

Abuse of Property Right Without Political Foundations: A Response to Katz

Mitchell N. Berman

Suppose that Oliver owns Blackacre, a parcel adjacent to Whiteacre, owned by Teresa. Oliver erects a large sculpture on Blackacre along the shared property line. The sculpture conforms to zoning regulations. But Oliver erects it in order to block Teresa's access to light. Is he legally entitled to do so?

Common law jurisdictions standardly hold that he is: property law does not inquire into an owner's motives or reasons for exercising his property rights.¹ Put differently, the scope of property rights is generally thought to be insensitive to an owner's motives or reasons. Larissa Katz maintains that this black letter rule, put so starkly, is neither faithful to the case law nor normatively attractive. In her recent article, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*,² Katz elaborates and defends a general principle of abuse of property right—a principle that would judge Oliver's conduct to be abusive.³

I argue in this Essay that Katz is broadly right about abuse of property right—but for the wrong reason. Katz grounds her abuse-of-right principle in a particular theory of property ownership. Her account is therefore (and avowedly) particular to the use and abuse of *property* rights; it does not arise from principles that are general to other legal departments nor does it bear implications for the resolution of other legal problems. That, I contend, is a mistake—and a costly one. By rooting the plausible principle that she favors in

-
1. A locus classicus is *Mayor of Bradford v. Pickles*, [1895] A.C. 587 (H.L.) (appeal taken from Eng.).
 2. Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 Yale L.J. 1444 (2013).
 3. What “abusive” means and whether it is equivalent to “impermissible” or “illegal” is not entirely clear. On one hand, Katz explains that “a *principle* of abuse of property right makes sense of a range of judicial responses to spiteful or extortionate uses of ownership. This single principle can illuminate remedial tinkering (e.g., substituting damages for injunctions), denying the right to exclude, and even treating the abusive behavior as itself a nuisance.” *Id.* at 1449 (footnote omitted). I take this to suggest that “abusive” is not equivalent to “impermissible from the legal point of view.” On the other hand, Katz's apparent agreement that it is paradoxical for it to be true both that one has a legal right to ϕ and that one's ϕ ing is abusive legally speaking, *see infra* note 20, suggests a contrary position.

property-specific grounds that prove highly doubtful, Katz obscures from view any possible consilience among the abuse-of-property principle and kindred legal principles outside the property arena. I aim to bring those connections to the surface.

Part I summarizes Katz’s account. Part II criticizes one of its two main components: Katz’s novel theory of ownership. Part III introduces the unsurprising suggestion that property doctrines that police abusive exercise of property rights are products of general moral principles against purposefully or knowingly harming others, and observes that Katz is likely to eschew this straightforward defense of abuse of property right on the ground that it is “external” and for that reason less promising or valuable than the “internal” account that she favors. Part III argues, however, that Katz’s apparent reasons for disfavoring external limits on property rights are unpersuasive. Part IV bolsters the credentials of an external reasons-based restriction on exercise of property rights by sketching deep similarities among abuse of property, informational blackmail, and the unconstitutional conditions doctrine.

I. KATZ IN BRIEF

Katz’s argument has two main components. The first is an account and endorsement of a particular construal of the principle of abuse of property right. According to the principle Katz defends, an owner abuses her property rights with respect to a thing she owns if she makes an otherwise permitted decision about how to use the thing solely in order to harm others, either as an end in itself (“spite”) or as a means to induce others to act as the owner desires (“leverage”). This is a substantive claim about the limits of a property owner’s rights. I will call it the “No-Intent-To-Harm Principle,” or “the NITH Principle,” for short.

The second component of Katz’s argument is a defense or grounding of that principle in a normative political-theoretical account of ownership. Property ownership is always morally problematic, Katz contends, because “[w]hen someone is granted ownership authority to determine the agenda for her property, she is then in a position to make decisions that bind us all,”⁴ thereby impinging on the autonomy of others. But we cannot insist that nobody make such decisions, for that would entail that nobody could use anything. “We thus have reason to authorize someone to make decisions about things on behalf of the rest of us in order to avoid a dilemma.”⁵ The institution of property ownership emerges as a response to that dilemma, or that coordination problem, and does so by assigning to individuals authority to

4. *Id.* at 1450.

5. *Id.* at 1478 (emphasis omitted).

resolve what Katz terms “the Basic Question”: “what (in their view) constitutes a worthwhile use of a thing.”⁶ I will call this defense of the institution of property ownership “the Ownership Theory.” Not only does it justify the introduction of property rights, it also sets limits on their scope. “A principle of abuse of property right simply marks the limit of that jurisdiction” that we have good reason to confer.⁷

In short, then, Katz advances the following two claims:

The No-Intent-To-Harm Principle: an owner acts abusively (i.e., runs afoul of limitations that are built into the property rights she purports to exercise) if she uses a thing for the purpose of causing harm to another.

The Ownership Theory: the legal-political institution of property rights is justified by, and only by, a society’s need to assign jurisdiction to answer the “Basic Question” of what is a worthwhile use of a thing.

In addition, Katz grounds the No-Intent-To-Harm Principle in the Ownership Theory. The No-Intent-To-Harm principle is true only in virtue of the Ownership Theory. “The reason” for the principle of abuse of property right, Katz maintains, “lies in the political foundations of the office of ownership itself.”⁸

II. THE OWNERSHIP THEORY: SOME DOUBTS

There are at least two reasons to doubt Katz’s theory of the institution of ownership. First, Katz’s theory—the Ownership Theory—supports a broader limitation on the scope of property rights than the NITH Principle contemplates, and one that is considerably less plausible. Second, aside from its dubious upshot, the Ownership Theory puts forth an implausibly narrow picture of the problem that the institution of ownership is designed to resolve and of its point or value.

A. *The Uncertain Relevance of Harmful Intent*

Katz does not purport to offer a sustained defense of the Ownership Theory, and what arguments she does present for that theory are highly

6. *Id.* at 1450.

7. *Id.*

8. *Id.*

telegraphic.⁹ But I suspect that many readers who find NITH plausible (or more than plausible) will take that plausibility to be good evidence in favor of the Ownership Theory. Of course, it would be fallacious to deduce the truth of the Ownership Theory from the (supposed) truth of NITH. Still, one might think this a sensible abductive inference, or inference to the best explanation.

I think, to the contrary, that the plausibility of NITH furnishes very weak support for the Ownership Theory. The problem is that the Ownership Theory actually entails that an owner's use of a thing that is motivated by idiosyncratic reasons unconnected to judgments about "what would be a worthwhile use" of that thing is abusive *even if those reasons do not involve intent to cause harm*. As Katz explains: "where the owner fails to take herself to be determining what constitutes a worthwhile use of a thing, she abuses her position of authority and either loses the law's full protection or, in some cases, even attracts sanction."¹⁰ This being so, the abuse-of-property principle that the Ownership Theory delivers does not *proscribe* a limited set of purposes (namely, intent to cause harm), but rather *prescribes* the reasons that must motivate property usage (namely, reasons that rest on judgments about what would be a worthwhile use or agenda for the property). The principle is better rendered, not as "No-Intent-To-Harm" (NITH), but as "Worthwhile-Uses-Only" (WUO). WUO implies NITH, but is much broader than NITH.

A hypothetical example will make the difference between WUO and NITH clearer and demonstrate its significance.

Green House

Oswald was preparing to repaint his white house yellow. Before doing so, however, Oswald's neighbor, Ned, volunteered how attractive he'd find Oswald's house were it yellow. Oswald hates Ned. So he paints his house green.

Here are two plausible observations about *Green House*. First, if, as most theorists believe, harm is a moralized or evaluative concept that is not reducible

9. The heart of the Ownership Theory is the claim that "*the* reason owners have standing [to impose on others private decisions about things] is to perform a coordination function that all of us have reason to accept," conjoined with both a view about precisely what that coordination function is, and a supposed moral principle that ownership authority must be constrained "to its narrowest scope consistent with discharging the coordination function." *Id.* at 1472 (emphasis added). Defending all this is the burden of Part II.B, which covers something less than a page and a half.

10. *Id.* at 1482.

to the mere non-provision of a benefit,¹¹ then Oswald's intent is only to withhold from Ned a benefit, not to inflict harm. Ned is not remotely likely to experience a setback to interests of the character or magnitude necessary to amount to a *harm*, on the most plausible accounts of that concept, and we have no basis to conclude that Oswald believed or intended otherwise.

Second, and nonetheless, Oswald's decision did not involve a judgment about what would be a worthwhile "use" of his home. Having identified a range of color choices that he would deem acceptable—or "worthwhile," whatever that might mean, exactly—Oswald made a decision regarding the property he owns on the strength of only a single consideration: what color would be least likely to please his neighbor. Unless a use is necessarily "worthwhile" just so long as the owner has some reason for favoring it—a construal of "worthwhile" that would render the Basic Question entirely toothless—we should conclude that Oswald's reasons for acting were not in keeping with the reasons why owners are granted authority to make decisions that "bind us all."

If these two judgments are correct, and if NITH fully constituted Katz's abuse-of-property principle, then Oswald did not abuse his property rights—a conclusion that probably jibes with most people's intuitions. But because Katz believes that the jurisdiction of a property owner extends only so far as she is answering the Basic Question, and because "[a] principle of abuse of property right simply marks the limits of that jurisdiction,"¹² it must follow that Oswald *did* abuse his rights, for "[a]n owner exceeds her jurisdiction whenever her reasons for acting do not concern what she thinks is a worthwhile use of her property."¹³ Or, again, "it is an abuse of right to exercise ownership authority for reasons other than the task with which owners are charged."¹⁴ If the conclusion that Oswald's action was *ultra vires* strikes you as implausible (regardless of whether you could muster good institutional or "pragmatic" reasons why no concrete legal consequences should attach), then you have reason to resist the Ownership Theory.

Admittedly, this is not a decisive objection. You might find it more plausible than I do that Oswald's conduct is abusive and that, as a result, he sacrifices some measure of "the law's full protection." Or perhaps Oswald doesn't run afoul of the Worthwhile-Use-Only Principle because his reasoning did, in some respect, concern what is a worthwhile use. I do not know how that argument would run, largely because Katz is surprisingly silent about what is

11. See, e.g., 1 JOEL FEINBERG, HARM TO OTHERS 31-36 (1984). Because Katz does not elaborate on the notion of harm in her essay, there is no way of knowing what conception of harm she means to employ.

12. Katz, *supra* note 2, at 1450.

13. *Id.* at 1464.

14. *Id.* at 1465.

involved in making a judgment about a worthwhile use,¹⁵ but I wouldn't rule it out as impossible.

In case you are tempted by either of these outs, consider a second hypothetical. This is a little more fanciful than *Green House*, but even less susceptible to either of the two avenues of escape I have just identified.

Vase in Box

Oscar owns a vase that he keeps on his mantle. He enjoys looking at it. One day, Oscar's drunken friend, Fred, dares him to put it away. Why? "Just because," says Fred. Not one to back off from a challenge, Oscar locks the vase in a box and stores it on a high shelf in his closet.

Surely Oscar's locking his vase away harms nobody. Indeed, it is not clear that this case even involves the withholding of a benefit. (Oscar rarely entertains, and the few friends who have seen the vase think it ugly.) If NITH defines the scope of abuse of property right, then Oscar's conduct is permissible and non-abusive. And yet Oscar is not motivated by a belief that locking the vase away in a box in his closet is "a worthwhile use" of it.¹⁶ The notion that such-and-such a use would be worthwhile is supposed to be an input to a decision regarding what to do with a thing, not an output. That is, an owner should opt for use ϕ as a consequence of a judgment that ϕ is a worthwhile use; she should not judge use ϕ to be worthwhile in consequence of a decision to undertake ϕ . Given that the Ownership Theory actually supports the broader principle Worthwhile-Uses-Only, and not only the narrower principle No-Intent-To-Harm, Oscar's act of locking away his own vase would not fall within the scope of his property rights—if the Ownership Theory is sound.

But surely Oscar's property rights in the vase fully entitle him to lock it in a box in his closet. If that is true—and its truth does not depend upon there

15. Although I do not pursue the matter further given space constraints, I confess to finding this silence troubling. And Katz's observation (made twice) that "reasons that go beyond the thing itself are ultra vires," *id.* at 1472, 1479, does not clarify matters for me. Given the instrumental uses to which things are put, I do not know what is included in the set of reasons that extend only to "the thing itself," and thus what is excluded. The image that most clearly emerges to me is that an owner should structure her practical reasoning such that she first poses the Basic Question with respect to each thing she owns and then guides her conduct in response to whatever answers she furnishes. But this proposal strikes me as so transparently unpromising that I doubt it is Katz's, hence my puzzlement.

16. Katz takes pains to allow that an owner may defer to another's judgment about worthwhile uses. *Id.* at 1459-63. This is not such a case: Fred did not believe that secreting the vase away would be a worthwhile use of it.

being a categorical and unqualified right to waste – then the Ownership Theory is not sound.

B. The Uncertain Relevance of “the Basic Question”

My second worry about the Ownership Theory is more direct and more fundamental: people rarely make decisions regarding how to use their property on the basis that Katz’s theory supposes. Katz assumes that, absent property rights, we disagree among ourselves regarding “what is a worthwhile use” of some thing. Because that is the problem that the institution of ownership is designed to resolve, that is the question that owners are charged to address. An owner exceeds her jurisdiction when establishing an agenda for a thing she owns based on any other considerations.

Now, I am skeptical that the institution of property is best justified or explained in terms of any single value or need. My inclinations here are pluralist.¹⁷ But put that aside. Assuming *arguendo* that the institution of property law is justified by a single value, or is responsive to a concern that could be usefully formulated as a single “Basic Question,” that single question is almost certainly not “what is a worthwhile use of this thing?” That form of question seeks to elicit the wrong sort of judgment. Members of a community can frequently agree regarding what is a worthwhile use of a given thing – *this* would be worthwhile, *that* would be worthwhile, *the other* would be worthwhile too. The problem is not that of deciding whether a given proposed use is or is not “worthwhile.” The problem (or a large part of it) is that we cannot make use of a thing in all the ways that qualify as worthwhile. We must choose from among the set of worthwhile uses. The problem is a practical one – it concerns what to do – not a theoretical one concerning what to believe.

This is not a quibble. Katz conceives of ownership as an institution devoted almost exclusively to solving the theoretical problem that we have divergent views regarding what is or is not “worthwhile.” Such an orientation leads her to emphasize “the importance of enabling the office of ownership to serve as a clearinghouse for *ideas* about the use of things.”¹⁸ But she overlooks the fact that even a single person’s judgments about this matter of evaluative fact will often underdetermine an answer to the question she confronts – namely, what is to be done. As a consequence, Katz’s narrow focus upon her “Basic Question” obscures from view the extent to which property rights, by allowing owners to make choices and carry out plans, enable us to refine and satisfy our

17. Those inclinations are considerably strengthened by the powerful and nuanced defense of a pluralist theory of property institutions put forth in HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011).

18. Katz, *supra* note 2, at 1462 (emphasis added).

preferences, hone our talents and capacities, and exert our wills upon the world. We constitute ourselves in part by exercising our wills free from interference by others, and property rights play a significant role in that project of self-constitution.

One might try to moot the challenge I have just raised by simply reframing the Basic Question from “what is a worthwhile use of this thing?” to “what is the most worthwhile use of this thing?” Indeed, a few passages suggest that this is what Katz really had in mind all along. For example, when discussing a decision that enjoined as a nuisance a property owner’s noisemaking conducted in order to pressure a neighboring couple to stop their own music playing, Katz approves the result on the grounds that “[t]he question [the defendant] put to himself was not how best to use his property, but rather how most effectively to force the plaintiffs to cease their musical enterprises.”¹⁹ Plausibly, “how best should this property be used?” is roughly equivalent to “what is this property’s most worthwhile use?”

This hoped-for fix would not solve the problem I am raising. Preliminarily, as a matter of Katz exegesis, the idea that the Basic Question an owner must answer is only whether some use is *a* worthwhile one, and not whether it is *the most* worthwhile, does not appear to be an accident or oversight. The exact phrase “a worthwhile use” appears over twenty times in an article of fewer than forty pages. More substantively, to demand that owners base their use-decisions on judgments about what would be *most* worthwhile or optimal would be a recipe for paralysis. It is unavoidable that we frequently must act in the face of options that we cannot rank order on any remotely objective metric such as “worthwhileness.” This is true whether the decision involves how to use our things or how to spend the weekend. Moreover, many theorists would prize this state of affairs, not bemoan it. People’s inability to resolve all questions of what to do by the exercise of judgment facilitates the development of our individuality as willing agents. We become who we are in part by choosing life projects and embarking on courses of action that the demands of rationality alone do not, as it were, select for us.

III. GROUNDING AN ABUSE OF PROPERTY RIGHT: OF INTERNAL AND EXTERNAL LIMITS

If Katz’s Ownership Theory is doubtful as a political justification for the institution of property ownership, then it cannot feature in a defense of the NITH Principle. But this would not entail that the NITH Principle (or a close analogue) is false, for it could rest on other grounds. Here is a straightforward possibility: first, it is morally wrong (*pro tanto*) to cause harm to another

19. *Id.* at 1464.

knowingly; and second, our law adopts or accommodates that moral principle, allowing it to help shape the contours of legal rights.

Although it is not absolutely clear what reason Katz might have for rejecting or disfavoring this alternative proposal, a possible explanation can be teased out of her announced preference for an “internal” rather than “external” restriction on property rights. Katz does not quite define “internal” or “external” limits, but the distinction appears to be, roughly, that the former are supplied by the very reasons or considerations that affirmatively justify the institution of property ownership, whereas the latter arise from general moral or legal principles that are not particular to property law and theory but cut across legal departments. In several places, Katz announces that an internal limitation is preferable or superior to an external one.²⁰

If my first pass at the internal/external distinction is roughly accurate, then it would seem that the (wholly unremarkable) proposal I am floating—that property rights are in some measure circumscribed by moral principles against harming others—falls on the external side of the line.²¹ What remains unclear is what is not to like about external limits.

As best I can tell, Katz offers only one argument against externally generated limits on property rights or their exercise: that a restriction on property rights must be internal to avoid the paradox that, at the same time, one can have a right to ϕ , and one’s doing ϕ could be “abusive” hence impermissible.²² Katz is right to want to avoid that odd or paradoxical conclusion. But this desideratum does not foreclose external restrictions. Katz offers no reason why the contours of specific legal rights, including the specific legal rights that collectively define the set of “property rights,” cannot be set by the interplay between reasons, values, or principles that provide affirmative

20. Katz particularly emphasizes both the difference between internal and external limits and her preference for the former when contrasting her analysis and defense of abuse of property right with accounts offered by Ernest Weinrib, Daniel Kelly, Joseph Perillo, and Henry Smith. See *id.* at 1447 n.5 (allowing that these other scholars have offered “valuable perspectives on the problems of spite and extortion,” but observing that “they assume a certain normative framework that incompletely accounts for the internal limits on ownership authority,” and further contending that “it is important to consider abuse of property right specifically in light of the idea of ownership and so apart from its analogues in other areas of law”).

21. There is a possible intimation in Katz that it is definitional, and not merely illustrative, of an external approach that it “balance[s] harm against social utility.” *Id.* at 1456. My suggestion that NITH or something like it reflects the legalization of a moral principle against harming others would not qualify as external on this definition. But then it would be even harder to see what reason Katz provides for resisting it.

22. *Id.* at 1456 & n.34. To be clear, the notion that rights are sometimes exercised “abusively” is not itself hard to accept. A paradox seems to arise only insofar as such abusive exercise is not permitted by the lights of the very same normative system that purports to recognize the right in question.

support for some such right and competing or opposing reasons, values, or principles, even of a very general character.

Indeed, an external restriction on property rights grounded in general moral principles can probably perform the function that Katz wants a principle of abuse of property right to serve better than her preferred internal approach does. Katz emphasizes that a principle of abuse of property right is just that—a principle.²³ Because, as Dworkin famously taught, principles have a dimension of weight,²⁴ the abuse-of-property-right principle can shape different doctrinal responses in different property contexts. In some contexts, an owner is barred from using her property for the purpose of harming another; other times such use is permitted but will not be aided by the full panoply of judicial remedies that a property owner can usually call upon. This state of affairs is just what to expect if the abuse-of-right principle in property law were, in essence, the partial legalization of a moral principle against harming others. It is less clear that Katz's internal approach can similarly generate a limitation that functions *as a principle*. Katz's limitation on property rights arises from the claimed fact that the reasons alone capable of supporting property institutions simply run out. As she explains, "we must constrain . . . ownership authority to its narrowest scope consistent with discharging the coordination function. That is why reasons that go beyond the thing itself are *ultra vires*."²⁵ That is also why she dubs her approach not only "internal," but also "jurisdictional." But if owners lack lawful *power* to use their things for the purpose of harming others, then it is unclear what allows for the context-sensitivity that Katz endorses.²⁶ Jurisdictional norms are generally understood to take the form of rules, not of principles.

IV. BEYOND PROPERTY

Let us leave property law for the moment and consider the criminal law. If you know (counterfactually!) that I am having an affair, you may tell my wife. I am not (absent other facts) legally or morally entitled to your silence, and you are not legally or morally obligated to keep mum. Yet if you offer me your silence on condition that I pay \$10,000, you have committed the legal and moral wrong denominated "blackmail." How it can be wrongful to threaten what one has a right to do has confounded criminal law scholars, moral

23. See *supra* note 3.

24. See RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1978).

25. Katz, *supra* note 2, at 1479.

26. See, e.g., *id.* at 1449.

philosophers, and economists for generations.²⁷ I believe that a solution to this puzzle will both lend support to the notion that rights, including property rights, are sometimes circumscribed by an actor's reasons for action, and help us think through the precise content of the abuse-of-property principle.

My proposed solution to the puzzle has two components: a claim about the scope of our expressive rights, and a claim about the probative value of a conditional offer of silence.²⁸ First, I deny that the action that a blackmailer threatens is something that, categorically, he has a right to do. On my view, the correct principle governing the permissible scope of criminal libel is roughly this: a person exceeds or "abuses" her rights by disclosing information that she foresees will be harmful to another's reputation unless she genuinely believes that the balance of morally relevant considerations renders the disclosure justified all things considered.

Of course, it will ordinarily be hard to know upon which beliefs and motives someone acted when revealing reputation-harming information about another. That's where the second piece of my preferred analysis comes in. The fact of a prior conditional offer of silence is frequently good evidence (depending upon many particulars, of course) that the subsequent disclosure, made after the conditional offer is rebuffed, is not animated by a bona fide belief that it is morally warranted despite the harm it will cause. Assuredly, this is not a deduction. It is an inference and thus necessarily defeasible. Its strength will be highly context-sensitive. But putting the epistemic challenge aside, the key claim remains that if a blackmailer threatens to disclose information that he would understand to be harmful and that he would not believe to be morally justified by the balance of reasons, then what he threatens is not within his rights to carry out. It is sometimes said that blackmail criminalizes actions that one has a "perfect right" to do.²⁹ That is precisely what my solution to the blackmail paradox denies. Reasons matter.

Does this account of blackmail's proper criminalization suggest that property rights too are sensitive to an owner's reasons for using her property this way or that? Katz rightly notes that "[o]wnership is generally seen as

27. For a rich sampling of commentary, see Symposium, *Blackmail*, 141 U. PA. L. REV. 1565-1989 (1993).

28. See Mitchell N. Berman, *Blackmail*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 37 (John Deigh & David Dolinko eds., 2011); Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998) [hereinafter, Berman, *The Evidentiary Theory*]. Although I believe that my account of blackmail has gained more support than any competing account, I fully acknowledge that it is far from having achieved the status of settled wisdom.

29. See, e.g., *Thorne v. Motor Trade Ass'n*, [1937] A.C. 797, 806 (H.L.) (appeal taken from Eng.) ("The ordinary blackmailer normally threatens to do what he has a perfect right to do—namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened.").

conferring a bargaining chip. . . . An owner is in a position to sell an easement, a license to use or to access her property, or a promise to forbear from an *undesirable activity*.³⁰ But forbearance from an undesirable activity is precisely what a blackmailer offers. Usually that undesirable activity is the communication of embarrassing information, but it could be something else: “informational blackmail” is not redundant and “noninformational blackmail” is not oxymoronic.³¹ The leverage cases that interest Katz, then, are not analogous to blackmail; they *are* blackmail.

Notice, though, that my account of blackmail endorses a limitation on the exercise of the right to reveal secrets that is somewhat more constraining than the NITH Principle that Katz favors. NITH constrains owners’ authority to use their property for the *purpose* of causing harm to others. On my account of blackmail, an “owner” of information exceeds her rights of disclosure when she *foresees* that doing so will cause harm, unless she believes that the disclosure is morally warranted, all things considered. Perhaps my account is mistaken. But if it is correct, does it teach that the exercise of rights in tangible property is likewise constrained by a principle more biting than NITH—that is, by a knowledge-based constraint, not a purpose-based one?

Not necessarily. Recall my suggestion that property rights might be shaped in part by moral principles that enjoin us not to harm others. If moral principles *contribute* to the contours of property rights but do not, all by themselves, *determine* the rights’ contours, then we should expect the precise contours of property rights to be sensitive to the particular considerations that nourish or give rise to rights regarding property in the first place. Put another way, the precise reasons for which an exercise of a given right should be deemed abusive or not within the right’s scope are partially but not fully determined by domain-specific considerations. It is plausibly part of the purpose or value of property rights that they serve to demarcate domains of unusually robust freedom of action. Therefore, NITH might indeed cabin the exercise of property rights—or of some of them—even if reason-based limitations on the exercise of *other* rights are more restrictive than NITH itself.

Whether that is so or not, the important point is that the external account I favor highlights a deep connection between abuse of property right and informational blackmail that Katz’s account, due its internal or “jurisdictional” character, cannot see. Furthermore, the external account sensitizes us to the possibility that NITH-like principles apply elsewhere too.

Consider constitutional law. The unconstitutional conditions problem arises whenever the state offers a benefit (i.e., some goodie the provision of which is not constitutionally required) on condition that the recipient waive

30. Katz, *supra* note 2, at 1459 (emphasis added).

31. For a brief discussion, see Berman, *The Evidentiary Theory*, *supra* note 28, at 866-67.

some constitutional protection or exercise a right in a manner that the state could not mandate. Famously, this problem arises across the constitutional spectrum. For example, government offers welfare funds on condition that recipients waive specified Fourth Amendment protections; land use bodies offer zoning variances on condition that property owners relinquish particular property rights or grant easements that the state could not command (without paying just compensation); prosecutors offer reduced sentences or charges on condition that defendants waive their rights to plead not guilty and to put the prosecution to its burden of proof. These and similar offers describe a problem or puzzle because the universal agreement that *some* such proposals are unconstitutional is in tension with the widespread intuition that if what is offered is indeed a “benefit” that the government need not provide, then it may be withheld for any reason at all.

That latter intuition, however, parallels what is said in the informational blackmail cases—namely, that one’s right to disclose embarrassing information about another entails that one may disclose the information for any reason—and is equally fallacious. It is far more plausible, I have argued elsewhere, that the state may not withhold a benefit for the purpose of making exercise of a constitutional right more costly, either to punish the rightholder for exercising her right in a way that the state disfavors or to deter other similarly situated rightholders from doing so. To do so—that is, to treat a rightholder less well for exercising her right than one otherwise would, in order to raise the cost of that exercise—is to “penalize” exercise of the right, and it is concomitant to the existence of a constitutional right that the correlative duty-holder not penalize its exercise. Put another way, what we may fairly call “the anti-penalty principle” holds that the state may not take the anticipated fact that some action (here, nonprovision of a benefit) would make exercise of a right more costly as a reason to favor that action.³²

Take a highly unrealistic example. Surely it would be unconstitutional for the state to condition eligibility for school lunches on the commitment of a child’s mother not to have an abortion. Why? A quick answer is that there is no nexus or germaneness between the benefit and the condition. But germaneness is better understood as an evidentiary tool, not as a constitutional requirement. The conditional provision of a benefit would be unconstitutional because if the state were to withhold the offered benefit on failure of the stated condition, then it would be acting *for the purpose* of making exercise of the abortion right more costly, not merely acting with the *knowledge* that nonprovision of the

32. For elaboration and defense of this claim see Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1316-33 (2013) [hereinafter Berman, *Medicaid Expansion*]; Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 32-36 (2001) [hereinafter, Berman, *Coercion Without Baselines*].

benefit would make exercise of the abortion right more costly. Lack of germaneness between condition and offered benefit is significant in practical terms because and insofar as it helps license the inference that, when it proceeds to withhold the benefit on failure of condition, the state would be doing so not *despite* the fact that withholding would raise the costs of exercising a right, but *because* of it.

This is just the heart of a solution to the unconstitutional conditions problem, not the full account, which could not be elaborated and defended in this short space.³³ The point of importance is that the anti-penalty principle at the heart of the analysis mirrors, almost precisely, the NITH principle that Katz invokes to circumscribe the exercise of property rights. Owners, says Katz, may not use their property for the purpose of harming others, either because they value the harm as a good in itself or for the further purpose of incentivizing others to act as the owner wishes. Governments, according to the solution to the unconstitutional conditions problem on offer, may not threaten to withhold benefits for the purpose of raising the cost of exercising constitutional rights, either because the government treats exercise of the right as a wrong that warrants punishment or for the further purpose of incentivizing other rightholders to acquiesce in the government's demands.³⁴ Our law's concern for reasons for action runs broader and deeper than courts and commentators generally acknowledge. Katz's defense of a principle of abuse of property is therefore a useful corrective. It would be more valuable still, as well as more secure, if the principle were rooted in more general, "external" considerations than in a highly doubtful analysis of property law's foundations.

Mitchell N. Berman is Leon Meltzer Professor of Law, The University of Pennsylvania (formerly Richard Dale Endowed Chair in Law, The University of Texas at Austin). For very helpful comments on a previous draft, the author would like to thank Sam Buell, Peter Cane, Hanoch Dagan, Henry Smith, and Larissa Katz. He would also like to thank the Yale Law Journal Forum Committee for doing him a kindness.

Preferred Citation: Mitchell N. Berman, Abuse of Property Right Without Political Foundations: A Response to Katz, 124 YALE L.J. F. 42 (2014), <http://yalelawjournal.org/forum/abuse-of-property-right-without-political-foundations-a-response-to-katz>.

33. For more complete analysis of the problem see Berman, *Coercion Without Baselines*, *supra* note 32.

34. See, e.g., Berman, *Medicaid Expansion*, *supra* note 32, at 1322 (“[G]overnment may not withhold benefits it would otherwise provide for the purpose either of discouraging agents from exercising their constitutional rights or of punishing them for doing so.”).