

**THE MARKET FOR GOSSIP:
Punish paparazzi and you will produce inefficiency**

ABSTRACT. 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 very famous case —the Corona case— the paper analyses Italian criminal law on extortion, discussing the values justifying its 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 explores the conflict between reputation, image and social welfare as the many values underpinning the (Italian) criminal law and the law and economics approach them. Finally, the paper suggests some solutions to the above problems.

I. INTRODUCTION

In 2011 Fabrizio Corona, a 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 bizarre personality of 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 make 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.

This paper explores these different opinions. Better, it analyses why and how the Italian criminal law qualifies Corona’s behaviour as extortion — a serious criminal offence. In particular, the paper, after describing the opinions of the Italian courts, examines the crime of extortion, focusing on one of its building blocks: the threat. Then, the paper examines the economics of Corona’s conduct, concluding that, within the market for gossip, punishing such behaviour may be inefficient. Afterwards, the paper remarks on the clash between the different values underpinning Italian criminal law and the law and economics approach. Finally, the paper considers whether and how Italian criminal law should change in relation to the teachings coming from the economic analysis of law.

II. THE CORONA CASE IN THE ACTION

The so-called "Corona case" has occupied the Italian magazines, newspapers and gossip media for many years, since 10th December 2009. Then, the Court of first instance² found Corona guilty of the

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Although the paper was born from our common elaboration, sections II and III are attributable to Eleonora Montani, Section IV to Mariateresa Maggiolino, and Section V to Giovanni Tuzet.

crime of extortion in consumed or attempted form in relation to four of the seven events contested. The facts at stake were well known: 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* included in the 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. Therefore, Corona’s victims had reasons to fear damage to their image.

The Court of appeal, with judgment number 6060 of 2nd December 2010³, reformed the decision of the Court of first instance and 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 Cassazione⁴.

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. Also, there was an absence of a real offensive potential inherent in 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.

In October 2011 the Cassazione, in decision n. 43317 of 20 October 20, 2011,⁵ 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 their 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 becomes *contra ius* and, hence, may also constitute a crime, if such an exercise is aimed at achieving purposes not permitted by the law, or if the results not fitting and correct.

III. ITALIAN CRIMINAL LAW: CRACKDOWN AND SERIOUS GAPS

Starting from the above-mentioned Corona case, this part of the paper describes the 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.

Article 629 of the Italian Criminal Code forbids the crime of extortion, punishing the conduct of one who, by violence or threat, forces another person to do or omit something, thus procuring for himself or others unjust profit and loss. The crime of extortion is punished with imprisonment from 5 to 10 years and a fine running from EUR 516 to EUR 2,065.

It belongs to the category of crimes which require the victim’s cooperation, 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.

² Court of Milan, December 10, 2009 (dep. March 4, 2010), in www.penalecontemporaneo.it.

³ Court of Appeal of Milan, December 2nd, 2010, in www.penalecontemporaneo.it.

⁴ Cassazione is the highest Italian Criminal Court. For the sake of simplicity, hereinafter we will name it also as the “High Court”.

⁵ Cassazione, Section II, October 20, 2011, n. 43317, Corona, in Cass. pen., 2012, p. 4092 s., with a note by Notargiacomo V., 2012, 4092 and Tarantino D., 2012.

The offence is multi-offensive as the legal interest protected is twofold: the heritage of the victim and her freedom of self-determination in relation to the act of disposing of the assets thereof. What characterizes the crime of extortion is just the form of attack, the means, not as a "material tool" but as conduct with an offensive attitude: the offender gets the cooperation of the injured person, who undergoes a constriction and, therefore, is injured in terms of his freedom of asset disposition.

3.1 *The seriousness of the offence*

In the present case the conduct is characterized as threatening.

A threat is the means used to both coerce others' freedom of self-determination and inflict an injury 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.

The seriousness of the conduct and of its potentialities addresses both the economic and personal spheres of the victim and, hence, justifies the particular strictness of the punishment.

To this systematic consideration we can add another one coming from the fields of criminology and criminal policy. The Mafia-type criminal organization uses 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.

On the other hand, a threat is, as always, a type of behaviour sanctioned across the entire legal system because of its aggressive nature.

However, in response to a penalty as high as that provided by art. 629 of the Criminal Code, 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 tolerable⁶.

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 — a 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 express or implicit, overt or disguised, direct or indirect, actual or figurative, oral or written, fixed or indefinite. However, it is verified that the threat is 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 damage, 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 interest.

The plurality of forms in which the threat takes shape is reflected in the variety of goods that can be the object of the conduct.⁸

In the case of our analysis, the Cassazione identifies right of image as the legal asset subject of protection, regardless of any reference to harm to honour and reputation. Such a reconstruction

⁶ See, e.g., Prosdocimi S., 2006, 680 ff.

⁷ See, e.g., Fiandaca G., Musco E., 2007, 151.

⁸ There are many legal assets targeted by such threat, moving from assets to assets of a personal nature, such as life or personal integrity, or assets of the personality, such as honor, reputation, until you get to capital goods, such as the tranquility of your home. Finally, the Court has recognized the importance of the threat to terminate an emotional connection or affiliation of the victim with a friendship group in spite of the particular circumstances; cf. Cass. pen., sec. II, 12.7.2007, C. and others, in *Foro. it.*, 2008, II, c. 168.

moves from analysis of the legislation to the protection of personal data. According to the court, pursuant to art. 2 - c) l. 675/1996 (now art. 4 of d.l. 196/2003, *privacy code*), "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. 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.⁹

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

3.3 *The injustice of threatened damage*

The injustice of damage expresses a normative concept by which the legislature intervenes in conduct with a particular note of worthlessness. 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 unjust offence to the victim's legally protected interests.¹⁰

There are no doubts about the injustice of damage when this is recognized through the provision of a criminal sanction. It is more difficult to find the 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 mean) and the condition imposed by the threat (i.e. its purpose). The damage is unjust when the legal system does not recognize its representation as a means of achieving the ultimate goal of the offender.¹¹ The problem with this perspective is evident where a tool considered lawful in itself is used in order 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, the owner of the agency, submitted alternatives to the people portrayed: on the one hand they could have the embarrassing pictures reburied in exchange for money; on the other hand, embarrassing pictures could be sold to newspapers and, therefore, disclosed by the media.

The Cassazione has recognized the crime of extortion in the decrypted conduct due to the absence of a relationship between the means – the threat by the owner of the photographic agency of exercising his right to sell and to 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 about finding a balance. 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 they present negative consequences for other people arising from that situation. However, injustice can still exist: although absent in the mean, it may lie in the purpose; that is the real reason for the use of the chosen mean.

⁹ The motivation reads: "The principle is now established that no one may be expropriated except in certain circumstances and in view of the fulfillment of certain interests equally deserving of protection, the exclusive right to dispose of his image like any other personal data".

¹⁰ Gatta G. L., 2013, 177 ff.

¹¹ Id., 187 ff.

The requirement for unjust damage is, therefore, a necessary tool for the selection of criminal behaviour 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. It justifies the publication of dubious 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 High Court, in a manner which is consistent with the law, such as selling the pictures to the media. If, as in the case under consideration, purchasing images is proposed to the subject of the photograph in order to prevent their publication, then that right is abused.

3.3.1 The injustice of the profit

Any profit that is not guaranteed 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, in fact, it is not possible to find any legally protected claim in the profit¹².

The unjust profit consists of the amounts required 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 compensation from the media. However, it is impossible to recognize the legitimacy of the compensation 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 High Court, 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 the expansion of the limits of communication of personal data as they are expressly provided by law, 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".¹³

3.4 The link between form and offensive attitude in a threat

A threat, or moral violence, consists of the announcement of unlawful damage 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 her 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.

The interpreter is called upon to recognize the characteristics of the concrete fact among the many and diverse offences. However, when, as in the case of a threat, it is the mode of conduct that matters, we cannot boil the result down to the offence.

¹² Cerase M., 2010, 176 ff. The author explores the concept by retracing the inaugural lecture of Coase, 1987, 655.

¹³ Thus, in the judgment under review.

¹⁴ A discussion of the topic can be found in Viganò F., 2002, XII ff.

A first element of reflection must be inferred from the legislative provision for approaching violence and threat as alternative and fungible modes of conduct, equalizing the two cases in terms of penalties. From this consideration follows the need to use a strict requirement for a threat, one capable of excluding conduct that does not produce any harm from the category of criminal behaviour.¹⁵

At this point, it is necessary to consider the link between form and offensive attitude in a threat, so as to remark 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 influence the behaviour of others while not having the character of a threat.

The nature of a threat requires shaping the mean by taking the structural requirements from the law and from the system, so as to delimit the boundaries of the mean by selecting those cases in which there is a clear direction of offensive behaviour towards one or more legal goods.

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 injury 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 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, such as the overbearing personality of the agent, the environmental circumstances in which the agent operates, the 'injustice' of the claim, and the particular subjective conditions of the victim, seen as a person of normal impressionability, without overlooking the verification of actual intimidation.

The judge should then determine whether conduct has been realized in a typically threatening method, 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.

IV. THE ECONOMICS OF DIGGING UP DIRT

In the wake of the Corona case, we now intend to assess the impact that the combined act¹⁷ of “digging up dirt to rebury it in exchange for money” has on social welfare,¹⁸ firstly by contrasting

¹⁵ Pedrazzi C., 1980, p. 1445 s., and Id., 2003, 381.

¹⁶ Gatta G.L., *supra* nt 10, at 237.

¹⁷ 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.*, J. Feinberg, 1988, 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 A.L., 1931, Campbell A.H., 1939, Williams G.L., 1954 and, more recently, J. Lindgren, 1984. *Contra, see, e.g.*, Gordon W.J., 1993 and Clark M., 1994. For varying viewpoints on the controversy over blackmail, see Berman M.N. 1998.

¹⁸ 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

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”.

3.1 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, \mathbf{SW}_0 , equates to the sum of their incomes, so that:

$$I_0(\mathbf{A}) = I_0,$$

in t_0

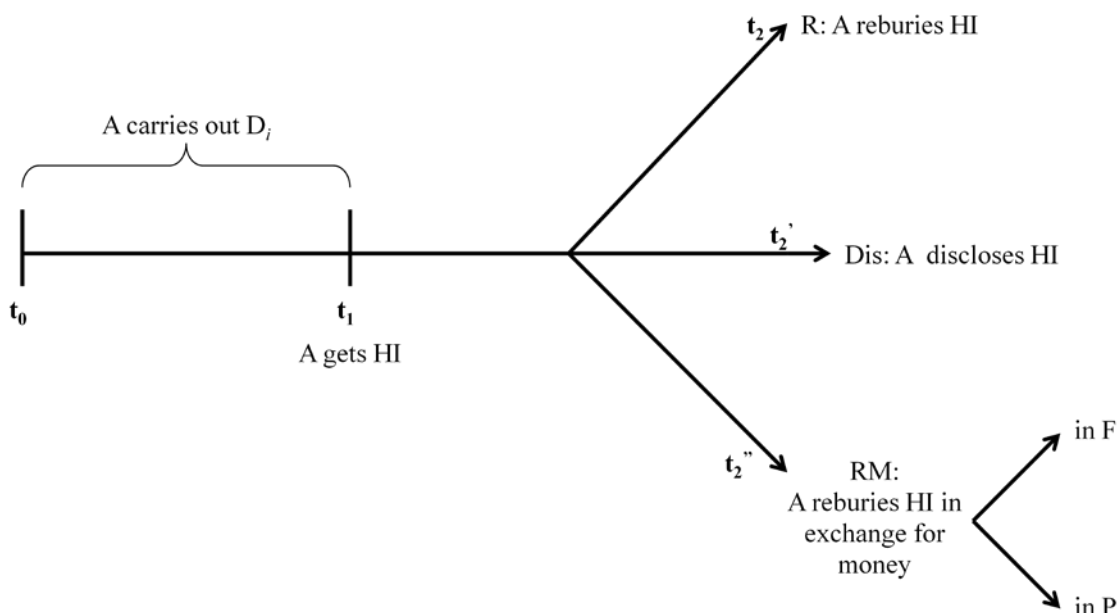
$$I_0(\mathbf{B}) = I_0 + V(\mathbf{HI}),$$

$$\mathbf{SW}_0 = I_0(\mathbf{A}) + I_0(\mathbf{B}) = 2I_0 + V(\mathbf{HI})$$

Now, suppose that there exist some lawful ways, say \mathbf{D}_i , whereby **A** can dig up dirt (i.e. subtract **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:



redressable harm should be limited to violations 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 W., Gordon D, 1985; Block W., 1997 . As said in the text, we here decide instead to define the legally redressable harm so as to include negative social consequences. For this approach, Epstein R.A., (1983); Coase R.H., 1988 and Posner R.A., 1993.

We name the costs that A sustains in order to dig up dirt in the period running from t_0 to t_1 $C^A(D_i)$,¹⁹ 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;²⁰ that is to say, according to the different usages that A can make of the hot information that he took from B. If we assume that A is a rational, risk-adverse agent,²¹ 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.

3.2 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, or²² 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.²³ Either way, A decides to try to subtract HI from B, 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:

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

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.²⁴

Therefore, in t_2 and t_2' , the incomes of A and B change in the following ways:

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

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

¹⁹ To sure, nothing excludes $C^A(D_i)$ sometimes equaling 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.

²⁰ 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.

²¹ We assume risk aversion for the sake of simplicity.

²² 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.

²³ 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 the following paragraph, 3.4), 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 pedophilia. 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 S., 1993, 1899.

²⁴ 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 $C^B(Dis)$.

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

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 so as to shape A's 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 *under which conditions* it is true that SW_R and SW_{Dis} outweigh SW_0 . By making some simple inequalities, we know that:

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

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

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 – in other words, when this private pleasure exceeds **the expenses that, if they were forbidden to dig, A and B should never bear**. Similarly, the law should allow A (the moralist) to dig up dirt when A's private pleasure in disclosing some hot details about B outweigh 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:

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

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

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, as a consequence, 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 legal system should be effect-based. It 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. Also, if this approach was too hard or too costly to be implemented, there are two second-best solutions. It could – as it actually does – allow the acts of digging up dirt to either rebury or disclose it, even though sometimes these activities make social welfare dwindle. In other words, the legal system could run the risk – as it actually does – of making some false-negative mistakes. Alternatively, the 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.

However, what about the focus of our paper; that is, the act of digging up dirt to rebury it only in exchange for money?

3.3 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 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 the optimal sanction for such behaviour, that is $S_F(\mathbf{RM})$, equals the benefits, $B_F^A(\mathbf{RM})$, which A gets from the deal with B, whatever the amounts of these benefits are, so that:

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

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

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

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:

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

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:

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

Now, let us consider how this analysis changes in P 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 his hot information to B, that is, $B_P^A(\mathbf{RM})$. **If A is a rational agent, we know that this amount of money equals the maximum value, i.e. $V(\mathbf{HI})$, that B gives to his 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.²⁵ In other words, he does not find any private pleasure, the above P^A and M^A , in digging up dirt, so that:

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

Rationally, A offers the deal to B when:

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

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 $V(\mathbf{HI})$, 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:

$$\text{in } t_2'' \quad I_{\mathbf{RM}}^P(A) = I_0 + V(\mathbf{HI}) - C_P^A(D_i)$$

$$\text{in } t_2'' \quad I_{\mathbf{RM}}^P(B) = I_0 + V(\mathbf{HI}) - C^B(S_i) - V(\mathbf{HI})$$

²⁵ Otherwise, we should add P^A and/or P^A , to $B_P^A(\mathbf{RM})$.

Accordingly, the social welfare of the state of the world where the act of “digging up dirt to rebury it in exchange for money” is:

$$\text{in } t_2'' \quad \mathbf{SW}_{RM}^P = 2\mathbf{I}_0 + \mathbf{V}(\mathbf{HI}) - \mathbf{C}^A(\mathbf{D}_i) - \mathbf{C}^B(\mathbf{S}_i)$$

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:**

$$2\mathbf{I}_0 + \mathbf{V}(\mathbf{HI}) - \mathbf{C}^A(\mathbf{D}_i) - \mathbf{C}^B(\mathbf{S}_i) > 2\mathbf{I}_0 + \mathbf{V}(\mathbf{HI}), \text{ only when} \\ \mathbf{C}^A(\mathbf{D}_i) + \mathbf{C}^B(\mathbf{S}_i) < \mathbf{0}, \text{ which is never true!} \quad [5]$$

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 \mathbf{D}_i whereby A subtracts HI from B, and the above \mathbf{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.²⁶

Indeed, it is true that:

$$\begin{aligned} \mathbf{I}_{RM}^F(\mathbf{A}) &= \mathbf{I}_0 & \mathbf{I}_{RM}^P(\mathbf{A}) &= \mathbf{I}_0 + \mathbf{V}(\mathbf{HI}) - \mathbf{C}_P^A(\mathbf{D}_i) \\ \mathbf{I}_{RM}^F(\mathbf{B}) &= \mathbf{I}_0 + \mathbf{V}(\mathbf{HI}) & \mathbf{I}_{RM}^P(\mathbf{B}) &= \mathbf{I}_0 - \mathbf{C}^B(\mathbf{S}_i) - \mathbf{V}(\mathbf{HI}) \end{aligned}$$

However, does this conclusion 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 that autonomously spurs A on to get HI and B on to defend his privacy?

3.4 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, \mathbf{A}^Z , whereas B is a famous person, \mathbf{B}^V . Again assume that the incomes of \mathbf{A}^Z and \mathbf{B}^V diverge just because of the value, $\mathbf{V}(\mathbf{HI})$, of the hot information regarding \mathbf{B}^V , with the following peculiarity. Due to the autonomous demand for gossip, $\mathbf{V}(\mathbf{HI})$ equals the amount of money, say $\mathbf{M}(\mathbf{HI})$, that the editors of gossip magazines, say \mathbf{E} , can afford in order to buy HI from \mathbf{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 \mathbf{B}^V . However, for the sake of simplicity, we here consider \mathbf{A}^Z , \mathbf{B}^V and \mathbf{E} as the only economic agents acting in the market for gossip by attributing the benefits coming from the publication of HI, say $\mathbf{B}^E(\mathbf{Dis})$, directly to \mathbf{E} .²⁷ However, let us put things in order.

In the opening scenario related to the market for gossip, assume that \mathbf{I}_0 is also the initial income of \mathbf{E} , so that:

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

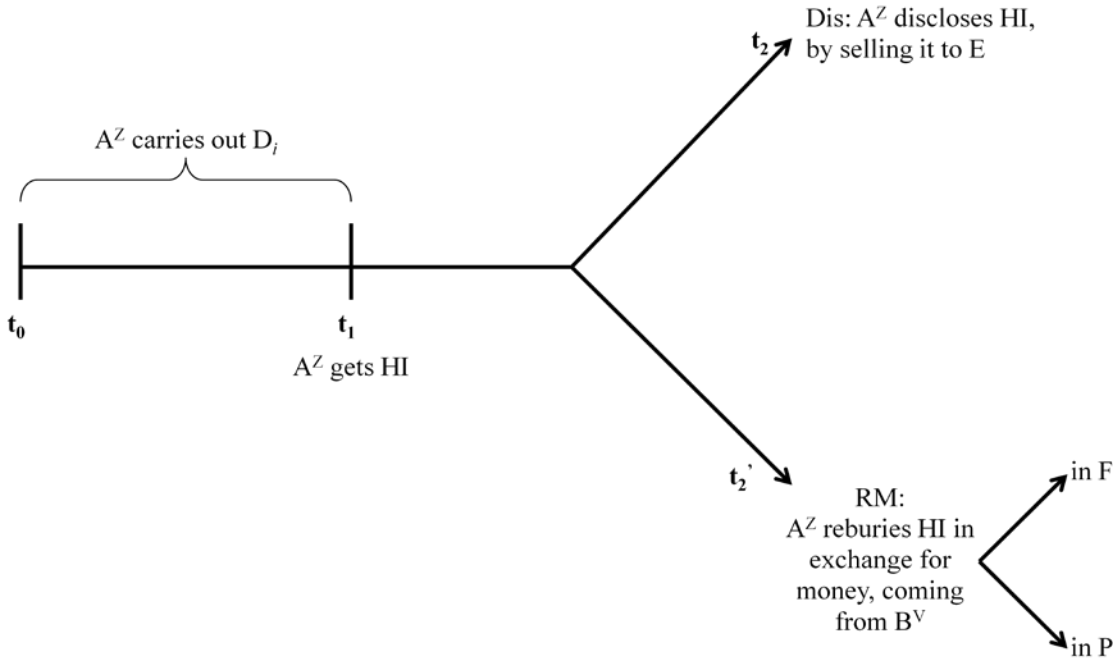
²⁶ See, also, Coase, 1988, 673.

²⁷ If we also include the public, we can argue that \mathbf{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 $\mathbf{B}^E(\mathbf{Dis})$.

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

- 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 allowed.

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 have available to pay, we have a case where A^Z moves from t_0 to t_2 when:

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

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 subtract his 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:

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

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

$$\begin{aligned} & \mathbf{SW}_{\text{Dis}}^{\text{G}} > \mathbf{SW}_0^{\text{G}}, \text{ which happens if} \\ & 3\mathbf{I}_0 + \mathbf{V}(\text{HI}) + \mathbf{B}^{\text{E}}(\text{Dis}) - \mathbf{C}^{\text{BF}}(\text{Dis}) - \mathbf{C}^{\text{A}}(\text{D}_i) - \mathbf{C}^{\text{B}}(\text{S}) > 3\mathbf{I}_0 + \mathbf{V}(\text{HI}), \text{ that is,} \\ & \mathbf{B}^{\text{E}}(\text{Dis}) > \mathbf{C}^{\text{AZ}}(\text{D}_i) + \mathbf{C}^{\text{BV}}(\text{S}_i) + \mathbf{C}^{\text{BV}}(\text{Dis}) \end{aligned} \quad [6]$$

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 the pain that celebrities suffer because of such disclosures, added to the all expenses that **the mere existence of the market for gossip imposes on both 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.

Again, hence, the law should endorse an effect-based approach that — truth be told — may be too hard and expensive to apply. 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. Nevertheless, we should not push this argument too far and deem this risk to be very high. The fact that we are talking about a market – i.e. the market for gossip – increases the probability that [6] is actually met: in the state of the world where paparazzi sell HI to editors, indeed, their private benefits and costs tend to overlap with the social benefits and costs because the pain that celebrities suffer is the only cost that paparazzi and editors cannot really internalize.

However, 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 subtracting HI from B^F 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:

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

Similarly, since B^V knows about this pay-off, he still sustains what necessary to defend his privacy, that is $\mathbf{C}^{\text{BV}}(\text{S}_i)$, 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:

$$\begin{aligned} & \text{in } t_2' \quad \mathbf{SW}_{\text{RM}}^{\text{G, F}} = \mathbf{SW}_{\text{Dis}}^{\text{G}} = \\ & \quad 3\mathbf{I}_0 + \mathbf{V}(\text{HI}) + \mathbf{B}^{\text{E}}(\text{Dis}) - \mathbf{C}^{\text{AZ}}(\text{D}_i) - \mathbf{C}^{\text{BV}}(\text{S}_i) - \mathbf{C}^{\text{BV}}(\text{Dis}) \end{aligned}$$

Differently, in P, A^Z may re-sell the HI to B^V at the price of $\mathbf{M}(\text{HI})$,²⁸ so to avoid B^V suffering the costs of disclosure. Therefore, it is true that:

$$\begin{aligned} & \text{in } t_2' \quad \mathbf{I}_{\text{RM}}(\text{A}^Z) = \mathbf{I}_0 + \mathbf{M}(\text{HI}) - \mathbf{C}^{\text{AZ}}(\text{D}_i), \\ & \quad \mathbf{I}_{\text{RM}}(\text{B}^V) = \mathbf{I}_0 - \mathbf{C}^{\text{BV}}(\text{S}_i) + \mathbf{V}(\text{HI}) - \mathbf{M}(\text{HI}) \end{aligned}$$

²⁸ 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 $\mathbf{V}(\text{HI})$. 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 $\mathbf{V}(\text{HI})$ 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 with Olympic rationality we cannot conceptualize this latter scenario.

$$I_{RM}(E) = I_0$$

$$SW^{G,P}_{RM} = 3I_0 + V(HI) - C^{AZ}(D_i) - C^{BV}(S_i)$$

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:

$$SW^{G,P}_{RM} > SW^{G,F}_{RM} = SW^G_{Dis},$$

$$\text{when } B^E(Dis) - C^B(Dis) < 0 \quad [7]$$

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 [7] shows, paparazzi and celebrities must be allowed to trade to rebury hot information when the public is not really interested in it, i.e. when the joy that the public gets from reading HI is lower than the pain that celebrities are obliged to suffer. Even more interestingly, in the market for gossip all these considerations are independent from the expenses sustained in the activities aimed at either subtracting or defending HI. In the market for gossip these activities are irrelevant because A^Z and B^V carry them anyway.

In summary, 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.

To be sure, the existence of this prohibition could stimulate paparazzi to improve the “appealing character” of the hot information that they get from celebrities, and also to do whatever they can to get that information. In F, indeed, an editor enjoys the right to be the only one to acquire that hot information. Now, this twofold possibility produces an ambivalent effect on social welfare: on the one hand, the potential increase in the quality of the hot information also boosts the benefits that the public enjoys from reading about celebrities; on the other hand, the power of the editors decreases social welfare because it enhances the expenses that paparazzi and celebrities suffer in order to get and defend HI.

V. 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 criminal regulation in Italy.

For sure, there are different values beneath the criminal law and the law and economics approach, respectively. Italian criminal law mainly protects honour, reputation and 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.²⁹

²⁹ 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.

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:³⁰

- 1) whether ultimate values amount to one or more
- 2) if there 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 as Corona's (honour, reputation, image, welfare etc.), 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 of 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).³¹ 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 of 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 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 each other. This position can be philosophically qualified as *value pluralism*. It is committed to the possibility of value conflicts together with the inability to avoid it 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

³⁰ See Raz 2005 for a discussion of similar issues in ethics, and Alexy 2002 for a discussion in terms of constitutional theory.

³¹ See in particular Posner 1973, 1979 and 1985. See also, among others, Friedman 2000.

persuade one 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.³² 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 at the same time, given the existing conditions and the binding legal rules in particular. 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 possible 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, for instance in a constitution, 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 conflicts 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.³³ 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.

VI. WHAT SOLUTION TO UNDERTAKE?

A POSSIBLE REFORM OF ITALIAN CRIMINAL LAW

The criminal principles of typicality, proportion and opportunity for punishment on the one hand, and the needs of criminal policy on the other hand, call attention to the difficult balance between

³² This seems to be the position of Dworkin 2011.

³³ 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".

conflicting requirements — a difficult balance that is even more evident in the progressive expansion of the concept of threat in Italian case law and legal interpretation.

In addition, the law and economics approach, which protects social welfare, shows that to exchange gossip with whomever, the same celebrities included, may be efficient and, as a consequence, it should not be always forbidden.

Given this clash of values, some suggestions deserve to be tested.

First, in the wake of a strict interpretation of the law and economics approach, one can propose not punishing paparazzi who dig up dirt to rebury it 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.

Second, in cases where such a drastic revolution would be impossible, some reforms of Italian criminal law would, however, be viable. For example, one can envisage a new criminal provision for blackmail that imposes lower sanctions. Differently, within the boundaries of the crime of extortion, one can introduce many alternative solutions, such as a lower minimum punishment or a safe-harbour for behaviours causing damage (or gaining profits) below a certain quantitative threshold.³⁴

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³⁴ Prosdocimi S., *Note sul delitto di estorsione*, in *Riv. trim. dir. pen. econ.*, 2006, 3, p. 685. In other jurisdictions, beside the more serious cases of extortion there are less serious cases that could be called blackmail. The French Criminal Code distinguishes extortion in the strict sense and the less severe *chantage* figure consisting, in essence, of the sale of silence about information prejudicial to the reputation of a person (Articles 312-1 et seq. Cp). In a similar figure of the Spanish Criminal Code, offence is provided for in Article 171, c.2, in the complex of a comprehensive discipline. A similar choice made the legislature of the U.S. provide a minor case of extortion called blackmail.

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