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WHY BLACKMAIL SHOULD BE CRIMINALIZED: A REPLY TO WALTER BLOCK AND DAVID GORDON

*Debra J. Campbell**

I. INTRODUCTION

In an article entitled *Blackmail, Extortion and Free Speech*,¹ Walter Block and David Gordon offer what they feel is the conclusive argument to a debate about blackmail.² The debate centers around the following question: In a capitalist society, why should blackmail be criminalized? The positions of those engaged in the debate range from those who claim blackmail should be criminalized simply because it is immoral to those who claim that there is no clear distinction between blackmail and other hard economic transactions; therefore criminalization of blackmail is unjustified.

In order to review the course of the debate without going into too much detail, I have divided my argument into four sections. In the first section I briefly summarize the "paradox" of blackmail which has fueled the current debate. The second section outlines various justifications for criminalizing blackmail which have been put forth, but which have been proven to be inadequate after careful analysis. In the third section, I present in more detail Block and Gordon's attempted resolution to the debate and criticize their argument. I hope to convince the reader that, although Block and Gordon's argument form is valid, the argument is unsound for at least two reasons: (1) one of their premises is clearly false, and (2) another premise is merely assumed when it needs to be argued for. Finally, in the fourth section, I argue that blackmail transactions can be distinguished in principle from legitimate economic transactions. Consequently, by means of a contract form of argument of the sort developed by John Rawls,³ the prohibition of blackmail can be justified while other hard economic transactions remain permissible.

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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. Block and Gordon contend that blackmail is only a permissible threat and since permissible threats are legal, blackmail should be legal. *Id.*

3. See J. RAWLS, *A THEORY OF JUSTICE* (1971).

II. THE ARGUMENT

A. *The Paradox of Blackmail Revisited*

In *Blackmail: A Preliminary Inquiry*, Murphy asks: What is it about blackmail that distinguishes it from other hard economic transactions?⁴ If we can discover some clear distinction between the two, then perhaps we can explain why blackmail is criminalized while other hard economic transactions, which seem as morally offensive as blackmail, are legal. For the purposes of this paper, following Murphy and others, I shall identify blackmail as "reputational extortion." A person commits the crime of reputational extortion if he "demands money or other valuable consideration under the threat of exercising his right of free speech by publicizing someone else's secret without use of the threat of force or violence."⁵ Murphy argues that criminalizing blackmail seems "paradoxical" because the blackmailer merely threatens to do something which he has the right to do, namely, reveal some true information. But this threat of warning becomes a criminal offense if joined with a demand for money. Thus, the "paradox of blackmail" is as follows:

Since all the blackmailer threatens to do is something which he has the right to do, why should we prohibit him from making the threat and tying the threat to a demand for money—particularly since the victim, given the legally permitted alternative, is often happy to have the opportunity to respond to such a threat?⁶

If this is an accurate and complete description of a blackmail transaction, then perhaps the state is just wrong to make blackmail a criminal offense. In fact, this paradox has led Block and Gordon to argue that blackmail should not be criminalized. I shall discuss their argument at length in the third section. For now, I must briefly digress and review the more common reasons given for criminalizing blackmail.

4. Murphy, *Blackmail: A Preliminary Inquiry*, 63 THE MONIST 156, 156-57 (1980). Murphy gives the following example of a hard, perhaps immoral, economic transaction: Your son is dying of leukemia and his last wish is to own a baseball autographed by Babe Ruth. I happen to own such a baseball. I find out that \$6,000 is your entire life's savings, and I offer to sell you the baseball for \$6,000. Murphy claims that the father in this case is under no less pressure than any blackmail victim. Therefore, why is this type of transaction legal, and blackmail not?

5. Block & Gordon, *supra* note 1, at 37. See also Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 274 (1982) (providing argument that secret information must be true and blackmailer must have acquired information innocently).

6. Murphy, *supra* note 4, at 160.

B. *The Inadequate Justifications*

First, I want to deny, with Murphy and others, that the immoral nature of blackmail alone is a sufficiently good reason for criminalizing it.⁷ Second, attempts to prove that blackmail violates a specific private property right of the victim have been equally fruitless.⁸ I also reject Murphy's proposal that "immorality plus disutility is a reasonable basis for criminalization"⁹ for the reasons given in an argument by Eric Mack.¹⁰

Robert Nozick's suggestion—that blackmail be prohibited because it is an "unproductive economic exchange" is ruled out for at least two reasons.¹¹ The first is argued by Murphy: All blackmail transactions are not "unproductive" in Nozick's sense.¹² The second is a more obvious objection: even if all and only blackmail transactions are "unproductive," one still would have to justify why non-productivity is an adequate justification for criminalization. Finally, any argument to criminalize blackmail because it involves a "coercive threat" is rejected by Murphy on the grounds that the threat of a blackmailer is not really a "coercive threat."¹³ I agree with Murphy in concluding that if one accepts Haksar's definition of a "coercive threat," then the threat which is an explicit part of any blackmail transaction is not "coercive." However, in the last section of this paper, I argue that blackmail can be distinguished from other hard economic transactions because it involves not a "coercive threat," but a "coercive offer."

C. *Block and Gordon's Proposal*

The inadequacy of the justifications presented above has prompted Walter Block and David Gordon to argue that there is no good justifica-

7. Block & Gordon, *supra* note 1, at 53. See also Murphy, *supra* note 4, at 163.

8. Block & Gordon, *supra* note 1, at 38 n.8. See also Mack, *supra* note 3, at 274; Murphy, *supra* note 4, at 160; Lindgren, *In Defense of Keeping Blackmail A Crime: Responding to Block and Gordon*, 20 LOY. L.A.L. REV. 35, 37 (1986).

9. Murphy, *supra* note 4, at 163.

10. Mack's argument, in part, is that some hard economic transactions, such as boycotts, are no different in principle from blackmail. If immorality in conjunction with social disutility does not justify prohibiting boycotts, then it also does not justify criminalizing blackmail.

11. R. NOZICK, ANARCHY, STATE, AND UTOPIA 85 (1974).

12. Murphy, *supra* note 4, at 158. Murphy provides an example in which the blackmailer is better off if the victim is able to buy the blackmailer's silence. This is a counter-example to Nozick's claim that blackmail transactions are unproductive.

13. Murphy follows V. Haksar's definition of a "coercive threat." A threat is coercive if the threatener's unilateral plan of action, should the offeree decline the offer, is morally impermissible. *Id.* at 156. See also Haksar, *Coercive Proposals [Rawls and Gandhi]*, 4 POL. THEORY 65, 68-69 (1976).

tion for making blackmail a criminal offense, and thus, it should be legal.¹⁴ They argue that since the blackmailer is only threatening to do something (reveal some true information) which he has a right to do, "blackmail" is nothing more than a permissible threat:

If a person has the right to do *X*, then he necessarily has the right to give warning of the fact that he will do or may do *X*—that is, to threaten to do *X*. Blackmail is thus a noncriminal act.¹⁵

There are numerous problems with this argument. Although the form of the argument is valid, an analysis of the content of their argument reveals the weaknesses of the premises offered. The content of the argument is as follows:

1. If one threatens to do what one has a right to do, then the threat is permissible and should be legal.
2. If something is only a permissible threat, then it also should be legal.
3. Blackmail is only threatening to do what one has a right to do.

Therefore,

4. Blackmail should be legal.

There are at least two ways to attack this argument. First, if one denies that blackmail is only threatening to do what one has a right to do, then the argument fails because the third premise is false. I plan to prove this in the next section of the paper by arguing that the blackmailer actually does two things, offers and threatens, and that the offer should be analyzed independently of the attendant threat. However, even if blackmail were no more than a permissible threat, that alone would not prove that it should be legal. Thus, the first premise of Block and Gordon's argument needs to be argued for, not just assumed.

D. The Coercive Offer

I begin my analysis of the blackmail transaction with the blackmailer's initial offer. The offer that the blackmailer proposes to the victim is in *form* the same as any offer proposing a legitimate economic exchange: *A* offers to *B* some product (in the case of blackmail, silence) in exchange for some consideration (usually money). Although any contract resulting from a blackmail offer is void, this does not tell us why the

14. Block & Gordon, *supra* note 1, at 38.

15. *Id.*

offer itself is (or should be) deemed criminal and prohibited.¹⁶ Not enough attention has been given to the fact that in any proposed economic exchange (including blackmail), the *offer* can be analyzed apart from any implicit or explicit attendant *threat* and/or any resultant exchange.

In fact, to distinguish legitimate economic exchanges from cases of blackmail one must disregard the threat involved and look carefully at the offer. Discussions of blackmail which focused on whether the attendant threat was permissible or impermissible¹⁷ have tended to obscure the real difference between these two types of economic transactions, that is, whether the offer creates a *legitimate* or a *coerced choice*.

In order to explain what I mean by a "coerced choice," I shall begin by reviewing some pertinent information from a recent article which contrasted clear-cut cases of criminal coercion with cases of blackmail. The difference between criminal coercion and blackmail is clearly described in the essay *Coercion, Blackmail, and Free Speech*.¹⁸ The commentator contrasts the Oregon statutes that prohibit criminal coercion¹⁹ with the statutes that prohibit blackmail.²⁰ First, it is interesting to note that separate statutes prohibit these two activities, and thus it seems that blackmail is treated as distinguishable from and not merely a type of criminal coercion. Second, in the article, "coercive speech" is defined as "speech forcing the listener to choose between two things when the listener has a

16. "A contract entered into under excessive or undue influence lacks genuine assent and is therefore voidable." G. JENTZ, K. CLARKSON & R. MILLER, *WEST'S BUSINESS LAW* 156 (citing RESTATEMENT (SECOND) OF CONTRACTS § 177 (2d ed. 1984)).

17. Block and Gordon assert that if a person has the right to do *X*, he necessarily has the right to give warning of the fact that he will do or may do *X*—that is, to threaten to do *X*. This I shall term a "permissible threat." Conversely, an "impermissible threat" is a warning to do something that one has no right to do. Block & Gordon, *supra* note 1, at 38.

18. Comment, *Coercion, Blackmail, and the Limits of Protected Speech*, 131 U. PA. L. REV. 1469 (1983).

19. The Oregon Revised Statute § 163.275 prohibits criminal coercion. The statute states:

(1) A person commits the crime of coercion when he compels or induces another person to engage in conduct from which he has a legal right to abstain . . . by means of instilling in him a fear that, if the demand is not complied with, the act of another, will:

. . . .

(e) Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule

OR. REV. STAT. § 163.275 (1981).

20. For the statute prohibiting blackmail, see MODEL PENAL CODE § 223.4 (1980). The statute provides: "A person is guilty of theft if he purposely obtains property of another by threatening to: . . . (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business reputation." *Id.* Comment, *supra* note 18, at 1470 (quoting MODEL PENAL CODE § 223.4 (1980)).

legitimate claim to both things."²¹ To bring this to bear on the issue of blackmail, I suggest that someone is proposing an offer that entails a "coerced choice" if his purpose is to force the listener to choose between two things when he (the listener) has a legitimate claim to both things.

For the purposes of my argument, an offer is "coercive" if the offeror creates a coerced choice for the offeree. Someone is the victim of a coerced choice if he has to choose between two things, both of which he had a right to before the offeror came on the scene.²² For example, some person *V* has a right to both *X* (his money) and *Y* (his secret). The person making the offer, call him *B*, has a concurrent right to *Y* (in the case of blackmail, the blackmailer has the right to publish true information about the victim). *B* is attempting to force *V* to *choose* between relinquishing his (*V*'s) right to either *X* or *Y*. The important thing to notice is that an offer is coercive only in the case that it creates a *coerced choice*, and *regardless of whether or not that choice is linked with a permissible or impermissible threat*.

As opposed to this, one person offers to another a "legitimate choice" if he proposes to exchange freely his right to some thing with the other person's right to some thing. Thus, a legitimate offer is a proposal to exchange rights to some thing(s), in which each person has a right to the thing they propose to exchange and no right to the other person's thing. Notice that a legitimate offer creates a legitimate choice, but that the legitimate choice is joined with either an implicit or explicit permissible threat.

To render this more concrete, contrast three types of offers: (1) the one which is used in clear cases of criminal coercion; (2) the offer which proposes a legal economic exchange; and (3) the offer which the blackmailer makes.

1. Criminal Coercion -

Offer: Give me your money or I will take your dog.

The offer in a clear case of criminal coercion links a *coerced choice* with an *impermissible threat*. Coerced choice: I have a

21. Comment, *supra* note 18, at 1471.

22. For the purposes of my argument, "right" will mean what J. Feinberg describes as a "passive right," i.e., I have a legitimate claim to the use of a thing and you have a corresponding duty not to interfere with my use of it. This raises two points. First, this "right" is not a claim to the exclusive use of a thing, since I will be discussing the right to information. Many people may have a right to the information with no one person having an exclusive right. The second point is that you have a duty not to interfere only with my *use* of the information. This does not mean that you may not use the same information, or correspondingly that I have any right to interfere with your use of it. J. FEINBERG, SOCIAL PHILOSOPHY 60 (1973).

right to my money and to my dog and you ask me to give up one or the other, though you have no right to either. Impermissible threat: you have no right to threaten to take my dog.

2. *Legal Economic Exchange* -

Offer: Give me your money or I (a store owner) keep this new set of golf clubs.

The offer in the case of a legitimate economic exchange links a *legitimate choice* with a *permissible threat*. Legitimate choice: I have a right to my money, you have a right to the golf clubs and you propose that we freely choose to exchange those rights. Permissible threat: you have a right to threaten to keep the golf clubs.

3. *Blackmail* -

Offer: Give me your money or I will expose your secret.

The offer in the case of blackmail joins a *coerced choice* and a *permissible threat*. Coerced choice: I have a right to my money and my secret and you ask me to relinquish one of those rights, just because you also have a right to my secret. Permissible threat: you have a right to threaten to tell my secret.

If one really wants to know if blackmail should be criminalized, the relevant question is, should the blackmailer be prohibited from making an offer which links a *coerced choice* with a *permissible threat*? Those who want to criminalize blackmail say "yes." Those who want to legalize blackmail say "no." I shall argue that society criminalizes blackmail because it has an interest in prohibiting coerced choices. Nevertheless, I think it should now be obvious that Block and Gordon's premise, that blackmail is just a permissible threat, is false. The above analysis should convince the reader that the permissible threat present in cases of reputational extortion is only a part of the transaction, not the entire story. Before I argue why society should prohibit blackmail, further discussion should be made about the "coercive offer" which distinguishes blackmail from legitimate economic exchanges.

Notice that the blackmail scenario has an asymmetry of rights that is not found in the case of criminal coercion or legal economic exchanges. In the clear case of criminal coercion, the victim has all the rights and the coercer has none. In the case of legitimate economic exchange each person has one right which they propose to exchange. In the case of blackmail, the victim has two rights but the blackmailer also has a right to one of the things the victim has a right to, i.e., the information. Since

one of the victim's rights happens to be something to which the blackmailer also has a right, the blackmailer asks (forces) the victim to choose between his rights. In the case of blackmail, the victim must give up one of his rights (his money or his secret) or suffer the consequences of non-compliance. The victim may feel that the price of dissent is minimal and as Block and Gordon put it, may say "Publish and be damned."²³ However, regardless of whether the proposed unilateral action by the blackmailer is immoral, intrusive, or even illegal, the offeree is the "victim" of a coercive offer *just in case the offeror created a coerced choice for the offeree.*

Murphy has objected that the person being blackmailed has no "right" to his secret.²⁴ Following Joel Feinberg, I claim that information about oneself is not just a liberty, but actually a right.²⁵ Feinberg argues that "what the right adds to the liberty is the duty of others not to interfere."²⁶ Feinberg classifies the right to "keep one's affairs secret, or one's reputation undamaged" as a passive right, that is, the right "not to be done to by others."²⁷ Notice that my argument for the criminalization of blackmail does not require that the victim's right to true information about himself be a right of exclusivity or a right to privacy. Others have argued convincingly that if the blackmailer came across the information innocently then it is impossible to prove that the blackmailer has invaded the victim's privacy.²⁸ Likewise, it would be very difficult if not impossible, to show that some true information about a person is for his exclusive use while other information is not. It is enough for my argument that the victim's right to information about himself is a right only because others have a duty not to interfere with *his* use of the information. It does not follow from the fact that the blackmailer has a duty not to interfere with the victim's right to have and use information about himself, that the victim has exclusive right to or use of the information. This is exactly what makes blackmail so interesting. Both the blackmailer and the victim have a passive right to the information, in the same way that all taxpayers have a right to use public parks. My argument is that the blackmailer forces the victim to choose between two of the victim's

23. Block & Gordon, *supra* note 1, at 39 (attributing quote to A. Wellesley, Duke of Wellington, when his mistress threatened to publish her diary and his letters. J. BARTLETT, *FAMILIAR QUOTATIONS* 506a (1968)).

24. This objection was raised by Professor J. G. Murphy during a personal conversation with him at Arizona State University, May, 1987.

25. J. FEINBERG, *supra* note 22, at 60.

26. *Id.* at 58.

27. *Id.* at 60.

28. Block & Gordon, *supra* note 1, at 38; Murphy, *supra* note 4, at 159-60.

rights—his right to his money and his right to his use of the information about himself and that this coerced choice is what society has an interest in prohibiting. Thus, I need only prove that the victim has a right (even if only a passive, non-exclusive one) to the information about himself, not that the victim has an exclusive right to his secret, or that the black-mailer violates such a right.

By focusing on the distinction between a legitimate offer and a coercive offer we can now separate blackmail from the type of economic exchanges that we want to protect. An economic exchange that consists of a legitimate offer and a permissible threat is a symmetrical exchange in which the power is balanced. I exchange my money for your golf clubs—period. Even a hard economic transaction, such as the one in Murphy's baseball example is now easily distinguished from a case of blackmail because the offer to sell you my baseball for \$6,000 is a legitimate offer not a coercive one.²⁹ My offer to sell you the baseball is not coercive because in making the offer I am not forcing you to choose between two things to which you already have a right. You have a right to your money, but you have no legitimate claim to my baseball.

In the case of blackmail, the offer includes a coerced choice. The blackmailer *by his offer* forces me to choose between two things, both of which I had a right to before he came on the scene. He is offering me the opportunity to buy his right to the information (or re-buy my right to the information). This "coerced choice," which is always present in a black-mailer's offer, is what we want to isolate and prohibit.

If we accept the above distinction between legitimate and coercive offers, then we can state a Rawlsian argument for criminalizing blackmail.³⁰ Rational self-interested persons, behind a veil of ignorance, would choose to prohibit blackmail because they would choose not to be subjected to coercive offers. Persons in Rawls' original position³¹ would have to choose between the following: If coercive offers are legal, then I

29. In Murphy's baseball example, I have a right to the baseball and the father has a right to his money. My offer to exchange the two is non-coercive because I am not forcing him to choose between two things he already had a right to. The father only had a right to his money, and had no right to my baseball. If we did make the exchange, and the courts later found the price of \$6,000 "unconscionable" or thought that the father was under "undue psychological pressure," then the father could be awarded civil remedies. Murphy, *supra* note 4, at 156-57.

30. A Rawlsian contract argument states that a moral principle is justified if rational, self-interested persons ignorant of their identity and circumstances would support it. See J. RAWLS, *supra* note 3.

31. Rawls' original position is similar to the hypothetical state of nature in traditional social contract theory, in which a group of free and rational persons in an initial position of equality come together and in one act choose principles of social cooperation. See J. RAWLS, *supra* note 3.

have the right to constantly try to force people into coerced choices. If coercive offers are illegal I may never benefit from forcing someone into a coerced choice, but I also do not have to risk being subjected to coerced choices myself. If you assume that people prefer security over risk, then it seems clear that we are all better off in a state in which none of us can blackmail, than one in which all of us can. Additionally, it seems that we would want to prohibit the type of coercive offer present in the blackmail scenario for the same reasons that we want to prohibit other unfair trade practices, such as private monopolies and usurious interest rates. If the offeror builds into his offer a coerced choice, then our ability to contract freely is limited. Thus we would justify prohibiting coercive offers not only because we are interested in security (not having to fear that we may become victims of blackmail) but because members of a capitalist society are interested in protecting their ability to contract freely.

III. CONCLUSION

To restate the argument: The offer in a typical blackmail transaction is a "coercive offer" because it creates a coerced choice for the victim, even though the attendant threat is a permissible threat. Remember that in the case of a coerced choice, the victim is faced with giving up one of his rights because the blackmailer has a concurrent right to one of those things. The offer proposed in a legitimate economic exchange is a legitimate offer because it creates a legitimate choice (there are no concurrent rights by which one party may coerce the other). This legitimate choice may or may not be accompanied by a permissible threat. Blackmail transactions can be distinguished from legitimate economic transactions by determining whether the offer which proposes the transaction is a legitimate offer or a coercive offer. Though society has no interest in prohibiting permissible threats, society does have an interest in prohibiting coercive offers because they interfere with a person's ability to contract freely. Therefore, the state should prohibit blackmail, which includes a coercive offer, while allowing other legal economic transactions which include only legitimate offers.