

Blackmail and Moralisms: Victimhood and Aristotelian Pride

Of those persons who favor laws against blackmail, many take that position because of the moral nastiness of the blackmailing act ("pay me or I'll tell...") These commentators are sometimes blind to where the self-interest of the so-called victim lies, for the victim often prefers paying for silence to having his secrets revealed. Much of the sophisticated literature on blackmail focuses on this gap in vision. Blackmail is called paradoxical because (among other things) it is a crime that a victim would often rather suffer than have discovered and prosecuted.

The moral view goes no further than the misbehavior of the blackmailer: the blackmailer is undecorous, or he is a Kantian bad boy using the victim as means to his own pecuniary ends. Also he is "selling" a silence that normatively belongs not to him but to the victim's associates or to the public.¹ My question is whether there may perhaps be a virtue in stopping our inquiries at the point where outrage arises-- whether it might not be best, when someone exists who is being blackmailed and prefers payoffs to publicity, to ignore his frustration and his desire to give in.

The law often ignores the effects of its not being obeyed. True, sometimes a legal edict boomerangs in such an obvious way (cf., the roaring twenties as a reaction to Prohibition) that the edict's failures have to be taken into account. But there may be good reason for not worrying about what happens when the law is broken beyond saying "we'll put the miscreants in jail".

One reason for focusing narrowly on the declaration of unlawfulness is because such declarations have an effect, in and of themselves. Declaring something unlawful gives a powerful social message that the proscribed behavior is undesirable. This may be a useful message to deliver even if the law when enforced does not reliably protect the interests of its immediate victims. The message may deter, or encourage character-formation that discourages bad acts. That is, even if the law fails to serve an individual who has the bad luck to be the chosen prey of one of the few undeterred nasties, the well-being of the class of potential victims may be affected positively by the law. Their overall self-interest may be served by ignoring the fate of those few persons who are blackmailed and want to give in.

This is one reason why a society might need declarations of "rights".

Another reason is to preserve the society's sense that what the rights protect is important. Sometimes we want to legislate against something in order to keep our sense of outrage alive.²

To preserve the sense of outrage it may be best if the rights are envisaged to be self-executing. We may need to operate on the assumption that having a right to something is the same as having a guarantee of access to that thing. "The law says I have a right to X, so I can live my life secure in the knowledge I have X". (We surely live more productively the more secure we are about the future- even an illusory security can, within limits, serve us better than an accurately negative view of our possibilities.) If we believe the right will be effective, we will be more outraged when strangers try to violate it.

The simple moral view of the law of blackmail helps to preserve the sense of outrage. This sense of outrage can have many effects-- one of which involves deterrence, and another involves impact on the victim class. Both affect the frequency of harmful acts.

Look first at the importance that the belief in rights has for the deterrence effect. Deterrence may be weakened if the public stops thinking in terms of an "absolute" or self-executing "right against blackmail" and instead begins to think of blackmail and other crimes simply as acts that have particularly high prices attached, and that sometimes may and sometimes may not be worthwhile. Such calculations can erode the sense of "thou shalt not", or the self-image "I am a law-abiding person"-- habits that can be more effective guides to behavior than rational calculation.

The potential impact on potential victims is parallel. For example, if property owners have nothing left of the right to exclude but a schedule of how much money they can obtain when people enter the land against their will, coupled with a schedule of the jail time or fines criminals have to pay, within generations the sense of "sacredness of property" will erode. This may be a bad thing or a good thing-- but it is a thing with real effects. As property holders become less angry at intrusions, penalties will decrease, and intrusions will become more common and more profitable.

Something similar might happen if instead of focusing on the simple declaration of outlawry-- the simple banning of the unsavory act of blackmail-- we concentrate on the possibility that a victim might prefer silence. One possibility is that the prospect of a victim paying an extortionist stops outraging us. It may become an image we contemplate analytically, without distress. And gradually it may come to seem acceptable to us that a victim should pay. And both proscription and penalties may in turn change to reflect this. The bad man's view of law can lead to a better law for bad men.³

I say that we should maintain the sense that one has self-executing rights (to be free of blackmail) and duties (to refrain from being a blackmailer) even though I know that, to the extent that the public interprets rights as guarantees, this right to be

free of blackmail gives rise to an illusion. A legal system cannot guarantee that a right will be effectuated for all. It can only punish or deter the right's violation. Lawyers all know this-- like Holmes's bad man, we know that the law is simply a prediction of what the enforcers will do.

But somehow that isn't the knowledge lawyers usually act on. We share the lay illusion. Even the classic Calabresi & Melamed article, in arguing that incomplete rights exist,⁴ posited them as coexisting with "property rules" entailing an absolute "right to say no".⁵ We can't be positivists for all purposes. Like Stanley Fish's baseball players, lawyers can only do what they do. And one thing they do is act like rights are effectual, existing separately from their mode of enforcement. Lawyers as much as the public may need the notion of rights that exist and are effectual separate from their enforceability for, if Holmes's bad man view of law became the lawmaker's view, much of the organizing structure of our law would vanish.

So the simple declaration of blackmail's outlawry can be important for reasons beyond the narrow cost-benefit calculus of victim self-interest. The way we frame the blackmail issue can have effects on the blackmailer, on the legal system, and on society at large. What most needs attention is, however, something I have not before mentioned: the blackmail law impacts on the victim's idea structure by putting before him the image of a person with pride.

For the law may have an effect not only on criminals, but on potential victims, and their sense of what their own best behavior should be. The key question is what kind of person a law against blackmail encourages to exist. We know the conventional answer vis a vis potential criminals: the law encourages such people not to blackmail. What is the message for potential victims? The law encourages them not to give in.

The image on which the blackmail prohibition rests is a victim who will have no truck with dishonor. It suggests one should not be so ashamed of one's past that one would give in to ignoble manipulation. Upholding this image may be worth the cost to those victims who aren't convinced by the image and want to give in, whether the question is examined in utilitarian terms or in terms of the jurisprudence of virtue.

The best weapon against blackmail may be a sense of outrage. As in any bilateral monopoly situation, it is the person who "won't budge," and can give a credible reason capable of convincing the other that he won't in fact budge, who wins. Several commentators have suggested the blackmail bargain is often irrational-- a last gasp effort to stave off nearly inevitable catastrophe, in which the victim will almost always be the long-term loser. If so, anger may be the best antidote to panic; anger is a passionate emotion, yet ironically it may be the best preserver of rationality.

The blackmailer brings up something embarrassing or private. It is a shaming experience to have such facts brought up by a hostile party. (Raised by a friend, the same issues' exposure can lead to increased intimacy rather than shame.) Shame inhibits anger, inhibits self-protection. The very revelation by a nasty person makes the contested information even more distasteful and frightening.

Shame also encourages conformity. The hostile stranger's revelation in itself increases the intensity of the victim's need to please the community, and his desperation to avoid revelations that would make the community cast him out.

The person is vulnerable, especially if the information is regarding proof of moral frailty. As the Milgrim experiments showed, sometimes one needs confidence in one's self-- willfulness, unwillingness to go along-- in order to do right. The potential victim needs his sense of outrage to fight off the wound to self-esteem inflicted by the blackmailer revealing the information to him, a wound which can be more destructive than the revelation of the contested fact to others. Sabini and Silver suggest, quite rightly, that it is often the notion that one cannot trust one's self (and the tale of something unpleasant one did long ago surely undermines that trust!) that undermines morality. It also undermines one's sense of one's own self-interest.

Our society may understate the value of pride. Compare for example the Christian ethos with Aristotle's. Christ said turn the other cheek; Aristotle says that one who takes a blow without returning it is a slave. The law of blackmail serves the victim who has pride, and perhaps teaches the rest of us to be prideful; the man who by contrast is willing to bow his head to his sins and pay for his hypocrisy, the law ignores.

Summary: Blackmail law can impact on the belief structures (moralisms) and behaviors of both the potential criminal and the potential victim; it also can affect the conceptual and value structures of lawyers and other societal onlookers. An article can usefully explore these issues surrounding what one might call the "symbolic" virtues of outlawing the act of blackmail. The most interesting of these symbolic functions relates to victim pride.

-- Footnotes --

1. See Lindgren
2. See Calabresi, IDEALS, BELIEFS, ATTITUTES AND THE LAW, at ____.
3. Some might advocate "acoustic separation"-- that lawyers should take the more 'realistic' bad man view of law, and lay property owners should be encouraged to take the 'sacredness' or 'rights' model as real. But I disagree-- both because acoustic separation is not so easily maintained, and because the danger of abandoning rights talk is in my opinion as great for lawyers as for laymen, since rights are one of our fundamental organizing categories.
4. Their classic article described entitlements protected only by "liability" rules-- a right to be paid -- as distinguished from entitlements protected by "property" rules -- a right to say no. Entitlements protected by liability rules are ordinarily described as "incomplete" rights; see Bohlen.
5. In fact, of course, a "property right" is violable. The costs are simply higher-- often involving punitive damages or criminal law "kickers"-- than are the costs of violating an entitlement protected only by a liability-rule.