Canadian Journal of Law & Jurisprudence XXVIII No.2 July 2015, 399-424
© *Canadian Journal of Law & Jurisprudence* 2015 doi: 10.1017/cjlj.2015.33

Blackmail, Subjectivity and Culpability

Ram Rivlin

Here is a puzzle: It is sometimes permissible for an agent to perform an action but impermissible for that agent to demand something in exchange for not performing it. How can it be? This notoriously perplexing question, often presented as "the paradox of blackmail," has prompted numerous scholarly attempts to explain why a blackmailer's threat to act permissibly is wrongful. A special subgroup of suggested solutions consists of revisionist, coercion-based theories, which advocate unraveling the puzzle by denying its very own presuppositions. They hold, in other words, that upon reflection all cases of wrongful blackmail actually involve a threat to act in an *impermissible* way. Thus, blackmail is not more puzzling than regular cases of extortion: it is, in fact, a threat to act impermissibly. What is puzzling about blackmail is only the fact that the threatened act seems to be permissible at first glance.

A revisionist approach thus eliminates the paradox, rather than resolving it. It aims at uncovering the feature that makes the threatened act seem permissible, though it is actually impermissible. One major strategy of these theories is to claim that the threatened act, while being legally permissible, is morally impermissible. Thus, for example, a case where A threatens to expose B's sexual orientation unless he is paid hush money is wrongful, since exposing this secret is morally impermissible. A conditional threat to act impermissibly (morally speaking) is wrong for the same reasons that general cases of extortion are wrongful.[1]

Yet there are cases in which this approach does not seem to fit. There are, in other words, cases of threats to do things which seem to be perfectly permissible, even from a moral point of view. For example, revealing one's adulterous behavior to one's spouse might be permissible. Why would a conditioned threat to do so be wrongful? This kind of case pulls in the direction of a special kind of coercion-based theories, which build on a subjective notion of right and wrong. They hold that while blackmail involves a threat to do something which is objectively permissible, some special character regarding the agent who performs the act (or threatens to do so) renders this act impermissible. Such theories, which constitute a subset of coercion-based theories, are "subjectivist theories of blackmail,"

For extremely helpful conversations and comments on earlier versions of this paper, I am indebted to David Enoch, Ofer Malcai, Re'em Segev, Mitch Berman, Scott Altman, and Hanoch Dagan.

1. Mitchell N Berman, "Blackmail" in John Deigh & David Dolinko, eds, *The Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2011) 37 at 51-52 [Berman, "Blackmail"]. See also Japa Pallikkathayil, "The Possibility of Choice: Three Accounts of the Problem with Coercion" (2011) 11 Philosopher's Imprint 16; Peter Westen, "Why the Paradox of Blackmail is so Hard to Resolve" (2012) 9 Ohio St J Crim L 585 [Westen, "Paradox"]; Joel Feinberg, *Harmless Wrongdoing* (New York: Oxford University Press, 1988) at 240-76; and most clearly James R Shaw, "The Morality of Blackmail" (2012) 40 Phil & Pub Affairs 165. Cf also Ken Levy, "The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats" (2007) 39 Conn L Rev 1051 at 1072 n 45.

of which Mitchell Berman's is the most prominent representative.[2]

This paper starts by elucidating and defending an improved version of a subjectivist theory of blackmail. As a coercion-based theory, it holds that blackmail, like extortion, involves a threat to act in a (morally) impermissible way. The impermissibility of the threatened action is based on the fact that its harmful consequences are intended by the blackmailer. The paper demonstrates how this illicit intention can be inferred from the structure of the proposal. It therefore first offers a clearer background for the existing subjectivist theory, as well as an improvement of its evidentiary component.

However, the claim that intentions are relevant to permissibility has been substantively challenged in modern moral philosophy. In response, I show why even those who reject the general relevance-of-intentions thesis can still accept the subjectivist theory. While some cases are easily resolved by having them hinge on the predictive value of intentions, a full picture is revealed only when we appreciate the role of permissibility and responsibility within the scheme of coercion claims. I therefore conclude with an improved subjectivist theory of blackmail which endures even if intention is not genuinely relevant to permissibility.

1. "The Paradox of Blackmail" 101

Dozens of articles thus far have dealt with the puzzle of blackmail.[3] Most of the discussion tends to focus on the case of "informational blackmail": A is threatening to reveal embarrassing information regarding B (paradigmatic examples include B's sexual behavior), unless B meets A's financial demand. The puzzle arises from the deeply intuitive sense that something is wrong with A's act coupled with the difficulty of explaining why.[4] Moreover, as a matter of doctrine, blackmail is usually criminally prohibited.[5]

---

2. See Berman, "Blackmail", *supra* note 1, which builds and expands on his own "Evidentiary Theory" of blackmail. See especially Mitchell N Berman, "The Evidentiary Theory of Blackmail: Taking Motives Seriously" (1998) 65 U Chicago L Rev 795 [Berman, "Evidentiary"] and Shaw, *supra* note 1. I discuss their views in detail below.

3. No less than 73 items were listed at the opening of recent writing on the matter, more than a decade ago. See Walter Block & Gary M Anderson, "Blackmail, Extortion, and Exchange" (2001) 44 NYL Sch L Rev 541 at 543 n 1-4. A comprehensive survey of this literature and its limits was offered by Berman, "Blackmail", *supra* note 1, as well as by Russell L Christopher, "Meta-Blackmail" (2006) 94 Geo LJ 739 [Christopher, "Meta-blackmail"]; and Ken Levy, *supra* note 1, making it redundant to do so again here. Meanwhile, the list has swelled even more. The most recent writing includes also: Shaw, *supra* note 1; Paul H Robinson, Michael T Cahill & Daniel M Bartels, "Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory" (2010) 89 Tex L Rev 29; Benjamin E Rosenberg, "Another Reason for Criminalizing Blackmail" 16 (2008) J Pol Philosophy 356; Russell L Christopher, "A Political Theory of Blackmail: A Reply to Professor Dripps" (2009) 3 Crim L & Philosophy 261; Westen, "Paradox", *supra* note 1.

4. Cf Leo Katz, "Blackmail and Other Forms of Arm-Twisting" (1993) 141 U Pa L Rev 1567 ("Nearly everyone seems to agree that blackmail is an indispensable part of a well-developed criminal code, but no one is sure what for."); Jeffrie G Murphy, "Blackmail: a Preliminary Inquiry" (1980) 63 The Monist 156; David Owens, "Should Blackmail Be Banned?" (1988) 63 Philosophy 501.

5. See George P Fletcher, "Blackmail: The Paradigmatic Crime" (1993) 141 U Pa L Rev 1617. For a detailed survey of examples, see Westen, "Paradox", *supra* note 1 at 587-88.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

Like other profound theoretical problems, a major part of the challenge is not only to solve the puzzle, but also to properly articulate and specify the challenge it poses.[6] At least four major different articulations of the puzzle can be listed:

1. *The "Synergetic Miracle"*: Since the threatened act is permissible (and hence, it would seem, nothing can be wrong with expressing the intention of doing it),[7] and since the demand to pay, in and of itself, is permissible and legitimate, it is unclear why the combination of these two permissible components should produce a forbidden act.[8] Of course, in many cases a wrong may emerge from a combination of permissible acts, with no mystery at all: driving is permissible, and drinking alcohol is permissible (at least for the sake of this argument), but the combination is wrong.[9] It seems better, therefore, to rephrase this articulation by replacing the "why" with a "how." Unlike the driving example (drinking makes driving more dangerous), in the blackmail case it is harder to demonstrate the connection between the components that produces this "normative synergy" of two rights that make a wrong.

In the case of blackmail, this connection takes the form of a *condition*: the performance of the act is conditioned on not fulfilling the demand. This emphasizes the centrality and importance of the choice made by the victim of blackmail, and the presence of an exchange.

2. *Blackmail and Bribery*: Another formulation, which has earned the title "the second paradox of blackmail,"[10] focuses on the disparity between so-called blackmail and what seems to be the symmetric transaction of bribery initiated by the other side. If the wrongfulness lies in the exchange, why should there be a difference between the two directions in which this exchange is conducted?[11] This formulation brings to mind the importance of the identity of the act's initiator. It hints, therefore, that what makes the blackmail wrong is not only the content of the transaction, and that we must pay attention to the agent rather than solely to the blackmailer's act.

---

6. For other attempts to cope with this challenge, see, e.g., Christopher, "Meta-blackmail", *supra* note 3; Levy, *supra* note 1. My proposed taxonomy and, to a larger extent, my analysis differ somewhat from these accounts.

7. Cf Walter Block & David Gordon, "Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren" (1985) 19 Loy LA L Rev 37 at 38.

8. See, for example, Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (Chicago: University of Chicago Press, 1996) at 133; Berman, "Evidentiary", *supra* note 2 at 796; Walter Block, "The Crime of Blackmail: A Libertarian Critique" (1999) 18 Crim Justice Ethics 3; James Lindgren, "Unraveling the Paradox of Blackmail" (1984) 84 Colum L Rev 670 at 680 [Lindgren, "Unraveling"]. As far as I know, Glanville Williams was the first to state the problem in these terms, in his "Blackmail" (1954) 79 Crim L Rev 162 at 240.

9. For this example and a parallel argument, see Michael Clark, "There Is No Paradox of Blackmail" (1994) 54 Analysis 54 at 55. See also Grant Lamond, "Coercion, Threats, and the Puzzle of Blackmail" in AP Simester & ATH Smith, eds, *Harm and Culpability* (Oxford: Clarendon, 1996) 215 at 216; Saul Smilansky, "May We Stop Worrying About Blackmail" (1995) 55 Analysis 116.

10. See, e.g., Sidney W DeLong, "Blackmailers, Bribe Takers, and the Second Paradox" (1993) 141 U Pa L Rev 1663; Kathryn Hope Christopher, "Toward a Resolution of Blackmail's Second Paradox" (2005) 37 Ariz. St LJ 1127. As will be shown below, there are a few candidates claiming the title "the second paradox."

11. Cf DeLong, *supra* note 10; Henry E Smith, "The Harm in Blackmail" (1998) 92 Nw U L Rev 861 at 907; James Lindgren, "The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act" (1988) 35 UCLA L Rev 815.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

3. *The Vague Borders of Hard Bargaining*:[12] According to this formulation, the so-called blackmail cannot be distinguished from other transactions which are conceived as legitimate, both legally and morally, such as threats to enforce one's rights through legal proceedings, to disconnect commercial relations,[13] or to refrain from selling products in great demand. Again, we encounter a structural similarity to other permitted exchanges, but now the similarity includes even the identity of the initiator!

To solve this problem it is necessary to distinguish, not in an ad-hoc manner, between these groups of cases. This can be done in two ways: the first is to show that some negative feature of "blackmail" transactions does not appear in the other permitted transactions. The second way is to admit the similar wrongfulness of both of these kinds of transactions, *prima facie*, but to nevertheless point out the special advantage or benefit unique to the permitted transactions, which makes them, all things considered, tolerable or even desirable.

4. *Expanding the Victim's Options*: Coercion seems to be wrong since it limits the opportunities open to the coerced party. This formulation of the paradox stresses that blackmail transactions are characterized by an expansion of the victim's options.[14] The conditioned threat gives victims another option, which they did not have before: to buy out the threat.[15] This option is usually better for the victim (after all, blackmail often works). Hence, it is argued, nothing can be coercive here.

Surely, though, the same argument can be applied to the regular case of extortion: threatening a *forbidden* act (e.g., "if you don't pay me, I'll kill you"). In this case also, the mere offer expands the victim's possibilities, and is built on the expected preference of the victim to pay rather than die. The only difference is that in the case of extortion, the victim is entitled to both his money and his immunity against violation of his rights, whereas in blackmail cases there is an apparently legitimate transaction (since the victim is not entitled to the threatening party's abstention from fulfilling the threat).[16] This formulation of the problem, then,

---

12. For this kind of definition of the problem, see, for example: Smilansky, *supra* note 9 at 116-20; Douglas H Ginsburg & Paul Shechtman, "Blackmail: An Economic Analysis of the Law" (1993) 141 U Pa L Rev 1849; Lindgren, "Unraveling", *supra* note 8 at 701-02; Scott Altman, "A Patchwork Theory of Blackmail" (1993)141 U Pa L Rev 1639 at 1658-59 [Altman, "Patchwork"]; Richard Epstein, "Blackmail, Inc." (1983) 50 U Chi L Rev 553 at 557-58.

13. Epstein, *supra* note 12 at 557; Ginsburg & Shechtman, *supra* note 12 at 1849; Eric Mack, "In Defense of Blackmail" (1982) 41 Phil Stud 274 at 282 (consumers' boycott). For more references, see Levy, *supra* note 1 at 1075.

14. See, for example, Levy, *ibid*; Ronald Joseph Scalise Jr "Blackmail, Legality, and Liberalism" (2000) 74 Tul L Rev 1483 at 1502; Smith, *supra* note 11 at 864. This line is occasionally presented by distinguishing between "advice," "proposal," "offer" and "threat." See Lamond, *supra* note 9 at 219-30; Kent Greenawalt, "Criminal Coercion and Freedom of Speech" (1983) 78 Nw U L Rev 1081 at 1095-102.

15. For an argument of this kind, see, e.g., Epstein, *supra* note 12 at 558; Russell Hardin "Blackmailing for Mutual Good" (1993) 141 U Pa L Rev 1787 at 1806; Alan Wertheimer, *Coercion* (Princeton, NJ: Princeton University Press, 1987) at 93. Much of this discussion emerged from the claim that what is wrong about blackmail is its being wasteful and inefficient. See Ronald Coase "The 1987 McCorkle Lecture: Blackmail" (1988) 74 Va L Rev 655 at 673-74.

16. This line of argument is prevalent in libertarian discussions of blackmail. See, for example, Walter Block, "The Crime of Blackmail: A Libertarian Critique" (1999) 18 Crim Just Ethics

seems to collapse into the previous formulation, which hinges on the nature of the exchange between the parties.

However, blackmail expands the victim's options only on the premise that the threatened act would have been executed absent any connection to negotiation with the victim. In these cases, presenting the option of buying immunity indeed benefits the victim. Yet as long as the threat evolves solely from the possibility of negotiation, with no other reason or intent to execute the threat independently, there is no expansion of the victim's possibilities.[17] The additional challenge of this formulation is, therefore, to distinguish between two kinds of threatened acts: those which would have been executed anyway, and those which were born for the sake of negotiation.

To sum up, the first articulation ("the synergetic miracle") focuses on the connection between the two components of blackmail that make it, somehow, impermissible. The second ("blackmail vs. bribery") concentrates on the centrality of the actor, noting that the act's permissibility seems to depend on which of the parties initiated it. The third articulation points out the parallels between blackmail and other legitimate practices, showing that something else, beyond the mere structure of this transaction, is needed in order to account for the problem of blackmail. And the fourth, which elaborates on the fact that the blackmailer's proposal actually expands the victim's options, highlights the premise that the blackmailer is not expected to execute the threat and only makes it due to the chances present of gaining something from it by means of blackmail.

The problem with blackmail is multifaceted. An adequate theory of blackmail should respond to all of these worries. This is where the coercion-based and the subjectivist theories of blackmail come in.

2. Revisionist Theories: Blackmail, Extortion and Coercion

A revisionist theory, which denies the permissibility of the threatened act, holds that blackmail is as wrongful as ordinary extortion. Al, who threatens to burn down Ben's business unless paid, commits wrongful extortion. The wrongfulness does not stem from the threatened forbidden act itself, which may never be performed. It stems from the way the threat affects the recipient's volition, leading Ben to succumb to the demand, in a context where proper consent is required.[18]

---

3 at 5, 8; Walter Block, "Trading Money for Silence" (1986) 8 U Haw L Rev 57 at 73. For a broader discussion and references, see Levy, *supra* note 1 at 1070-74. See also James Lindgren, "Blackmail: On Waste, Morals, and Ronald Coase" (1989) 36 UCLA L Rev 597 at 599 ("precisely what makes blackmail paradoxical … [is that] the victim does not own or control the information").

17. This is the source of the Nozickean discussions of whether or not the victim would prefer that the blackmailer's proposal not exist. See Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 85. For a discussion about the proper baseline, see Levy, *supra* note 1 at 1075.

18. Cf Thomas Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge: Harvard University Press, 2008) at 76-81; Craig L Carr, "Coercion and Freedom" (1988) 25 Am Phil Q 59; Pallikkathayil, *supra* note 1, esp. at 13; Berman, "Blackmail", *supra* note 1 at 52 (citing Katz). See also the way extortion is regarded by the Model Penal Code as a sort of theft, at subsection 4 of §223, and the sources at *infra* note 58. But cf James Lindgren, "Unraveling", *supra* note 8 at 676 n 31.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

In other words, the problem with extortion is that it involves obtaining something through coercion. According to Nozick's classic formulation, coercion is a case where the coercer (C), who wants one's victim (V) to do some act (Φ), claims that C will bring about an outcome which shall turn V's decision not to Φ less preferable to V than Φing.[19] The claim is coercive if (and only if) it tries to induce V's choice by proposing to inflict loss on V, if there is no surrender to C's demand.

Surely, loss and gain are defined in relation to a certain baseline.[20] A widely accepted view, which I will not try to defend here, holds that this baseline should be moral.[21] According to the moralized baseline view, a conditional proposal is a coercive threat where the proposal indicates that if the recipient denies the demand, the proposer will make the recipient worse off than the recipient *ought* to be, or is *entitled* to be. In simpler words, a conditional proposal is a coercive threat *only if it would be wrongful for the agent to carry out the threatened act*.[22] Indeed, the impermissibility of the threatened act is the cornerstone of common legal doctrines of extortion or duress.[23]

Note further that it is *moral* rather than *legal* impermissibility which is of importance. While the most grave moral wrongdoings are often also forbidden by law, a conditional threat of murder would be coercive even in a pre-legal condition, or if the legal prohibition is abolished for some reason. On this suggestion, coercion, as a moral concept, consists of conditionally threatening a morally impermissible act. Extortion, as a legal concept, consists of acquiring something through coercion, where proper consent is required (as, *e.g.,* in the context of

---

19. See Robert Nozick, "Coercion" in Sidney Morgenbesser, Patrick Suppes & Morton White, eds, *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (New York: St. Martin's Press, 1969) 440; Scott Anderson, "Coercion" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (2006 edition), online: http://plato.stanford.edu/archives/spr2006/entries/coercion. Full coercion takes place when V finds C's claim credible, and Φ's in order to reduce the probability of C's bringing about that outcome.

20. For a detailed discussion, see, for instance, Anderson, *supra* note 19 at 2.2. With a given baseline and the two optional courses of action proposed by C, the way to distinguish between coercive threat and non-coercive offer will be to compare the option V prefers *less* to the baseline. See Michael Gorr, "Toward a Theory of Coercion" (1986) 16 Can J of Phil 383 at 391-97.

21. See, e.g., Anderson, *supra* note 19 at 2.3 and the references there; Wertheimer, *supra* note 15 at 217 ("[m]oral baseline does most of the important work…"). Whether the moralized account is sufficient or only necessary for coercion, is beyond what is necessary here. Cf also Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge: Harvard University Press, 2006) at 51-52 (a threat is not coercive if the threatening party is authorized [in a Darwallian, moralized sense] to apply the threatened sanction); Berman, "Blackmail", *supra* note 1 at 65. But see John Lawrence Hill "Moralized Theories of Coercion: A Critical Analysis" (1997) 74 Denv U L Rev 907. Fully defending this view from critiques is not part of this project.

22. Admittedly, impermissibility is not *sufficient* for coercion. The threat should be severe enough to give V a compelling reason to comply with the demand. Hence, for example, snubbing a friend might be morally impermissible, but a threat to do so is not likely to be coercive, at least in normal circumstances. Moreover, this way of presentation bypasses, for reasons of simplicity, more complicated cases, such as where the recipient may be better off due to what other people (other than the agent) do.

23. See, e.g., *Model Penal Code* §223.4(1) (obtaining property by a threat to commit a criminal offence); Rick Bigwood, "Coercion in Contract: the Theoretical Constructs of Duress" (1996) 46 U of Toronto LJ 201 at 214.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

transferring property, sexual relations, etc.). There is no need for the threatened act to be illegal for the conditional threat to be coercive, and its use for appropriation of property (or other protected interests) criminalized. Consequentially, if blackmail involves a threat to act in a *morally* impermissible way, it is on par with regular extortion, and should be *legally* banned, as a wrongful way of gaining property.[24]

Much more could be said here, of course, and much has been said elsewhere, in defending this view.[25] Moreover, some issues are still left unresolved.[26] For the purposes of this paper, though, I will assume—in line with this general picture—that conditional threats to commit morally impermissible acts are indeed properly criminalized as extortion.

However, this falls short of solving the puzzle of blackmail, since some paradigmatic cases of blackmail involve threatened acts that seem to be perfectly permissible, even from a moral point of view.[27] For example, revealing embarrassing but true and relevant information about a public figure might be—at least in some circumstances—morally permissible or even required. Nevertheless, anyone who attempts to extract money from this figure by threatening to reveal the information unless paid is widely considered to be committing the crime of blackmail, not to mention acting wrongfully.[28] Should we abandon the revisionist, coercion-based theories? This is where the subjectivist theory comes into play.

3. Motives, Intentions and Rightness: The Subjectivist Theory and its Limits

This section explains how, through the lens of a subjective notion of rightness, typical blackmail scenarios are nonetheless revealed to involve a proposal to act impermissibly, despite the apparent permissibility of the threatened act. I start by briefly surveying existing subjectivist theories, namely theories that relate the wrong in blackmail to subjective features of the blackmailing agent, and explain why a new theory is needed. Relying on the distinction between intended and merely foreseen harm and its alleged normative ramifications, I then show how the blackmailer's bi-conditional proposal indicates that the harmful component

24. Shaw, *supra* note 1, overlooks this last point, hence he underestimates his contribution to the legal problem of blackmail. Berman, "Blackmail", *supra* note 1, focuses on the wrongfulness of the coercion rather than on the wrongfulness of acquiring something without consent. The importance of this divergence will be clearer later on.

25. See *supra* note 1 and 21.

26. For example, does any kind of moral impermissibility have this function in creating coercion, or should it be constrained to (moral) right-infringing behavior, or to such that is amenable, at least *pro tanto*, to state intervention? Here one should interject one's general theory about law and morals and the limits of the state. My use of the term "moral" hereinafter is meant to include this reservation.

27. See Berman, "Blackmail", *supra* note 1 (distinguishing between *Legal Blackmail* and *Moral Blackmail*); Westen, "Paradox", *supra* note 1 at 612 (the 5th category: paradoxical blackmail); Shaw, *supra* note 1 at 180.

28. Note that to the extent that the threatened act is morally required, the agent might act wrongfully also in abstaining from action in accordance to her duty, making her deeds close to bribery in their structure. Yet that does not make it a theft by extortion from the blackmailee. For a related point, see Shaw, *supra* note 1 at 185.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

of the proposed act is intended by the blackmailer, and explain when such a finding should suffice for this act to be deemed impermissible, and the proposal to commit it—coercive. This section then goes on to explore challenges to the view that intentions are relevant to permissibility, which cast doubt on this argument. Section 4 is devoted to dealing with those challenges.

a. Background: Intentions and (Im)Permissibility

The second and fourth formulations of the blackmail puzzle draw attention to the agents who make the blackmailing proposal, and to their (explanatory) reasons for doing so. This has led a few scholars to ascribe the wrongfulness of blackmail to the blackmailer's intentions. Wendy Gordon claims that "[t]he deontologic case against blackmail seems clear: One person *deliberately* seeks to harm another to serve her own ends—to exact money or other advantage—and does so in a context where she has no conceivable justification for her act," thus making it an "unjustified *intentional* infliction of harm on another to benefit one's self."[29] Likewise, Levy stressed the fact that blackmail involves "deliberately inflicted harm."[30] Grant Lamond has also proposed viewing those motives as the basis of blackmail's coerciveness.[31]

Mitchell Berman was the first to integrate the motive into a coercion-based revisionist theory, by highlighting the motive blackmailers would likely have for *doing as they threaten*, rather than the motives for issuing the threat.[32] According to Berman, the wicked motive (or some other close mental state)[33] might make the threatened *act* wrongful, even if it would not be wrongful in the absence of this mental state ["the *subjectivist* hypothesis"].[34] It will thus render the conditional *threat* coercive, as a threat to act impermissibly. This hypothesis rests on a non-consequentialist comprehension of right and wrong, according to which the right act is defined not only by the consequences that it will bring about,[35] but also by other elements which characterize the action. The theory's second

---

29. Wendy J Gordon, "Truth and Consequences: The Force of Blackmail's Central Case" (1993) 141 U Pa L Rev 1741 at 1758-59. Gordon claims (though within a different framework of understanding blackmail, and—in my opinion—conflating the moral status of the threat with that of the threatened act) that by presenting the threat, the agent acts with intention to harm the threatened party, seeing the possible good consequences of her act as a mere side-effect. Thus, similar to the doctrine of double effect, which I get to later in the text, the act should be evaluated according to its intended consequence, not according to those possibly redeeming consequences which are merely foreseen. *Ibid* at 1765-66.

30. Levy, *supra* note 1 at 1082-83.

31. Lamond, *supra* note 9.

32. Berman, "Evidentiary", *supra* note 2 at 845-48. The integration within a coercion-based revisionist theory was made clear in Berman, "Blackmail", *supra* note 1 at 59.

33. In the latest version of his theory, the focus is on beliefs, rather than motives. See Berman, "Blackmail", *supra* note 1 at n 119. See also *infra* note 39.

34. Berman, "Blackmail", *supra* note 1 at 68. In Berman's view, there are complicated relations between the wrongfulness of the act and the blameworthiness of the actor. My suggested version avoids that.

35. This could be put in terms of focusing on the *act* rather than the *action*, namely determining permissibility based only on the value that the act produces, with no attention to the agent. See William D Ross, *The Right and the Good* (Indianapolis: Hackett, 1988) at 7.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

component—the one which indeed gives Berman's theory its name—is the claim that the setup of the blackmailing proposal can serve as sufficient *evidence* for the existence of this wicked motive behind the threatened action (were it to take place[36]) ["the *evidentiary* hypothesis"].

Packing it all together, the *evidentiary* hypothesis shows that a wicked motive accompanies the threatened *act* in blackmail scenarios; the *subjectivist* hypothesis holds that such a motive renders this *act* impermissible; and finally—the *revisionist* coercion-based theory holds that a conditional threat to act impermissibly is coercive, hence a demand backed by such a threat is on a par with ordinary extortion. Therefore, blackmail is properly criminalized, since like extortion it is a form of acquiring something through coercion, in a context where voluntary consent is required.[37] The suggested solution reveals how what at first glance appears to be a case of proposing to do a permissible act, is actually a threat to act *impermissibly*, once one notices other factors that impact the act's deontic status. Thus, the paradox of blackmail is not only resolved—actually it is explained away, by denying its premise regarding the permissibility of the threatened act.

According to Berman's own new version of the subjective hypothesis, "an actor wrongs another if he knowingly causes him harm without reasonably believing that producing that harm is consistent with the balance of undefeated moral reasons under the circumstances," "based on reasonable and appropriately thorough moral evaluation."[38] This view affects the content of what needs to be demonstrated at the evidentiary stage, and complicates it. As others have noted, the focus on beliefs also raises several difficulties regarding the relevant notion of permissibility.[39]

I therefore wish to concentrate on a version of a subjectivist theory which is closer, but not identical, to Berman's original view. This version is grounded in a more widespread notion of permissibility: one that rests on the distinction between intended and mere foreseen harm, a common distinction in intuitive judgment.[40] This subjective criterion, I argue, is also less expansive in its "evidential" assumptions. In what follows I briefly present this subjective criterion and the accompanying evidentiary hypothesis. I then move on to discussing the challenge this view faces in contemporary moral theory.

---

36. For some more details, see *infra* note 50.

37. Berman himself might not go along with the last move, since he denies the relation between coercion in the "offensive" sense (as a wrongdoing) and in the defensive sense (i.e., as mitigating one's voluntariness or responsibility). See Mitchell N Berman, "The Normative Functions of Coercion Claims" (2002) 8 Legal Theory 45 [Berman, "Functions"]. I get back to this point below.

38. Berman, "Blackmail", *supra* note 1 at 68 and at n 119. This view, which is presented "only to a first approximation," does not vary substantially from the original motive-centered version according to Berman. He refers to it, saying that "a sharp distinction between [the] versions is probably overly stylized." See also his explanation at 101 n 119 ("the latter encompasses the former").

39. See Peter Westen, "A Critique of Belief-based Theory of Blackmail" (2012) 9 Ohio St J Crim L (Online Appendix), online: http://moritzlaw.osu.edu/students/groups/osjcl/issues-and-articles/volume-92/ [Westen, "Critique"]. See also Shaw, *supra* note 1 at 171.

40. See Robinson et al, *supra* note 3.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

i. The Relevance View: Intending and Foreseeing Harm

Is the agent's mental state relevant to the moral permissibility of the action? A widespread view (which I shall refer to as "the relevance view"[41]) holds that it is, by distinguishing between bringing about intended harm and bringing about (mere) foreseen harm as a side-effect. This view is not only part of commonsense morality: it has been argued that such a view is required in order to accommodate the doing-allowing divide,[42] and maybe even for the coherence of any deontological theory.[43] A related view lies at the root of (at least one version of) what is known as the Doctrine of Double Effect (DDE).[44] According to this reading of DDE,[45] two acts, which are alike in their non-mental characteristics, differ in terms of permissibility simply by virtue of differences in the agent's intentions. Intentions are thus intrinsically relevant to permissibility.[46]

Note that the intending-foreseeing distinction should not be formulated in terms of an absolute dichotomy between forbidden versus permissible acts. It is only necessary to assert that it is morally *worse* (namely harder to justify) for an agent to perform an action while intending its resultant harm than to perform the same act while merely foreseeing that same harm, and intending other legitimate results.[47] Hence, acts which are "marginal" from a moral perspective, namely that come close to the impermissibility threshold, might be either permissible or impermissible, depending on the intentions of the agent who commits them.

Returning to blackmail scenarios, the argument goes as follows: the threatened act, which has some merits, involves harmful results to the victim. Generally, when these results are not intended, the act is permissible (due to its merits), albeit only marginally. However, if it could be shown that blackmailers intend to inflict harm on their victim by their act, this intention might be pivotal in making the threatened action impermissible after all.[48] As a result, the conditioned proposal becomes a threat to commit an impermissible act, hence coercive.

---

41. I borrow the term from Douglas Husak, "The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility" (2009) 3 Crim L & Phil 51.

42. See Jeff McMahan, "Intention, Permissibility, Terrorism, and War" (2009) 23 Phil Persp 345 at 349-51.

43. For the claim that without the distinction between intending and foreseeing, or something close to it, there can be no distinction between deontology and consequentialism, see David Enoch, "Intending, Foreseeing, and the State" (2007) 13 Legal Theory 69 at 71 and at 97-99.

44. Some even fully identify DDE with the intending-foreseeing distinction. Note, however, that rejecting DDE while accepting the distinction is possible. See, e.g., Alison McIntyre, "Doing Away with Double Effect" (2001) 111 Ethics 219.

45. For a non-mental reading of DDE, see the text for note 69 below.

46. For the exact sort of relevancy cf Hallvard Lillehammer, "Scanlon on Intention and Permissibility" (2010) 70 Analysis 578.

47. Cf Warren Quinn, "Actions, Intentions, and Consequences: The Doctrine of Double Effect" (1989) 18 *Phil and Pub Aff* 334.

48. The marginality can be roughly portrayed as a case in which the balance of reasons for and against the act is close enough for the question of the agent's intention to be pivotal. Where the balance is not marginal, the agent's intent does not suffice to render the action impermissible. Surely, the required scope of marginality depends on the strength of the intent-based consideration. As long as its pivotal role is secured, the exact details are not of much importance to the current argument. For some more details, see the text for *infra* note 57.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

At first glance, if the subjectivist theory of blackmail could be constructed along these lines, it would be theoretically attractive. All that is left to show is that blackmail scenarios indeed contain an intended harm. This is where the "*evidentiary* hypothesis" comes in.

ii. Threatening as Intending Harm: The Evidentiary Hypothesis

Suppose that the relevance view is true, and that the permissibility of the threatened act in blackmail scenarios is indeed marginal, making the question of the agent's intention pivotal for the act's permissibility. Why should we think that the threatened act in blackmail involves an intention to harm the victim? Berman's evidentiary theory offers a quite straightforward answer. First, the very fact of the conditioned threat indicates the threatening party's belief in the harmful potential of the threatened act.[49] Otherwise, there is no basis for expecting the threatened party's acquiescence to the accompanying demand.

Second, the blackmailer's willingness to accept money in order to refrain from acting indicates that the motivating reasons behind the threatened act could not have been[50] the kind of reasons which justify it, morally speaking. According to Berman, "A reasonable factfinder could suspect that, had any of these [good] interests motivated D [the threatening party], he would not have offered to sell H [the threatened party] his silence."[51] Indeed, this argument is about "inferring bad motives, not deducing them,"[52] and hence establishes only a rebuttable presumption. However, in the absence of such rebutting evidence, it has strong probative value, hence the conclusion that the threatened act is meant to rest on bad motives still stands.

A distinction should be drawn between two different lines of thought that are present in Berman's argument. According to the first, revealing the secret is morally problematic *pro tanto*, due to its negative effect on the secret-owner. However, generally it is nevertheless permissible, all things considered, due to its positive value, be it in terms of exercising free speech[53] or of caring about the interests of others who might gain from knowing the concealed information.

---

49. Cf Berman, "Blackmail", *supra* note 1 at 69-70. Berman uses it to infer that the agent has no belief in the justifiability of the action. I am less sure about the validity of this inference.

50. Berman avoids discussing the counterfactual and time-dependent nature of his analysis. As a coercion-based theory, the normative features of the threatened act should be evaluated at the time of performance of the threat (or offer). An agent A threatens at t_0 to commit Φ unless her demand is accepted. The threatened act Φ is supposed to be performed only should the threat be ignored at t_1. At this stage, the actor's reasons for executing Φ might be different (actually, putting aside considerations of reputation or revenge, usually the actor no longer has any reason at all to perform the threatened act). Moreover, the question of coercion is of greatest interest in cases where the demand was indeed accepted, and hence the threat was never carried out, meaning that at t_1 A was not engaged in Φing at all. A better formulation of this view needs to rely on A's reasons for (Φing at t_1) as those are conceived at t_0, not as they are (factually or counterfactually) at t_1.

51. Berman, "Evidentiary", *supra* note 2 at 845.

52. *Ibid* at n 176.

53. For such a view see, e.g., Levy, *supra* note 1 at 1055, 1066. Whether or not free speech can justify the speech rather than only the abstention from silencing it, is beyond the scope of my discussion here.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

The financial demand serves, according to this line of thought, as evidence for the *lack of right motivating reasons* behind this secret-telling, which—presumably—is incompatible with such a demand. Thus, there is nothing to outweigh the *pro tanto* wrongfulness.

However, this inference seems to me as unconvincing: a person might genuinely care about the interests of the other, but nevertheless have a stronger preference for personal gain. Acknowledging that "every man has his price" does not entail an absolute lack of moral reasoning. The blackmailer might be motivated to reveal the secret by the right reasons, yet nevertheless find the opportunity to gain some money to outweigh those reasons. One might even suggest that a higher financial demand indicates a strong "good" motivation in favor of the act, which requires substantial compensation in order for one to abandon it. Standing alone, then, the financial demand seems to have poor evidentiary power: the blackmailer might still be motivated (also) by the right reasons.[54]

Therefore, I suggest another line of reasoning, according to which the evidence focuses not on the lack of reasons in favor of the act, but rather on reasons *against it*, which emerge from the fact that its harm is intended. An example may help: a blackmailer (B) who threatens to reveal the victim's (V) adulterous behavior to V's spouse might be motivated also by his belief that V's spouse deserves to know the truth. Yet if V agrees to the revelation, or even volunteers to confess, it will foil B's plan. The fact that V will be harmed by the revelation is required for B to be able to extract money from V. V's harm is not a regrettable side-effect of telling the secret. Rather it is means to B's end in threatening to do so.[55] The act B is threatening to commit is, therefore, an act of causing intended harm. According to this line of reasoning, the evidence does not preclude the good motive which gives the action its *positive* value, but rather indicates a harmful intention which gives the action its *negative* value. It derives from the inner logic of the blackmailing proposal, rather than from

---

54. Cf Westen, "Critique", *supra* note 39 at 6. The same line of reasoning may apply against Shaw's inference of what he terms "impermissible disregard." See Shaw, *supra* note 1 at 170. After all, if the blackmailer might gain from selling her silence, why shouldn't it count as value to be offset against the harm to the victim? Note, however, that according to my taxonomy, Shaw's version is not subjectivist in the strict sense, since the subjectivity is needed only for the sake of the evidentiary phase, while what makes the threatened act impermissible are the justifying reasons behind the action, rather than the motivating ones. His view is thus not vulnerable to the critique of the relevance view, which I discuss below, yet it is vulnerable to my current critique, regarding the possibility of inferring the lack of good reasons for the act.

55. For the need to evaluate B's intent at the time of the threat, see the discussion at *supra* note 50. While the harm is not necessarily among the means to the end of the secret-telling, it serves the end the counterfactual secret-telling is supposed to serve. Thus, the harmful component of the hypothetical act as presented by B (telling the secret) serves B's actual aim. Put differently, where the act under discussion is hypothetical, it is affected (also) by the mental state which accompanies its utterance.

Another example might help here: Suppose that B threatens to drive recklessly near V's children, unless paid by V. If B eventually hits V's child with his car, it seems to me appropriate to regard his behavior as purposeful. I believe that something similar lies at the root of the *actio libera causa* principle. For a recent related view, see Larry Alexander, "Causing the Conditions of One's Defense: A Theoretical Non-Problem" (2013) 7 Crim Law & Phil 623. Cf also Claire Finkelstein and Leo Katz, "Contrived Defenses and Deterrent Threats: Two Facets of One Problem" (2008) 5 Ohio St J Crim L 479.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

a guess regarding the blackmailer's psychology.[56] It thus offers a more stable basis for the subjectivist theory.

Note, however, that even within the new framework, the *pro tanto* problematic nature of the threatened act has a role in the theory. After all, any commercial offer (which includes, at least in implied manner, a statement like "unless you pay me [5$], I will not give you [these donuts]") is based on a similar plan to utilize the buyer's interest in the merchandise. Hence, the donut seller offers to intentionally frustrate the customer's interest if she does not pay, and will similarly be disappointed to find out that the customer has no such interest. How does the case of blackmail differ (recall the third formulation of the paradox!)? The answer lies in the initial nature of the act and the principle of *marginality*. Even without much detail about the harm-causing, suffice it to suppose that while refraining from selling the donut is—under normal circumstances—legitimate, blackmail cases involve acts which are more problematic *pro tanto*. Hence, the difference might be just a matter of being pivotal: while the additional component of intending to frustrate the interests of the victim is sufficient to render the disclosure of a secret impermissible, it is not sufficient to turn not distributing one's donuts into a morally impermissible action. As long as the act is morally problematic and marginal in the first place, it's possible for the intention-related component to be pivotal in making it, all things considered, impermissible.[57]

---

56. Another way to appreciate the same point is through the legitimacy of utilizing one's options for personal gain. As James Shaw's version of the subjectivist theory stresses, the wrong in blackmail stems from threatening to act in a way that involves the moral wrong of "impermissible disregard" of the victim's interests (Shaw, *supra* note 1 at 169-71). Yet this disregard disappears once B—the threatening party—has independent ends for acting as threatened, since those ends "offset" the harm to V—the victim. Shaw then faces the question why we shouldn't count B's ability to extract money from V among the financial reasons which B is entitled to consider. Cf Shaw, *ibid* at 171 n 11.

57. The inference of illicit intentions, as explained earlier, faces a challenge. Suppose that Al, in the framework of his work as a journalist, plans to (permissibly) expose a secret about Ben. He then realizes that Ben will be harmed by this exposure, so he proposes to abstain from publishing the secret, if Ben compensates him (for the loss of time, let's say). Under these circumstances, it sounds reasonable to say that the harm to Ben is not intended by Al. After all, he might prefer publishing to concealing the information, or at least be indifferent between the alternatives. The financial demand stems from Al's foresight of the damage, which leads him to offer a pareto superior solution (I'm indebted to Mitchell Berman for this point).

This example demands another look. Al faces three courses of action: he may publish the information, refrain from publishing, or refrain from publishing for compensation. He surely prefers the third alternative to the second one. He then presents the following bi-conditional: "if you compensate me, I will not publish the information; if you do not compensate me, I will." The final clause is designed to give Ben a reason to pay, and so the damage from the exposure has a role in advancing Al to his second-best goal. I therefore find it legitimate to say that the act as threatened (see *supra* note 50)—within the communication with Ben—intends this harm.

None of this means that the example is not in some ways unique. The independent reasons behind the initial plan of publishing, and the value of the invested time, can both count in favor of the exposure, making it less marginal at the outset, thus making the intention not pivotal. The fact that the harm is intended only as a second-best outcome might affect the normative picture too. The case, like other cases which involve market-price blackmail, should be decided contextually, based on careful evaluation of the facts that affect the permissibility of the threatened act. Some of these cases are coercive blackmail, while others are legitimate

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

To conclude, blackmail cases are cases of threatening to perform an act which is morally problematic due to its substantial negative effects on someone else. In general, the balance of considerations renders this action (marginally) permissible, despite its problematic *pro tanto* features. However, when these negative effects are intended, and not merely foreseen, the overall balance changes, and the action becomes impermissible. The accompanying demand—maybe together with other circumstantial evidence that may support or rebut this inference—indicates that those negative effects are intended. Thus, a proposal to act in this way is a proposal to act in an impermissible way, i.e., a coercive threat. A demand backed by such a threat is an attempt to achieve something through coercion, in a context where voluntary exchange is required. This is why it is wrong (and properly criminalized).

The argument can be presented as resting on the following four claims:

I. *The threat (or basic coercion) principle*: A proposal to Φ is a coercive threat, hence (*prima facie*) wrongful, if Φ is impermissible.

II. *The intending-foreseeing principle*: For any Φ which entails harmful results, if those results are intended by the agent who performed Φ, then Φ is morally worse than a parallel Φ where those results were merely foreseen.

III. *The evidentiary hypothesis*: Financial demands of the sort that prevail in blackmail scenarios are proper evidence for the existence of such intent.

IV. *The marginality hypothesis*: Blackmail scenarios involve proposals to act in a morally marginal (or borderline) way, therefore the question whether Φ is permissible or not might depend on whether their harm is intended or not.

This is an appealing picture. It explains blackmail as a form of basic coercion, and thus as parallel to extortion; hence, it accounts for the customary design of the criminal code.[58] It clarifies the connection between the two components of blackmail—the threatened act and the conditioned demand—and explains how together they generate the result of impermissibility. It reveals why a bribery case, which has much less evidentiary force,[59] is different from blackmail; and it shows

---

bargains. I take it to be an advantage of my proposed theory, since it better tracks the intuitive judgment regarding market-price blackmail. Indeed, in these cases it is much less clear that blackmail is wrongful. See, e.g., Berman, "Blackmail", *supra* note 1 at 75. Some cases of market-price blackmail are coercive under the basic revisionist view, since sometimes there is a market-price for morally impermissible actions (paparazzi might be an example). Other cases should be decided, in my opinion, based on the question of marginality.

Be that as it may, I see no reason to insist on this point here. If, under the depicted circumstances, referring to Ben's harm as intended by Al seems unwarranted, then it follows that special further circumstances might mitigate or even rebut the inference regarding the blackmailer's intentions. In this case, the contextualized analysis of the act's permissibility should be supplemented with an evaluation of the blackmailer's mental state. The inference is thus still less expansive in its evidential presuppositions, but it is not necessarily conclusive.

58. Cf Stuart P Green, "Theft by Coercion: Extortion, Blackmail, and Hard Bargaining" (2005) 44 Washburn L J 553. For a list of statutes which cover blackmail under the offences of extortion or coercion, see Westen, "Paradox", *supra* note 1 at 587-88.

59. In bribery cases, the bribed party wishes to perform an act prior to the financial offer. Hence, it is plausible that this party has an independent reason to perform the act, and has no prior plan that involves the harm to the other party.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

why blackmail differs from other sorts of legitimate bargaining (due to the marginality hypothesis). Furthermore, it captures the intuitive force of some other central suggestions, which are based on the way blackmailers would have acted had they not met their victim;[60] and it fits common pre-theoretical intuitions about the various blackmail-like scenarios, as was lately shown in experimental work.[61] May we, then, stop worrying about the puzzle of blackmail?

b. The Flaws of Intentions-Based Theory

While the view that the intentions of agents are relevant to the permissibility of their actions was once widespread and influential, in recent decades it has been more often doubted than defended.[62] By now, supporters of the relevance view seem to be a minority among moral philosophers.[63] What matters for permissibility, according to the alternative view, are only the objective (or justifying) reasons for action, rather than the motivating (or explanatory) reasons which actually guided the agent's behavior. If genuine reasons justify an action, it is permissible. The reasons upon which the agent happened to act are irrelevant to the moral status of the act itself.

For example, diverting the infamous trolley from its original track (saving five and killing one) is permissible in the given circumstances,[64] and this conclusion does not change even if the agent who diverts the trolley actually *wants* to kill the person who is standing on the other track, and would divert the trolley even if the original track was vacant.[65] Thomas Scanlon and others have suggested that opposing intuitions derive from failure to distinguish between moral judgments that relate to actions and judgments that relate to agents.[66] The agent who acts with illicit intentions is rightly criticized and condemned, but the deontic status of the act remains untouched.

Furthermore, other claims target the conceptual divide between intending and foreseeing harm as incoherent.[67] After all, even in the paradigmatic cases

---

60. See Nozick, *supra* note 17 at 84-87 and the (indeed persuasive) interpretation suggested for his view by Berman, "Blackmail", *supra* note 1 at 45-49; Altman, "Patchwork", *supra* note 12 at 1642.

61. Robinson et al, *supra* note 3 at 347.

62. McMahan, *supra* note 42.

63. *Ibid* at 345. See also Husak, *supra* note 41 at 53.

64. For the classical discussions of this thought experiment, see, for example, Philippa Foot, "The Problem of Abortion and the Doctrine of the Double Effect" in *Virtues and Vices and Other Essays in Moral Philosophy* (Berkeley: University of California, 1978) 19 at 21-22; Judith Jarvis Thomson, "The Trolley Problem" (1985) 94 Yale LJ 1395.

65. For another view on those questions, see, recently, Victor Tadros, *The Ends of Harm—The Moral Foundations of Criminal Law* (New York: Oxford University Press, 2011) at 162.

66. See Scanlon, *supra* note 18 at 22. Scanlon distinguishes between assessing permissibility (as a guide to deliberation) and assessing the agent's particular decision-making (as a standard of criticism). Thomson distinguishes between assessing the act and assessing the agent's character: Judith J Thomson, "Physician Assisted Suicides: Two Moral Arguments" (1999) 109 Ethics 497 at 514-16. Cf also Bennett's version of distinguishing "first order morality" and "second order morality" in Jonathan Bennett, *The Act Itself* (New York: Oxford University Press, 1998) at 221-24.

67. For a discussion, see, e.g., Alison Hills, "Intentions, Foreseen Consequences and the Doctrine of Double Effect" (2007) 133 Phil Stud 257.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

of intended harm, the harm can be presented as a mere side-effect. For instance, in the famous *transplant* scenario, one can argue that the agent intends only to harvest the patient's organs, while the patient's death is only a regrettable side-effect, which the agent would have been happy to avoid if it were possible. Put more generally, as long as one's ultimate end requires the harmful means only causally and not logically, the harm can be regarded as unintended.[68]

This kind of difficulty may motivate a fundamental alternative view of the DDE. This view does not focus on the subjective mental state of the agent, but rather on the objective causal structure of the action.[69] It examines whether the action's harmful consequences were part of the causal chain on the road to the desired end. It is thus a Patient/Causal-Centered Version ("CCV"). According to this formulation, *transplant* is wrong not because the physician intended to kill the patient, but because the patient's death occurred along the causal chain of saving the other five patients, whereas in the classic trolley case it does not. According to CCV, an action which maximizes the good might nevertheless be impermissible if this maximization is achieved through harming someone else.[70]

While the two formulations of DDE largely converge, there could be a difference between them in various cases. Thus, again, according to CCV, killing the one and saving the five in *trolley* is permissible even if the agent wishes to kill the one and intends to do so (and even if the agent would have flipped the switch in order to kill this person anyway).[71] Note that what is of importance is not the causal chain towards the realization of the *agent's final end*,[72] but the causal chain toward the good result which made the action *prima facie* permissible.[73] Since in this example the death of the one does not lead causally to the saving of the five, flipping the switch does not violate this one's rights. Permissibility thus remains a matter of objective fact, with no relation to the agent's mental state.

---

68. See Bennet, *supra* note 66 at 210ff; see also Kimberly Ferzan, "Beyond Intention" (2008) 29 Cardozo L Rev 1147. For an attempt to cope with this criticism see N Delaney, "Two Cheers for "Closeness": Terror, Targeting and Double Effect" (2008) 137 Phil Stud 335; William J FitzPatrick, "The Intend/Foresee Distinction and the Problem of Closeness" (2006) 128 Phil Stud 585.

69. I rely here on Enoch*, supra* note 43 at 71. See also Westen, "Paradox", *supra* note 1 at 623.

70. The distinction between the two versions of DDE echoes the formulation of deontological constraints as a whole, as either agent-centered constraints, focusing on the agent's special involvement in the harm brought about or as patient-centered constraints, focusing on the victim's right not to be involved in something harmful in order to further the purposes of another. For the distinction between agent-centered and patient-centered deontology, and a similar view, see Larry Alexander & Michael Moore, "Deontological Ethics" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Fall 2008 edition) at 2.2.1., online: http://plato.stanford.edu/archives/fall2008/entries/ethics-deontological/.

71. Cf Frances M Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Oxford: Oxford University Press, 2007) at 13 (where an act Φ is justified because of its good consequences, although it entails some foreseen harm to a few people, an agent will act permissibly even if she performs Φ only in order to harm those people).

72. Cf Lawrence Masek, "Intentions, Motives and the Doctrine of Double Effect" (2010) 60 The Phil Q 567. The causal structure towards this end, or the agent's belief regarding it, might be part of the definition of her intention.

73. Of course, as long as the action is not justified as a matter of consequential considerations (as, e.g., in a case of killing an innocent person without saving other lives), the deontological constraint is not required in order to rule it out. For reasons of simplicity, I do not deal here with deontological permissions or prerogatives.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

We can now return to our tentative reliance on intended harm as a component of the subjectivist theory of blackmail. The theory is based on the mental state of the agent, more specifically on the agent/mental-state-centered version of DDE. As described above, the harm to the threatened party is indeed a constitutive component of the blackmailer's plan, which focuses on the possibility of extracting money from the victim. However, the evidentiary thesis seems to fail once one tries to formulate it in the Patient/Causal-Centered Version, since the harm to the threatened party has no role in the relevant causal chain.[74]

Another look at the informational blackmail example will clarify this point. In this case, as described above, disclosing V's secret is permissible due to, let's say, the interest of V's spouse in knowing the truth. While the harm to V serves the *blackmailer's* final end, it is not part of the causal chain that leads to *what justifies the act*, namely the spouse's knowledge. Hence, V's harm cannot be seen as (merely) the means to maximize the good. In this state of affairs, according to CCV there is no deontological constraint against disclosing the information. Therefore, the blackmailer's proposal is a proposal to act permissibly, and hence it involves no coercion (at least not under the simple account of coercion, as presented above).

To sum up, the revised subjectivist theory hinges on the intending-foreseeing divide. Alas, this divide and its normative significance are roundly criticized. Some tend to completely disregard this distinction. Others formulate this (or a close enough) distinction not in terms of mental states, but in terms of causal chains. Either way, the subjectivist theory doesn't work, since even assuming that the blackmailer's proposal indeed indicates one's intent to harm the blackmailed party, this does not affect the permissibility of the proposed act. Hence, if this act is generally permissible, proposing to commit it unless paid is not coercive.

The subjectivist theory works, then, only for those who still uphold the relevance-of-intentions view.[75] While philosophical arguments should not be decided on the basis of head-counting, it sounds unpromising to base one's theory of blackmail on a view which is constantly losing support in the general field, and to undertake the liability of unattractive positions (for independent reasons) in this field.[76] On the other hand, those who have abandoned the relevance view might see it as the false source of intuitions regarding blackmail, thus leading them to advocate the decriminalization of blackmail.[77]

---

74. Berman seems to overlook this fact. See Berman, "Blackmail", *supra* note 1 at 102 n 122.

75. The debate is not over yet. See, for example, Ralph Wedgwood, "Scanlon on Double Effect" (2011) 83 Phil & Phen Research 464; McMahan, *supra* note 42; Husak, *supra* note 41 (mentioning Anthony Duff and Michael Moore as supporters of DDE); Steven Sverdlik, *Motive and Rightness* (Oxford: Oxford University Press, 2011); Tadros, *supra* note 65; S Matthew Liao, "Intentions and Moral Permissibility: The Case of Acting Permissibly with Bad Intentions" (2012) 31 Law & Phil 703.

76. Since "one person's *modus tollens* is another person's *modus ponens*," if the relevance-of-intent view is better equipped to solve the puzzle of blackmail, this may earn this view some plausibility points within the debate. Yet from this point of view also, there is room to inquire whether the puzzle could be nevertheless solved without being committed to the relevance view.

77. Such a step is hinted at in Westen, "Paradox", *supra* note 1 at 634.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

Before arriving at any of these conclusions, let us try to rescue the subjectivist theory by investigating whether it can survive the failure of the relevance-of-intent principle. In other words, we have to reconstruct the subjectivist theory without resorting to this hypothesis. The following section suggests two such strategies.

4. Rescuing the Intention-Based Theory

Let us recall where we stand now: the coercion-based solution to the blackmail puzzle is rooted in insisting that blackmailers are not proposing to do something they are entitled to do. Rather, upon closer examination it was revealed that they are proposing to act impermissibly. The heart of the theory lies in the claim that what seems to be, at first glance, permissible (though only marginally), turns out to be impermissible when performed out of a specific mental state (such as intending harm). Since the conditioned threat indicates the existence of this mental state, blackmail cases would seem to be threats to act impermissibly. However, in the final account doubt was cast on this argument, since the view that intentions are relevant to permissibility has been challenged. In this section, I will attempt to suggest two strategies for rescuing the subjectivist theory, while denying the relevance of intentions. The *first* focuses on the indirect relevance of intentions. The *second*, which is indeed more ambitious, suggests a minor correction to the general theory of simple coercion, thus making intentions relevant to coercion even without being relevant to permissibility.

a. A Double-Evidentiary Thesis: Intentions as Prediction or Cause

So far, the discussion has been devoted to assessing the *intrinsic* role of intention in evaluations of permissibility. Those who object to the *relevance view* deny that an agent's intention, by itself, generates an important difference in the normative properties of the action performed by this agent, *all other things held equal*. In other words, the debate over intentions is not whether intention has any sort of ramifications for the permissibility of an action, but whether it has any such *intrinsic* ramifications.

However, leaving aside the cleaned-up hypothetical examples, in real life no one denies that one's intentions might affect the permissibility of one's action, albeit only instrumentally.[78] First and foremost, intentions have what Scanlon termed "predictive significance" as to the foreseen consequences of the act.[79] For example, while the interesting philosophical debate about *terror bombing* (which intends the killing of civilians) versus *strategic bombing* (which merely foresees it) focuses on cases of equivalent acts and consequences, in reality the difference in intention is expected to result in different ways the bombing is

78. See, e.g., Enoch, *supra* note 43. Steven Sverdlik argues for the same conclusion, see *supra* note 75.
79. See Scanlon, *supra* note 18 at 13, 62-63.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

planned and carried out, hence in its consequences as well.

In the same fashion, revealing V's secret in order to damage V may plausibly be predicted to be carried out in a way that will cause graver damage to V than a revelation motivated by care for V's spouse. It might, for example, affect the extent of publication (whether C reveals the secret to V's coworkers too), or its form (whether C presents the data in a gentle or shocking way). The intention thus affects the predicted consequences of the action. The threatened act in blackmail scenarios is predicted to bring about graver harm to the victim than regular cases of revealing secrets. This difference might suffice in order to render this originally marginal act impermissible.

Moreover, sometimes the agent's intentions have not only predictive or indicative value, but also causal value, meaning that the very existence of the intention leads to a bad consequence. If, for example, people tend to experience an intended harm in a more severe manner than they experience mere unintended harm, then the intention affects the permissibility of the action derivatively, by expanding the scope of the expected harm.[80] Along these lines, the victims of blackmail might experience the harm in the revelation of their secret as more serious when they know it was revealed in order to cause them pain. Thus, again, intentions are relevant to the intended act's permissibility, not intrinsically but through their effect on the consequences of this action.

This tentative conclusion opens the door for a double-evidentiary theory of blackmail: the conditioned threat indicates that the threatened act will (hypothetically) be executed with the intention of bringing about harm to the victim. This harmful intention, in turn, indicates that the magnitude of the harm is expected to be more serious than in the parallel no-intention case. It is this latter factor that turns the act from being generally and ordinarily permissible into being wrongful when done intentionally. Thus, as a matter of evidence, blackmail is a threat to do what is (expected to be) impermissible.

However, this is not enough. While intended harm usually indicates more severe consequences, this is not necessarily the case. One can imagine cases of blackmail where the threatened act has the exact same consequences as in the non-intended case. If the theory cannot explain their wrongfulness, it remains under-inclusive. A failure to account for some cases of blackmail also implies that it probably fails to trace the root of the problem.[81] Therefore, we should still look further, for another possible strategy.

---

80. Indeed, "even a dog distinguishes between being stumbled over and being kicked" (Oliver Wendell Holmes, Jr, *The Common Law* (Cambridge, MA: Belknap of Harvard University Press, 1963) at 3. As Thomas Nagel puts it, "The victim feels outrage when he is deliberately harmed… not simply because of the quantity of the harm but because of the assault on his value of having *my* actions guided by *his* evil" (see his *The View From Nowhere* (New York: Oxford University Press, 1986) at 184).

81. One possible strategy for holders of such a view is indeed to 'bite the bullet' and deny the wrongfulness of blackmail in cases of this last sort, while ascribing the opposite intuition to the common case. According to that view, the double-evidentiary theory is actually a debunking move that should serve as an argument for the decriminalization of blackmail. An alternative is to deny the unity of the wrongfulness of blackmail. Cf Altman, "Patchwork", *supra* note 12.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

b. Beyond Impermissibility: Coercion, Consent and Culpability

So far, I have discussed the way the criminalization of blackmail can be reconciled with no more than the ordinary account of simple coercion, which consists of conditionally threatening to act impermissibly. Yet given the nuanced normative evaluation of acts and actors (as stressed above), perhaps the traditional characterization of coercion is inaccurate, neglecting the difference between the act and the agent to the same extent as holders of the relevance view do. In other words, perhaps the distinction between coercive threats and permissible offers can be reformulated in terms of the agent's culpability (or something close to it) rather than in terms of permissibility. According to this amended view, a conditional proposal is a coercive threat *if the agent that will carry out the threatened act would be culpable for doing so*. If intentions are relevant to the assessment of culpability,[82] and culpability—rather than only impermissibility[83]—affects coerciveness, then the subjectivist theory can survive the rejection of the *relevance view* regarding permissibility, but still explain the wrong in blackmail in terms of coerciveness, and hold that blackmail is just a subcase of ordinary extortion.[84]

Why should we think that culpability, even without impermissibility, affects the coerciveness of proposals? To answer this question it is necessary to develop no less than a comprehensive theory of coercion, a task I cannot undertake within the limits of the present paper. Instead, I shall provide an initial outline. I first claim that the wrong in extortion is about acquiring something without proper consent. I then analyze the special role coercion claims have in the context of evaluating consent, and how it differs from other contexts, such as excusing someone from responsibility or placing blame on the coercer. I explain why the threatening party's culpability might be relevant to the extent that the threatener is entitled to rely on the threatee's consent. Finally, I demonstrate how these claims fit into the classic blackmail scenario.

i. What is Wrong with Extortion?

Revisionist views on blackmail hold that there is nothing special about the

82. In my use of "culpability" here I do not wish to engage in the debate whether or not one might be blameworthy for a permissible act (cf Justin A Capes, "Blameworthiness Without Wrongdoing" (2012) 93 Pacific Phil Quart 417). I use it to mean something like "worthiness of moral condemnation or critique vis-à-vis that action" and will use it interchangeably with being "condemnable" or "deplorable."

83. What I need here is culpability with *no* impermissibility, namely that the culpability of the proposer is *sufficient* for coercion, even if the proposed act is permissible. So impermissibility is not *necessary*. Whether or not it is *sufficient* is beyond my needs here.

84. Berman himself talks occasionally about blame, rather than impermissibility, although not systematically. In this fashion, he says that "normative concerns are not limited to whether a proposal is inherently wrongful in either an objective or conventional sense; they extend as well to considerations of the moral character of an actor's motives for advancing a proposal that is itself morally ambiguous" (Berman, "Evidentiary", *supra* note 2 at 851). Similarly, in his recent writings he sometimes refers to whether or not "[a]n actor behaves in morally blameworthy fashion" (Berman, "Blackmail", *supra* note 1 at 68; 101 n 119). See also the way his view is presented by Rosenberg, *supra* note 3 at 357 ("Blackmail is wrong because the blackmailer threatens an act that, were he to engage in it, would be blameworthy…").

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

criminalization of blackmail. Rather, it should be regarded as a general case of extortion, with the subjectivist theory explaining its coercive component. Both Berman and Shaw, the prominent advocates of earlier subjectivist theories, focus on the wrong in coercion, which consists of attaching an improper sanction to one's deliberation, or placing improper pressure on one's choice, in a way that violates one's freedom or autonomy.[85] If the wrong of blackmail derives solely from the wrong of coercion, it should presumably be limited only to cases where the coercee is entitled to act free from this pressure, meaning presumably cases in which the coercer is not entitled to act as threatened.

In contrast, I have insisted earlier that blackmail and extortion should be understood as an instance of *theft by coercion*.[86] In other words, it is not the coercion per se which constitutes the wrong, but the acquiring of something of value through the use of coercion as a means to this end. At the heart of the wrong in extortion and blackmail is the fact that the victim's consent is defective, due to being obtained in a dubious way. In this way, the moral wrong of coercion turns to be the legal wrong of acquiring the other's property without the owner's proper consent. Focusing on consent and the way it is invalidated by coercion prepares the ground for a more careful examination of the role coercion has in the wrong of blackmail (and extortion in general).

In a seemingly unrelated paper, Mitchel Berman famously distinguished between two different functions of coercion claims: an *offensive* function, suggesting when an agent is wrongful in coercing and a *defensive* function, which serves as a call for excusing a coercee from blame for what had been done.[87] As Berman persuasively argued, these are totally different (and logically independent) functions. Berman himself focuses his discussion of blackmail on the offensive meaning only, since apparently what is at stake is the criminalization of blackmail, which involves the offensive function. I wish to suggest, however, that having it hinge on something which is closer to the defensive function is the key to a full understanding of the wrong in extortion, hence also in blackmail. Let me elaborate.

ii. The Third Function of Coercion Claim: Coercion and Consent

If the wrong in blackmail derives directly from its coerciveness, then one should indeed focus only on simple coercion, which depends—as presented earlier—on the permissibility of the threatened act. In contrast, to the extent that the wrongfulness is rooted in taking someone's property without proper consent, through the use of coercion as a tool for extracting consent, agreement or a promise, it is possible to recognize a *third* category of functions of coercion claims. This category resembles—yet is not identical to—the defensive function that relates

85. See Shaw, *supra* note 1 at 167; Berman, "Functions", *supra* note 37 at 52.
86. Cf the sources cited *supra* note 18. Of course, when the blackmailer demands sex rather than property, the nature of the offence should change to rape, and so forth.
87. See Berman, "Functions", *supra* note 37.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

to the conditions in which a coercee is excused for its deeds.[88] Appreciating this point requires a closer look at the nature of consent.

Consent is morally transformative: it turns an otherwise illegitimate act into a legitimate one by waiving one's objection to the transgression of one's moral boundaries.[89] Thus, the conditions in which the victim's consent should not be held to be transformative, or—relatedly—this promise should not be deemed obligatory, are not identical to the conditions in which the victim would not be responsible for one's physical actions, or would be excused for violating any duties or transgressing another's rights. If V—a victim of coercion—did something wrong (e.g., committed theft) under a coercive threat, V might be excused for acting wrongfully.[90] In contrast, when V breaks a promise extracted through coercion, or insists on the right surrendered under coercion, V does nothing wrong to be excused for. The promise was not binding and the consent was not valid in the first place. In other words, there are two different levels of coercion here: the level of coercion which excuses someone from being responsible for acting wrongfully is different from the level of coercion which denies one's consent of its transformative nature, or precludes one's promise from being obligatory.[91] A given level of pressure might not excuse from wrongdoing but still suffice to render the promise nonbinding.

Moreover, the difference between excuse-related coercion and consent-related coercion is not only a matter of the degree of required "freedom," or the extent to which one's choice is constrained. It is rooted in another feature of promising or consenting: the fact that both are *dyadic-relational* actions, performed between two agents. For that reason, as long as the coercing party is the same party who gains the consent or is the promisee, there is room for a comparative-relational account of consenting and promising. Under this model, in order to determine the moral implications of one's consent it is necessary to evaluate the behavior of *both* of the parties, rather than only the constraints faced by the consenting party. What is called for is comparative evaluation, whether or not the consent was efficacious regarding the rights and duties of the concrete other party; or whether a promise was binding towards the concrete promisee. It is unfair for the coercing

---

88. On three different notions of coercion, see William A Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge: Cambridge University Press, 1998) at 74. Grant Lamond also discusses three different notions in his "The Coerciveness of Law" (2000) 20 Oxford J of Legal Studies 39 at 47-48, yet they are less relevant to my discussion here. See also *infra* note 91.

89. See, e.g., Pallikkathayil, *supra* note 1 at 7; Larry Alexander, "The Ontology of Consent" (2014) 55 Analytic Phil 102.

90. In some cases she might even be justified in doing so. However, there is still a need to "offset" a wrongdoing. Analyzing the exact nature of the duress defense is beyond my needs here. For such an attempt, see Claire Finkelstein, "Duress—A Philosophical Account of the Defense in Law" (1995) 37 Ariz L Rev 251.

91. Berman suggests arguing that in such cases one has to be excused for making a promise one did not intend to honor from the beginning (see Berman, "Functions", *supra* note 37 at 66). I think that focusing on giving consent clearly shows why this move is not attractive. This is exactly what Edmundson termed the "justification defeating" (rather than the "justification supplying") context of coercion claim, in a short yet valuable remark in Edmundson, *supra* note 88 at 74.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

party to benefit from consent that was obtained by one's own faulty deeds. Thus, the consent should not be effective as to this party.[92]

This comparative notion of coercion is actually also a *distributional* one. It asks which of the two parties—the coercer or the victim—has to bear the cost of the retreat from what was seemingly (the manifestation of) V's consent or promise. While generally persons have to bear the costs of their consent or promise even if they do not stand behind it anymore, sometimes it is justified to shift the costs of this retreat (or gap between intention and manifestation) onto the other party, who induced this consent in dubious ways.[93] Focusing on the distributional feature of such a claim opens the door for an evaluation of the parties vis-à-vis the consent, rather than focusing merely on the impermissibility of their acts. In other words, if one of the two parties has to suffer the consequences of the consent, it should be the more culpable one.

iii. Back to Blackmail

How does this all tie in with the case of blackmail? In the basic blackmail scenario, C authors V's distress by threatening to reveal V's secret, thus inducing V's consent to give to C V's money. In doing so, C is acting maliciously, since even if intending V's distress does not affect the permissibility of the act (i.e., revealing the secret), it surely does affect the evaluation of the actor, namely the culpability of V vis-à-vis that action. Therefore, under the distributional model of coercion, V's consent (to give C money) should not be regarded as transformative as to C's rights and duties, nor should V's promises be binding against C.[94] C, the blackmailer, is not entitled to earn from his malicious behavior, and so V's consent is not transformative as to C's rights in V's money. Consequentially, by taking V's money C is taking money without its owner's proper consent. By doing so, C commits theft by coercion, an act which is properly criminalized as an instance of theft,[95] even if the act V is threatening to do is permissible after all.

Note that this suggestion is still part of what I earlier termed a "revisionist theory," namely one that sees blackmail as basically just a form of extortion. Extortion involves coercion, and so does blackmail. Extortion consists of taking one's money without one's proper consent, and so does blackmail. What is special in the case of blackmail is only that it is more complicated to demonstrate

---

92. Cf Larry Alexander, "The Moral Magic of Consent (II)" (1996) 2 Legal Theory 165 at 171 ("Threats by the boundary crosser, then, do not vitiate consent; rather, they render the boundary crosser *himself morally powerless to take advantage of the consent he has induced*" [emphasis added]). See also Franklin G Miller & Alan Wertheimer, eds, *The Ethics of Consent: Theory and Practice* (Oxford: Oxford University Press, 2010) 79 at 94.

93. Berman discusses a similar line of thought in Berman, "Functions", *supra* note 37 at 68, yet argues that it has no essential connection to coercion. I follow Edmundson, *supra* note 88, in contending that it does.

94. As to the interesting question of third-party coercion, I leave it for another occasion. Cf, e.g., Joseph Millum, "Consent under Pressure: The Puzzle of Third Party Coercion" (2014) 17 Ethical Theory & Moral Practice 113.

95. Similarly, if what C is asking for is sexual behavior, the relevant crime might be rape or other sorts of sexual assault. Whether the character of consent is unified between property and sex is a different question, which I cannot address here.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

the coercion, namely, to explain why the victim's consent should not be regarded as properly transformative as to the blackmailer's rights in the money extracted. For that purpose I introduced the distributional account of consent, which strives to justly allocate the costs of consent that was given out of distress, when the beneficiary is responsible for this distress.

To fully appreciate this view, let me briefly examine it against two other examples. First, let us take Thomson's famous vengeful doctor example,[96] where the doctor injects the suicide-assisting drug out of vengeful motives, intending to cause the patient's death as an end. Thomson has argued that while the doctor's character is morally stained, the act is permissible. Imagine now that the doctor is acting within the framework of a contract, willing to come only if paid. In other words, she proposes to the patient: "I will inject the drug only if you pay me a sum of money." Should my account lead to the conclusion that this contract was extortionist, due to the malicious behavior of the doctor? I believe it should not. Indeed, the doctor acts in a malicious way, and is relatively the wicked party to the agreement. Yet the doctor's maliciousness is not the cause of the patient's distress (the pain is). Moreover, what the doctor is threatening to do if not paid—i.e., not to inject the drug—is not the behavior that manifests the maliciousness. Therefore, the patient's consent to pay is not the result of an intended distress, caused maliciously by the doctor. Under my account, then, vengeful physicians may continue to get paid for assisting suicide.[97]

What about the donut seller? Earlier I discussed the case of the donut shopkeeper, who says that unless money is paid, she shall not sell her donuts. The seller, I argued, intends to cause (some level of) distress in refusing to give the donut, in order to induce the consumer to pay for the donut. Here again, however, there is no real challenge. First, the shopkeeper is not responsible for the consumer's hunger or sugar craving.[98] Second, the level of distress caused by being denied a donut is—at least under normal circumstances—not of the sort that should affect the moral power of one's consent. Lastly, abstaining from distributing your donuts for free is much less morally suspicious than revealing someone's embarrassing secret, and so the relative-distributional consideration here is much weaker. It is safe to conclude, then, that my suggested theory of coercion and blackmail will not lead to excessive over-inclusiveness, due to making every case of bargaining a case of extortion.

In summary, under the view suggested in this section, in order for a transaction to be extortionist it is not necessary for someone to threaten to act impermissibly. While such a threat is surely the paradigmatic case of coercion, since it is a deliberate and malicious way of causing distress and exploiting that distress for

96. Thomson, *supra* note 66 at 516.

97. What if the doctor, out of her vengeful motives, wishes not only to kill the patient but also to exploit the situation in order to impoverish the patient? That brings the case closer to the exploitation angle, which requires a separate discussion, yet still falls short of causing the patient's distress.

98. One might say that the blackmailer is equally not responsible for the fact that her victim has an embarrassing secret. However, absent the blackmailer the secret would cause no serious distress, while absent the donut seller the consumer's distress still stands.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

one's own profit, there are some peripheral instances that share these characteristics without involving an impermissible act. The distributional understanding of consent requires that a consent that originated in someone's distress not enrich whoever deliberately created that distress in order to induce that consent, as long as it was created in a morally condemnable way. While in most cases deliberately creating distress in a morally-condemnable way is also impermissible, this is not a necessary requirement for the consent to be deemed ineffective as regards the condemnable party. Thus, extracting money (or other things of value) in this way through reliance on someone's manifestation of consent is a way of taking their property without their proper consent, namely a sort of theft by coercion. Theft is properly criminalized as a way of protecting one's right to property.

Conclusion

Coercion consists of threatening to execute an impermissible act. This explains well why extortion is wrong, and why some cases of threatening to act legally but immorally are wrongful too. Yet why do threats to execute permissible acts also seem to be coercive? Subjectivist theories suggest that in evaluating the permissibility of an act factors that relate to the agent's mental state while doing it should be taken into account. In this way, acts which are generally permissible might be found to be impermissible after all.

In this paper, I have suggested an improvement on existing subjectivist theories, by relating to the difference between intending the harmful results of the act and merely foreseeing them, a difference that might negatively affect the moral evaluation of this act. Thus, the same physical act with the very same consequences might be either permissible or impermissible, depending on the reasons which motivated the agent. I demonstrated why the structure of the blackmail transaction indicates that blackmailers intend the harm to their victim. For some actions, which are morally suspicious to begin with, this factor suffices to render them impermissible. Thus, we can conclude that blackmail actually contains a threat to act impermissibly, based on a firmer evidentiary basis and clearer normative comprehension.

This suggestion, however, revealed the theory's vulnerability to attacks on the relevance of intentions to moral permissibility. If the harm being intended does not affect the threatened act's permissibility, then blackmail scenarios cannot be coercive. I therefore offered, in the last section, suggestions as to how the theory can avoid this conclusion. First, I explored the way in which the uncontroversial instrumental role of intentions in evaluating permissibility can be integrated into the subjectivist theory. Thus, the agent's intentions might frequently indicate the seriousness of the act's consequences, or even have a causal role in creating those consequences.

Second, I investigated the possibility of grounding the phenomenon of coercion not in the permissibility of the act which constrains the choice of the victim, but rather in the relative culpability of the parties regarding this constraint. Relying on a distributional view of coercion and consent, I argued that where

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press

someone deliberatively and maliciously creates distress in order to induce the other's consent, such consent should not be regarded as transforming the rights and duties between those two parties in a way that will benefit the malicious party. If the consent is not transformative, taking the victim's money is not permissible and should be dealt with as a sort of theft, just as regular extortion should. Thus, even if intentions are not relevant to permissibility, they are relevant for the consent-inducing function of coercion claims. Subjectivity matters, then, although in a more convoluted way than previously argued.

https://doi.org/10.1017/cjlj.2015.33 Published online by Cambridge University Press