase of the pictures). Finally, what characterizes the crime of extortion is the offensive attitude of the conduct: the offender gets the cooperation of the injured person, who undergoes a constriction and, therefore, is injured in terms of his self-determination freedom of asset disposition.

3.1. *The Seriousness of the Offence.*

In the Corona case the conduct is characterized as threatening. As said above, a threat is the means used to both coerce others' freedom of self-determination and inflict a loss to the victim's assets. Indeed, the damage in the crime of extortion is twofold and consists of: (i) the harm suffered by the victim, and (ii) the extorter's unfair profit.

What justifies the particular harshness of the punishment is, first and foremost, the seriousness of the conduct and its potential offensive attitude against both the economic and the personal spheres of the victim. In addition, from a criminology and criminal policy perspective, we know that the harshness of the punishment derives from the fact that Mafia-type criminal organizations use extortion to obtain wealth. The so-called "pizzo" is the form of extortion that arouses, in fact, most social alarm and that is immediately associated in people's minds with the word "extortion". Pizzo is a kind of payment imposed by Mafia-type criminal organizations on "protected" firms. In light of this, hence, it is clear that in the act of "digging up dirt to rebury it in exchange for money" nothing of this sort takes place.

Besides, a threat is a type of behaviour sanctioned across the entire Italian legal system because of its aggressive nature. However, in response to a penalty as high as that provided by extortion, to be relevant the compulsion must present a character of particular intensity which goes beyond the boundaries of those forms of pressure that are considered socially tolerable.⁶ Also from this perspective, the act of "digging up dirt to rebury it in exchange for money" does not seem to express a coercion so intense that goes beyond the boundaries of those forms of pressure that are considered socially tolerable.

3.2. *The Object of the Threat: the Harm Threatened.*

A threat is expressed when the extorter predicts future and unjust harm to the victim – harm that depends on the offender's will or behaviour as well as on what the offender depicts to the victim as dependent on his will and behaviour.

There are many forms in which a threat is carried out. It may be explicit or implicit, overt or disguised, direct or indirect, actual or figurative, oral or written, definite or indefinite. However, it is required that the threat be serious and credible enough to play a significant role in coercing the will of the victim.⁷

It will be up to the judge to evaluate whether, *in practice*, the threat is effective enough to intimidate the victim, by considering the credibility of the threat, the quality of the harm, as it can be objectively appreciated, and the link between the seriousness of the threatened harm, as perceived by the victim, and the importance of the threatened legal interests.

The plurality of forms in which the threat takes shape is reflected in the variety of values

⁶ See, e.g., PROSDOCIMI (2006), pp. 680ff.

⁷ See, e.g., FIANDACA and MUSCO (2014), p. 160.

that can be affected by the conduct.⁸

In the case of “digging up dirt to rebury it in exchange for money”, one can identify the right of image as the protected value. Such a reconstruction moves from the analysis of the legislation on the protection of personal data. Pursuant to Art. 2 - c) l. 675/1996 (now Art. 4 of the European GDPR, *i.e.* General Data Protection Regulation), “any information concerning an individual, legal person, entity or association, identified or identifiable, even indirectly, by reference to any other information...” is personal data, images included.⁹ According to this view, the threatened harm causes damage that lurks on the diffusion and use of images as such because such diffusion and use are deemed as forms of unauthorized disclosure of personal information. In other words, this damage occurs regardless of the prejudicial capacity of the content of the images to harm the honour and reputation of the offended party.¹⁰

It seems clear that such an approach leads, at least theoretically, to an enlargement of the area of the criminal act of extortion.

3.3. *The Injustice of the Threatened Harm.*

The injustice of harm expresses a normative concept. This element helps to delineate the threat as a fact of oppression. As already noted, the type of oppression considered relevant as a threat consists of the prospect of an unjust offence to the victim’s legally protected interests.¹¹

There are no doubts about the injustice of such harm as established through the provision of a criminal sanction. It is more difficult to find injustice in a threat when it is used as a means to an ulterior purpose. In this case, it seems necessary to consider further the profile represented by the relationship between the harm threatened (the means) and the condition imposed by the threat (*i.e.* the specific end of the offender). The harm is unjust when the law does not accept its representation as a means for achieving the ultimate goal of the offender.¹² The problem with this perspective is evident, since a means which is considered lawful in itself is used to achieve an unfair purpose.

In the present case, in fact, the defendant lawfully acquired pictures relating to the private lives of well-known sportsmen, businessmen and celebrities portrayed in situations which were potentially compromising to their images. The defendant submitted the following alternative to the people portrayed: on the one hand, they could have had the embarrassing pictures reburied in exchange for money; on the other hand, the embarrassing pictures could have been sold to newspapers and, therefore, disclosed by the media. The Cassazione has recognized the crime of extortion in the described conduct due to the absence of a legitimate relationship between the means – the threat by the owner of the photographic agency of exercising his right to sell and publish the pictures – and the aim – the carrying out of an advantage which is unfair because the law on personal data does not allow any form of commercialization of such pictures other from sale to newspapers.

This apparent inconsistency finds a *ratio* in the need to balance different interests and values, and a limitation in the interaction between the spheres of freedom of the individuals. It is quite clear, in fact, that those who have the opportunity to take advantage of a situation compliant with the law do not do any injustice and do not pose any threat, even when the would-be situation that they represent entails negative consequences for other people. For

⁸ There are many values targeted by such threats, moving from personal holdings (such as money) to personal interests, such as life or personal integrity, to honour and reputation as qualities of the personality of the victim, to the tranquillity of your home as what helps people to shelter their well-being. Additionally, the Cassazione has recognized the relevance of the threat to terminate an emotional connection or affiliation of the victim with a group of friends; see Cassazione, Section II, July 12, 2007, C. and others, in *Foro italiano*, 2008, II, c. 168.

⁹ Art. 4 of the Regulation (EU) 2016/679 (General Data Protection Regulation) provides that “personal data” means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”. The European Data Protection Regulation is applicable as of May 25, 2018, in all Member States to harmonize personal data protection laws across Europe. The definition adopted by the GDPR is more complex than the previous one, but still supports and justifies the reasoning that the Italian Court developed in the case here at stake.

¹⁰ The opinion of the Cassazione in the Corona case reads (§ 2 of the legal reasons): “The principle is now established that no one may be expropriated, except in certain circumstances and in view of the fulfilment of certain interests equally deserving of protection, of the exclusive right to dispose of his image like any other personal data”.

¹¹ GATTA (2013), pp. 177ff.

¹² GATTA (2013), pp. 187ff.

example, no creditor is punished for representing to his debtor the negative consequences that will follow from the insolvency of the debtor.

However, injustice can still exist: although absent in the means, it may lie in the purpose; that is the real reason for the use of the chosen means. The requirement of an unjust harm is, therefore, a necessary condition for the qualification of that behaviour as criminal, because it allows the judge to stigmatize only those threats that are an expression of socially intolerable abuse.

In our case, it should be noted that the freedom of the press responds to the logic of balancing conflicting interests and values. It justifies the publication of embarrassing and/or compromising images concerning the private lives of celebrities because of the public interest in those images, and in the habits of the same celebrities, who – it should not be forgotten – derive profit from their notoriety.

The freedom of the press includes the economic use of the images themselves, as long as the profits are derived, as pointed out by the Cassazione, in a manner which is consistent with the law, such as selling the pictures to the media because of the public interest in those images. If, as in the case under consideration, purchasing images is proposed to the subject of the photograph in order to prevent their publication, then the freedom of the press is abused because there is not any public interest to protect.

3.3.1. *The Injustice of the Profit.*

Any profit that is not protected by the law, directly or indirectly, is to be considered illegitimate. Again, the profit is not only unjust when it is obtained by illegal means but also when it is obtained by lawful means in order to achieve unlawful purposes; in this case, indeed, it is not possible to find any legally protected claim in the profit.¹³

The unjust profit consists of the amounts demanded for selling photographic images to the portrayed subjects.

It is not disputed that the accused, if he had sold the pictures to the media, would have been entitled to payment from the media. However, it is impossible to recognize the legitimacy of the payment obtained by this different transfer of the images to the subject of the photograph, to prevent publication, since the rules only protect the public interest in the information.

According to the Cassazione, the only legal form of commercial use of the personal data of others is represented by publication in the press, while the equation advertising–marketability of the images, as backed by the defence, would lead to enlarge the boundaries of the lawful communication of personal data, up to a substantial freedom of supply to an indeterminate audience of potential buyers. The enlargement of the area of the marketability of “products” concerning the person would involve distortive effects in the market in which basic human values are involved.

3.4. *The Link Between Form and Offensive Attitude in a Threat.*

A threat, or moral violence, consists of the representation of unlawful harm as causally dependent on the will of the agent, who is able to injure the integrity of the psychological well-being of the victim of the offence and his freedom of self-determination.

In a society where relationships are becoming more complex and the boundaries of individual freedom seem to be fading under a multiplicity of influences, the need to balance different interests and values is undeniable.¹⁴ It is from this perspective that we should read the legislature’s choice not to protect the above outlined legal interests on each side and against any possible aggression but to select the most relevant offence in the light of those legal interests.

A first element of reflection must be inferred from the legislative provision which treats violence and threat as alternative and fungible modes of conduct, equalizing the two in terms of penalties. From this consideration follows the need to use a strict understanding of what

¹³ COASE (1988), p. 655.

¹⁴ A discussion of the topic can be found in VIGANÒ (2002), pp. XIIIff.

counts as a threat, one capable of excluding conduct that does not produce any harm from the viewpoint of criminal law.¹⁵

At this point, it is necessary to consider the link between form and offensive attitude in a threat, so as to reflect on how the attitude of the offensive conduct – *i.e.* the ability to intimidate and harm the psychic integrity and freedom of self-determination of the victim – depends on the specific features of the victim as they can be appreciated in relation to the specific fact of oppression.¹⁶ In short, a threat is not any conduct capable of inducing fear or producing a coercion effect. Indeed, there are many forms of pressure and influence that induce fear and affect the behaviour of others while not having the character of a threat.

The nature of a threat requires shaping the means by taking into account its structural requirements, so as to delimit the boundaries of the means by selecting those cases in which there is a clear impingement of the offensive behaviour on one or more values.

The form of the means of the offence does not affect the credibility of the threat, namely its ability to strike fear in the recipient. The effective potential for harm must be evaluated by taking into account all the circumstances of the case: including the personal conditions of the author and of the victim, recognizing or excluding the configuration of the offence committed by means of a threat, depending on whether or not there has been an offence to legal assets (psychic integrity and freedom of self-determination).

The connotation of conduct as threatening and its ability to integrate the structural element of the crime of extortion will be evaluated in relation to the concrete objective circumstances.

The judge should then determine whether conduct has been realized in a typically threatening way, if it has really been to the detriment of the victim, and whether there are causal relationships between the psychological threat and the fear that the offender has inflicted *ab extrinseco* to the victim.

3.5.

The Extortion of “Digging up Dirt to Rebury It in Exchange for Money” – Of Symbolic Measures.

Overall, our analysis suggests that the choice of the Cassazione to bring the act of “digging up dirt to rebury it in exchange for money” under the crime of extortion appear largely symbolic. Behavior such as the one we described continues to occur, and this in spite of the severity of the sanction. This highlights a lack of deterrent effect.

It is also necessary to remember that often the sanctions become stronger when the legislature or the judiciary undergoes pressure by the public opinion. In such contexts, hence, criminalization choices may impose sanctions that are mainly expressive and symbolic with the ultimate result of “talking” not only to the actual or potential offenders, but also to all citizens and potential victims of the crime as so to settle their anxiety. In light of this, hence, the one who “dialogs” with the sanction is not the offender but the victim.

In a criminal policy perspective, if we stretch these considerations to the extreme, we could argue that the crime of extortion is not well-structured to both protect the interests at stake and give a fair punishment to the offender.

And this for what concerns not only the criminal law analysis, but also the criminal policy perspective. Now the time is ripe to switch our point of view and to endorse the law and economics approach.

4.

The Economics of Digging up Dirt.

As is well-known, when we use economics to analyze a piece of law, we must apply a two-prong test: we have to establish, firstly, the conditions under which the conduct at stake harms the social welfare¹⁷ and, secondly, whether the legal rule that punishes that conduct intervenes

¹⁵ PEDRAZZI (1980), pp. 1445ff. and ID. (2003), p. 381.

¹⁶ GATTA (2013), p. 237.

¹⁷ In light of this, our approach diverges from that of Block who, endorsing libertarianism, argues that the law should protect individual freedom and not social welfare. In other words, according to Block, in a liberal society, legally redressable harm should be limited to violations

exactly when harm to social welfare exists (or is likely to exist). Indeed, granted that the social welfare is the quintessential value that the law-and-economics approach protects, a legal rule is inefficient when it forbids a behaviour that increases social welfare.

Hence, in the wake of the case of Fabrizio Corona, we now intend to assess the impact that the combined act¹⁸ of “digging up dirt to rebury it in exchange for money” has on social welfare, by contrasting the state of the world, say **F**, where this act is optimally deterred, with the state of the world, say **P**, where this act is allowed. Afterwards, we will develop the same comparison within the market for gossip. To be sure, in order to make these analyses as complete as possible, we will also appreciate the social impact that some alternative behaviours entail, like the act of “digging up dirt to rebury it”, the act of “digging up dirt to disclose it” and the act of “digging up dirt to sell it to a gossip magazine editor”.

4.1. *Setting The Stage.*

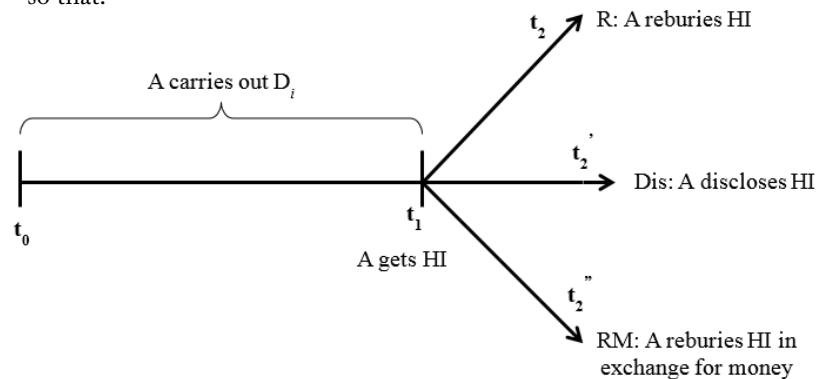
Consider the case of two ordinary individuals, **A** and **B**, whose initial incomes, $I_0(\mathbf{A})$ and $I_0(\mathbf{B})$, diverge because **B** controls some “hot” information about himself, **HI**, which has a certain value, $V(\mathbf{HI})$. Since **A** and **B** are the sole economic agents who act in this opening scenario, t_0 , the social welfare, SW_0 , equates to the sum of their incomes,¹⁹ so that:

$$\begin{aligned} I_0(\mathbf{A}) &= I_0, \\ \text{in } t_0 \quad I_0(\mathbf{B}) &= I_0 + V(\mathbf{HI}), \\ SW_0 &= I_0(\mathbf{A}) + I_0(\mathbf{B}) = 2I_0 + V(\mathbf{HI}) \end{aligned}$$

Now, suppose that there exist some lawful ways, say D_i , whereby **A** can dig up dirt (*i.e.* get **HI** from **B**), in order to:

- rebury it, say **R**
- disclose it, say **Dis**
- or rebury it only in exchange for money, say **RM**

In particular, consider that we can frame and picture these alternatives along the time line, so that:



of rights. Since blackmail results from the combination of two rights, the right to demand money and the right to disclose information, the choice to criminalize blackmail follows from other approaches, such as paternalism or legal moralism. See, *e.g.*, BLOCK and GORDON (1985), GORDON (1993) and BLOCK (1997). As said in the text, we here define the legally redressable harm so as to include negative social consequences. For this approach, see EPSTEIN (1983), COASE (1988) and POSNER (1993).

¹⁸ For the sake of argument, in this section we do not consider whether courts qualify such behaviour as extortion, as the Italian courts actually did, or as blackmail, as US courts would have done. Indeed, in the United States the crime of extortion consists of combining a demand for money (or another valuable consideration) with a threat to do something *illegal*, as in the case when **A** says “Give me \$100 or I will kill you”. Differently, the crime of blackmail requires combining a demand for money (or for another valuable consideration) with a threat to do something *legal*, as in the case when **A** says “Give me \$100 or I will tell everyone that you betray your wife”. In other words, blackmail is different from extortion because blackmail involves the threat to do something that one has the legal right to do, namely revealing important information. See, *e.g.*, FEINBERG (1988), p. 239. We should not marvel, hence, that part of the US legal literature considers blackmail a paradox. For this literature, indeed, no harm could ever result from the mere combination of two acts – the demand and the threat – that are lawful when they occur in isolation from one another. See, *e.g.*, GOODHART (1931), pp. 175-189; CAMPBELL (1939); WILLIAMS (1954); and, more recently, LINDGREN (1984). *Contra*, see, *e.g.*, GORDON (1993) and CLARK (1994). For varying viewpoints on the controversy over blackmail, see BERMAN (1998).

¹⁹ Here we endorse a very simple conceptualization of social welfare, where it is postulated to be an increasing function – *i.e.* the sum – of individuals’ well-being – that here is equalized to individuals’ incomes. We further assume the so-called condition of equal concern – *i.e.* the value of the social welfare does not depend on which individual sees his income increase or decrease.

We name the costs that A sustains in order to dig up dirt in the period running from t_0 to t_1 $C^A(D_i)$,²⁰ and call $B^A(R)$, $B^A(Dis)$ and $B^A(RM)$ the benefits that A enjoys in t_2 , t_2' and t_2'' , respectively;²¹ that is to say, according to the different usages that A can make of the hot information that he got from B. If we assume that A is a rational, risk-averse agent,²² we also know that he chooses how to behave according to the pay-off of each of these optional actions. Therefore, let us analyse these pay-offs.

4.2.

The Economics of Digging up Dirt to Either Rebury or Disclose It.

Let us focus on the act of “digging up dirt to rebury it”, and on the act of “digging up dirt to disclose it”, whose pay-offs are both independent from the existence of the prohibition against “digging up dirt to rebury it in exchange for money”. For example, suppose that A is a *meddler*, who experiences a sort of private pleasure, say P^A , just from knowing the details of someone else’s life, or²³ consider A to be a kind of *moralist*, who enjoys another form of private pleasure, say P^A , from letting other people know some hot details about B’s life, although these people are actually indifferent to that information.²⁴ Either way, A decides to try to know HI, *i.e.* to move from t_0 to t_2 , or from t_0 to t_2' , when the benefits of this behaviour exceed its costs; that is to say, when the following conditions occur:

$$\begin{array}{ll} \text{in } t_2 & P^A > C^A(D_i), \text{ with } B^A(R) = P^A \\ \text{in } t_2' & P^A > C^A(D_i), \text{ with } B^A(Dis) = P^A \end{array}$$

Since B knows about this twofold possibility he tries, first and foremost, to shield his privacy by sustaining some expenses, say $C^B(S_i)$, in the period running from t_0 to t_1 . Then, however, if A gets that information, in t_1 , B loses the value, $V(HI)$, of his hot information. Furthermore, whereas in t_2 B does not suffer any other harm, in t_2' B suffers also the cost, say $C^B(Dis)$, of having his hot information disclosed.²⁵

Therefore, in t_2 and t_2' , *i.e.* when A reburies HI or when A discloses it, the incomes of A and B change in the following ways:

$$\begin{array}{ll} \text{in } t_2 & I_R(A) = I_0 + P^A - C^A(D_i) + V(HI) \\ & I_R(B) = I_0 - C^B(S_i) \\ \text{in } t_2' & I_{Dis}(A) = I_0 + P^A - C^A(D_i) + V(HI) \\ & I_{Dis}(B) = I_0 - C^B(S_i) - C^B(Dis) \end{array}$$

Also, because of the sums of these incomes, in the two scenarios the social welfare is as follows:

$$\begin{array}{ll} \text{in } t_2 & SW_R = 2I_0 + P^A - C^A(D_i) + V(HI) - C^B(S_i) \\ \text{in } t_2' & SW_{Dis} = 2I_0 + P^A - C^A(D_i) + V(HI) - C^B(S_i) - C^B(Dis) \end{array}$$

Hence, granted that when P^A and P^A outweigh $C^A(D_i)$ A actually moves from t_0 to t_2 , or from t_0 to t_2' , should the law prevent these two alternatives ever happening? In other words, granted that we want the law to protect social welfare, should it intervene as so to shape A’s

²⁰ To be sure, nothing excludes $C^A(D_i)$ sometimes equalling zero, such as in the textbook case of a labourer who, while standing on a ladder, accidentally discovers a Catholic clergyman having a love affair with a woman. In this scenario, the labourer does not try to get HI on purpose: he happens to know it a cost that, accordingly, is very near to zero.

²¹ For the sake of simplicity, we do not consider here the benefits that A expects to get from obtaining HI, that is, $E[B^A(R)]$, $E[B^A(Dis)]$ and $E[B^A(RM)]$. Working with these probabilities would make our analysis more precise but not more meaningful as a matter of substance.

²² We assume risk aversion for the sake of simplicity.

²³ Again, it is just for the sake of simplicity that we are not considering the case of an individual who is both a meddler and a moralist.

²⁴ In other words, the case that we are considering here differs from a case where the public, as such, has its own interest in knowing the hot information regarding B, either because B is a very important person (see below Section 4.4), or because this hot information addresses a crime. For example, suppose again that A is a labourer who happens to see a Catholic clergyman in a compromising position, which this time amounts to an act of paedophilia. In this case, the whole of society has an interest in knowing HI – an interest that clearly counterbalances the costs entailed by the acts of digging up dirt and disclosing it. For this last hypothesis, see SHAVELL (1993), p. 1899.

²⁵ In other words, in t_2 the value of the silence of A, who holds HI but does not disclose it, is the lack of $C^B(Dis)$.

incentives to dig up dirt? Should the law act so that the private benefits of A (either the meddler or the moralist) never exceed the costs of digging up dirt?

In order to answer these questions, we must consider the *conditions under which* it is true that SW_R and SW_{Dis} outweigh SW_0 . By making some simple inequalities, we know that:

$$\begin{aligned} & SW_R > SW_0, \text{ when} \\ \text{in } t_2 \quad & 2I_0 + P^A - C^A(D_i) + V(HI) - C^B(S_i) > 2I_0 + V(HI), \text{ that is, when} \quad [1] \\ & P^A > C^A(D_i) + C^B(S_i) \end{aligned}$$

$$\begin{aligned} & SW_{Dis} > SW_0, \text{ when} \\ \text{in } t_2' \quad & 2I_0 + P^A - C^A(D_i) + V(HI) - C^B(S_i) - C^B(Dis) > 2I_0 + V(HI), \text{ that is, when} \quad [2] \\ & P^A > C^A(D_i) + C^B(S_i) + C^B(Dis) \end{aligned}$$

Therefore, the law should allow A (the meddler) to dig up dirt when A's private pleasure in knowing some hot details about B's life overcomes the expenses that both A and B sustain just because of the fact that A is allowed to dig up dirt – *i.e.* **the expenses that A and B should never bear, if the very same act of digging up dirt were forbidden**. Similarly, the law should allow A (the moralist) to dig up dirt when A's private pleasure in disclosing some hot details about B outweighs not only the above expenses, but also the harm that B suffers because of the disclosure of his HI. On the other hand, the law should prevent A from digging up dirt when it is true that:

$$\text{in } t_2 \quad P^A < C^A(D_i) + C^B(S_i) \quad [3]$$

$$\text{in } t_2' \quad P^A < C^A(D_i) + C^B(S_i) + C^B(Dis) \quad [4]$$

In summary, the above analysis shows a very simple point: individuals devote their time and resources to activities that may be either productive or unproductive, *i.e.* to activities that sometimes are social welfare enhancing and other times are socially wasteful. Indeed, **when [1] or [2] hold true, the states of the world in t_2 and t_2' are better than the state of the world in t_0 and, consequently, the acts of digging up dirt to rebury or disclose it are both desirable. Differently, when [3] or [4] hold true, the states of the world in t_2 and t_2' are worse than the state of the world in t_0 and, accordingly, the connected acts become undesirable.** Therefore, an optimal effect-based legal system should allow or forbid the act of “digging up dirt to rebury it” according to whether [1] or [3] are met. Likewise, it should allow or forbid the act of “digging up dirt to disclose it” according to whether [2] or [4] are met.

However, what actually happens is that in general a legal system opts for a second-best solution: it allows the acts of digging up dirt to either rebury or disclose it, even though sometimes these activities make social welfare dwindle, *i.e.* even though it paves the route to some false-negative mistakes. Alternatively, a legal system could forbid even the mere act of digging up dirt, regardless of the usages that individuals make of that “dirt”, arguing that the mere possibility of digging up dirt obliges individuals to devote their time and resources to activities that, sometimes, can turn out to be socially wasteful. On this occasion, the legal system would overlook the cases when these acts enhance social welfare and, hence, it would run the risk of making some false-positive mistakes.

Simply put, an efficient legal system should authorize or punish the acts of digging up dirt “to rebury” or “to disclose” it depending on the sole specific circumstances that forecast the effects that these very same acts produce on social welfare. When it does not do it, by allowing or forbidding these acts indiscriminately or based on other circumstances, it is either under-deterrent or over-deterrent.

That being said, what about the act of digging up dirt to rebury it only in exchange for money?

4.3. *The Economics of Digging up Dirt to Rebury It in Exchange for Money.*

In connection to the act of digging up dirt to rebury it in exchange for money, the law plays just one of the above-mentioned roles: **it excludes the possibility that A will ever have enough incentives to endorse this action.** Indeed, given our shared definition of what optimal deterrence is, we know that in F – that is, just the state of the world where optimal deterrence takes place – the optimal sanction for such behaviour, that is $S_F^A(\text{RM})$, equals the benefits, $B_F^A(\text{RM})$, which A gets from the deal with B, whatever the amounts of these benefits are, so that:

$$\begin{aligned} & C_F^A(D_i) + S_F^A(\text{RM}) > B_F^A(\text{RM}), \\ \text{in } t_2'' & \text{ even when } C_F^A(D_i) \rightarrow \varepsilon, \text{ with } \varepsilon > 0 \text{ and } B_F^A(\text{RM}) \rightarrow \infty \\ & \text{because } B_F^A(\text{RM}) = S_F^A(\text{RM}) \end{aligned}$$

In other words, in F, A cannot have any reason to *move* from his initial position, so that:

$$\text{in } t_2'' \quad I_{\text{RM}}^F(A) = I_0(A)$$

Equally, in F, B does not take any particular action because, in knowing the above pay-off for A, B does not need to sustain the expenses necessary to protect his privacy. In other words, in F, B also cannot have any reason to *move* from his initial position and it is true that:

$$\text{in } t_2'' \quad I_{\text{RM}}^F(B) = I_0(B)$$

As a result, the social welfare of the state of the world where the act of “digging up dirt to rebury it in exchange for money” is optimally deterred does not dwindle: it equals the initial social welfare:

$$\text{in } t_2'' \quad \text{SW}_{\text{RM}}^F = \text{SW}_0 = 2I_0 + V(\text{HI})$$

Now, let us consider how this analysis changes in P, that is, when the act of “digging up dirt to rebury it in exchange for money” is allowed. All other things equal, say **Euros** are the money that A receives in order to return the hot information to B, that is, $B_P^A(\text{RM})$. **If A is a rational agent, we know that this amount of money equals the maximum value, i.e. $V(\text{HI})$, that B gives to the hot information.** In addition, for the sake of simplicity, assume that A is not a meddler or a moralist, i.e. that his only interest in getting the hot information lies in the sum of money that he can get from re-selling the information to B.²⁶ In other words, he does not find any private pleasure, the above P^A and P^B , in digging up dirt, so that:

$$\text{in } t_2'' \quad B_P^A(\text{RM}) = \text{Euros} = V(\text{HI})$$

Rationally, A offers the deal to B when:

$$\text{in } t_2'' \quad V(\text{HI}) > C_P^A(D_i)$$

In P, B will always have incentives to sustain the expenses, $C^B(S_i)$, necessary to protect his privacy because B knows that, in P, whoever is interested in extracting some hot information from him just wants to trade it for money. In addition, because of the bargain with A, B pays Euros to A, gets back $V(\text{HI})$, and does not suffer any loss due to disclosure; that is, B does not suffer $C^B(\text{Dis})$.

Therefore, in terms of the incomes of A and B, it is true that:

$$\begin{aligned} & \text{in } t_2'' \quad I_{\text{RM}}^P(A) = I_0 + V(\text{HI}) - C_P^A(D_i) \\ & \text{in } t_2'' \quad I_{\text{RM}}^P(B) = I_0 + V(\text{HI}) - C^B(S_i) - V(\text{HI}) \end{aligned}$$

Accordingly, the social welfare of the state of the world where the legal system allows the

²⁶ Otherwise, we should add P^A and/or P^B to $B_P^A(\text{RM})$.

act of “digging up dirt to rebury it in exchange for money” is:

$$\text{in } t_2 \quad \text{SW}_{RM}^P = 2I_0 + V(HI) - C^A(D_i) - C^B(S_i)$$

Hence, whether the law should allow the act of “digging up dirt to rebury it in exchange for money” depends on whether the social welfare in P outweighs the social welfare in F that, in turn, equals the initial social welfare. By making other simple inequalities, **we know that this never happens because:**

$$2I_0 + V(HI) - C^A(D_i) - C^B(S) > 2I_0 + V(HI), \text{ only when} \\ C^A(D_i) + C^B(S) < 0, \text{ which is never true!} \quad [5]$$

In other words, punishing the act of “digging up dirt to rebury it in exchange for money” is always efficient (or always welfare-increasing) because the possibility of digging up dirt to resell it to its owner triggers some activities – *i.e.* the above D_i whereby A gets to know HI, and the above S_i whereby B attempts to defend his privacy – that do not produce any economic value. On the contrary, they cause a deadweight loss for society and a mere redistribution of wealth between A and B, by making A richer and B poorer.²⁷ Indeed, it is true that:

$$\begin{aligned} I_{RM}^F(A) &= I_0 & I_{RM}^P(A) &= I_0 + V(HI) - C_P^A(D_i) \\ I_{RM}^F(B) &= I_0 + V(HI) & I_{RM}^P(B) &= I_0 - C^B(S_i) - V(HI) \end{aligned}$$

Now, does the above conclusion about the act of “digging up dirt to rebury it in exchange for money” change when A is a paparazzo and B is a very important person? In particular, does condition [5] change, when there is a market for gossip? The crucial point of these questions is whether the above conclusion changes when there is something, such as the existence of publishers of gossip magazines, that autonomously spurs A on to get HI and B on to defend his privacy. The publishers of gossip magazines are indeed alternative acquirers of HI that, as such, create a genuine demand and a genuine market for HI.

4.4.

The Economics of Digging up Dirt to Rebury It in Exchange for Money Within the Market for Gossip.

Let us go back to our initial scenario and consider that now A is a paparazzo, A^Z , whereas B is a famous person, B^V . Again assume that the incomes of A^Z and B^V diverge just because of the value, $V(HI)$, of the hot information regarding B^V , with the following peculiarity. Due to the autonomous demand for gossip, $V(HI)$ equals the amount of money, say $M(HI)$, that the editors of gossip magazines, say E, can afford in order to buy HI from A^Z . To be sure, these editors buy HI on behalf of the public, which is assumed to benefit from knowing some hot details about B^V . However, for the sake of simplicity, we here consider A^Z , B^V and E as the only economic agents acting in the market for gossip by attributing the benefits coming from the publication of HI, say $B^E(Dis)$, directly to E.²⁸ However, let us put things in order.

In the opening scenario related to the market for gossip, assume that I_0 is also the initial income of E, so that:

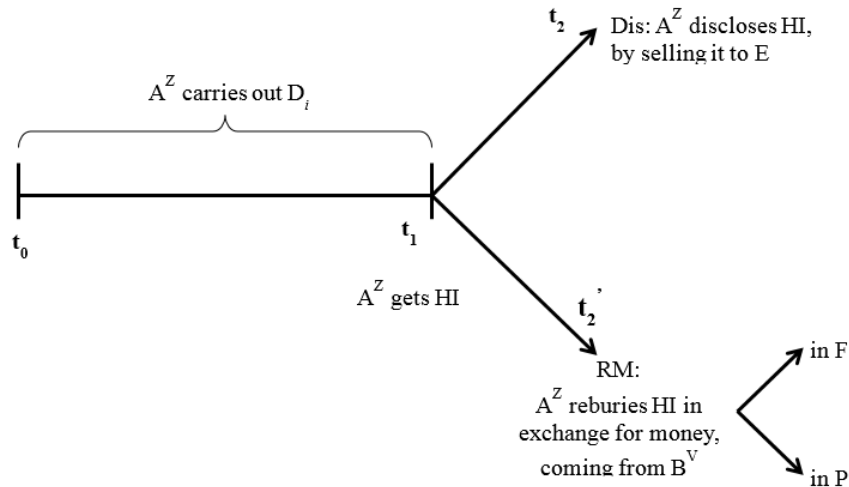
$$\begin{aligned} I_0(A^Z) &= I_0(A) = I_0, \\ I_0(B^V) &= I_0(B) = I_0 + V(HI), \\ \text{in } t_0 \quad I_0(E) &= I_0, \text{ so that} \\ \text{SW}_0^G &= I_0(A^Z) + I_0(B^V) + I_0(E) = 3I_0 + V(HI) \end{aligned}$$

Given the demand for gossip, two options are available to A^Z once he sustains the costs, $C^{AZ}(D_i)$, necessary to lawfully get HI from B^V . Namely:

²⁷ See, also, COASE (1988), p. 673.

²⁸ If we also include the public, we can argue that E gets the revenues of the sales of magazines, the public pays for them, and then the public benefits from the pleasure of getting HI disclosed, *i.e.* from $B^E(Dis)$.

- either A^Z contributes to the disclosure of HI by selling it to E in exchange for $M(HI)$, say **Dis**
 - or A^Z reburies HI in exchange for “another” sum of money coming from B^V , say **RM**.
- In other words, it is true that:



where F and P are, again, the scenarios where the act of “digging up dirt to rebury it in exchange for money” is respectively forbidden or permitted.

Again, to make the analysis as complete as possible, let us consider first what happens to the incomes of our three economic agents in t_2 . First, given that $B^{AZ}(\text{Dis})$ equals the money that editors are willing to pay, we have a case where A^Z moves from t_0 to t_2 when:

$$\text{in } t_2 \quad M(HI) - C^{AZ}(D_i) > 0, \quad \text{where } B^{AZ}(\text{Dis}) = M(HI)$$

On the part of E, let us assume, for the sake of simplicity, that E does not bear any transaction costs in dealing with A^Z or in publishing his magazines. In addition, by paying $M(HI)$ to A^Z , E acquires $V(HI)$ and the further benefit, $B^E(\text{Dis})$, that comes from the publication of HI.

Finally, turning to B^V , he first and foremost bears the cost, $C^{BV}(S_i)$, necessary for shielding his privacy — a cost that he suffers because of the very same market for gossip, *i.e.* because he knows that A^Z has reasons to get the HI in order to then trade it with E. Second, once B^V loses his HI he has further to sustain the costs of having it disclosed, say $C^{BV}(\text{Dis})$.

Therefore, the incomes of our three agents change in the following way:

$$\begin{aligned} \text{in } t_2 \quad I_2(A^Z) &= I_0 + M(HI) - C^{AZ}(D_i), \\ I_2(B^V) &= I_0 - C^{BV}(S_i) - C^{BV}(\text{Dis}) \\ I_2(E) &= I_0 + V(HI) + B^E(\text{Dis}) - M(HI) \\ \text{SWG}_{\text{Dis}}^G &= 3I_0 + V(HI) + B^E(\text{Dis}) - C^{AZ}(D_i) - C^{BV}(S_i) - C^{BV}(\text{Dis}) \end{aligned}$$

Therefore, it is efficient (*i.e.* welfare-increasing) that A^Z drives the market of gossip from t_0 to t_2 when:

$$\text{SWG}_{\text{Dis}}^G > \text{SWG}_0^G, \text{ which happens if } 3I_0 + V(HI) + B^E(\text{Dis}) - C^{AZ}(D_i) - C^{BV}(S_i) - C^{BV}(\text{Dis}) > 3I_0 + V(HI), \text{ that is,}$$

$$B^E(\text{Dis}) > C^{AZ}(D_i) + C^{BV}(S_i) + C^{BV}(\text{Dis}) \quad [6]$$

In summary, not differently from what happens in the above case of the *moralist* (see

condition [2]), the legal system should allow gossip magazines to disclose hot details about celebrities when the pleasure that the public gains from reading gossip magazines outweighs *both* the pain that celebrities suffer because of such disclosures *and* all the expenses that **the mere existence of the market for gossip imposes on paparazzi and very important people**. Vice versa, *i.e.* when this public pleasure is lower than the sum of these different kinds of costs, the law should forbid editors from publishing gossip.

However, as a matter of fact, at present, Western legal systems accommodate a second-best solution: they allow the publication of gossip anyway while bearing the risk of some false-negative mistakes. Therefore, there may well be cases in which the market for gossip rises although it should not even exist, because

$$B^E(\text{Dis}) < C^{AZ}(D_i) + C^{BV}(S_i) + C^{BV}(\text{Dis}) \quad [7]$$

Now let us consider a case in which A^Z is paid to rebury HI instead of selling it to E and, in particular, let us distinguish the scenario, F, where this act is optimally forbidden, from the scenario, P, where this act is permitted.

What is peculiar in the market for gossip is that A^Z is interested in knowing HI even when optimal deterrence is in force. Indeed, even assuming that the sanction for RM equals the money that A^Z can get from B^V , A^Z still has E as a potential buyer of HI. Therefore, in the market for gossip A^Z moves from t_0 to t_1 , regardless whether the act of “digging up dirt to rebury it in exchange for money” is optimally deterred, but when it is again true that:

$$\begin{aligned} \text{in } t_2' \quad & M(\text{HI}) - C^{AZ}(D_i) > 0, \\ & \text{where } B^{AZ}(\text{Dis}) = M(\text{HI}) \end{aligned}$$

Similarly, since B^V knows about this pay-off, he still sustains what necessary to defend his privacy, that is $C^{BV}(S_i)$, regardless of whether optimal deterrence is in force or not.

Once A^Z gets HI, because of the prohibition the only action available to A^Z is selling the information to E, so that the social welfare in F equals the social welfare in t_2 , that is:

$$\begin{aligned} \text{in } t_2' \quad & SW_{RM}^{G,F} = SW_{Dis}^G = \\ & 3I_0 + V(\text{HI}) + B^E(\text{Dis}) - C^{AZ}(D_i) - C^{BV}(S_i) - C^{BV}(\text{Dis}) \end{aligned}$$

Differently, in P, A^Z may re-sell the HI to B^V at the price of $M(\text{HI})$,²⁹ so to avoid B^V suffering the costs of disclosure. Therefore, it is true that:

$$\begin{aligned} \text{in } t_2' \quad & I_{RM}(A^Z) = I_0 + M(\text{HI}) - C^{AZ}(D_i), \\ & I_{RM}(B^V) = I_0 - C^{BV}(S_i) + V(\text{HI}) - M(\text{HI}) \\ & I_{RM}(E) = I_0 \\ & SW_{RM}^{G,P} = 3I_0 + V(\text{HI}) - C^{AZ}(D_i) - C^{BV}(S_i) \end{aligned}$$

Accordingly, if we now confront the social welfare that the market for gossip achieves in P with the social welfare that the same market achieves in F, which in turn equals the social welfare in t_2 , we know that:

$$\begin{aligned} & SW_{RM}^{G,P} > SW_{RM}^{G,F} = SW_{Dis}^G \\ & \text{when } B^E(\text{Dis}) - C^B(\text{Dis}) < 0 \end{aligned} \quad [8]$$

In other words, the prohibition against “digging up dirt to rebury it in exchange for money” is welfare enhancing when the benefits that the public gets, via E, from the publication of HI are higher than the pain that B^V suffers because of the disclosure of HI. In other words, as [8] shows, paparazzi and celebrities must be allowed to trade to rebury HI when the public is

²⁹ To be sure, we can imagine that in this state of the world E and B^V bid to obtain HI. Nevertheless, it is rational to assume that this exchange of bids will not go beyond $V(\text{HI})$. In other words, none of the potential buyers will ever offer more than the value of HI. The only situation in which this condition is not met occurs when we assume that $V(\text{HI})$ is not the “objective value” of HI but the value of HI as B^V perceives it. However, as long as our agents are omniscient and enjoy Olympic rationality we must exclude this latter scenario.

not really interested in that information, *i.e.* when the joy that the public gets from knowing HI is lower than the pain that celebrities are going to suffer.

Two consequences follow from this. First, in the market for gossip all the above considerations are independent from the expenses sustained in the activities aimed at either getting or shielding HI. In the market for gossip these activities are immaterial, because A^Z and B^V perform them anyway. Second, if you read [7] together with [8], the act of “digging up dirt to rebury it in exchange for money” is efficient **exactly when** the market for gossip should not exist, that is to say

$$\text{when } B^E(\text{Dis}) < C^{AZ}(D_i) + C^{BV}(S_i) + C^{BV}(\text{Dis})$$

$$B^E(\text{Dis}) < C^B(\text{Dis}) \text{ is certainly true, because}$$

$$C^{AZ}(D_i) > 0 \text{ and } C^{BV}(S_i) > 0$$

This means that, when the market for gossip is inefficient, the possibility to rebury hot information in exchange for money is a way to limit the waste of resources that would occur otherwise. As a consequence, a general prohibition against the act of “digging up dirt to rebury it in exchange for money” – that we can call blackmail or extortion according to the jurisdictions that we consider – does not take into consideration that, in the market for gossip, such an act may increase social welfare and, accordingly, its prohibition may be counterproductive by decreasing social welfare.³⁰

In summary, the economic analysis that we have just developed shows that, if the Italian courts had protected the social welfare, the defendant would not have been sentenced to jail.

5.

A Clash of Values.

What the preceding analysis does not discuss is the clash of values that we face when we consider, on the one hand, the economic argument in favour of paparazzi and, on the other, the arguments that support such a kind of criminal regulation, like the one adopted in Italy.

For sure, there are different values beneath the criminal law and the law and economics approach, respectively. Italian criminal law protects many values running from personal freedom to right of image, while it disregards values such as social welfare and economic efficiency. In contrast, the economic approach is just (or mainly) focused on social welfare or efficiency. Indeed the two approaches protect or seek to realize as much as they can those different values, so that there is a clash whenever the satisfaction of one value among them occurs at the expense of another.

This sounds intuitive but some philosophical and conceptual refinements must be made. The fundamental problem here consists of figuring out what the *relationships* are between such values.³¹ First, we need a conceptual distinction between ultimate and derivative values. The reason for making this distinction will be clear in a moment. Then, we need to distinguish three questions concerning ultimate values:³²

- 1) whether ultimate values amount to one or more;
- 2) if such values are more than one, whether they are in harmony or in conflict;
- 3) if they are in conflict, whether value conflicts can be solved in general or only in a case-by-case assessment.

It is clear that these questions pertain to ultimate values because the plurality of derivative ones is pacifically admissible. The real issue is whether ultimate values are plural and, if they are, whether they live in harmony or not and, if they clash, how to solve their conflicts.

Given the account we have been presenting of the plurality of values at stake in cases such

³⁰ Cf. NOZICK (1974), pp. 84-86; MURPHY (1980), pp. 164-165; FEINBERG (1988), pp. 262-264.

³¹ We leave to one side the issue of the *nature* of values, roughly speaking whether they are objective or subjective. This is a deep and complex issue we cannot deal with here. Just note that a subjectivist about values is usually inclined to embrace value pluralism, while an objectivist is more inclined toward a value monism, even though this is not necessarily so: it is conceptually possible to be a subjectivist monist and an objectivist pluralist.

³² See RAZ (2005) for a discussion of similar issues in ethics, and ALEXY (2002) for a discussion in terms of constitutional theory.

as Corona's (mainly right of image and social welfare), one might think that we have already answered our first and second questions. The answers appear to be the following: yes, there is more than one ultimate value, and yes they are in conflict. For example, in some cases at least you cannot maximize social welfare except at the expense of a personal value like image, and vice versa.

However, to stop at that consideration would be a simplistic way of addressing the problem. One might wonder indeed whether the plurality of values and their clashes are nothing but the result of a misunderstanding. To put it differently, one might ask whether there is a way to accommodate what we perceive to be their conflicting plurality, and whether that accommodation would consist in reframing such issues according to a unique value parameter, or whether, in contrast, value plurality is irreducible and conflicts are to some extent inevitable.

Economic analysis of law has often been presented as a research programme that aims to give an economic account of every legal phenomenon (for instance in terms of social welfare or in terms of efficiency as wealth maximization).³³ Hence, if economic analysis has the capacity to explain (or even justify) *every* legal phenomenon in terms of economic value, every alleged value conflict is just apparent. It would just be the result of a misunderstanding or the upshot of a misconception. This is because, the argument would go, the only values at play are economic, and the non-economic values can and shall be reframed and understood in economic terms. Of course the possibility of a conflict would not be totally explained away, for different economic values might still be in conflict with one another. However, this is usually excluded by economic analysis once it claims, in a *reductio ad unum* process, that there is an ultimate economic value (such as social welfare) that disposes of everything else and constitutes the foundation of any derivative value (such as competition or absence of information asymmetries). This position can be philosophically qualified as *value monism*. It depicts value conflicts as apparent phenomena that must be reframed and disposed of in a monistic picture: where we have the impression that a clash of economic and non-economic values occurs, what we actually face is a conflict between economically efficient and inefficient ways of addressing a given problem.

If, instead, the aim of the economic analysis of law is more modest and consists in giving an account of *certain parts* of legal systems or of *certain aspects* of legal phenomena, then we retain the possibility of genuine value conflicts insofar as certain parts or certain aspects of the law are explained (or even justified) in economic terms while others are explained (or justified) in non-economic terms, and they are irreducible to one another. This position can be philosophically qualified as *value pluralism*. It is committed to the possibility of value conflicts together with the inability to avoid them once and for all, even though such clashes can be certainly faced and at least temporarily solved with some strategies. In particular, this can be done with argumentative strategies that try to persuade their addressees of the correctness of certain solutions to given problems, or at least with authoritative decisions that settle the disputes one way or another.

Note that the same conclusions are to be drawn when, instead of making reference to economic analysis, we make reference to moral doctrine. If you subscribe to a moral doctrine that purports to give an account of every legal phenomenon, then you find yourself in the position of a monist who takes value conflicts to be the result of a misconception of moral issues.³⁴ If, on the other hand, you subscribe to a moral doctrine that purports to give an account of just some parts or some aspects of the law, then you are in the position of a pluralist who cannot deny the possibility of genuine value conflicts.

Once you admit to possible clashes of values, you finally face the third question above, namely whether such conflicts can be addressed in general or only case by case. This is not the place to give a full answer to this. However, notice a couple of important things. First, value conflicts usually occur *in concreto*, not *in abstracto*. It is in concrete cases that values clash with one another. It is in a concrete case like Corona's that different fundamental or ultimate values cannot be equally satisfied to the same extent at the same time. Welfare and image, for example, do not conflict as such or in the abstract. It is only in concrete cases and situations that they do; then decisions must be made in order to protect or realize one value at the expense of another. Secondly, even if conflicts occur in concrete cases and not in the abstract, it is pos-

³³ See in particular POSNER (1973), (1979) and (1985). See also, among others, FRIEDMAN (2000).

³⁴ This seems to be the position of DWORKIN (2011).

sible to solve them in general. That is, it is not impossible to establish a general rule which, as a general preference relationship or even a sort of algorithm, establishes that a certain value must take precedence over another. In principle it is even possible to establish, in a constitution for instance, a hierarchy of values that must be respected and implemented by legislatures and judges. However, it is clear that such general answers to the problem of value conflict have serious drawbacks. In particular, they are very unsatisfying in terms of flexibility, sensitivity to contextual features, appreciation of the circumstances of concrete cases, assessment of the consequences in given situations, balancing of what is at stake, etc. Therefore, case-by-case answers, possibly by sensible and informed judges or decision-makers, seem to score better than general rules in dealing with such matters. However, of course, case-by-case decisions are less palatable in terms of legal certainty, predictability and judicial restraint.

Now, in Corona's case we face a clash of values and see a final decision that was made based upon a set of legal rules that invariably favour some personal values (or "rights of personality") over economic welfare or efficiency. Whether that is a desirable outcome or not depends on the values one subscribes to. For an economic theorist devoted to social welfare this is not a good way of addressing such cases in that it precludes the possibility of enhancing social welfare in given situations such as the gossip market. As we saw above, the Italian law disregards the fact that "digging up dirt to rebury it in exchange for money" may increase social welfare when a market for gossip is established. So this way of treating such cases deserves a critique in economic terms. However, of course, that critique does not hold for those who elect non-economic values as their ultimate ones.³⁵ Some intermediate solutions are conceivable though and, as we try to show below, there are some possible reforms of Italian law that deserve our attention.

6. What Solution to Undertake? A Possible Reform of Italian Criminal Law.

In this paper we have analysed whether the conduct of "digging up dirt, to rebury it in exchange for money" deserves to be harshly punished by a criminal rule such as the Italian one for the crime of extortion.

From a criminal policy perspective, we have noticed that the Italian crime of extortion imposes very severe penalties, because it protects legal values such as personal freedom and personal property. Nevertheless, the act of "digging up dirt, to rebury it in exchange for money" affects other legal values, like the right of image, which are less important than the previous ones. As a consequence, we have argued that, in order to avoid over-deterrence, the approach towards those who "dig up dirt to rebury it in exchange for money" should be more lenient, thanks to either lower penalties or the use of less serious offences.³⁶

We confirm this result by adopting the law and economics approach for which, as well-known, social welfare becomes the legal value to be protected. According to this perspective, the criminalization of the act of 'digging up dirt, to rebury it in exchange for money' produces inefficiency just when the benefits that the public enjoys from reading about celebrities are lower than the pain that the same celebrities suffer because of the disclosure, *i.e.* just when the market for gossip should not exist. Hence, *under this specific condition* the lawfulness of the act of 'digging up dirt to rebury it in exchange for money' is a second-best solution, because it limits the social waste that the mere existence of the market for gossip produces.

Therefore, by bringing this latter law-and-economics insight within a criminal policy perspective, we cannot but notice that the Italian crime of extortion, which *always* punishes paparazzi for the act of bargaining with their "famous victims", is over-deterrent, just because it does not provide any exception for the case of paparazzi that sell back gossip to celebrities

³⁵ Then what an economic theorist should do is articulate a form of value monism to show that the defence of ultimate non-economic values is misconceived. However that is hard to do, especially when the values at stake are those expressed in constitutional charters and known as "fundamental human rights".

³⁶ Cf. PROSDOCIMI (2006). In other jurisdictions, beside the more serious cases of extortion there are less serious cases that can be called blackmail. The French Criminal Code distinguishes extortion in the strict sense and the less severe *chantage* conduct consisting, in essence, in the sale of silence about information prejudicial to the reputation of a person (Arts. 312-1ff. of the Criminal Code). The Spanish Criminal Code provides similarly in Art. 171, c. 2, in the framework of a comprehensive discipline. A similar choice was made by the legislature of the US providing for a minor case of extortion called *blackmail*.

when the benefits that the public enjoys from reading gossip magazines are lower than the pain that the same celebrities would suffer. To include such an exception in the relevant article of the code, instead, would be an optimal reform, at least if the legislature decides to pursue the protection of social welfare.

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