A Critique of Mitchell Berman’s Belief-Based Theory of Blackmail

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I have focused on the evidentiary theory of blackmail that Mitchell Berman first presented in 1998 because it resolves a problem in Feinberg’s account of crime-exposure blackmail and because it appears to cohere with ordinary intuitions about blackmail. However, I should say something about the alternative theory that Berman presented in 2011. Berman continues to affirm the validity of his 1998 views, but he now gives greater emphasis to the beliefs with which a putative blackmailer acts than to his motivations.

I. BERMAN’S “BELIEF” VIEW OF CRIMINAL RESPONSIBILITY

Berman bases his 2011 view of criminal responsibility upon an actor’s prior moral responsibility, which he argues consists of two elements: (1) actor A is morally blameworthy, Berman says, if he knowingly causes B harm without “reasonably believing” that his conduct is permitted by the balance of undefeated moral reasons—whether his lack of reasonable belief results from (a) failing to seriously deliberate about whether the harm he causes is permitted by the balance of undefeated moral reasons, or (b) deliberating and concluding that the harm is impermissible—and (2) actor A who knowingly causes B harm without believing that the harm is morally permitted is not only morally blameworthy, he also morally “wrongs” B.

Berman’s belief view is similar to his motivational view in one respect: they both assert that, regardless of whether A’s conduct is actually justified as a balance of evils, A’s subjective attitude can result in his wronging B. Yet the two views also differ in an important respect. Under Berman’s motivational view—and under the doctrine of double effect (“DDE”) as well—A wrongs B if his purpose is to hurt B, even if A rightly believes that his conduct is justified by a balance of evils.

1. Feinberg, who justifies the criminalization of blackmail on moral wrongfulness of what blackmailers threaten and/or offer, cannot account for crime-exposure blackmail given that neither the threatened act of exposing crimes nor the offered act of omitting to expose crime is a crime, tort, or moral wrong. See Joel Feinberg, Harmless Wrongdoing 241–45, 243 n.48 (1988).


3. Id. at 68.

4. Id.

5. Id.
In contrast, under Berman’s belief view, A wrongs B if, and only if, A acts in the face of apparent moral reasons not to do so, and he does not reasonably believe that his conduct is justified by the balance of evils.

II. Berman’s New Claim That Biconditional Proposals Regarding Adultery Are Wrongful

Berman argued in 1998 that an actor’s bad motivation ultimately explains the moral and criminal wrongfulness of biconditional proposals (“BPs”) regarding embarrassing or incriminating information. In contrast, Berman claims in 2011 that it is an actor’s bad beliefs that render BPs regarding embarrassing information morally wrongful. To sustain the claim, Berman focuses on BPs regarding what he calls the “paradigmatic case” of blackmail, namely, BPs regarding adultery—while simultaneously assuming that what holds for adultery will tend to hold for BPs regarding other kinds of embarrassing information.

Berman’s argument consists of five steps:

**STEP 1: The Moral Culpability and Wrongfulness of Unconditional Acts**

- **Premise 1.** An actor would be morally culpable if he disclosed embarrassing information without reasonably believing that he was justified in disclosing it, just as he would be morally culpable if he kept information secret without reasonably believing that he was justified in keeping it secret.

- **Premise 2.** In addition to being culpable, an actor would also commit a moral wrong if he disclosed embarrassing information without reasonably believing that he was justified in disclosing it, just as he would commit a moral wrong if he kept information secret without reasonably believing that he was justified in keeping it secret.

**STEP 2: The Moral Culpability and Wrongfulness of Threats**

- **Premise 3.** An actor commits a wrong by either threatening to do something that would be morally wrong to do unconditionally or offering to do something that would be wrong to do unconditionally.

**STEP 3: Empirical Beliefs regarding Disclosures of Adultery**

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6 Id. at 90.
Premise 4. With respect to people who contemplate making disclosures of adultery, it is “overwhelmingly likely”\(^7\) that they do not reasonably believe that unconditional disclosure and unconditional secrecy are both justified, either because they have not seriously deliberated about the matter or because they have deliberated and come to believe that one or the other unconditional act would be unjustified.

Therefore, it is overwhelmingly likely that actors who make BPs regarding adultery—and thus both threaten to disclose the adultery and offer to keep it secret—commit moral wrongs.

STEP 4: The Criminality of BPs regarding Adultery

Premise 5. The state is justified in enacting a blanket criminal prohibition against conduct when it is overwhelmingly likely that the conduct is morally wrongful.

STEP 5: Conclusion

Therefore, the state is justified in enacting a blanket criminal prohibition against making BPs regarding adultery.

III. BERMAN’S CLAIM THAT BPS REGARDING ADULTERY ARE COERCIVE

We have seen that, while Berman relies in 1998 on evidentiary theory to show that BPs regarding embarrassing or incriminating information are wrongful, he does not do so in 2011. He relies instead upon an actor’s belief, arguing that it is overwhelmingly likely that actors who make such BPs regarding adultery do not reasonably believe that, as between disclosure as secrecy, they are justified in doing whichever they choose, and that, therefore, they necessarily commit a wrong in threatening the one and offering the other.

This does not mean, however, that Berman abandons evidentiary theory. On the contrary, having argued that it is overwhelmingly likely that BPs regarding adultery are morally wrongful, Berman invokes evidentiary theory in 2011 to claim that BPs regarding adultery are wrongful in a particular direction. Their wrongfulness, he says, consists not in offering secrecy that actors believe to be wrongful but in threatening disclosures that actors believe wrongful.\(^8\) The claim is significant because wrongful threats constitute coercion. In short, Berman says,

\(^7\) Id. at 68.

\(^8\) Id. at 69–70.
actors who make BPs regarding adultery are guilty of a particular kind of wrongful proposals, namely, coercive proposals.  

How, then, does Berman argue that the moral wrongfulness of BPs regarding adultery consists of coercive threats of disclosure? He does so by invoking evidentiary theory. First, he seeks to demonstrate that the making of a BP regarding adultery is evidence that an actor does not believe that silence is wrongful. He begins by reminding readers of his previous claim that an actor commits a moral wrong if he knowingly inflicts a harm without reasonably considering whether it is justified. Given that disclosures of adultery are known to be morally freighted, he says, a reasonable actor cannot come to conclude that silence is wrongful unless he first does the hard moral work of weighing the harms of disclosure against the harms of silence. Yet it is an empirical fact, he says, that persons do not undertake hard work of that kind unless it matters to them, that is, unless they wish to act in accord with the moral conclusion it yields. By making a BP in which he both threatens to disclose and offers to keep silent, an actor gives evidence that he was never disposed to do the hard moral work of deciding which of those two courses of action he ought to take, because by making the BP, he conditionally proposes to do both. It therefore follows that an actor who makes a BP also gives evidence that, rather than concluding that silence is wrongful, he never even considered whether it is wrongful or not.

Second, Berman argues that, because the harms of disclosing adultery tend to be salient, and because the harms of action tend to be more salient than those of omissions, most actors tend to start with a belief that disclosure is wrongful without having to do a lot of hard moral work to get there. Berman, therefore, concludes that because the making of a BP of adultery is evidence that an actor does not believe that silence is wrongful, and because most people do believe that disclosing adultery is wrongful, the making of a BP regarding adultery is evidence that most threats of disclosure are wrongful by virtue of actors’ believing disclosure to be wrongful.

IV. PROBLEMS WITH BERMAN’S BELIEF-BASED THEORY

Berman’s 1998 article is problematic because it rests on a motivational theory of criminal responsibility that is problematic. Berman’s 2011 essay eliminates those two problems by replacing his motivational theory of criminal responsibility with a belief-based theory. Berman’s 2011 essay nevertheless raises problems of its own, including problems concerning (a) Berman’s claim that BPs about adultery are wrongful, (b) Berman’s claim that BPs about adultery are coercive, and (c) Berman’s assumption that BPs regarding adultery are paradigmatic of BPs in general.

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9 Id. at 70.
10 Id. at 69.
11 Id. at 69–70.
A. Berman’s claim that BPs about adultery are wrongful

Berman’s claim regarding the wrongfulness of BPs about adultery is set forth in five premises above. I believe that three of its premises—namely, Premises 1, 2, and 4—are problematic.

**Premise 1.** An actor would be *morally culpable* if he disclosed embarrassing information without reasonably believing that he was justified in disclosing it, just as he would be morally culpable if he kept information secret without reasonably believing that he was justified in keeping it secret.

We have seen that, according to Berman, there are two ways in which an actor might disclose embarrassing information or keep it secret “without reasonably believing” that he is justified in doing so: (1) by failing to seriously deliberate about the justifiability of his conduct; and (2) by deliberating and concluding that his conduct is unjustified. I am concerned here with (2), i.e., actors who believe that their conduct is morally unjustified. Contrary to Premise 1, it is not true that an actor is culpable who believes his conduct is unjustified—not, at least, unless something else exists that Berman does not address, namely, concurrence between the actor’s moral standards and prevailing moral standards. Consider two ways in which A and B may disagree about whether it is morally unjustified to disclose adultery. A and B may both be motivated by prevailing moral standards but differ because they differ about the facts, e.g., they may differ on whether the disclosure will help or hurt the injured spouse. Alternatively, A and B may agree on the facts but differ because one of them may possess idiosyncratic moral views that do not reflect prevailing moral standards, e.g., A may believe that all disclosures that lead to marital dissention are morally wrongful. The latter possibility, viz., that people differ because of idiosyncratic moral views, is problematic for Berman. For, in so far as people make disclosures that they believe to be wrongful based upon moral standards that *do not reflect prevailing moral standards*, they are *not* morally blameworthy. Take a person, for example, who makes a disclosure of adultery that he believes to be wrongful because he believes, idiosyncratically, that it is always wrong to make a husband look bad in his wife’s eyes. The disclosure may be blameworthy as measured by the person’s personal moral views. But it is not blameworthy by prevailing moral standards unless there are other facts that make the disclosure wrongful by such standards.

**Premise 2.** In addition to being culpable, an actor would also commit a *moral wrong* if he disclosed embarrassing information without reasonably believing that he was justified in disclosing it, just as he would commit a moral wrong if he kept information secret without reasonably believing that he was justified in keeping it secret.
Premise 2 is based upon a fallacy: the fallacy of equating beliefs in wrongful harm and absence of beliefs in permissible harm with wrongful harm itself. Consider an actor, A, who maliciously discloses to persons who socialize with B that B is HIV-positive—all the while mistakenly believing that B is celibate and no actual threat to sexual partners, only to learn afterwards that the disclosure saved several of B’s friends from infection. A may have believed that he wrongfully harmed B; he may have wished to wrongfully harm B; and he may have inflicted the dignitary harm that consists of attempting to wrongfully harm B. But given that the disclosure was justified, A did not inflict the wrongful harm of subjecting B to embarrassing information that should have been withheld.

Premise 4. With respect to people who contemplate making disclosures of adultery, it is “overwhelmingly likely”\(^\text{12}\) that they do not reasonably believe that unconditional disclosure and unconditional secrecy are both justified, either because they have not seriously deliberated about the matter or because they have deliberated and come to believe that one or the other unconditional act would be unjustified.

BPs regarding adultery are wrongful, Berman argues, if actors either fail to consider whether disclosure and secrecy are both justified or believe that one or the other is unjustified.\(^\text{13}\) This means that BPs regarding adultery are not wrongful in his view with respect to actors who (1) are in “equipoise” regarding the pros and cons of disclosure, being unable to decide whether it is justified or not, or (2) believe that both courses of actions—both disclosure and secrecy—are permissible under the circumstances. Berman is aware of the problem that this presents, and he addresses it in the form of empirical pronouncements, stating that (i) it is “overwhelmingly likely”\(^\text{14}\) that actors who make BPs regarding adultery do possess such beliefs; (ii) it “surely . . . is a very rare case” when an actor is “truly in equipoise regarding what the balance of undefeated moral reasons requires;”\(^\text{15}\) and (iii) it “strikes” Berman as “fairly implausible in the mine run of cases”\(^\text{16}\) that an actor would think that disclosure and secrecy are both permissible.

The problem with Premise 4 is that Berman provides no support for his empirical pronouncements. Michael Gorr claims that, even after people deliberate, they are often uncertain regarding whether they disclose adultery or keep it secret.\(^\text{17}\) If Gorr is right, then it is often rather than rarely the case that people who

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\(^\text{12}\) Id. at 68.
\(^\text{13}\) Id.
\(^\text{14}\) Id.
\(^\text{15}\) Id. at 65.
\(^\text{16}\) Id. at 77.
learn of another’s spouse’s adultery are allowed either to disclose it or to keep it secret, because, as Berman points out, people who are reasonably uncertain about which course of action to take cannot be blamed whichever action they take. And, if people are often allowed to take either one course of action or the other, they probably often believe they are allowed to take one action or the other.

B. Berman’s claim that BP’s regarding adultery are coercive

Berman’s argument, that BPs regarding adultery are wrongful threats rather than wrongful offers, is premised upon five (5) claims:

(1) The harms of disclosing adultery are so salient that actors are not likely to conclude that silence is wrongful unless they previously engage in difficult moral reflection.

(2) Making a BP regarding adultery is evidence that an actor did not engage in such difficult reflection—and, hence, evidence that he did not form a belief that silence is wrongful—because people who both threaten disclosure and offer silence are not likely to have cared enough about which course of action is wrongful to have engaged in such reflection.

(3) The making of BPs regarding adultery is not evidence that actors failed to form beliefs that disclosure is wrongful, because the harms of disclosing adultery are so salient that actors can conclude that it is harmful without having to engage in difficult moral reflection.

(4) Actors who make BPs regarding adultery are likely to believe that disclosure is wrongful.

(5) Therefore, actors who make BPs regarding adultery are likely to be guilty of coercion.

I believe that claims 1–3 and 5 are open to serious question.

**Claim 1:** The harms of disclosing adultery are so salient that actors are not likely to conclude that silence is wrongful unless they previously engage in difficult moral reflection.

Claim 1 mistakenly assumes that because it may be difficult for philosophers to decide that silence about adultery is wrong, it is also difficult for ordinary persons. In reality, ordinary persons may start from moral premises that render it easy to decide that silence is wrong, e.g., “A woman has a right to know that her husband is cheating,” or “Marriages based on adultery are not worth saving.” To be sure, I have argued that acting contrary to beliefs based upon idiosyncratic moral standards do not inflict wrongs. However, the issue here is different. The

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18 See Berman, supra note 2, at 64–65.
only issue here is the anterior one regarding whether actors can possess moral standards that make it easy for them to come to believe that silence about adultery is wrongful.

**Claim 2**: The making of a BP regarding adultery is evidence that an actor did not engage in such difficult reflection—and, hence, evidence that he did not form a belief that silence is wrongful—because people who both threaten disclosure and offer silence are not likely to have cared enough about which course of action is wrongful to have engaged in such reflection.

Berman assumes that making a BP regarding adultery at Time-1 ("T1") tends to be psychologically inconsistent with engaging in difficult moral reflection at T1. However, an actor can easily engage in such reflection at T1 and yet later make a BP regarding adultery. Thus, an actor may engage in moral reflection at T1 and decide that disclosure and silence are both permitted. Or he may engage in moral reflection at T1 and, yet, make a BP at Time-2 ("T2") after concluding that, although silence is wrongful, the wrongfulness is slight. Or he may engage in moral reflection at T1 and, yet, make a BP at T2 after concluding that the moral harm of silence which would otherwise render silence wrongful is outweighed by the good things he will accomplish with his money in the event he extracts it from the adulterer.

**Claim 3**: The making of BPs regarding adultery is not evidence that actors failed to form beliefs that disclosure is wrongful, because the harms of disclosing adultery are so salient that actors can conclude that disclosure is harmful without having to engage in difficult moral reflection.

The problem with Claim 3 is that it confuses the salience of harm with salience of wrongful harm. Berman may be right that the harms that result from disclosing adultery are salient. However, to say (as Berman rightly does) that the choice between disclosing adultery and keeping it silent is widely recognized to be "morally freighted" means that people recognize that the harm which disclosure inflicts is not equivalent to wrongful harm, and that to determine wrongful harm, they must weigh the harm which disclosure inflicts against the harms which silence inflict. Doing that requires hard moral reflection in any event.

**Claim 5**: Actors who make BPs regarding adultery are likely to be guilty of coercion.

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19 Id. at 68.
Claim 5 suffers from the same problem as Premise 2. Just as believing a threat to be wrongful does not make it wrongful, so, too, believing a threat to be wrongful does not make it coercive. An actor who believes his threat to be wrongful may be trying to coerce his target. But an actor does not actually coerce his target unless (i) the target thinks the threat is wrongful, and (ii) the target is right in thinking the threat is wrongful.

C. Berman’s assumption that BPs about adultery are paradigmatic

Berman believes that, in order to show that BPs regarding embarrassing or incriminating disclosures are criminalizable, it is incumbent upon him to show that they are wrongfully coercive. To do so, he focuses on BPs regarding adultery, implicitly assuming that what is true of adultery will be true generally.

The problem is that Berman’s argument for the coerciveness of BPs regarding adultery does not apply to other BPs that he wishes to criminalize. Berman’s argument for the coerciveness of BPs regarding adultery is that the harms of disclosing adultery are substantially more salient than the harms of keeping it secret. However, that is not true of other BPs. Consider, for example, an actor, A, who is aware that B is HIV-positive and, hence, an immediate threat to his sexual partners. If anything, the harms of not disclosing B’s HIV infection are more salient than the harms of disclosure, and A’s wrong consists in what he offers rather than what he threatens. Accordingly, Berman must either advocate decriminalizing BPs regarding HIV infection or explain why they can be criminalized despite the fact that they are not wrongfully coercive. To be sure, Berman might argue that such BPs are morally wrongful for what they offer, i.e., silence, rather than for what they threaten. However, it does not necessarily follow that an actor who commits a moral wrong by making an offer of silence also commits a criminal wrong. For, insofar as the moral wrongfulness of a BP is a function of the moral wrongfulness of not making a disclosure that one ought to disclose, it is a function of something that is typically non-criminal, namely, an omission. And if an omission is not criminal, an actor’s conditional offer to omit is not wrongful either.