

Intentionally Harming Others Without Any Benefit to Oneself

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ABSTRACT

Is it wrong in itself to purposely harm others without any benefit to oneself? I examine this question through the lens of an enigmatic provision of the Model Penal Code, which proposes that it be an offense to purposefully obtain property of another “by threatening to inflict any harm that would not benefit the actor.” I argue that the act of inflicting harm without benefit to oneself is not inherently wrong because (i) in contrast to “prima facie torts,” which consist solely of unjustified harms, harms that do not benefit actors are not necessarily unjustified, given that they may justifiably benefit third parties, and (ii) contrary to the “abuse of rights” doctrine, any malice evidenced by inflicting harm without benefit to oneself does not transform justified harms into unjustified harms. Then, after considering and rejecting several reasons for thinking otherwise, I argue that a threat of harm without benefit to oneself is also not itself a morally wrongful inducement to surrender property.

INTRODUCTION

It *can* be wrong to purposely harm others without any benefit to oneself, such as shooting and killing a friend in a drunken brawl. The question is whether it is *always* wrong to purposely harm another without benefit to oneself. I examine this moral question through the lens of an enigmatic provision in the Model Penal Code (“MPC”) on the crime of extortion. MPC § 223.4 begins with a conventional view of extortion, proposing that it be an offense for an actor to purposely obtain property of another by threatening one or more of six enumerated harms, all of which have well-established counterparts in Anglo-American extortion law. Yet, section 223.4 goes on to embrace a seventh norm that was without precedent in Anglo-American criminal or civil law: the self-proclaimed “residual”¹ norm of extortion in section 223.4(7), which would make it an offense to purposefully obtain property of another “by threatening to inflict *any other harm that would not benefit the actor.*”²

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¹ MODEL PENAL CODE § 223.4(7) cmt. k at 220 (AM. L. INST., Official Draft and Revised Comments 1980) [hereinafter MPC].

² MPC § 223.4(7) (AM. L. INST.) (emphasis added).

The MPC's residual norm has experienced a paradoxical reception since its adoption in 1962. Numerous states have enacted extortion provisions that are modeled upon it.³ Yet, apart from three court decisions, the norm remains either uninvoked or superfluous.⁴

This is a normative inquiry into the moral justification for the MPC § 223.4(7)'s residual norm of extortion. Part I is a brief account of the nature of extortion, including extortion as defined in MPC § 223.4. Part II recounts the history of the adoption of section 223.4(7) by the American Law Institute ("ALI"), including two alternative residual norms that the ALI considered but rejected. Part III compares these three residual norms to the European "abuse-of-rights" doctrine and the American "prima-facie-tort" doctrine. Part IV examines the normative justification for making it a crime to obtain property of another by threatening to inflict a harm that would not benefit the actor. Part V examines caselaw in states that have adopted the MPC's residual norm. I conclude by expressing skepticism about the supposed inherent wrongfulness of inflicting harm without benefit to oneself and the purported wrongfulness of obtaining property of others by threats of such harm.

I. THE MODEL PENAL CODE OFFENSE OF EXTORTION

A. *The Nature of Extortion.*

"Extortion" is the criminal offense of exacting property of another by threatening to otherwise inflict a future harm consisting of one or more statutorily-enumerated acts or omissions, X.⁵ An extortionate "threat," in turn, is what Joel Feinberg calls a "biconditional proposal,"⁶ consisting of two *ifs*: a proposal to harm another by bringing about a statutorily-enumerated act or omission, X, if property of another is withheld, combined with a proposal *not* to bring about such an act or omission—that is, to bring about non-X—if the property is surrendered.⁷ To illustrate, it constitutes extortion in most jurisdictions to exact property of another by a threat of a criminal assault, that is, to exact property by simultaneously proposing (i) to commit such an assault if the property is withheld, and (ii) to refrain from committing the assault if the property is surrendered.

The fact that extortionate threats are biconditionals is significant because when an actor successfully exacts property of another by *threatening* to bring about a statutorily enumerated act or omission, X, the actor gains control over the property by simultaneously *proposing* to do non-X in the event the target complies. This

³ See *infra* notes 60–62.

⁴ See discussion *infra* notes 65–69.

⁵ See, e.g., MPC § 223.4(7) (AM. L. INST.). By contrast, "robbery," which is also a criminal offense of obtaining property of another by means of threat, consists of threats not of future harm but of immediate physical harm. See, e.g., MPC § 222.1 (AM. L. INST.).

⁶ 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 216–29 (1986).

⁷ See MPC § 223.4(7) cmts. 1–2 at 201–02, 205–06 (AM. L. INST.).

means that where either X or non-X is itself unlawful, an actor who gains control over property of another by threatening to bring about X gains it by representing he will do one or another of two things, one of which is necessarily unlawful.

The content of statutorily enumerated acts and omissions, X, and their nonfeasances, non-X, vary from jurisdiction to jurisdiction, depending upon how jurisdictions define extortion. But, ultimately, such threatened acts or omissions and their respective nonfeasances fall into one of two subsets: (1) acts or omissions, or their respective nonfeasances, that are “unlawful” in themselves, whether because they are themselves criminal offenses, intentional torts, or instances of official malfeasance; and (2) acts and omissions, and their respective nonfeasances, that are not unlawful in themselves because not themselves criminal offenses, intentional torts, or acts of official malfeasance.

B. *MPC § 223.4.*

MPC § 223.4 is a subset of the MPC’s broader concept of “theft.”⁸ Actors are guilty of “theft” under the MPC if they unlawfully obtain property of another.⁹ And actors “obtain” such property if they “brin[g] about a transfer or purported transfer of a legal interest in [property],” whether by having it transferred to themselves or to third parties.¹⁰

MPC § 223.4 proposes that it be the subset offense of “Theft by Extortion” to obtain property of another by threatening to take one or more enumerated actions or omissions:

A person is guilty of theft if he purposely obtains property of another by threatening to:

- (1) Inflict bodily injury on anyone or commit any other criminal offense;
or
- (2) Accuse anyone of a criminal offense;
- (3) Expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his creditor or business repute;
- (4) Take or withhold action as an official, or cause an official to take or withhold action; or
- (5) Bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or
- (6) Testify or provide information or withhold testimony or information with respect to another’s legal claim or defense; or
- (7) Inflict any other harm which would not benefit the actor.

⁸ See MPC §§ 223.0–223.9 (AM. L. INST.).

⁹ See MPC §§ 223.2–223.3 (AM. L. INST.).

¹⁰ See MPC § 223.0(5) (AM. L. INST.).

These threatened actions and omissions (and their respective nonfeasances) vary in respect of their lawfulness. Some are unlawful in that they are crimes in themselves, e.g., inflicting bodily injuries or other criminal offenses upon persons (section 223.4(1)); others are torts in themselves, e.g., exposing secrets that are protected by rights of privacy (section 223.4(3)); and still others are civil violations, e.g., malfeasance by public officials in taking actions for which they lack authority (section 223.4(4)). In contrast, other threatened actions and omissions (and their respective nonfeasances) that section 223.4 encompasses are not unlawful in themselves because they are not crimes, torts, or civil violations in themselves. Thus, section 223.4(3) makes it an offense to exact property of another by threats to expose secrets that subject another to hatred, contempt or ridicule, including where both making and refraining from making such exposures enjoy First Amendment protection.

What remains is the last of section 223.4's enumerated threats, namely, those set forth in section 223.4(7). Section 223.4(7) has no antecedents at common law.¹¹ It would make it an offense to exact property from another by threatening to inflict "any other harm which would not benefit the actor."¹² The reference to "other harm" appears on its face to exclude the six harms that section 223.4 previously enumerates in subsections 1-6. However, it does not follow that the ALI means to exonerate actors who threaten such harms without benefit to themselves. On the contrary, because subsections 1-6 already inculcate all actors who obtain property of others by threatening subsection 1-6 harms, regardless of whether they benefit therefrom, the ALI likely means to inculcate all actors who obtain property of others by threats of harms that would not benefit the actors themselves.

II. A HISTORY OF THE ALI'S ADOPTION OF MPC § 223.4(7).

The ALI approved the official text of section 223.4 ("Theft by Extortion") in 1962, proposing that it be an offense to purposely obtain property of another by threatening "any other harm that would not benefit the actor" (hereinafter "HNBA").¹³ In doing so, the ALI implicitly rejected two alternative, residual norms that differ significantly from its official version.

¹¹ See Douglas Ginsburg and Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1866 (1993) ("to our knowledge, [the residual norm is] unique to the Model Penal Code").

¹² Simultaneously, the ALI adopted a provision entitled "Criminal Coercion," proposing that it be an offense to make any of four enumerated threats for the purpose of restricting another's "freedom of action" to the latter's "detriment." MPC § 212.5 (AM. L. INST.). The four enumerated threats did not include threats of "harm that would not benefit the actor," though the ALI commented that adopting states could "arguabl[y]" choose to include such threats. See MPC § 212.5 cmt. 2 at 266-67 (AM. L. INST.).

¹³ Two decades after adopting MPC § 223.4(7), the ALI also proposed that it be a defense of duress to induce a contract on terms that are "unfair" by threatening a "harm [that] would not

The ALI began its consideration of extortion (which its authors initially called “Theft by Intimidation”) in November 1953. However, the November 1953 draft makes no reference to HNBA. Instead, the draft propounds a residual norm that, as we shall see below in part III.A., involves threats of harm that resemble the European abuse-of-rights doctrine, proposing that it be a crime to obtain property of another by threatening to “do anything else which could serve no purpose of the actor’s but to inflict harm upon another”¹⁴

The ALI did not consider extortion again until February 1954 when it replaced the November 1953 residual norm with an alternative norm that, as we shall see below in part III.B., involved threats of harm that resembled the American prima-facie-tort doctrine. The February 1954 draft both lengthens and shortens the enumerated threats that the MPC treats as extortionate means of obtaining property of others: it lengthens them to include threats of (i) “physical confinement or restraint” and (ii) harm a person’s “credit”; and it shortens them to eliminate threats to “betray a confidence.”¹⁵ More significantly, it proposes that it be an offense to obtain property of another by threatening “otherwise to disadvantage any person under circumstances where the infliction of the harm would serve no legitimate interest of the actor.”¹⁶

The February 1954 draft also breaks new ground by including explanatory Comments. The Comments explain that the ALI proposes the new “catchall” prohibition because “[a]ny particularization of criminal threats is bound to be incomplete.”¹⁷ The Comments illustrate the scope of the new prohibition with examples of respective threats that do and do not violate it. Thus, the Comments hypothesize two actors, i.e., “Foreman” and “Friend of purchasing agent,” who, the Comments state, would be guilty under the draft prohibition because they do not benefit from the harm they inflict:

Foreman. “[T]he foreman in a manufacturing plant requires the workers under him to pay him a percentage of their wages on pain of dismissal or other employment discrimination.”

Friend of purchasing agent. “[A] close friend of the purchasing agent of a great corporation obtains money from an important supplier by threatening to influence the purchasing agent to divert his business elsewhere.”¹⁸

significantly benefit the party making the threat.” RESTATEMENT (SECOND) OF CONTRACTS § 176(2)(a) (1979) (emphasis added).

¹⁴ MPC § 206.4 (AM. L. INST., Discussion Draft No. 3, Nov. 20, 1953).

¹⁵ MPC §§ 206.3(2), 206.3(5) (AM. L. INST., Discussion Draft No. 4, Feb. 13, 1954).

¹⁶ MPC § 206.3(10) (AM. L. INST., Discussion Draft No. 4, Feb. 13, 1954).

¹⁷ MPC § 206.3(10) cmt. 16 (AM. L. INST., Discussion Draft No. 4, Feb. 13, 1954).

¹⁸ *Id.*

The Comments hypothesize two further actors, i.e., “Employer” and “Purchasing corporation,” who, the Comments state, would *not* be guilty under the draft prohibition because they have legitimate reasons for inflicting harms—i.e., to reduce wages and supplier costs, respectively—though, the Comments note, the actors might otherwise be guilty under independent laws that require employers to pay minimum wages or laws that prohibit kickbacks by employees or price-discrimination by suppliers:

Employer. An employer requires workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination.

Purchasing corporation. A purchasing corporation itself obtains money from an important supplier by threatening to influence its purchasing agent to divert the corporation’s business elsewhere.¹⁹

The ALI first referred to the threat of “harm which would not benefit the actor” (“HNBA”) in March 1954 when it replaced its two previous residual norms with one framed in the language of HNBA. Thus, after enumerating a list of specific threats that are nearly identical to the February enumeration, the March 1954 draft concludes by proposing that it be an offense to obtain property of another by threatening to “*inflict any other harm which would not benefit the actor.*”²⁰

Like its February 1954 predecessor, the March 1954 draft also includes accompanying Comments. The Comments are revealing for three reasons. First, they cite no legal authority, whether state or federal, to support the new residual prohibition. Nor do they attempt to justify the new prohibition, apart from declaring that (a) it is otherwise impossible to “catalogue in advance” all situations involving unlawful threats of harm, (b) the residual norm states “the general principle” on which non-enumerated threats are to be included within extortion; and (c) the new norm would criminalize conduct, such as described in “Foreman” and “Friend of purchasing agent,” that the MPC’s enumeration of specific threats do not criminalize.²¹

Second, to illustrate the scope of the residual norm, the Comments repeat the same four hypothetical examples as the February 1954 draft and draw the same four conclusions from them,²² despite the fact that the residual norms underlying the February and March draft are quite different. (The February draft would have made it an offense to obtain property of another by threatening a harm “for no [legitimate] purpose,” while the March draft would make it an offense to obtain property of another by threatening a harm that “would serve no legitimate interest of the actor.”)

¹⁹ *Id.*

²⁰ MPC § 206.3(11) (AM. L. INST., Council Draft No. 6, Mar. 5, 1954). The March draft enlarges list of threats to include threats to a person’s “business repute.”

²¹ MPC § 206.3(11) cmt. 17 (AM. L. INST., Council Draft No. 6, Mar. 5, 1954).

²² *Id.*

In addition, the Comments added a new hypothetical example of conduct that would violate the residual norm:

Professor. “A professor obtains property from a student by threatening to give him a failing grade.”²³

Third, and most significantly, the Comments emphasize that the “[a]bsence of benefit to the actor” is “the touchstone of what in present law would commonly be called ‘malicious’ injury”²⁴—meaning that an actor derives no “benefit” (within the meaning of section 223.4(7)) from harming a party who balks in the face of a threat in the event the actor’s sole goal in inflicting harm is malice or vindictiveness.²⁵ To illustrate, the friend in “Friend of a purchasing agent” does not benefit from inducing his or her purchasing-agent friend to harm the company’s present supplier by replacing the present supplier with a new one because the only benefit the friend arguably derives from doing so is that of expressing malice toward the present supplier. In contrast, the employer in “Employer” does benefit from harming an existing employee by replacing him or her with an employee whose salary or wages are lower, even if the employer harbors malice toward the existing employee for refusing to be paid less.²⁶

Eight years then ensued until the ALI’s official draft of 1962. During those eight years, the ALI changed “Theft by Intimidation” in several respects. The ALI reduced the list of specific threats; it changed the title of the offense from “Theft by Intimidation” to “Theft by Extortion;” and it renumbered the offense of theft by extortion as section 223.4.²⁷ Yet the ALI did not change the March 1954, residual norm. By the same token, the ALI’s official revised Comments to MPC § 223.4(7), published in 1980, did not change the five hypothetical examples from 1954—three

²³ *Id.*

²⁴ *Id.*

²⁵ The proposition that malice does not constitute a “benefit” within the meaning of section 223.4(7) is reinforced by the ALI’s comments on the contractual defense of duress. RESTATEMENT (SECOND) OF CONTRACTS § 176 (AM. L. INST.) states that a contract is the product of an improper “threat” if, in addition to producing an unfair exchange, the threatened act would harm the recipient and would not significantly “benefit the [threatener].” The accompanying Comment explains that an actor does not significantly benefit from a threatened act if the act is done “maliciously and unconscionably, out of pure vindictiveness.” *Id.* at § 176 cmt. f.

²⁶ Acting out of a mixture of motives is not the same as acting out of “pure” vindictiveness. Compare comment f to the RESTATEMENT (SECOND) OF CONTRACTS § 176, *supra* note 25 (“pure vindictiveness”) with Katz, *infra* note 40, at 1468–71 (contrasting pure vindictiveness with “mixed motives”). On the complexity of parsing mixed motives, see Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L. J. 1106 (2018).

²⁷ The official draft of section 223.4 reduces the list of threats by eliminating threats of “physical confinement or restraint,” by requiring that threats of defamation be threats to reveal defamatory “secrets;” otherwise eliminating threats to reveal another’s “secrets;” and by eliminating threats against “property” that are not otherwise threats of “criminal offense.” See MPC § 223.4 (AM. L. INST.).

of which, as we have seen, illustrate violations of section 223.4(7), and two of which illustrate non-violations—though the Comments also add that a corporate company agent would violate the residual prohibition by demanding payment for his personal benefit (as opposed to the corporation’s benefit) under threat of his corporation’s ceasing to do business with a supplier.²⁸

To my knowledge, section 223.4(7)’s residual norm, including its reference to HNBA, originated with the ALI and had no textual counterpart in state or federal law, except, perhaps, as a rule in equity.²⁹ Despite its innovative nature, section 223.4(7) has influenced state penal codes. Sixteen states have adopted theft statutes that make it crime to obtain *property* by threatening a harm that would not benefit the actor, and several states have adopted statutes that also make it a crime to coerce *conduct* by threatening a harm that would not benefit the actor. Some statutes follow the MPC verbatim.³⁰ Others add qualifying terms by making it a crime to obtain property by threatening to perform an act that would “materially” or “substantially” harm another without “substantially” or “materially” benefitting the actor.³¹

III. HNBA IN THE CONTEXT OF ABUSE-OF-RIGHTS AND PRIMA-FACIE TORTS

As we have seen, earlier drafts of MPC § 223.4(7) explored and rejected two alternative norms before settling on threats to inflict HNBA. The alternative norms, namely, the European wrong of abuse of rights and the American wrong of a prima facie tort, are revealing because they involve harms that are wrongs in their own right.

Abuses of rights and prima facie torts differ from one another in that the former focus on an actor’s malice, while the latter focus on conduct that is objectively unjustified. Nevertheless, they share something in common: invasions of privacy, personal security and property are invasions of *specific* personal interests, but prima facie torts and abuses of rights are *generic wrongs* in that they encompass invasions of *any* personal interest a victim may possess, whether interests of privacy, reputation, personal security or property.

²⁸ See MPC § 223.4 cmt. k (AM. L. INST.).

²⁹ Cf. *McClure v. Leaycraft*, 183 N.Y. 36, 44 (N.Y. 1905) (“An injunction that bears heavily on the defendant without benefitting the plaintiff will always be withheld as oppressive [and, hence, denied].”).

³⁰ ALASKA STAT. § 11.41.520(a)(7) (2018); CONN. GEN. STAT. ANN. § 53a-119(5)(I) (2018); 720 ILL. COMP. STAT. 5/115-5(k) (2018); MO. REV. STAT. § 570.010(4)(g) (2018); 18 PA. CONS. STAT. § 3923(a)(7) (2018); S.D. CODIFIED LAWS § 22-30A-4(7) (2018).

³¹ See ALA. STAT. § 13A-8-1(14)(k) (2018); ARK. CODE ANN. § 5-36-101(19)(ix) (2018); HAW. REV. STAT. ANN. § 707-764(1)(l) (2018); IDAHO CODE ANN. § 18-2403(2)(e)(9) (2018); 17-A ME. REV. STAT. ANN. § 355(2)(B) (2018); N.H. REV. STAT. ANN. § 637:5(II)(i) (2018); N.J. STAT. ANN. § 2C:20-5(g) (2018); N.Y. PENAL LAW § 155.05(e)(IX) (McKinney 2018); UTAH CODE ANN. 1953 § 76-6-406(2)(i) (2018).

A. *The abuse-of-rights doctrine.*

The initial draft of what eventually became the MPC's "Theft by Extortion" was the ALI's November 1953 draft. As discussed above, the 1953 draft included a residual norm that based the wrongfulness of threatened harms on the threatener's *motivation* in inflicting harm. It proposed that it be a crime for an actor to obtain property of another by threatening to do "anything . . . which could serve no purpose of the actor's but to inflict harm upon another" ³²

Significantly, the 1953 norm based the criminality of obtaining property by means of threats upon the same norm that underlies the European civil doctrine of "abuse of rights," though there is no indication the ALI was conscious of the parallels. The abuse-of-rights doctrine itself comes in several versions. A commonplace version, however, declares it to be a civil wrong for persons to inflict harms if their very purpose is that recipients suffer, even if the harms would otherwise be lawful and justified. ³³ The first clause of the abuse-of-rights provision of the 1992 Civil Code of the Netherlands is a good example:

The holder of a right may not exercise it to the extent that it is abused. Instances of abuse of right are the exercise of a right with the sole intention of harming another. . . . ³⁴

The abuse-of-rights doctrine also has parallels in U.S. law, particularly in property law, where it is often stated to be a private nuisance for a landowner to use his property for no other reason than to spite a neighbor, such as by erecting a fence. Thus, the Restatement (Second) of Torts § 829, which post-dated the MPC, declares it to be "unreasonable" to intentionally invade another's interest in the use and enjoyment of land "if the harm is significant and the actor's conduct is (a) for the sole purpose of causing harm to the other." ³⁵ Ward Farnsworth, referencing rules regarding spite fences, observes that "[U.S. jurisdictions] treat[] an act not otherwise wrongful as wrongful when it is motivated by enmity." ³⁶

The authors of the November 1953 draft do not explain why, after initially proposing a residual norm that resembled the abuse-of-rights doctrine, they

³² MPC § 206.4 (AM. L. INST., Discussion Draft No. 3, Nov. 20, 1953).

³³ See generally, Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L. J. 389 (2002); A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New*, 54 LA. L. REV. 1173 (1993); Vera Bolgar, *Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 LA. L. REV. 1015 (1975). For the argument that, if an actor *possesses* a right, describing its exercise as an "abuse of rights" is self-contradictory (because exercising a right is not actionable), and, if an actor *does not* possess a right, describing an exercise as an "abuse of rights" is vacuous, see Fred Schauer, *Can Rights be Abused?*, 31 PHIL. Q. 225 (1981).

³⁴ See NEW NETHERLANDS CIVIL CODE: PATRIMONIAL LAW Art. 13(2) (PROPERTY, OBLIGATIONS AND SPECIAL CONTRACTS) (P.P.C. Haanappel & E. Mackaay trans. 1990).

³⁵ RESTATEMENT (SECOND) OF TORTS § 829 (AM. L. INST. 1979).

³⁶ Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 234 (2002).

abandoned it a few months later. But it is revealing that the principle that underlies the November 1953 draft—i.e., that an actor’s subjective malice in causing harm can transform an otherwise justified harm into wrongful harm—has been contested by philosophers since medieval theologians advanced it as the “Doctrine of Double Effect” (“DDE”). DDE would distinguish, for example, between Strategic Bombers and Terror Bombers: a Strategic Bomber intentionally bombs the munitions factory of an enemy who is waging an unjust war, knowing that the bombing will kill nearby civilians but does so for the beneficent purpose of saving overall lives by destroying munitions; a Terror Bomber intentionally bombs the same munitions factory in the same way and under the same circumstances, also knowing that the bombing will save overall lives, but does so for the malicious purpose of killing nearby civilians. DDE exponents reason that even if the Strategic Bomber is justified in bombing the factory, the Terror Bomber may not be because he acts for a malicious purpose.³⁷

DDE remains controversial because it stands in opposition to the view, expressed by Thomas Cooley, that “[m]alicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.”³⁸ Consider, for example, Larry Alexander and Kimberly Ferzan’s criticism of DDE’s distinction between Strategic and Terror Bombers:

[S]uppose [a] bombing run has been programmed by Strategic Bomber, who is now ill and unable to fly the plane. The only available pilot is Terror Bomber; and although he knows that the bombing run is justified by the destruction of the munitions factory despite the death of innocent civilians, he will fly the route only to further his intention to kill the civilians and terrorize the population. If we regard him as culpable for the bombing [as DDE does], he will not fly the route Because when he flies, he will be doing exactly what the strategic Bomber would have done—dropping the same bombs at the same location—his act should be deemed justifiable and hence nonculpable. We want him to fly the route despite his intent. His intent reveals an unsavory character, but it does not convert his otherwise justifiable act into an unjustifiable one.³⁹

Commentators continue to debate the moral tenability of DDE. Nevertheless, philosophic opinion today runs against DDE and, hence, implicitly against the abuse-of-rights doctrine reflected in Restatement of Property § 829.⁴⁰ Moreover,

³⁷ For discussion of the doctrine of double effect, see Peter Westen, *Is Intent Constitutive of Wrongdoing?*, in *CRIME, PUNISHMENT AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 193, 202–08 (Rowan Cruft, Matthew Kramer, & Mark Reiff eds., 2011).

³⁸ THOMAS COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 690 (1879).

³⁹ LARRY ALEXANDER & KIMBERLY FERZAN, *CRIME AND CULPABILITY* 98 (2009).

⁴⁰ See, e.g., THOMAS SCANLON, *MORAL DIMENSIONS* 8–36 (2008). For the argument that a property owner does not act with malice if, despite the owner’s ill will to another, the owner possesses legitimate self-regarding or other-regarding interests in inflicting harm, see Larissa Katz, *Spite and*

philosophers are not alone in doubting that an actor's malicious motives can transform otherwise lawful conduct into unlawful conduct. Nadav Shoked, in an exhaustive historical study of 200 years of U.S. jurisprudence, argues that, contrary to state statutes that purport to invalidate property uses based upon "spite," and contrary to Restatement of Property § 829 which declares property uses based on malice to be "unreasonable," U.S. courts have *not* overturned objectively lawful uses of property because of subjective malice motivating property owners (except during a short, transitional period in the mid-19th century). Instead, U.S. courts have based the rights of owners to use their property to harm their neighbors upon whether the owners themselves objectively benefit from the uses. Indeed, even when courts purport to resolve cases based upon whether owners act out of malice, courts actually base their determinations not on evidence of mental states of malice but on evidence that owners derive no objective benefit from harming neighbors.⁴¹

To illustrate, Shoked reviews the history of so-called "spite fences." In the mid-19th century, when the rights of property owners were thought to be absolute regardless of whether they served beneficent purposes, U.S. courts prevented owners from erecting fences that served no beneficial purposes by invoking evidence of an owner's malice. Within a few years, however, courts abandoned the pretense that property rights were absolute and began candidly assessing fences by weighing objective harms to neighbors against objective beneficial uses to owners. Having no further need to resort to owners' subjective states of mind in order to regulate fences, courts ceased basing fence decisions upon evidence of malice. And within jurisdictions that were bound by statutes that were explicitly framed in terms of spite, courts interpreted "spite fences" to mean fences that objectively harmed neighbors without sufficient benefit to owners.⁴²

This is not to claim that European jurisdictions agree or base their judgments on objective factors rather than malice. Nor is it to claim that Restatement of Property § 829 will continue to remain dormant. Nevertheless, it is noteworthy that European lawmakers have refrained from adopting the abuse-of-rights doctrine as a criminal law norm (as opposed to a civil law norm) or as an element of the crime of extortion.

B. *Prima-facie-tort doctrine.*

The February 1954 draft of what eventually became the MPC's "Theft by Extortion" changed direction by proposing that it be an offense to obtain property of another by threatening "otherwise to disadvantage any person under circumstances where the infliction of the harm would serve no legitimate interest of the actor."⁴³

Extortion: A Jurisdictional Principle of Abuse of Property Rights, 122 YALE L. J. 1444, 1459, 1471 (2013).

⁴¹ See generally Nadav Shoked, *Two Hundred Years of Spite*, 110 NW. L. REV. 357 (2016).

⁴² See *id.* at 384–98.

⁴³ MPC §206.3(10). (AM. L. INST., Discussion Draft No. 4, Feb. 13, 1954).

Contrary to the November 1953 draft, which focused on an actor's malicious purpose in inflicting harm that might otherwise be lawful, the February 1954 draft does the opposite: rather than refer to an actor's malicious purpose, it focuses on the objective legitimacy of what the actor threatens, legitimacy being measured by the relationship between harm being threatened and the actor's objective interest in inflicting it. In that respect, the February 1954 draft appears to base the criminality of obtaining property by means of threats upon the same threats of harm that underlie the American civil doctrine of prima facie torts, though, again, there is no indication that the ALI was conscious of the parallels.

The prima-facie-tort doctrine traces its origins to an 1889 statement by Lord Bowen in England⁴⁴ and to an 1894 observation by Oliver Wendell Holmes in the United States.⁴⁵ It has since been championed by academics,⁴⁶ embraced by the Restatement (Second) of Torts § 870,⁴⁷ and accepted by numerous state courts.⁴⁸ The doctrine declares it to be a tort for which an actor is liable for damages to *intentionally injure another person without justification*.⁴⁹ The doctrine resembles the threatened harm in the ALI's February 1954 draft. Thus, just as the prima-facie-tort doctrine makes it a civil tort for an actor to intentionally injure another without justification, the February 1954 draft would have it be a criminal offense to obtain property of another by threatening a harm that serves no legitimate interest of the actor, including an actor's legitimate interest safeguarding others. To be sure, the two doctrines appear to differ regarding mental states because the prima-facie-tort doctrine explicitly requires *intentional* harm while the February 1954 draft is silent regarding mental states. However, just as the former doctrine explicitly requires intentional harm, the latter *implicitly* requires it, too, because to "threaten" to harm another if property is not surrendered is to manifestly *intend* to harm if property is withheld.

⁴⁴ See *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598, 613 (1889) (Eng.), *aff'd*, [1892] A.C. 25 ("Intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade is actionable if done without just cause or excuse.").

⁴⁵ See Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894) ("[T]he intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause.").

⁴⁶ See Kenneth Vandavelde, *The Modern Prima Facie Tort Doctrine*, 79 KY. L. J. 519, 528 (1991) ("A prima facie tort is the intentional infliction of injury without justification.").

⁴⁷ See RESTATEMENT (SECOND) OF TORTS § 870 (AM. L. INST. 1979) ("One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances.").

⁴⁸ For commentators who have applauded the doctrine, see Vandavelde, *supra* note 46, at 520 n.4. *But see* Dan Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 345-46 (1980).

⁴⁹ For states that have adopted the doctrine, see Vandavelde, *supra* note 46, at 526-27. New York has adopted a modification of the doctrine that requires that the actor's conduct be motivated solely by malice and not otherwise be actionable. *See id.* at 537-44.

C. *Distinctions between inflicting HNBA, prima facie torts and abuse of rights.*

The November 1953 and February 1954 alternatives to section 223.4(7) would each have made it an offense to obtain property of another by threatening harms that are themselves unlawful in jurisdictions here or abroad, i.e., the tort of abuse of rights and prima facie torts, respectively. In contrast, section 223.4(7) proposes that it be an offense to obtain property of another by threatening something, i.e., HNBA, that is not itself unlawful.

In addition, the naked act of *inflicting* HNBA (as opposed to the crime of obtaining property by threatening to inflict it) differs significantly from abuse of rights torts and prima facie torts. The naked act of inflicting HNBA differs from an abuse of rights because the constitutive element of abuse of rights is the actor's subjective motivation while the constitutive element of inflicting HNBA is the objective relationship of third-person harms to first-person benefits. A naked act of inflicting HNBA also differs from prima facie torts because the prima facie tort doctrine is a *derivative* norm in ways that naked acts of inflicting HNBA are not: prima facie torts consist of inflicting such harms as are independently determined to be unjustified under the circumstances while HNBA consists of inflicting harms that would not benefit an actor, regardless of whether the harms are otherwise justified.

IV. THE NORMATIVE JUSTIFICATION FOR MAKING IT A CRIME TO OBTAIN PROPERTY OF ANOTHER WITHOUT ANY BENEFIT TO ONESELF

We have previously seen that section 223.4(7)'s reference to "any other harm" is broad enough to encompass both *unlawful* and *lawful* harms. The distinction between unlawful and lawful harms is significant because it is relevant to whether it is appropriate for the ALI to make it a crime to obtain property of another by a threat of HNBA. It also bears upon whether the naked act of inflicting HNBA is a generic moral wrong comparable to that of prima facie torts.

A. *Harms that are unlawful in themselves.*

Section 223.4(7) makes it an offense to exact property of another by threats of harms some of which are unlawful in themselves, e.g., the unlawful harm of subjecting a neighbor's land to an unlawful nuisance. The ALI acted appropriately in criminalizing the extorting of property by threats of harms that are criminal or civil wrongs in themselves. Indeed, doing so would be appropriate, regardless of whether actors would *benefit* from inflicting such harms.

1. Harms that are criminal wrongs in themselves.

Section 223.4(7)'s reference to "any other harm" does not include threats of *criminal* harm because section 223.4(1) already criminalizes extortionate threats to commit "any . . . criminal offense." Nevertheless, the ALI is justified in

criminalizing extortionate threats of criminal harm in section 223.4(1). The justification is not that such threats cause targets of extortion to fear that they *themselves* will become victim of crime, because section 223.4(1) goes beyond threatened crimes against extortion targets by including threats of crime “against *anyone*.” Rather, the justification is that threats of criminal harm against targets or third persons violate the *autonomy* of targets of extortion. Prior to receiving threats of criminal harm, targets enjoy legal and moral rights to two things: (i) to retain property, and (ii) to remain free of criminal harm to themselves and/or to others for whom they care. Subsequent to receiving threats of criminal harm, targets must forgo one right or the other, at least as long as the threats are credible. Targets who respond by surrendering property do so to protect themselves or others from crimes from which they ought to be free; targets who respond by retaining property do so at the risk that threateners will subject them or others for whom they care to criminal harm.

2. Harms that are civil wrongs in themselves.

Section 223.4 contains several subsections, including 223.4(7)’s residual norm, that apply to extortionate threats of harms that are *civil* wrongs in themselves.

i. Section 223.4(3-5).

Several subsections of section 223.4 make it a crime to obtain property of another by threatened harms that are civil wrongs. Thus, section 223.4(3) makes it a crime to obtain property of another by threatening to disclose secrets that subject persons to hatred, contempt or ridicule, including where such disclosures lack First Amendment protection and thus are tortious invasions of privacy and/or defamation. Section 223.4(4) makes it a crime for public officials to obtain property of others by threatening to take or withhold official action, including where taking or withholding action is unlawful because *ex officio*. And section 223.4(5) makes it a crime for a labor leader to obtain property of another for the leader’s personal benefit by threatening collective action, including where collective action is unlawful in itself.

Now it seems plausible that, just as the state is justified in criminalizing the obtaining of property of others by threats of *criminal* harms, it is also justified in criminalizing the obtaining of property of others by threats of *civil* wrongs because all such threats unlawfully infringe upon a target’s autonomy. Nevertheless, threatened civil wrongs raise questions that threatened criminal wrongs do not. If civil law suffices to redress torts and official wrongs once they occur, why does it not also suffice to redress mere *threats* of civil wrong? What prevents targets of civil extortion from rejecting such threats out of hand, knowing that the targets possess civil remedies in the event the threats are executed? What justifies the state in making it a *criminal* offense to obtain property of others by threats of harm that are no more than *civil* wrongs?

The answer lies in why states resort to criminal law with respect to acts that are already civil wrongs. States do so when (i) the state has strong interests in deterring the conduct, and/or (ii) civil remedies are inadequate to provide police the conduct. The state is justified in criminalizing extortionate threats of civil wrongs because the absence of criminal sanctions incentivizes extortionists to demand amounts of property that are less than the costs to their targets of pursuing civil relief, thereby precluding effective civil remedies. Threats of criminal prosecution are an appropriate deterrent to such extortion because victims of extortion cannot be counted upon to invoke civil law to police extortion.

ii. Section 223.4(7).

The residual norm in section 223.4(7) also applies to extortionate threats of harms that are civil wrongs, provided that the latter are not already encompassed by sections 223.4(3-5). An example is the offense of obtaining property of another by threats to inflict torts of extreme emotional distress that would not benefit the actor. And, just as the ALI is justified in using sections 223.4(3-5) to encompass extortionate threats of harms that are civil wrongs in themselves, the ALI is justified in using the residual norm of section 223.4(7) to encompass such wrongs as well.

B. Harms that are lawful in themselves.

The more difficult question is whether the ALI was justified in using section 223.4 to encompass extortionate threats of harms that are *lawful* in themselves. By its terms, section 223.4 clearly encompasses threats of lawful harms. Thus, section 223.4(2) criminalizes extortionate threats to accuse another of a crime, including where neither *accusing* persons nor *failing* to accuse them is itself a criminal or civil wrong; section 223.4(3) criminalizes extortionate threats to expose secrets that subject another to hatred, contempt or ridicule, including where both making and refraining from making such exposures enjoy First Amendment protection; section 223.4(4) criminalizes extortionate threats by public officials to take or withhold official action, including where such actions and omissions are within an official's lawful discretion; section 223.4(5) criminalizes extortionate threats by collective actions leaders to engage in collection action where the property demanded is not for the benefit of the group, including where both the taking and refraining from such collective actions are lawful; section 223.4(6) criminalizes extortionate threats to testify or withhold testimony regarding another's legal claim, including where both the giving and withholding such testimony are lawful; and section 223.4(7) criminalizes extortionate threats of harms that would not benefit the actor, including harms and their nonfeasances that are lawful in themselves, e.g., firing and retaining employees at will.

We shall see below that, with one exception, the aforementioned subsections 223.4(2-6) all involve threatened harms and omissions that, though also lawful in themselves, arise in particularized contexts such as to render them *wrongful*

inducements to surrendering property. In contrast, section 223.4(7)'s residual norm involves no such contexts. Consequently, if the ALI is justified in proposing to criminalize extortionate threats in section 223.4(7), it must be either because the naked act of 'inflicting harm that would not benefit the actor' is morally wrongful in itself or because it is a form of morally wrongful inducement to surrendering property that we have yet to address.

1. Section 223.4(2-6)'s application to *lawful* harms.

The ALI was right to criminalize the threatened harms enumerated in sections 223.4(2 & 4-6) because, though none is wrongful in itself, all arise in contexts that render them morally wrongful inducements to the surrender of property. Thus, regardless of whether misprision of felony is itself a criminal offense, extortionists obstruct justice by demanding and receiving money in exchange for refraining from reporting crimes that their express threats reveal themselves to be willing and able to report.⁵⁰ Regardless of whether an action is within a public official's discretion, it is a breach of public trust for a public official to demand and receive money in exchange for taking or refraining from taking official action that the public expects to be based solely upon the official's disinterested assessment of public interest. Regardless of whether labor leaders have discretion to call strikes, they unjustly enrich themselves by utilizing the power to call strikes to benefit themselves rather than the unions for whose benefit they possess the power in the first place. And, regardless of whether judicial witnesses have discretion to testify, witnesses (other than expert witnesses or out-of-state witnesses) obstruct justice by taking money in exchange for testifying for one party rather than for another.

The sole exception is section 223.4(3), which makes it an offense to obtain property of another by means of blackmail and, specifically, by threatening to disclose secrets that threateners have a First Amendment right to disclose but which subject others to ridicule, hatred or contempt.⁵¹ Yet the crime of blackmail provides thin support for section 223.4(7)'s residual norm because commentators famously disagree about whether criminal laws against blackmail are justified in so far as such laws extend to threatened disclosures that possess First Amendment protection.⁵²

2. Section 223.4(7)'s application to *lawful* harms.

⁵⁰ See Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 800–02 (1998).

⁵¹ Like a number of states, *see, e.g.*, ALASKA STAT. § 11.41.520 (2018), the MPC treats blackmail as an instance of extortion. *See* MPC § 223.4 (AM. L. INST.).

⁵² For debate about what commentators call the "paradox of blackmail," *see* Peter Westen, *Blackmail: A Crime of Paradox and Irony*, in THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 119, 136–38 (Larry Alexander & Kimberly Ferzan eds., 2019). For a review of recent scholarship defending the criminalization of blackmail, including theories based upon coercion, *see* Peter Westen, *Critical Commentary*, <http://www-personal.umich.edu/~pkw/criticalcommentary/> [perma.cc/K8XH-YCA2] (last visited Apr. 24, 2022).

There are two features of ‘inflicting HNBA’ and ‘obtaining property of another by a threat of HNBA’ that might be thought to render them inherently wrongful—namely, *mental states* they may reveal actors to possess and/or *unjustified harms* they may produce.

i. The *mental state* of inflicting harm without benefit to oneself.

It will be recalled that the ALI originally considered but rejected a residual norm that was based upon the malicious intent actors would manifest in the event they implemented threatened harms. However, it will also be recalled from discussion of the abuse-of-rights doctrine that skepticism about the Doctrine of Double Effect has undermined the view that the *intent* with which a person acts can itself transform otherwise non-wrongful harm into wrongful harm—skepticism that is reinforced by 200 years of jurisprudence regarding the right of property owners to put their property to uses based upon spite. Consequently, to the extent such skepticism is warranted, the intent with which a person acts does not itself render an otherwise lawful act of inflicting HNBA wrongful. And, because intent does transform a lawful act of HNBA into a wrongful one, it does not justify criminalizing the obtaining property of another by threatening to inflict an otherwise lawful act of HNBA.

ii. The justification for inflicting harm without benefit to oneself.

The alternative is to argue that, regardless of whether a harm is otherwise lawful, inflicting it without benefit to oneself transforms it from being an acceptable harm to a wrongful harm. Yet the argument presents two difficulties. For one, it is not obvious that benefit to *anyone* is necessary to prevent an otherwise acceptable harm from becoming wrongful,⁵³ though we need not decide that here. More to the point, even if a benefit to *someone* is necessary to prevent a harm from becoming wrongful, the benefit need not be to the actor himself. After all, even heinous harms such as homicide become justified when imposed to benefit third persons. Consider a passerby who, upon seeing a runaway trolley on a lethal path toward 5 workers on the track, saves the 5 by intentionally turning the trolley on to a sidetrack where it will kill one worker on the sidetrack. The act of turning the trolley is an act of HNBA because it consists of killing a worker without any benefit to the passerby herself. Even though the homicide would otherwise constitute murder, it becomes justified because of the 5 innocent lives it saves.⁵⁴

⁵³ See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 712 (1984).

⁵⁴ See Judith Thomson, *The Trolley Problem*, 94 YALE L. J. 1395, 1409. Cf. MPC § 3.02 (AM. L. INST.).

By the same token, if acts of HNBA are not inherently unjustified, neither are mere *threats* of HNBA. And, if threats of HNBA are not inherently unjustified, neither is ‘obtaining property by threats of HNBA’. To illustrate, suppose the following:

Mary and John

Mary is a politically conservative Republican in a wealthy, gated community of mostly politically conservative GOP homeowners. But Mary is involved in a hostile, acrimonious feud with her neighbor, John. Though Mary has little sympathy for the Black Lives Matter movement and worries that the BLM voter registration drives will increase registration by Democrats, she knows that John detests BLM. Accordingly, after being advised that doing so is lawful under local zoning and homeowners’ association rules, Mary purchases a neon “Black Lives Matter” sign, installs it in her backyard facing John’s house, and activates it for ten minutes while John is barbecuing with friends in his back yard. Mary thereupon notifies John that, if John anonymously contributes \$2,500 to a BLM voter registration drive, she will permanently remove the sign, but if he refuses, she will activate the sign whenever John has social gatherings in his backyard. Mary suspects that the sign will alienate her other neighbors, and she fears that it will lower real estate values in the neighborhood. Yet she nonetheless persists out of animus toward John.

John sues Mary for activating the sign, claiming that it amounted to a *prima facie* tort and a nuisance. But the suit is dismissed for failure to state a claim. After failing to obtain civil relief, John yields to Mary’s demand and anonymously contributes \$2,500 to a local BLM voter registration drive. The local prosecutor responds by prosecuting Mary under the state’s verbatim version of MPC § 223.4(7).

Mary’s actions satisfy the elements of section 223.4(7). Mary “obtained” property belonging to John by virtue of inducing John to transfer it to a BLM charity;⁵⁵ Mary did so by threatening to harm John’s enjoyment of his property—indeed, that was the very purpose of her threat; and Mary derived no personal benefit from the threatened harm other than the gratification of angering John.⁵⁶ Nevertheless, although the threatened harm, had it been inflicted, would not have benefitted Mary, it would have benefitted *society* because it consisted of socially worthwhile speech. To be sure, Mary’s BLM sign was not an expression of her own personal views of the BLM movement. Nevertheless, the threat was a proper means

⁵⁵ For purposes of section 223.4(7), an actor “obtains” property of another if the actor’s threat induces the target to convey property to the actor “or [to] another.” MPC § 223.0(5) (AM. L. INST.).

⁵⁶ MPC comments state that acting out of malice does not constitute a “benefit” within the meaning of section 223.4(7). *See supra* note 25.

of obtaining a donation to BLM because it highlighted for the public the salience of the BLM movement and how controversial it was in Mary's wealthy community.

Now, it might be thought that the normative force of "Mary and John" depends upon its consisting of free speech. But that is not so. Consider the following, which does not involve speech:

Sue and her Parents

Sue is a single mother who has exclusive custody of her two children. The children's father is a veteran who, having lost his job, lives on the street. Sue has regularly allowed her own parents to spend time alone with their only grandchildren—something Sue's parents say they cherish—despite the children's complaint that their grandparents make it unpleasant for them by denigrating the homeless. After consulting with a lawyer who tells her that she has discretion to control the conditions under which her children interact with their grandparents, Sue tells her parents that, unless they stop denigrating the homeless in front of the children and contribute \$2,500 to the local homeless shelter, she will not allow the children to spend unsupervised time alone with them. Sue persists, knowing that the threatened harm will wound her parents, and she fears that it may estrange them from her. The grandparents send \$2,500 to the homeless shelter.

Sue's actions also satisfy the elements of section 223.4(7). Sue obtained property belonging to her parents by threatening to harm them by denying them access to their grandchildren.⁵⁷ Sue did so with no personal benefit to herself and, indeed, at some risk to her relationship to her parents. Nevertheless, although the threatened harm, had it been inflicted, would not have benefitted Sue, it was a proper means of obtaining a donation to the local homeless shelter because it would have benefitted her children by shielding them from negative disparagement of their father.

The ALI's three illustrative hypotheticals provide no support for a residual norm as broad as section 223.4(7). "Foreman" and "Friend of a purchasing agent" are both instances of a specific wrong of which section 223.4(5) is also a subset. Each instantiates a narrow rationale, and neither supports a broader wrong of obtaining property by threatened harms that would not benefit the actor. The limited wrong that underlies "Foreman" and "Friend of a purchasing agent" is the same

⁵⁷ Philosophers continue to debate the nature of "harm" for purposes of criminal law. *See, e.g.*, 1 JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW (1985); JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 2 (1988). The American law of torts tends to take an expansive view. *See* RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965) ("severe emotional distress"). *See, e.g.*, *Fernandez v. Walgreen Hastings Co.*, 968 P.2d 774 (N.M. 1998) (grandparents suffer harm by loss of consortium with grandchildren). Absent guidance from the ALI or court interpretations, however, the scope of what constitutes "harm" under MPC § 223.4(7) remains undetermined.

limited wrong that underlies section 223.4(5) involving union leaders, namely, the wrong of exploiting one's role as a representative or ally of a representative of a collective body to obtain for oneself property that rightly belongs to the collective as a whole.

Similarly, "Professor" is an instance of a limited wrong identical to that which underlies sections 223.4(4 & 6). Section 223.4(4) prohibits public officials from obtaining property of another by threatening to take or not take official action; and section 223.4(6) prohibits potential witnesses from obtaining property of another by threatening to testify or not testify. The same wrong also underlies "Professor," namely, the wrong that a person in public or private authority commits who, while being empowered to exercise discretion in accord with prescribed criteria, exploits his authority by threatening to base discretionary decisions upon personal economic advantage rather than prescribed criteria. None of the hypotheticals depends upon any broader norm.

V. CASE LAW INTERPRETING THE MPC'S RESIDUAL NORM

The MPC's residual norm of extortion is more than an academic proposal. Sixteen states have enacted penal code extortion provisions that either precisely⁵⁸ or substantially⁵⁹ track the wording of section 223.4(7), though they label them variously as "Extortion," "Theft by Extortion," "Theft," "Larceny," "Threat," and "Stealing." Three of the sixteen states have also enacted provisions regarding "coercion," "sex trafficking," and/or "forced labor" that are based upon threats of HNBA.⁶⁰ Nevertheless, despite the statutes being decades old, states have been reluctant to enforce them. Twelve of the states appear not to have convicted anyone

⁵⁸ See CONN. GEN. STAT. § 53a-119 (2018) ("Larceny defined"); MO. REV. STAT. §§ 570.010(4)(g), 570.030.1(1) ("stealing"); 18 PA. CONS. STAT. § 3923 (2018) ("Theft").

⁵⁹ Two states substitute "the person making the threat" for "the actor." See ALASKA STAT. § 11.41.520 (2018) ("Extortion") and S.D. CODIFIED LAWS § 22-30A-4 (2018) ("Theft by threat"). One state substitutes "the offender" for "the actor." See 720 ILL. COMP. STAT. § 5/15-5 (2018) ("Threat"). Nine states make it an offense to threaten an "act" that would not "substantially benefit" the actor but would "substantially" or "materially" "harm" another with respect to his "health, safety, business, calling, career, financial condition, reputation or personal relationships." See ALA. CODE §§ 13A-8-1(14)(k) (2018) ("Threat"), 13A-8-15 (2018) ("Extortion"); ARK. CODE § 5-36-101(19)(A)(ix) ("Theft"); HAW. REV. STAT. § 707-764 (2018) ("Extortion"); IDAHO CODE § 18-2403 (2018) ("theft"); ME. REV. STAT. ANN. tit. 17, § 355 (2018) ("Theft by unauthorized taking or transfer"); N.H. REV. STAT. ANN. § 637:5 (2018) ("Theft by Extortion"); N.Y. PENAL LAW § 155.05 (2018) ("Larceny"); N.D. CENT. CODE § 12.1-23-10(13)(l) (2018) ("Theft and Related Offenses"); UTAH CODE ANN. § 76-6-406 (2018) ("Theft by Extortion"). Two states make it an offense to inflict an "act" that would not "materially benefit" the actor. See IDAHO REV. STAT. § 18-2403(9); N.Y. PEN. C. § 155.05(2)(e)(ix). One state makes it an offense to inflict a "harm" that does not substantially benefit the actor but would "materially harm" another. See N.J. STAT. ANN. § 2C:20-5 (2018) ("Theft by extortion").

⁶⁰ See ME. STAT. tit. 17, §§ 304 (2018) (Forced Labor), 852 (2018) (Sex Trafficking); N.J. STAT. ANN. § 2C:13-5 (2018) (Coercion); N.Y. PENAL LAW §§ 135.60 (2018) (Coercion), 230.34 (2018) (Sex Trafficking).

of violating them.⁶¹ And courts in Hawaii have applied the norm to support convictions that could just as easily have been based upon alternative, less controversial, Hawaiian extortion provisions.⁶²

To be sure, New Hampshire, New Jersey and New York have invoked the residual norm in a total of three cases to support indictments that could not have been supported under alternative extortion provisions. However, none of the three cases justifies criminalizing extortionate threats of HNBA because each was an instance of a narrower, less controversial wrong that could have been criminalized without reference to the residual norm.

A. *People v. Forde* (New York).

*People v. Forde*⁶³ was an instance of the previously discussed, narrower wrong that underlies section 223.4(5), namely, the wrong of exploiting one's role as a representative of a collective body to obtain an economic benefit for oneself that rightly belongs to the collective as a whole. The defendant in *Forde* was a labor-union representative who was alleged to have personally pocketed \$2,000 from an employer by threatening that, unless the employer paid him that amount personally, the defendant would enforce a collective bargaining requirement that at least 50% of the worksite carpenters be union members.

B. *State v. Hynes* (New Hampshire).

*State v. Hynes*⁶⁴ was an instance of a narrow wrong—and, indeed, one that constitutes an intentional tort under the Restatement (Second) of Torts—of using threats of frivolous civil litigation to obtain property of another.⁶⁵ The defendant in *Hynes* was an attorney who, although he had never personally frequented the hair salon at issue and never represented a client who had, nevertheless threatened the hair salon that, unless it paid him \$500, he would sue the salon for sex and age discrimination for charging more to cut women's hair than men's and children's hair, despite having no standing to bring such a suit.

⁶¹ There are no appellate records in Alabama, Alaska, Arkansas, Connecticut, Idaho, Illinois, Maine, Missouri, North Dakota, Pennsylvania, South Dakota or Utah of their having applied their respective residual norms to sustain convictions for extortion, coercion, sex trafficking, and/or forced labor.

⁶² See *State v. Pudiquet*, 922 P.2d 1032, 1040 (Haw. Ct. App. 1996) (a threat of “bodily injury” and/or “damage to property”); *State v. Parel*, 310 P.2d 1047 (Haw. Ct. App. 2010) (a threat to “expose a secret . . . whether true or false, tending to . . . impair the threatened person's business credit”).

⁶³ 552 N.Y.S.2d 113 (N.Y. App. Div. 1990).

⁶⁴ 978 A.2d 264 (N.H. 2009).

⁶⁵ See RESTATEMENT (SECOND) OF TORTS § 682 (AM. L. INST. 1977).

C. *State v. Roth* (New Jersey).

*State v. Roth*⁶⁶ was similar to *Hynes*. The defendant in *Roth*, having previously set aside a sheriff's sale on technical grounds despite having neither personally bid at the sale nor possessed sufficient financing to bid at the sale, obtained \$2,000 from the winning bidder at the subsequent sale by threatening to set aside the second sale as well, despite believing that he was acting unlawfully in doing so.

Now it might be thought that, although the threatened harms in *Hynes* and *Roth* would not have benefitted the actors themselves, they would have conferred benefits on third parties, i.e., persons who suffer from sex and age discrimination at hair salons and persons who wish to participate in sheriffs' sales. But, aside from the fact that the threatened lawsuits in *Hynes* and *Roth* either could not have been brought or would not otherwise have been brought, the threats were wrongful for the same reason that extortionate threats to accuse others of crimes are wrongful. Extortionate threats to accuse others of crimes are wrongful because they consist of biconditional proposals to *hush up* crimes in return for payment.⁶⁷ So, too, the threats in *Hynes* and *Roth* were wrongful because they consisted of biconditional proposals to hush up civil violations in return for payment.

CONCLUSION

Model Penal Code § 223.4(7) proposes that it be a crime of extortion to obtain property of another by threatening a *harm which would not benefit the actor*. With a salient exception, offenses of "extortion" typically consist of threatened harms that are either morally wrongful in themselves or morally wrongful inducements to persons to relinquish property—the exception being the controversial crime of informational blackmail where harmful disclosures and nondisclosures are not wrongful in themselves and where trading silence for remuneration is not morally wrongful either. The question is: is the naked *act* of inflicting a harm without benefit to oneself inherently wrongful and, if not, is the *threat* of such harm a wrongful inducement to relinquish property?

I argue that the act of inflicting harm without benefit to oneself is not inherently wrongful because (i) in contrast to "prima facie torts," which consist solely of harms that are unjustified, harms that do not benefit actors are not necessarily unjustified because, although they do not benefit actors, they may justifiably benefit third parties, and (ii) contrary to the "abuse of rights" doctrine, any malice evidenced by inflicting harm without benefit to oneself does not transform justified harms into unjustified harms. Then, after considering and rejecting several reasons for thinking otherwise, I argue that a threat of harm without benefit to oneself is not itself a morally wrongful inducement to a person to relinquish property.

⁶⁶ 673 A.2d 285 (N.J. Super. Ct. App. Div. 1996)

⁶⁷ See text and note, *supra* note 7.

If this analysis is correct, it means that the residual norm of extortion contained in MPC § 223.4(7) is deeply problematic.⁶⁸ That would help explain why states so rarely enforce statutes based upon it.⁶⁹ And it might explain why more than one state has invalidated such statutes on grounds of vagueness, a common rubric for invalidating statutes that courts regard as problematic on substantive grounds.⁷⁰

The MPC's residual norm would be more tenable if "harm which would not benefit the *actor*" were interpreted to mean "harm which would not benefit to *anyone*." However, the courts that have addressed the issue have rejected that interpretation, ruling instead that benefits of helping third persons or society as a whole do not constitute benefits to "the actor."⁷¹ And, even then, the norm would be underinclusive unless "no benefit" were understood also to mean none sufficient to justify whatever unjustified harms are involved.

⁶⁸ For commentators who are skeptical of the norm, see Lindgren, *supra* note 53, at 712 (describing the residual norm as "strange," "problematic," "lack[ing] a rationale," and "violat[ing] common sense"); Ginsburg and Shechtman, *supra* note 11, at 1858-59 (expressing "concer[n]" about the residual norm and noting that the ALI provides no "analytic justification for [it]"). Stephen E. Sachs, *Saving Toby: Extortion, Blackmail, and the Right to Destroy*, 24 YALE L. & POL'Y REV. 251, 260-61 (2006), embraces the residual norm as a way to identify acts of malice but does not address the issue inherent in criticism of the Doctrine of Double Effect of punishing persons for otherwise justified harms based upon their motives.

For scholarly skepticism of section 223.4(7)'s analogous rule of contractual duress under RESTATEMENT (SECOND) OF CONTS. § 176(2)(a) (AM. L. INST.), see Hamish Stewart, *A Formal Approach to Contractual Duress*, 47 U. TORONTO L. J. 175, 192-93 (1997) (Restatement rule is "difficult to explain" and "not obviously consistent with the presupposition of freedom of contract"); Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397, 1428 n. 125 (2009) (Restatement rule "misfires" by focusing on malice rather than coercion and is contrary to recent caselaw); Einer Elhauge, *Contrived Threats versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 528-29 (2016) (Restatement rule "overdeter[s]" contracting by invalidating contracts that should, instead, be set aside on the narrower ground that they involve "contrived threats" "uncontrived warnings").

⁶⁹ See *People v. Forde*, 552 N.Y.S.2d 113 (N.Y. 1990); *State v. Hynes*, 978 A.2d 264 (N.H. App. Div. 2009).

⁷⁰ See *State v. Steiger*, 781 P.2d 616, 617, 620-21 (Ariz. Ct. App. 1989) (invalidating on vagueness grounds an Arizona statute that made it an offense to obtain property of another by threatening to perform any act "which would not in itself materially benefit the defendant but which is calculated to harm another . . ."); *State v. Robertson*, 649 P.2d 569, 577 (Or. 1982) (invalidating on vagueness grounds a state statute that made it an offense to coerce another to engage in conduct that the latter had a right to eschew by threatening to inflict "any harm which would not benefit the actor"). See also Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960).

⁷¹ See *Hynes*, 978 A.2d at 272 ("the phrase 'substantially benefit' is not so broad as to encompass 'an altruistic sense of accomplishment for ridding the world of a perceived injustice'"); *State v. Roth*, 673 A.2d 285, 288-89 (N.J. Super. Ct. App. Div., 1996) (it would "eviscerate" the statute to interpret "benefit" to include "societal goal[s]").