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IN DEFENSE OF KEEPING BLACKMAIL A CRIME: RESPONDING TO BLOCK AND GORDON

*James Lindgren**

In a recent issue of this journal, Walter Block and David Gordon argued that some kinds of common blackmail or extortion threats should no longer be criminal.¹ They would legalize threats that could be legally carried out. If you could do something, they say, you ought to be able to threaten to do it. So, for example, they would allow me to make the following threats: I will expose that you had an extramarital affair, beat your spouse or had an abortion unless you pay me \$1000 a month for the rest of your life. If I could legally expose the damaging information (and I could), they think I ought to be able to threaten to expose it unless paid off. They would simply wipe out this large class of blackmail—threats to take legal acts. Elsewhere in the literature, this problem is called the paradox of blackmail.²

To reach their strange conclusion, Block and Gordon attack the work of several scholars—Robert Nozick, Richard Posner, Richard Epstein and myself. Of course, I am pleased when anyone takes my work seriously enough to say it is wrong. And I am particularly pleased to be in such illustrious company. I am writing here to advance two positions, one in defense of all four of us,³ one in defense of myself alone.

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1. Block & Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A.L. REV. 37 (1985).

2. See generally Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984); Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 156-57 (1980); Williams, *Blackmail*, 1954 CRIM. L. REV. 79, 163.

3. Although I am speaking here in defense of Nozick, Posner and Epstein, I am not speaking on their behalf. The arguments are my own, and I suspect that Nozick and Posner, in particular, think differently than I do about the role of morality in law. See *infra* notes 7-15 and accompanying text. My own critiques of their theories (as well as other theories of blackmail) are set out in Lindgren, *supra* note 2.

I. DEFENDING BLACKMAIL THEORISTS

A. *The Empty Search for Violations of Rights*

I think Block and Gordon reach different results from the rest of us mostly because they take a different approach. Nozick, Posner, Epstein and I looked at blackmail and tried to explain what is particularly immoral, inefficient or harmful about the behavior. Block and Gordon, on the other hand, admit its immorality but point out that it is consensual and ask instead: What rights does blackmail violate? They conclude that informational blackmail violates no right of the victim and thus should be legal.

At the most basic (and trivial) level, every crime involves a violation of rights—if only a citizen's right to be free of the behavior prohibited by the crime. A homicide is criminal since it violates the right not to be killed. Robbery is criminal since it violates the right not to be robbed. And blackmail is criminal since it violates the right not to be blackmailed. Obviously, Block and Gordon mean something more than this. They assume that something can be made criminal only if it violates some other law, only if there is a source of illegality independent of the law against the particular behavior. This is a misguided search.

Using Block and Gordon's standards for criminality, it would be difficult to justify making almost any behavior criminal—even murder. For except for killing, what is wrong with murder? To justify making murder criminal under Block and Gordon's standard, we would have to discover some violated right other than the right not to be killed. The core wrongdoing of murder is killing, just as the core wrongdoing of blackmail is immoral coercion. Of course, murder causes harms other than death, but so does blackmail cause harms other than immoral coercion. Both the academic literature and the press have described lives ruined by persistent blackmailers.⁴ You cannot require that every crime be based, not on the harmful behavior that the crime prohibits, but on some other law that the behavior might violate. How then would you support that other law—by looking at yet a third. At some point you would run out of prior laws. When we put behavior in a conceptual box and call it criminal, it is not because it could just as easily fit in another conceptual box. There must be something intrinsic in the behavior that merits punishment.

Returning to murder, is murder criminal because it involves the lesser crime of battery, which is an offensive touching? Then battery

4. See generally M. HEPWORTH, *BLACKMAIL* (1975).

would be criminal because it involves an assault, which is putting the victim in fear of a battery. Collapsing the analysis, murder would be criminal because it usually puts someone in fear of an offensive touching. For such trivial behavior, the death penalty seems a bit severe. And even if you were willing to accept this, it would not be enough to justify the criminality of murder because we have not identified the crime that can justify assault.

A slightly different version of this quest for violated rights would look not to other crimes as justifications but instead to the civil law. Thus, for instance, our civil law system recognizes the right of private property, so that when someone steals from an owner, they violate the owner's property rights. The owner has a civil remedy against the thief, such as an action for conversion. In other words, the crime of theft can be justified because it fits into the structure of the civil law system of private property.

Yet if this is the approach Block and Gordon meant to take, the criminality of blackmail would be justified. Our civil law usually counts a blackmail threat as civil duress,⁵ so that a contract signed under a blackmail threat is unenforceable.⁶ Moreover, most states treat blackmail as a species of theft, so that all of the civil remedies available to victims of theft should be available to victims of blackmail. Thus a blackmail threat typically violates the victim's civil right to keep his property and be free of duress. If the victim can show a resulting loss, he can pursue his civil remedies.

Ultimately, the search for violated rights leads nowhere. To justify every crime by showing that it is subsumed in another crime is fallacious, since not every crime can be based on a logically prior crime. And if Block and Gordon meant that behavior can be made criminal only if it violates some corresponding civil right, blackmail would be adequately justified, since the civil law provides its own remedies for blackmail threats. To me, the question of rights is better understood as the goal rather than the means to reach it. If we can figure out what is particularly immoral or harmful about the behavior, then we have justified the law's decision to give citizens a right to be free of blackmail.

5. *See generally* Gallon v. Lloyd-Thomas Co., 264 F.2d 821 (8th Cir. 1959); Hornstein v. Paramount Pictures, 292 N.Y. 468, 55 N.E.2d 740 (1944).

6. A blackmail threat that seeks to compel action rather than obtain property could presumably be the subject of an action for intentional infliction of emotional distress, though offhand I do not recall one.

B. The Insufficiency of Consent to Negate Criminality

Block and Gordon make another point—that blackmail is consensual. It is not clear whether they intend this as support for the notion that blackmail violates no rights or as an independent ground negating criminality. Yet whichever they intend, it is fairly easily dispensed with.

Consent is not a universal bar to criminality. If I buy a product from a price-fixer, the contract is consensual. Yet I may have been the victim of a criminal violation of the antitrust laws. This is true even if I know that the price is higher than it would be in a fully competitive market. Although I would prefer to pay the lower price, I am willing to pay the higher price because I can still benefit from the contract at that higher price. That the contract may be consensual is no bar to the antitrust laws prohibiting price-fixing.

Blackmail is similar. Although the victim may agree with the blackmailer, that does not undercut society's consensus that the blackmailer is taking unfair advantage of the victim. Block and Gordon admit as much by granting the immorality of blackmail. The victim may prefer the blackmail agreement to exposure, but what he really prefers is for the blackmailer to go away empty-handed, keeping the secret.

Even Block and Gordon implicitly recognize that consent is not in itself enough to negate criminality. They would, for example, make criminal a professor's threat to flunk a student unless the student (who deserves to pass) pays \$50—since this breaches the professor's duty to his school. Yet a student who gives in to such a threat is consenting to the contract. The student must think that he can benefit from the contract or he would not go along. Unlike Block and Gordon, I would put this case on much the same ground as the earlier examples. Despite consent, an agreement negotiated under certain kinds of immoral threats may be punished as blackmail, just as other agreements negotiated immorally can be punished as price-fixing or fraud. After all, even a robber's threat, "Your money or your life" proposes a bargain where a victim usually stands to gain by consenting. The crucial point in all these cases is not consent, but the immorality of the leverage used to induce "consent."

C. The Significance of Immorality

Block and Gordon are willing to admit the immorality of blackmail, but reject the relevance of immorality to the criminal law. In attacking Epstein, they say:

Perhaps [Epstein's argument] arises out of a confusion between

morality (the study of what is or is not immoral) and legal philosophy (the study of what should or should not be prohibited by force of law). . . . Blackmail may well be underhanded, evil, vicious, reprehensible and immoral. But that is entirely beside the point. Our concern here is solely with the question of the criminal, not moral, status of blackmail.⁷

Instead of immorality, they focus unhelpfully on violations of rights. It is almost as if as nonlawyers they have heard the shibboleth "You can't legislate morality" and assumed that immorality has little to do with the criminal law. Although the precise relation of morality to criminal law is open to wide debate, most theories of the criminal law emphasize morality very heavily. Henry Hart went perhaps a bit further than most when he wrote, "What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition."⁸ A current textbook written by official commentators to the Model Penal Code explains: "That the criminal law derives from moral values cannot be doubted; some notion of right and wrong necessarily underlies the decision of what to punish."⁹ Most theories combine some notion of immorality with some notion of harm, disutility or inefficiency. A few center only on the latter concerns. None to my knowledge adopt Block and Gordon's novel approach of requiring violations of independent rights.

Immorality matters. As a society, we have rejected Lady Wootton's proposal that we make bad results criminal and worry about intent only in sentencing.¹⁰ In defining almost every serious crime, we require mens rea—or in the terminology of the Model Penal Code, "culpability."¹¹ In drawing the line between homicide and legitimate self-defense, most of the law is based on whether the threatened person was acting unreasonably. The modern trend is to treat attempts for most crimes as seriously as completed crimes, in part because although the results differ, the morality of the behavior is similar. Again and again, morality comes up in setting the boundaries of the criminal law. The few crimes that do move

7. Block & Gordon, *supra* note 1, at 47.

8. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958).

9. P. LOW, J. JEFFRIES & R. BONNIE, *CRIMINAL LAW* 34 (2d ed. 1986). Low and Jeffries are reporters for the Model Penal Code.

10. B. WOOTTON, *CRIME AND CRIMINAL LAW* (1963). See also Leivitt, *Extent and Function of the Doctrine of Mens Rea*, 17 *ILL. L. REV.* 578 (1923). But see H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

11. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

away from morality by not requiring mens rea are often vigorously attacked by criminal law theorists.

But not all immoral behavior is criminal. This may be because either the behavior is not sufficiently immoral, it does not cause serious enough harm or it is not a traditional concern of the criminal law.¹² For example, usually lying is seriously immoral but not illegal. But if lying is used to gain property or advantages from other people, it may be punished as civil and criminal fraud. Blackmail is similar. As Block and Gordon admit, it is a seriously immoral way of obtaining property or advantages. Like other seriously immoral ways of obtaining property, it is made criminal. At common law, one type of blackmail, a threat to accuse of sodomy, was punished under the crime of robbery.¹³ Today many states consolidate blackmail with other immoral ways of gaining property under their theft statutes.¹⁴

The importance of morality to crime definition cuts across all ways of gaining property or compelling action. For example, a threat or use of force is usually criminal. But sometimes the police or private citizens may threaten or use force to make an arrest or stop a crime.¹⁵ The unreasonable or immoral use of force is made criminal; the reasonable or moral use of force is justified. Much the same is true of blackmail. Threats are made criminal depending on their immorality.

II. DEFENDING THE CRIMINALITY OF BLACKMAIL

The next step is to determine what separates fair from unfair threats seeking property or compelling action. This is not an easy task, and unlike Block and Gordon, I am not willing to grant the immorality of blackmail without some explanation. Here Posner, Epstein, Nozick and I all take different approaches. Thus I must stop defending the four of us and move to my own defense. To respond to Block and Gordon's particular criticisms of my explanation for blackmail, I must repeat a summary of my views:

12. Block and Gordon seem to think that blackmail is not a traditional concern of the Anglo-American criminal law, but it has been a crime for more than two centuries. Threats of harm (whether deserved or not) have been a concern even longer, as have immoral ways of acquiring other people's property.

Richard Posner has argued that the central purpose of the criminal law is to discourage coercive transfers. See Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

13. See, e.g., R. PERKINS, *CRIMINAL LAW* 372 (2d ed. 1969). Also, the commentary to the influential Field Code states that "extortion partakes in an inferior degree of the nature of robbery." N.Y. PENAL CODE § 584 (Proposed Code 1865).

14. See, e.g., MODEL PENAL CODE §§ 223.0-223.9 (Proposed Official Draft 1962).

15. See, e.g., *id.* §§ 3.04-3.09.

[T]he key to the wrongfulness of the blackmail transaction is its triangular structure. The transaction implicitly involves not only the blackmailer and his victim but always a third party as well. This third party may be, for example, the victim's spouse or employer, the authorities or even the public at large. When a blackmailer tries to use his right to release damaging information, he is threatening to tell others. If the blackmail victim pays the blackmailer, it is to avoid the harm that those others would inflict. Thus blackmail is a way that one person requests something in return for suppressing the actual or potential interests of others. To get what he wants, the blackmailer uses leverage that is less his than someone else's. Selling the right to go to the police involves suppressing the state's interests. Selling the right to tell a tort victim who committed the tort involves suppressing the tort victim's interests. And selling the right to inform others of embarrassing (but legal) behavior involves suppressing the interests of those other people.

Noninformational blackmail involves the same misuse of a third party's leverage for the blackmailer's own benefit. For example, when a labor leader threatens to call a strike unless he is given a personal payoff, he is using the leverage of third parties to bargain for his own benefit. Thus the criminalization of informational and noninformational blackmail represents a principled decision that advantages may not be gained by extra leverage belonging more to a third party than to the threatener.¹⁶

Block and Gordon make essentially three criticisms. First, they argue that there is no relevant difference between suppressing information and releasing it. This is an odd argument for the authors to make in an article entitled "Blackmail, Extortion and *Free Speech*."¹⁷ After all, the framers of the Constitution thought that releasing information was so important that they wrote the first amendment to protect that behavior. Any effort to understand something as elusive as blackmail must be willing to recognize distinctions more subtle than the one between the release and the suppression of information. In my view, someone who takes money for suppressing a crime effectively settles the government's claim, and for that reason may be punished as a blackmailer.

Second, Block and Gordon contend that there is no suppression of

16. Lindgren, *supra* note 2, at 672.

17. The full title is *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*. See Block & Gordon, *supra* note 1, at 1 (emphasis added).

claims in blackmail since a third party "is as free as before to pursue all his legal remedies."¹⁸ In the example I just gave, the government can still prosecute the criminal if they can discover the crime by other methods. In my article, I discussed this argument:

Thus when a blackmailer threatens to turn in a criminal unless paid money, the blackmailer is bargaining with the state's chip. The blackmail victim pays to avoid the harm that the state would inflict; he pays because he believes that he can thereby suppress the state's potential criminal claim. Of course, this does not effect a legally binding settlement, but the leverage is effective precisely to the extent that a victim believes that he has reached an effective settlement.¹⁹

Without some hint from Block and Gordon about what is wrong with my argument here, I do not know how to improve it. The blackmail victim would not pay unless he thought that he had a good chance of effectively settling the matter. And, undoubtedly, the amount the victim is willing to pay depends in part on how likely it is that the settlement is final. Once again, Block and Gordon ignore the *de facto* settlement of claims, just because it is not a *de jure* settlement. This is a little like ignoring *de facto* discrimination because it is not *de jure* discrimination.

Block and Gordon's last accusation is that my use of metaphors obscured the true nature of things. At least as to using metaphors, I must plead guilty. I speak about bargaining with someone else's chips and settling other people's claims with a fully disclosed recognition that some of the claims they are settling are legally enforceable and some are not. Analogy and metaphor seemed the best way to express that blackmail law treats the enforceable and unenforceable interests of third parties in roughly equivalent ways. Thus if you threaten to expose a tortfeasor unless the tortfeasor pays you off instead of the victim of the tort, you are bargaining with the tort victim's claim. Now it may be invoking a metaphor to say that you are "settling" that tort victim's claim. The tortfeasor is paying in the hope that he has made an effective settlement, which in this case is analogous to a legal settlement. To me, the law of blackmail expresses the consensus that a threatener does not have a sufficient personal stake in the potential dispute between the tortfeasor and the tort victim so that he may effectively settle that dispute through blackmail.

Looking at analogous cases was not an act of desperation; it was

18. *Id.* at 53.

19. Lindgren, *supra* note 2, at 702.

quite consciously part of my method. To illuminate the subtleties of the problem and my attempted explanation, I discussed or mentioned scores of examples (in fact many more than any other blackmail theorist). And I followed a method commonly used for examining philosophical ideas. For instance, in his little classic, *Thinking With Concepts*,²⁰ Cambridge philosopher John Wilson lays out a method for analyzing difficult concepts—like truth, equality or blackmail. Although I do not pretend that I slavishly followed Wilson's method, I did take his main suggestions. I looked at model cases to find the core of the concept.²¹ I looked at counter-examples to explain why they were not part of the concept.²² I looked at borderline cases to explain what made them odd or difficult.²³ And I looked at analogous cases to search for similar principles and to fit my theory into a broader context.²⁴ I may not have succeeded, but I doubt that speaking metaphorically hindered anyone's understanding of my ideas. I suspect that the analogies had the opposite effect. And, indeed, Block and Gordon seem to understand the similarities I point to; they simply reject their relevance.

At first glance, all three of Block and Gordon's criticisms of my theory seem shockingly literal. They fail to see the difference between suppressing and releasing information, fail to recognize the similarity between blackmail and settling or suppressing other people's interests, and seem to reject the very idea of using analogies.

But I think that all these particular criticisms are explainable if you remember their general approach—the misguided search for rights violations. A theorist looking for violations of rights might say: It doesn't matter whether you suppress or release information if you don't violate anyone's rights by doing so. Moreover, you don't violate anyone's rights by effectively (though not legally) settling someone else's claim. And last, don't analogize similar types of immoral leverage since they are not sufficiently similar if some leverage involves abridging rights and some doesn't.

Thus all Block and Gordon's criticisms of my theory are not really as specific as they seem. Nor do they stem from literal-mindedness. Rather they arise from applying different standards for criminality, insisting on violations of rights independent of the right to be free of blackmail threats. Posner, Epstein, Nozick and I all use lower standards for

20. J. WILSON, *THINKING WITH CONCEPTS* (1963).

21. *See id.* at 28-29.

22. *See id.* at 29-30.

23. *See id.* at 31.

24. *See id.* at 30-31.

criminality, which may explain why we (for different reasons) argue that blackmail ought to be illegal. Block and Gordon's standard for criminality is unrealistically high—too high to explain the illegality of almost any crime, let alone one as difficult and paradoxical as blackmail.