

Truth and Consequences:

The Force of Blackmail's Central Case

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Symposium on Blackmail

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I am grateful to Sam Postbrief and Gary Francione for comments on this paper in draft. I would like to thank Warren Schwartz (though he will probably disapprove this paper's departures into deontology), for first suggesting to me the relevance of blackmail to property theory. For discussions on the general topic of blackmail I am grateful to Allan Axelrod, Claire Finkelstein, Russell Hardin, Jennie Metzstein, and, in particular, the always generous Jim Lindgren.

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beneficial effects could result from successful blackmail.⁸¹ The doctrine of double effect (DDE) and my suggested correlative, the doctrine of single effect (DSE), suggest that no significance should be given to either the lawful nature of the threat or the potentially beneficial side-effects of blackmail. Under DSE, the blackmailer violates deontological constraints if he threatens disclosure in an intent to obtain money or other advantage because, inter alia, were he to have alternative threats available he would threaten anyway. The nature of the threat is outside the intent of the blackmailer in the same way the killing of civilians is outside the intent of the strategic bomber. Since the blackmailer's end is harm, it is not redeemable by the possibility that some component of the means he used might be lawful.⁸² Like the terror bomber, the direct intent of the blackmailer is to do harm, and as with terror bombing, such intentional harm is impermissible regardless of its beneficial side-effects.

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One might imagine that the ordinary commercial transaction also stands condemned by this converse-DDE test. Thus it might be argued that the ordinary buyer and seller have the same intent as the blackmailer does: that an ordinary buyer would be delighted to obtain goods

⁸¹See the discussion of the Posner and Landes position at note 50 and following.

⁸²In the taxonomy of ends, means, and effects, the transfer payment the blackmailer hopes to obtain is his "end". The threat of disclosure that he employs is his "means". Disclosure itself is a sort of counterfactual side-effect of the means: if the means is successful in extracting a transfer payment, disclosure will not occur, but if the means is unsuccessful, disclosure might occur. It is therefore hard to classify, *no. The intent is included* *it might be* ~~but it is sufficiently related to the threat to be considered part of the means.~~ As for the deterrent effect that paying blackmail might have on possible wrongdoers, see Landes and Posner, *supra* note ?, it would be a side-effect (or more technically an "after-effect") of the end.

Under DDE, a bad "means" cannot be engaged in to achieve a good "end"; this is the terror bombing example, where killing civilians is a means to the end of winning the just war. In strategic bombing, killing civilians is less a directly-intended end than an obliquely-intended side-effect. One can argue that if an "end" is harming, deontic constraints will be violated even if a directly-intended "means" is not itself harmful. (For example, one gives candy to a child in the hope he will get cavities but he happens to enjoy the candy and never is afflicted with dental caries. The malevolent act still violates deontological constraints.) One need not go so far to condemn a blackmailer's acts, however, for all his means do harm to his victim.

The means here is a mere side effect

Meaning the child's candy is a mere side-effect

Suppose the negotiator should give the celebrity a choice between disclosure or paying what the equivalent of a journalist would pay for the story.
anyone would have secrets of this type, so that the tabloid journalist would have a privilege to publish the secret and destroy the celebrity's reputation-- the celebrity is limited in his ability to protect his reputation by the amount of money he possesses or can borrow. The celebrity may not have enough to buy out the network journalist. If so, the "highest valued use" of the information would now seem to be publication.

As I have argued elsewhere, an economist should not give the market her usual deference in situations such as this, where the outcome of bargaining will be dependent on the initial allocation of ownership rights.⁵⁶ The market's inability to make determinate choices regarding the "highest valued use" of resources such as reputation suggests that we may lose little in the way of meaningful guidance by outlawing markets in blackmail information.

V. A nonconsequentialist moral view

A. Background

The key issue for policymakers in assessing blackmail is probably the perceived wrongfulness in what blackmailers do. Yet the nonconsequential case for blackmail's wrongfulness has not yet been clearly stated. In one of the first and most interesting articles on modern blackmail theory, Jeffrie Murphy argued that a deontological case against blackmail probably could not be made.⁵⁷ Robert Nozick, usually thought of as a deontologic theorist, has argued that the law could prohibit "unproductive exchanges". As we have seen, these include central-case blackmail. However, Nozick's rationale is opaque. A number of commentators have asked

⁵⁶Wendy Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problems of Private Censorship*, 57 U Chi L Rev 1009 at 1042-43 (1990).

⁵⁷Murphy, *supra* note 26.