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## Meta-Blackmail

Russell Christopher  
russell-christopher@utulsa.edu

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# EXCHANGE: META-BLACKMAIL

## Meta-Blackmail

RUSSELL L. CHRISTOPHER\*

### ABSTRACT

*Blackmail remains one of the most difficult, and unsolved, puzzles in all of law. While nearly all endorse blackmail's criminalization, no one can explain why it should even be a crime. By introducing the novel concept of meta-blackmail, this Article explains why the puzzle of blackmail—how it can be a crime to conditionally threaten to do what one has a right to do—cannot be resolved. While a conventional blackmail proposal backs a demand for money with the threat to disclose the recipient's embarrassing secret, a meta-blackmail proposal backs a demand for money with the threat to blackmail the recipient. Thus, conventional blackmail threatens a lawful act (e.g., disclosure of an embarrassing secret), but meta-blackmail threatens an unlawful act—blackmail itself. The comparative assessment of meta-blackmail and conventional blackmail reveals a trilemma: (i) since meta-blackmail threatens an unlawful act, meta-blackmail is a more serious level of criminality; (ii) since both meta-blackmail and conventional blackmail, in effect and function, demand money for nondisclosure of an embarrassing secret, they are equivalent; and (iii) since threatening blackmail should be less serious than actually committing blackmail, meta-blackmail is less serious. The trilemma, which is best resolved by decriminalizing blackmail, demonstrates that criminalizing blackmail violates a number of intuitions that are more compelling than the intuition that blackmail is properly criminalized. To preserve the more valued intuitions, blackmail should be decriminalized.*

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## INTRODUCTION

The crime of blackmail<sup>1</sup> is “one of the most elusive intellectual puzzles in all of law.”<sup>2</sup> Despite blackmail being widely reviled as “moral murder,”<sup>3</sup> “murder of the soul,”<sup>4</sup> and “the most detestable of crimes,”<sup>5</sup> no one can explain why it should even be a crime.<sup>6</sup> Explanations of blackmail have been proffered by

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1. Popularly understood, blackmail is the “attempt to trade silence for money.” Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1817 n.1 (1993). For similar conceptions of blackmail, see, for example, 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 241 (1988), observing that blackmail is the “attempt to extract money or advantage by means of a threat to disclose [embarrassing] information about the victim,” and Joseph Isenbergh, *Blackmail from A to C*, 141 U. PA. L. REV. 1905, 1905 (1993), defining the central case of blackmail as “the sale of silence by someone who is otherwise free to disclose what he knows.” For examples of blackmail which do not involve threatening disclosure of an embarrassing secret, see LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 134–37 (1996), which notes, for example, that “[p]ay me \$10,000, or I’ll flunk you on this exam” qualifies as blackmail.

Under some formulations, blackmail is considered a type of extortion. For example, the Model Penal Code defines theft by extortion, in part, as follows:

- A person is guilty of theft if he purposely obtains property of another by threatening to:
- (1) inflict bodily injury on anyone or commit any other criminal offense; or . . .
  - (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute . . . .

MODEL PENAL CODE § 223.4 (Official Draft and Revised Comments 1985). The Model Penal Code mixes both (what would commonly be understood as) blackmail (paragraph (3)) and extortion (paragraph (1)) in the same theft-by-extortion statute. For criticisms of the Model Penal Code provision as seriously overinclusive in criminalizing a considerable number of obviously permissible economic transactions, see Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1857–59 (1993), and James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 710–13 (1984). By a convention in the literature, however, extortion is often distinguished from blackmail by the former threatening an unlawful act (for example, future physical harm) and the latter threatening a lawful act (for example, disclosing an embarrassing secret). See, e.g., FEINBERG, *supra*, at 240–41; Steven Shavell, *An Economic Analysis of Threats and Their Legality: Blackmail, Extortion and Robbery*, 141 U. PA. L. REV. 1877, 1877 n.1 (1993). For clarity, I will use the term extortion to refer only to nonblackmail extortion, unless otherwise specified.

2. James Lindgren, *Blackmail: An Afterword*, 141 U. PA. L. REV. 1975, 1975 (1993).

3. Ronald Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 675 (1988).

4. Peter Alldridge, *Attempted Murder of the Soul: Privacy and Secrets*, 13 OXFORD J.L. STUD. 368, 382 (1993) (quoting *R v. Hadjou*, (1989) 11 Cr. App. R(S). 29 (Eng.)).

5. MIKE HEPWORTH, *BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE* 20 (1975).

6. See, e.g., Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567, 1567 (1993) (“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*, 63 MONIST 156, 156 (1980) (“Most of us are inclined to believe that blackmail is clearly immoral (even a particularly sleazy kind of immorality) and thus are quite content that it be criminalized. Justifying this

many of the leading scholars of our time—all to no avail.<sup>7</sup> Even the preeminent economist Ronald Coase, after ruminating over blackmail since 1930,<sup>8</sup> could conclude only that “blackmail, like pornography, is difficult to define, but you know it when you see it.”<sup>9</sup> Because of its profound and wide-ranging implications<sup>10</sup> both within criminal law<sup>11</sup> and beyond,<sup>12</sup> the blackmail puzzle has triggered a stunning outpouring of interdisciplinary scholarship—criminal law theorists,<sup>13</sup> moral philosophers,<sup>14</sup> judges,<sup>15</sup> political philosophers,<sup>16</sup> legal historians,<sup>17</sup> and economists<sup>18</sup>—endeavoring to find a solution.<sup>19</sup> But the blackmail

belief, however, turns out to be more of a problem than it might at first seem.”); David Owens, *Should Blackmail Be Banned?*, 63 PHIL. 501, 501 (1988) (“There is no right to blackmail. So says the law and so say most moral observers. . . . However, it is surprisingly difficult to say just what is wrong with blackmail.”).

7. Lindgren, *supra* note 1, at 671 (“Possible rationales for blackmail have been presented by some of the leading legal scholars of this century, including Arthur Goodhart, Robert Nozick, Lawrence Friedman, Richard Posner, and Richard Epstein. None, however, has successfully explained the crime.”); see also *infra* notes 20, 32. For additional leading scholars positing accounts of blackmail, see, for example, sources cited *infra* notes 13–18.

8. Coase, *supra* note 3, at 665 (relating that he first began thinking about blackmail as a student in “1929 or 1930”).

9. *Id.* at 669.

10. See Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 799 (1998) (“[T]he blackmail paradox is not merely a tantalizing intellectual puzzle. The number and stature of minds it has attracted bespeak a widely held belief that a solution to this single conundrum will bear broad and deep implications.”).

11. See Lindgren, *supra* note 2, at 1975 (“The struggle to understand blackmail is a struggle for the soul of the criminal law.”).

12. Leo Katz and James Lindgren catalogue the wide variety of issues affected by the intractable puzzle of blackmail:

[I]t has come to seem to us that one cannot think about coercion, contracts, consent, robbery, rape, unconstitutional conditions, nuclear deterrence, assumption of risk, the greater-includes-the-lesser arguments, plea bargains, settlements, sexual harassment, insider trading, bribery, domination, secrecy, privacy, law enforcement, utilitarianism and deontology without being tripped up repeatedly by the paradox of blackmail.

Leo Katz & James Lindgren, *Instead of a Preface*, 141 U. PA. L. REV. 1565, 1565 (1993).

13. See, e.g., KATZ, *supra* note 1, at 133–96; George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617 (1993).

14. See, e.g., FEINBERG, *supra* note 1, at 238–76; Murphy, *supra* note 6.

15. See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* 95–103 (1981); Ginsburg & Shechtman, *supra* note 1; Posner, *supra* note 1.

16. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 84–87 (1974); Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 PHIL. & PUB. AFF. 43 (1992).

17. See, e.g., Lawrence M. Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1110–15 (2002); R.H. Helmholtz, *The Roman Law of Blackmail*, 30 J. LEG. STUD. 33 (2001).

18. See, e.g., Coase, *supra* note 3. For prominent “law and economics” scholars addressing blackmail, see, for example, Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983); Posner, *supra* note 1; and Shavell, *supra* note 1.

19. See, e.g., Berman, *supra* note 10, at 796–97 (“The so-called paradox of blackmail has garnered an extraordinary degree of interdisciplinary scholarly attention. Contributors to the debate have included law professors and judges, moral philosophers and economists.”); Helmholtz, *supra* note 17, at 34 (“The reason for the prohibition against what might be regarded as freedom of contract does seem

puzzle has stubbornly resisted resolution.<sup>20</sup> This Article explains why: the intuitions that criminalizing blackmail violates are more compelling than the intuition that blackmail is properly criminalized.

The puzzle of blackmail is not whether blackmail should be criminalized, but rather how or why blackmail should be criminalized.<sup>21</sup> While Justice Oliver Wendell Holmes has intoned that “what you may do . . . you may threaten to do,”<sup>22</sup> the law of blackmail declares that what you may do you *must not* conditionally threaten to do.<sup>23</sup> For example, in the canonical blackmail scenario,

mysterious, and the natural desire to hit upon a plausible explanation has proved inviting to a wide variety of theoretical approaches.”)

20. See FEINBERG, *supra* note 1, at 238 (“[I]t is disconcertingly difficult to show that [blackmail’s] prohibition satisfies the harm principle.”); Coase, *supra* note 3, at 656 (noting “the lack of any consensus among lawyers about the nature of blackmail”); Lindgren, *supra* note 1, at 670 (“Most crimes do not need theories to explain why the behavior is criminal. The wrongdoing is self-evident. But blackmail is unique among major crimes: no one has yet figured out why it ought to be illegal.”); Henry E. Smith, *The Harm in Blackmail*, 92 N.W. U. L. REV. 861, 862 (1998) (observing that with blackmail, unlike other crimes, “it is far more difficult to explain why the act is criminal than to identify what is illegal”).

21. The overwhelming majority of scholars find that blackmail is properly criminalized. See *supra* note 6. For a small sampling of the scholars defending the view that blackmail is properly prohibited, see sources cited *supra* notes 13, 15–18. For an extensive list of virtually all the scholars who defend blackmail’s criminalization, see Walter Block & Gary M. Anderson, *Blackmail, Extortion, and Exchange*, 44 N.Y.L. SCH. L. REV. 541, 543 n.2 (2001).

For the very few scholars arguing that blackmail should be decriminalized entirely, see generally MURRAY N. ROTHBARD, *MAN, ECONOMY, AND STATE* 443 n.49 (1962) (advocating for the decriminalization of blackmail on libertarian grounds); Walter Block & David Gordon, *Blackmail, Extortion and Free Speech: A Reply to Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37, 37 (1985) (same); Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 273, 274 (1982) (same).

For the very few scholars finding that only the paradigmatic type of blackmail should be decriminalized, see Joel Feinberg, *The Paradox of Blackmail*, 1 RATIO JURIS 83, 94 (1988) (“In summary, I have argued that only category 2 blackmail involving threats to warn the public of legally innocent underhanded dealing need be legalized in order to preserve the overall coherence of a legal system.”); Isenbergh, *supra* note 1, at 1930 (endorsing decriminalization of blackmail involving threats to disclose private information (not regarding a crime or a tort)); and Ronald Joseph Scalise, Jr., Comment, *Blackmail, Legality, and Liberalism*, 74 TUL. L. REV. 1483, 1486–90 (2000) (agreeing with Feinberg, *supra*, that blackmail in Feinberg’s category 2 should be decriminalized). Jeffrie Murphy has also hinted that blackmail should be decriminalized:

[Under one view] it will not be legitimate to make blackmail a crime, because a blackmailer typically threatens to do things he has a full legal right to do, that is, circulate or publish true information. I accept this and have indeed argued elsewhere that, in principle, blackmail should *not* be a crime.

Jeffrie G. Murphy, *Some Ruminations on Women, Violence, and the Criminal Law*, in *IN HARM’S WAY: ESSAYS IN HONOR OF JOEL FEINBERG* 209, 228 n.17 (Jules L. Coleman & Allen Buchanan eds., 1994) (citing Murphy, *supra* note 6).

22. *Vegeahn v. Guntner*, 44 N.E. 1077, 1081 (Mass. 1896).

23. Virtually every jurisdiction criminalizes the attempt to obtain a material good or advantage upon the issuance of a conditional threat to commit a lawful act (e.g., disclose an embarrassing secret). See James Lindgren, *Blackmail and Extortion*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 115, 119 (Sanford Kadish ed., 1983). Prior to 1843, however, only threats to commit unlawful acts or to accuse a person of committing an infamous criminal offense were prohibited in England. See HEPWORTH, *supra* note 5, at 14. Criminalizing the modern conception of blackmail (conditional threats to commit lawful acts) did not occur in England until the Libel Act of 1843. See Alldridge, *supra* note 4, at 372.

Blackmailer shows Victim pictures of Victim engaging in adultery and utters to Victim the following proposal: "If you do not give me \$1000, then I will disclose your adulterous relationship." No individual component of the proposal is unlawful. Blackmailer may permissibly request money from Victim; Blackmailer may permissibly threaten to unconditionally disclose the adultery; and, Blackmailer may even permissibly disclose the adultery. The two components of a blackmail proposal (the demand of payment of money and the threat of disclosure of a secret) are each independently legal but in conjunction are criminal.<sup>24</sup> While traditionally articulated as "[w]hy do two rights make a wrong,"<sup>25</sup> the preferable expression of the puzzle is why threatening to conditionally commit what is lawful to actually commit should constitute a criminal offense.<sup>26</sup> Despite the individually lawful components, by some mysterious alchemy proposing to condition the disclosure on nonreceipt of the money

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Russell Hardin contrasts the origin of blackmail with its modern conception:

"[B]lackmail" meant the tribute paid by English dwellers along the Scottish border to Scottish chieftains to secure immunity from border raids. "Mail" was then a wallet or traveling bag and, by association, what was carried in such a bag, such as what we now call mail. "White rent" was tendered in silver coin ("white money"); blackmail was payment in kind, for example, in cattle or labor. If the protection the chieftains sold was protection against other marauders, they offered merely an exchange of services for services. In that case, their offer, while perhaps too good to refuse, was not like modern blackmail or extortion. If their protection was from their own depredations, the chieftains were like the modern mafia. Their offer of a deal was extortion. Such an offer is also unlike modern blackmail. Blackmail typically lies somewhere between these two possibilities.

Russell Hardin, *Blackmailing for Mutual Good*, 141 U. PA. L. REV. 1787, 1787 (1993) (footnotes omitted).

Judge Douglas Ginsburg and Paul Shechtman locate the origin of blackmail as a criminal offense as an attempt to plug a loophole in the common law offense of robbery. See Ginsburg & Shechtman, *supra* note 1, at 1851–57. Robbery required that the theft be from the victim's person or in his presence. Enterprising criminals found that they could accomplish a robbery in effect by sending a letter containing intimidating threats. The frightened victim handed over his goods or money, but the letter sender avoided robbery liability because of the absence of the "from the victim's person or in his presence" element. Addressing this loophole, the Scottish Parliament passed two acts in 1567 and 1587, the latter prohibiting "blak meill." *Id.* at 1851 & n.3 (citing Scot. Act., Jam. 6, ch. 27 (1567) (Scot.) (outlawry); Scot. Act., Jam. 6, ch. 59, § 13 (1587) (Scot.) ("blak meill")).

24. See Glanville Williams, *Blackmail*, 1954 CRIM. L. REV. 79, 163 ("Together, the demand and the threat constitute the crime of blackmail."); see also Smith, *supra* note 20, at 862 ("[B]lackmail consists of a *threat* to reveal a secret on the one hand and a *demand* for payment to keep the secret on the other.") (emphasis added).

25. Lindgren, *supra* note 2, at 1975. Glanville Williams, credited as being the first to express the puzzle of blackmail in these terms, explained it as follows: "two things that taken separately are moral and legal whites together make a moral and legal black." Williams, *supra* note 24, at 163. But two rights making a wrong is fairly common within the criminal law. See, e.g., Michael Clark, *There is No Paradox of Blackmail*, 54 ANALYSIS 54, 55 (1994) ("It is not in itself illegal to be drunk nor is it illegal to be in charge of a motor car, but it is illegal to be drunk in charge of a car."); Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. PA. L. REV. 1741, 1743 & nn.16 & 19 (1993) (arguing same).

26. For the other traditional puzzles of blackmail, see *infra* text accompanying notes 58–64, 216.

constitutes the crime of blackmail.<sup>27</sup> In contrast, threatening to conditionally commit what is *unlawful* to actually commit (as in robbery<sup>28</sup>) is easily explained as criminal and is not puzzling at all.<sup>29</sup> The difficulty in justifying blackmail as criminal and the ease of justifying robbery's criminalization is thus a function of the absence and presence, respectively, of a threatened act that is unlawful.<sup>30</sup> Although numerous theories of blackmail have been advanced, no theory has succeeded in placing the justification of blackmail's criminalization on the same firm footing as the justification of robbery's criminalization.<sup>31</sup> Moreover, no account has even attracted an appreciable number of adherents.<sup>32</sup>

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27. It should be noted that not all instances of blackmail are problematic. Blackmail is puzzling or paradoxical where the threatened act is lawful and moral. See Lindgren, *supra* note 1, at 671 n.7 ("Where what the blackmailer threatens to do is itself criminal, the criminality of blackmail is fairly easily justified."); Smith, *supra* note 20, at 864 ("Blackmail as a crime has been a puzzle because the illegitimacy of the blackmailer's threat is difficult to explain in general. But not *all* types of threat that result in blackmail are equally difficult to explain as illegitimate.").

Following a convention in the literature, see *supra* note 1, I will use the term blackmail to denote those proposals with lawful and moral threatened acts and the term extortion to denote those proposals with an unlawful and immoral threatened act (not arising to the level of robbery). I will restrict my discussion to only the problematic type of blackmail (where the threatened act is lawful and moral).

28. Robbery is a theft accomplished by the use of force or the threat of force. See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW 870 (3d ed. 2000) (noting that robbery involves the taking of property by "violence or intimidation"). When accomplished by threat, robbery—like blackmail and extortion—is a conditional threat theft offense. While the demand component in all three might be the same—a demand for money or some material advantage—the threatened act component differs. Robbery typically differs from extortion by either of two features of the threatened act component.

First, the threatened act in robbery is threatened to be carried out imminently or immediately if the victim does not comply with the demand. The threatened act in extortion is threatened to be carried out at some future point in time. See, e.g., Lindgren, *supra* note 23, at 115 ("The distinction traditionally drawn between robbery and . . . extortion is that a person commits robbery when he threatens to do *immediate* bodily harm, whereas he commits . . . extortion when he threatens to do bodily harm *in the future*."). Second, while the threatened act in robbery is typically death or serious bodily harm, the threatened act in extortion is typically a less serious bodily injury or any unlawful act or some specified lawful acts. See, e.g., PAUL ROBINSON, CRIMINAL LAW 788 (1997) ("Where the actor causes or threatens immediate serious bodily injury, the offense is robbery . . . . Where the actor threatens less than serious bodily injury . . . the offense is theft by extortion."). Less typically, the threatened act may be any serious felony, any felony, or any unlawful act. See, e.g., LAFAVE, *supra*, at 872–75. For examples of robbery statutes requiring this type of threatened act, see *infra* Part II.A.1. In contrast, the threatened act in (nonextortion) blackmail is a lawful act. For other differences between robbery and extortion, see LAFAVE, *supra*, at 882–83; ROBINSON, *supra*, at 781.

29. Criminalizing conditional threats to commit unlawful acts is unproblematic:

[The robber] is not threatening to do something that he or she has a right to do. No one has a right to inflict unprovoked violence on another, and laws against such violence, an obvious harm, are among the least mysterious. Furthermore, it is relatively unproblematic to outlaw the making of a threat to do something that is illegal.

Smith, *supra* note 20, at 864.

30. See, e.g., FEINBERG, *supra* note 1, at 239 ("The robber and other extortionists, in short, threaten to do what they have no legal right to do, and then demand money for not doing it, while the blackmailer threatens only to do what he has a legal right to do, and then offers to refrain from doing so for a fee.").

31. For a discussion of the justification of the criminalization of robbery, see *infra* notes 260–65 and accompanying text.

32. See, e.g., Berman, *supra* note 10, at 797 ("Despite many efforts, however, it is an understatement to observe that no consensus has emerged in support of any one or combination of the proffered



This Article introduces a novel way of expressing the canonical blackmail proposal that both bridges and widens the justificatory gap between blackmail and robbery. This new expression I will term “meta-blackmail.”<sup>33</sup> In contrast to the conventional expression of the canonical blackmail proposal, a meta-blackmail expression threatens blackmail itself. For example, Blackmailer says to Victim, “If you do not give me \$1000, then I will blackmail you.” While the threatened act in the conventional expression—disclosure of the adultery—is lawful, the threatened act in the meta-blackmail expression—blackmail itself—is criminal. Thus, while conventional blackmail’s criminalization is puzzling to justify, meta-blackmail’s criminalization is seemingly easily justified. Meta-blackmail may be justified as criminal on the same basis as robbery—a demand for money coupled with the threat to commit an *unlawful* act.

No existing theory of blackmail has addressed meta-blackmail.<sup>34</sup> This Article undertakes an analysis of the three logically possible outcomes as to the comparative assessment of meta-blackmail versus conventional blackmail: (i) meta-blackmail constitutes a more serious level of criminality than conventional blackmail, (ii) meta-blackmail is equivalent to conventional blackmail, and (iii) meta-blackmail is less serious than conventional blackmail.<sup>35</sup> Each of these possible outcomes is supported by an interpretive strategy or perspective—formalist,<sup>36</sup> functionalist,<sup>37</sup> and substantivist,<sup>38</sup> respectively<sup>39</sup>—which, in turn,

theories [of blackmail].”); Isenbergh, *supra* note 1, at 1907 (“Scholarly accounts of the prohibition of blackmail are widely contradictory; none seems to me entirely satisfying.”); Smith, *supra* note 20, at 862 (“Despite great efforts on the part of commentators, thus far no theory of blackmail’s status as a crime has gained wide acceptance.”).

33. I am indebted to Leo Katz for coining the term.

34. For a review of the principal accounts of blackmail, none of which address meta-blackmail, see *infra* Part I.

35. For a discussion of a possible fourth outcome, see *infra* note 213.

36. The formalist approach focuses on the formal difference between meta-blackmail and conventional blackmail. While meta-blackmail threatens an unlawful act (blackmail itself), the conventional blackmail proposal threatens a lawful act (disclosure of another’s embarrassing secret). As a result, meta-blackmail arguably should be treated as the more serious level of criminality. For a more expansive discussion of the formalist approach, see *infra* Part II.A. For a discussion of the various types of formalism in law and morality, see Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 607 (1999) (identifying three types of formalism); Martin Stone, *Formalism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 166, 170–71 (Jules Coleman & Scott Shapiro eds., 2002) (categorizing seven varieties of formalism).

37. The functionalist approach focuses on the function each proposal serves. The meta-blackmail proposal arguably serves the same function as the conventional blackmail proposal, because it ultimately puts the recipient to the same choice as does conventional blackmail—whether concealment of the secret is valued more than the amount of the demanded payment. Since the two proposals are functionally equivalent, they should be treated as equivalent levels of criminality. For a more expansive discussion of the functionalist approach, see *infra* Part III.A. For a discussion of functionalism, and its opposition to formalism, see KATZ, *supra* note 1, at 2–4; Pildes, *supra* note 36, at 609–10.

38. The substantivist approach focuses on the substantive difference between meta-blackmail and conventional blackmail. One such difference is that by uttering a meta-blackmail proposal one threatens blackmail and by uttering a conventional blackmail proposal one actually commits blackmail. Since arguably a threat to commit a crime should be a lesser level of criminality than actually committing that crime, meta-blackmail should be treated as a lesser level of criminality than conventional blackmail.

is supported by a compelling principle or intuition.<sup>40</sup> Supporting the formalist approach that meta-blackmail is more serious is the intuition that a conditional threat to commit an unlawful act is properly more serious, *ceteris paribus*,<sup>41</sup> than a conditional threat to commit a lawful act. Equally intuitive, in support of the functionalist approach, is that if two differently expressed proposals both, in effect, propose exchanging the concealment of the same secret in return for the same amount of money to the same person, the two proposals should be treated equivalently under the criminal law. And supporting the substantivist approach that meta-blackmail is a less serious level of criminality is the intuition that a conditional threat to threaten is less serious, *ceteris paribus*, than a conditional threat.<sup>42</sup>

None of these three approaches is clearly preferable to the others. Considered individually all three intuitions are compelling. But as applied to the comparative assessment of meta-blackmail and conventional blackmail, they are jointly incompatible. This gives rise to what we might term the trilemma of meta-blackmail.

Examination of this trilemma tests our commitment to the intuition that blackmail is properly criminalized. As will be demonstrated, decriminalizing blackmail dissolves the trilemma and affords the embrace of all three compelling intuitions without conflict. Criminalizing blackmail is consistent with any one, but only one, of the three compelling intuitions. If we are to preserve our intuition that blackmail is properly criminalized, we must reject two of the three compelling intuitions. Like a blackmail proposal, the trilemma puts to us a difficult choice of which we value more. Resolving the trilemma of meta-blackmail either forces the decriminalization of blackmail or adds considerably to the already difficult puzzles to be surmounted in justifying the criminalization

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For a more expansive discussion of the substantivist approach, see *infra* Part IV.A. For an additional substantive difference between the two proposals, see *infra* note 42 and accompanying text. For a discussion of substantivism and its opposition to formalism, see P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 5–11 (1987); Daniel Farber, *Legal Formalism and the Red-Hot Knife*, 66 U. CHI. L. REV. 597, 600 (1999).

39. The labels “formalist,” “functionalist,” and “substantivist” are merely suggestive. No aspect of this Article’s argument hinges on whether treating meta-blackmail as more serious, equivalent, or less serious does or does not truly exemplify formalism, functionalism, and substantivism, respectively.

40. Cf. Avery Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 496 (2004) (“[A]most all questions of interpretation implicate the tension between form and substance.”).

41. For a discussion of the philosophical uses of the phrase “*ceteris paribus*,” or “all other things being equal,” see JULIAN BAGGINI & PETER S. FOUL, THE PHILOSOPHER’S TOOLKIT: A COMPENDIUM OF PHILOSOPHICAL CONCEPTS AND METHODS 74–76 (2003).

42. Because blackmail is a conditional threat, meta-blackmail (which threatens blackmail itself) is a conditional threat to threaten. The intuitions supporting the substantivist approach that meta-blackmail is less serious are that (i) threatening blackmail is less serious than actually committing blackmail, and (ii) a conditional threat to threaten is less serious than a conditional threat. For a discussion of these intuitions, see *infra* Part IV.A.

of blackmail.<sup>43</sup>

After canvassing and critiquing the principal existing theories of blackmail in Part I of this Article, Part II presents the formalist perspective or interpretive strategy, focusing on the lawful act threatened in conventional blackmail and the unlawful act threatened in meta-blackmail. A plausible, if not compelling, intuition or principle is that proposals threatening unlawful acts should be considered more serious, *ceteris paribus*, than proposals threatening lawful acts. Applying the principle or intuition to the formal difference between the proposals generates the conclusion that meta-blackmail should reach a more serious level of criminality than conventional blackmail. Supporting this conclusion is that meta-blackmail (but not conventional blackmail) qualifies as the greater crime of robbery and is clearly coercive. But the formalist approach generates significant puzzles and difficulties. For example, how can threatening to commit a crime be more serious than actually committing the crime? That is, how can threatening blackmail be more serious than blackmail itself?<sup>44</sup>

Part III advances the functionalist perspective or interpretive strategy that views meta-blackmail and conventional blackmail as equivalent in function in that each puts Victim to the same ultimate choice—either pay \$1000 to conceal the secret or do not pay and risk disclosure of the secret. Unpacking the meta-blackmail proposal reveals it to be composed of the same individually lawful components as blackmail. Because the threatened act is blackmail itself, and blackmail itself (in the context of the hypothetical) contains a threat to disclose the secret, the meta-blackmail proposal may be understood as a threat to threaten to disclose the secret. In effect and function, a threat to threaten to disclose the secret boils down to a threat to disclose the secret which is no different than conventional blackmail. As a result, the functionalist perspective views them not as two proposals but as two irrelevantly different expressions of the same proposal.<sup>45</sup> Based on the intuition that functionally equivalent proposals should be treated equivalently, meta-blackmail and conventional blackmail

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43. The recent trend in blackmail scholarship has been to downgrade the degree of difficulty of satisfactorily justifying blackmail's criminalization from a paradox, *see, e.g.*, Lindgren, *supra* note 1, at 670, to merely a puzzle, *see, e.g.*, Berman, *supra* note 10, at 796 n.1; Clark, *supra* note 25, at 55; Fletcher, *supra* note 13, at 1617; Gordon, *supra* note 25, at 1742–46; Grant Lamond, *Coercion, Threats and the Puzzle of Blackmail*, in HARM AND CULPABILITY 215, 216 n.1 (A.P. Simester & A.T.H. Smith eds., 1996). *But see* Sidney DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. PA. L. REV. 1663, 1663–65 (1993) (identifying two paradoxes of blackmail); Gorr, *supra* note 16, at 44–49 (contending that blackmail is paradoxical but susceptible to resolution under most circumstances); Saul Smilansky, *May We Stop Worrying About Blackmail?* 55 ANALYSIS 116, 116 (1995) (acknowledging that blackmail is paradoxical). Whether termed a paradox or a puzzle, blackmail is no less mysterious. This Article will demonstrate that this current trend is misguided and that justifying the criminalization of blackmail is appreciably more difficult than even previously supposed.

44. The formalist approach incurs additional difficulties from the perspective of the other two approaches to meta-blackmail. For example, if meta-blackmail and conventional blackmail are functionally equivalent, then why should meta-blackmail be treated as more serious?

45. For example, the expressions “4+3” and “5+2” are nominally and formally different, but functionally equivalent in expressing the amount represented by the numeral “7.”

should be treated as equivalent in seriousness of criminality. But the functionalist approach also generates significant puzzles and anomalies. For example, how can a threat to commit a lawful act be as serious, *ceteris paribus*, as a threat to commit an unlawful act?

Part IV considers the substantivist perspective or interpretive strategy that meta-blackmail is less serious than conventional blackmail. Where the functionalist views a threat to threaten to disclose a secret as effectively collapsing into a threat to disclose a secret, the substantivist perspective finds a substantive difference between a threat to threaten and a threat. The harm in a threat to threaten is arguably more remote, indirect, and attenuated than a threat. A plausible, if not compelling, intuition is that, *ceteris paribus*, the more remote, indirect, and attenuated the threatened harm of a proposal, the less serious the level of criminality. Applying the intuition to the substantivist interpretive strategy generates the conclusion that meta-blackmail (a conditional threat to threaten) is less serious than conventional blackmail (a conditional threat). Like the other two approaches, however, the substantivist approach yields significant puzzles. For example, how can threatening an unlawful act be a less serious crime, *ceteris paribus*, than threatening a lawful act?

Part V considers the preferability of the three approaches to meta-blackmail from a variety of perspectives. First, with respect to harmonizing blackmail with robbery, treating meta-blackmail as equivalent or less serious would necessitate revision of some jurisdictions' robbery statutes. Second, with respect to resolving the puzzle of blackmail, the most promising approach is treating meta-blackmail and conventional blackmail equivalently. If equivalent, and because meta-blackmail threatens an unlawful act, then conventional blackmail is equivalent to a proposal threatening an unlawful act. Because justifying the criminalization of threats to commit unlawful acts is unproblematic, and conventional blackmail is functionally equivalent<sup>46</sup> to a threat to commit an unlawful act, justifying the criminalization of conventional blackmail is seemingly also unproblematic. While from a formalist perspective conventional blackmail threatens a lawful act, from a functionalist perspective it threatens an unlawful act.<sup>47</sup> Analysis of meta-blackmail might then be seen as the holy grail of blackmail scholarship—the identification of an independently unlawful component of blackmail. While this may provide a technical solution to the puzzle of blackmail, as will be demonstrated, it is not an altogether satisfactory solution.<sup>48</sup> Third, with respect to supporting the decriminalization of blackmail, none of the approaches is preferable. But this very indeterminacy as to the preferable

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46. For a discussion of functionally equivalent blackmail transactions, see KATZ, *supra* note 1, at 2-4.

47. From the functionalist perspective, conventional blackmail may be understood to threaten an unlawful act, because meta-blackmail clearly threatens an unlawful act, and meta-blackmail and conventional blackmail are arguably functionally equivalent.

48. For a discussion of why the technical solution to the puzzle of blackmail supplied by the analysis of meta-blackmail is not entirely satisfactory, see *infra* Part V.B.

approach supports decriminalizing blackmail by generating the trilemma of meta-blackmail which is best resolved by decriminalizing blackmail.

### I. A CRITICAL REVIEW OF THE THEORIES OF BLACKMAIL

It is widely acknowledged that no resolution of the blackmail puzzle has yet been found acceptable.<sup>49</sup> Commentators express skepticism that any single argument or approach can satisfactorily explain blackmail,<sup>50</sup> suggest that some combination or patchwork theory may be necessary,<sup>51</sup> and even caution that a combination of theories is unworkable.<sup>52</sup> One commentator goes so far as to conclude "that the paradoxes of blackmail may not yield to rational analysis."<sup>53</sup> Proponents of the competing approaches to the justification of blackmail—consequentialist and nonconsequentialist<sup>54</sup>—have each asserted that the other approach is inadequate to the task.<sup>55</sup> Russell Hardin despairs of the possibility that either approach will be found satisfactory to an adherent of the other approach.<sup>56</sup> Recently, Mitchell Berman has argued that the two predominant approaches to resolving the paradox (in addition to the specific answers thus far

49. See *supra* notes 6–7, 20 & 32 and accompanying text.

50. See, e.g., Fletcher, *supra* note 13, at 1637 ("Many words and expressions at hand express what is wrong with blackmail. . . . None of these arguments, however, offers a convincing account of the difference between cases of punishable and nonpunishable conduct. All of them capture a portion of blackmail's evil, but none accounts systematically for [all of] the cases.").

51. See, e.g., Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. PA. L. REV. 1639, 1640 (1993) ("I recommend abandoning the search for a unified explanation. Probably no single flaw justifies condemning and prohibiting all and only blackmail transactions."); Mark P. Gergen, *A Priest Responds to the Bean Counters: Leo Katz on Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law*, 22 LAW & SOC. INQUIRY 879, 891–92 (1997) (book review) (arguing same); Gordon, *supra* note 25, at 1785 (same).

52. Smith, *supra* note 20, at 897 ("[A multitude-of-approaches solution risks] becoming a just-so story: a post-hoc rationalization that blackmail is illegal because it has that unique combination of negative features which we wish to criminalize. A theory like that is not very predictive and explains little.").

53. DeLong, *supra* note 43, at 1665.

54. Consequentialist accounts attempt to justify blackmail's prohibition based on the bad societal consequences that stem from blackmail. See *infra* Part I.A. Nonconsequentialist accounts attempt to identify why blackmail is intrinsically wrong. See *infra* Part I.B. For the view that accounts of blackmail may be divided between consequentialist and nonconsequentialist theories, see, for example, Berman, *supra* note 10, at 799; Lindgren, *supra* note 2, at 1976, 1981. Alan Wertheimer similarly divides up blackmail theories between internal (nonconsequentialist) and external (consequentialist) theories. ALAN WERTHEIMER, COERCION 93, 96 (1987). A symposium on blackmail distinguished the approaches by the terms "Economics" (consequentialist) and "Morals" (nonconsequentialist). See generally Symposium, *Blackmail*, 141 U. PA. L. REV. 1565 (1993).

55. See Smith, *supra* note 20, at 863 ("[Blackmail] is such a central puzzle to legal theorists that it has led to claims by those in the utilitarian and deontological camps that the other framework for explaining the criminal law must be inadequate.").

56. Hardin, *supra* note 23, at 1816 ("There is little hope that any theory is soon going to trump all the others. Any moral argument that concludes that blackmail is right or wrong *tout court* is specious. Blackmail, like every other kind of action or result, is right or wrong, good or bad only as an implication of particular moral theories.").

proposed) are doomed to failure.<sup>57</sup> In addition to failing to resolve the puzzle of conventional blackmail, none of the following theories satisfactorily explain, or even address, meta-blackmail.

#### A. CONSEQUENTIALIST

Consequentialist approaches to blackmail attempt to justify its criminalization by the undesirable consequences which would stem from permitting blackmail. Economists and “law and economics” scholars have been drawn less to the “why is it unlawful to threaten to do that which is lawful” puzzle of blackmail than to the related puzzle of how to distinguish blackmail from permissible “hard bargains.”<sup>58</sup> For an example, consider Jeffrie Murphy’s classic hypothetical of a permissible hard bargain (hereinafter the “Baseball Example”).<sup>59</sup> Suppose a sports memorabilia dealer knows that your son is dying and that the only thing which would bring your son solace in his last days is a baseball autographed by Babe Ruth which is the last of its kind in existence. Although the “going rate” for the ball is \$6000, the dealer knows that you have \$12,000 (which is all the money you have in the world). The dealer makes the following proposal: “If you do not pay me \$12,000, I will not give you the baseball.” Though perhaps unfair, the dealer’s proposition is lawful. For another example of a transaction thought to have the same structure as blackmail but which is generally permissible, consider the economic boycott of a store or company in order to change their employment practices or political stances.<sup>60</sup> If

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57. Berman, *supra* note 10, at 797 (“[Both approaches will] always prove unable to distinguish blackmail from much behavior that is, and should remain, free from criminal sanction.”).

58. Ginsburg and Shechtman comment negatively on efforts to distinguish blackmail from other permissible transactions:

The legal literature especially suffers from an inability to define blackmail in a way that meaningfully distinguishes it from threats of unquestioned legality made in the course of economic bargaining. All agree that a key employee may lawfully threaten to quit unless his wages are raised, and that if his threat comes at a time when his employer is particularly vulnerable, he may have engaged in sharp practices but not criminal conduct. Many threats, such as those of a customer to take his business elsewhere if a price is not lowered, or to enter production for his own use if suppliers are not more obliging, are actually relied upon in a competitive exchange economy to discipline the market. But despite our general ability to agree on the lawfulness of particular threats, drafting a general law that separates blackmail from bargaining has proved an elusive task.

Ginsburg & Shechtman, *supra* note 1, at 1849.

59. Murphy, *supra* note 6, at 156–57.

60. Consider the following analogy between economic boycotts and blackmail:

When *X* boycotts *Y* he offers *Y* his future patronage solely on condition of *Y*’s changing his ways in some manner pleasing to *X* where this change is external to the normal conception of what *Y* sells. Thus, *X* boycotts *Y* if he indicates that he will not patronize retailer *Y* unless *Y* ends racial discrimination in his hiring [practices] . . . . *Y* will see the financial and psychic costs of securing relief from the boycott as purchasing something which he would have gotten anyway in the normal course of events.

. . . .

Such a special boycott, then, is like the blackmailing of a private person since no motive is

such hard bargains are lawful, how do we distinguish them, if at all, from impermissible transactions like blackmail?

Distinguishing blackmail from permissible transactions has significant implications for economic theory<sup>61</sup> and political philosophy.<sup>62</sup> Libertarians contend that all economic exchanges between consenting adults, including blackmail, are permissible.<sup>63</sup> On the other hand, Marxists claim that all capitalistic exchanges, because they are akin to blackmail, should be impermissible.<sup>64</sup> Upon blackmail, then, oddly enough, both Marxists and Libertarians, though drawing different conclusions as to its permissibility, agree: it is not distinguishable from other capitalistic transactions. It is Liberals who argue that blackmail is properly prohibited and seek to distinguish it from hard, but permissible, bargains like the Baseball Example.

There are two principal consequentialist approaches to blackmail. First, blackmail promotes economic inefficiency because it is an “unproductive exchange,”<sup>65</sup> and a waste of resources by both the blackmailer and the blackmailee.<sup>66</sup> Second, blackmail generates harms extrinsic to the blackmail exchange by encouraging fraud<sup>67</sup> and unlawful blackmailee self-help.<sup>68</sup>

## 1. Blackmail as Economic Inefficiency

*a. Unproductive Exchange.* Judge Richard Posner, Robert Nozick, Judge Douglas Ginsburg and Paul Shechtman, and Ronald Coase each argue that blackmail’s economic inefficiency supplies a basis for both criminalizing it as well as distinguishing it from permissible bargains. In typical bargains, the seller exchanges a good in return for the purchaser’s money or other consideration. Because each values what the other is exchanging more than what each gives up, the transaction yields a net benefit. In contrast, blackmail transactions are

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involved in the posing of the boycott threat except that of securing the special ‘payment’ from the retailer. . . . If such a boycott succeeds, the retailer gets only the patronage that he otherwise would have gotten and he pays a higher price—the surrender of the normal goods plus his preferred racial or political stance.

Mack, *supra* note 21, at 282. Mack concludes that because such boycotts are permissible—and because blackmail cannot be distinguished, on a principled basis, from such boycotts—blackmail should also be permissible. *Id.* at 282–83.

61. Posner, *supra* note 1, at 1818 (“Economists and economically minded lawyers have found the prohibition of blackmail more problematic than have other students of the legal system. Economists tend to be great believers in voluntary transactions.”).

62. See, e.g., Murphy, *supra* note 6, at 157–58.

63. *Id.* at 157 n.11 (quoting ROTHBARD, *supra* note 21, at 443 n.49 (“Blackmail would not be illegal in the free society. For blackmail is the receipt of money in exchange for the service of not publicizing certain information about the other person. No violence or threat of violence to person or property is involved.”)).

64. *Id.* at 157.

65. See *infra* Part I.A.1.a.

66. See *infra* Parts I.A.1.b–c.

67. See *infra* Part I.A.2.a.

68. See *infra* Part I.A.2.b.

merely a “sterile redistributive activity,”<sup>69</sup> or “unproductive exchange,”<sup>70</sup> in which there is no net social welfare gain.<sup>71</sup> But by criminalizing blackmail, “factors of production are released for other purposes and the value of production is increased.”<sup>72</sup>

Under Nozick’s account, there are two necessary conditions for an unproductive exchange: (i) the purchaser is not made better off than she would be without the transaction,<sup>73</sup> and (ii) “it merely gives you [the purchaser] relief from something that would not threaten if not for the possibility of an exchange to get relief from it.”<sup>74</sup> This second condition is best explained by an example:

If your next-door neighbor plans to erect a certain structure on his land, which he has a right to do, you might be better off if he didn’t exist at all. (No one else would choose to erect that monstrosity [that ruins your scenic view].) Yet purchasing his abstention from proceeding with his plans will be a productive exchange. Suppose, however, that the neighbor has no desire to erect the structure on the land; he formulates his plan and informs you of it solely in order to sell you his abstention from it. Such an exchange would not be a productive one. . . .<sup>75</sup>

In other words, Nozick’s second condition is that the seller’s sole motive is to sell abstention. Since a blackmailee would be better off without the blackmailer, and the blackmailer’s motive is to sell abstention, blackmail is an unproductive exchange,<sup>76</sup> and thus should be unlawful.

Joseph Isenbergh explains, however, that blackmail only appears to be sterile and unproductive, because nothing seems to change.<sup>77</sup> But what changes are your property rights.<sup>78</sup> Although in Nozick’s example your view is no better now than it was before the purchase of the scenic easement, you now have a property right to enjoy the view which you previously enjoyed only by happenstance.<sup>79</sup> Similarly, “something does happen in a blackmail bargain: a reframing

69. Posner, *supra* note 1, at 1820.

70. Nozick, *supra* note 16, at 84–86.

71. See Ginsburg & Shechtman, *supra* note 1, at 1859.

72. Coase, *supra* note 3, at 673.

73. Nozick, *supra* note 16, at 84 (“[I]f I pay you for not harming me, I gain nothing from you that I wouldn’t possess if either you didn’t exist at all or existed without having anything to do with me.”).

74. *Id.* at 85.

75. *Id.* at 84–85.

76. *Id.* at 85.

77. Isenbergh, *supra* note 1, at 1920–21.

78. *Id.* at 1921. Henry Smith makes the similar point that property rights are altered in informational blackmail: “The blackmailer has *not* invested in receiving a mere transfer payment for maintaining the status quo: the now-suppressed evidence might have come out some other way but now cannot.” Smith, *supra* note 20, at 892.

79. Contrary to Nozick, Isenbergh persuasively argues that the “exchange is in fact productive given the more valuable allocation of property rights that results.” Isenbergh, *supra* note 1, at 1920–21. The allocation of property rights that results is more valuable, because you value the view more than your



of property rights between” the blackmailer and the purchaser of concealment.<sup>80</sup> The purchaser “has more secure control over the information than before as a result of the bargain.”<sup>81</sup> Accordingly, blackmail exchanges are productive rather than wasteful.<sup>82</sup> And by prohibiting productive exchanges, it is the *criminalization* of blackmail, not blackmail itself, which is inefficient.<sup>83</sup>

Consider the following more specific example demonstrating that Nozick’s account is underinclusive in that not all instances of blackmail would satisfy the first condition of an unproductive exchange.<sup>84</sup> Suppose a private detective hired by your soon-to-be-divorced spouse unearths information on you that would cost you millions of dollars in your divorce settlement were it to come to light.<sup>85</sup> If the private detective offers not to disclose the information to your spouse if you pay \$10,000 (double the \$5,000 fee the detective would have received from your spouse), the exchange (despite constituting blackmail) is productive, because you (as well as the detective) are made better off.<sup>86</sup>

Nozick’s theory is also overinclusive, because permissible transactions also satisfy the conditions for an unproductive exchange.<sup>87</sup> Consider a variation on the Baseball Example.<sup>88</sup> Suppose the father takes the dying son every day to the free local sports museum, which has in its collection the prized baseball. Due to budgetary cutbacks the museum is forced to sell the baseball to an exhibitor

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neighbor values the right to build; similarly, your neighbor values your money more than the right to build. *Id.* at 1921–22.

80. *Id.* at 1920.

81. *Id.*

82. The allocation of rights in the blackmail exchange is more valuable, because the blackmailee values concealment of the information more than the money used to purchase the concealment; similarly, the blackmailer values receipt of the purchase price more than the right to disclose the information. Because in the blackmail exchange each party values what they receive more than what they give up, the exchange is productive.

83. For a critical comment on Isenbergh’s approach, see Berman, *supra* note 10, at 813–14, who argues that Isenbergh’s “radical” explanation of the puzzle of blackmail is not “in tune with current law and common intuition” and fails to justify blackmail’s prohibition. However, Berman fails to level any specific criticism at Isenbergh’s account and ultimately uses Isenbergh’s analysis supporting decriminalization of blackmail to critique other economic inefficiency accounts that support blackmail’s prohibition.

84. For the view that Nozick’s account is underinclusive, see, for example, Berman, *supra* note 10, at 828–29; Katz, *supra* note 6, at 1579; and Murphy, *supra* note 6, at 158–59.

85. To tighten the hypothetical we might further suppose that the detective has obtained the only evidence of your damaging conduct and that but for the detective’s obtaining this evidence first, your spouse would have eventually obtained it through other means.

86. For a different criticism of Nozick’s first condition for an unproductive exchange, see Fletcher, *supra* note 13, at 1623, who argues that whether a transaction makes one better or worse off than if the transaction did not exist at all is inescapably ambiguous, because it depends on what one’s baseline or normal state of affairs is apart from the transaction.

87. Katz, *supra* note 6, at 1579 (“It sweeps into the blackmail category a lot of perfectly innocent conduct: The silver medalist at the Olympics would be better off if the gold medalist didn’t exist.”) Though satisfying the first condition for an unproductive exchange, the example is unclear as to how the second condition would be satisfied.

88. This variation is based, in part, on a hypothetical devised by David Owens. See Owens, *supra* note 6, at 501–05.

who buys it only to make money by charging people exorbitant sums to see it. The exhibitor threatens not to let the dying son view the baseball unless his fee is met. If the father pays, is the exchange unproductive? The first condition is satisfied because the father would have been better off had the exhibitor not existed and the baseball stayed in the museum. The second condition is also satisfied because the exhibitor's only motive in obtaining the baseball is to sell abstention (from a threat that would not be made were it not for the possibility of entering into an exchange to sell relief from it). Though the exhibitor's activity is entirely lawful it would nonetheless constitute an unproductive exchange and would be unlawful under Nozick's account.<sup>89</sup>

*b. Blackmailer's Waste of Resources.* Coase, as well as Ginsburg and Shechtman, argue that blackmail's waste of resources supports its prohibition. The blackmailer incurs research costs in obtaining the information and both blackmailer and blackmailee incur transaction costs.<sup>90</sup> "No rational economic planner would tolerate the existence of an industry dedicated to digging up dirt, at real resource cost, and then reburying it."<sup>91</sup>

But the waste of resources approach is underinclusive in accounting for two types of blackmail in which the information is fortuitously obtained without incurring research costs. In the first type, termed "participant blackmail,"<sup>92</sup> the blackmailer acquires the information through a prior relationship with the victim.<sup>93</sup> The second type, "opportunistic blackmail,"<sup>94</sup> arises where the blackmailer accidentally stumbles across the information.<sup>95</sup> Therefore, discouraging the waste of resources in the acquisition of the information cannot explain the prohibition of these two types of blackmail.<sup>96</sup>

Ginsburg and Shechtman reply that if the blackmailer discloses the information (in order to bolster the credibility of her future threats), the transaction costs she incurs in doing so are not a result of the accidentally acquired information but constitute "an investment decision"<sup>97</sup> for the next blackmail

89. Perhaps the most fundamental difficulty with Nozick's approach is its failure to demonstrate that such "unproductive exchanges" are immoral. Moreover, even if they are immoral it is not clear that they should be criminalized rather than constrained through tort or contract remedies. See Berman, *supra* note 10, at 829; Gordon, *supra* note 25, at 1758 & n.83; Lindgren, *supra* note 1, at 700; Murphy, *supra* note 6, at 158; Smith, *supra* note 20, at 890 n.91.

90. See Coase, *supra* note 3, at 674 (contending that the resources utilized to collect information for blackmail are wasted).

91. Ginsburg & Shechtman, *supra* note 1, at 1860 (footnote omitted).

92. HEPWORTH, *supra* note 5, at 76-77.

93. For an example of participant blackmail, suppose a man has an affair with a woman he believed to be unmarried and, upon subsequently finding out her marital status, decides to blackmail her years later by threatening to reveal the affair to her husband.

94. HEPWORTH, *supra* note 5, at 75-76.

95. For an example of opportunistic blackmail, suppose a motorist pulls into a seemingly deserted highway rest stop and sees a famous televangelist having sexual intercourse with a woman not his wife and subsequently blackmails him.

96. Lindgren, *supra* note 1, at 694-95.

97. Ginsburg & Shechtman, *supra* note 1, at 1876.

opportunity.<sup>98</sup> But then Ginsburg and Shechtman cannot account for blackmail's prohibition where the blackmailer fails to disclose. Additionally, they cannot explain blackmail's prohibition where the blackmailer discloses out of sadistic pleasure in seeing the blackmailee suffer, for the pleasure of spreading gossip, out of civic duty or to benefit another,<sup>99</sup> for selfish economic gain unrelated to another blackmailing opportunity,<sup>100</sup> or to bolster not their credibility as a blackmailer but their bargaining credibility in the "legitimate" business world.<sup>101</sup>

Coase argues that the transaction costs of the blackmail bargain itself are wasted.<sup>102</sup> But the costs incurred by at least some blackmailers in making good on their threat and disclosing may be so slight—picking up a phone or mailing a letter—as to be trivial.<sup>103</sup> Even if the costs of carrying out a blackmail threat are nontrivial, what is lacking is a demonstration that participant and opportunistic blackmail involve appreciably greater transaction costs than permissible economic transactions.<sup>104</sup>

*c. Blackmailee's Waste of Resources.* Rather than focusing on the *blackmailer's* wasted resources, another approach considers the *blackmailee's* waste of

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98. *Id.* at 1875–76.

99. While not completely altruistic, a blackmailer whose threat is rebuffed might disclose information about the character of a politician that he feels, if he cannot make money from its concealment, should be disclosed for the public good. Or another blackmailer might disclose, if he cannot profit from its concealment, an adulterous affair, because he believes it is wrong and that the betrayed spouse deserves to know.

100. While she would prefer to profit by concealing the information, a blackmailer might disclose embarrassing facts about a business competitor that will cause his business to lose customers. The blackmailer discloses not so much to personally harm the competitor but so as to benefit her own business by gaining the competitor's customers.

101. Posner observes that, "[t]hreats have the interesting property that both parties involved—the threatener and the person threatened—are made worse off if the threat is actually carried out." Posner, *supra* note 1, at 1819. While this is true in the short run, some advantages accrue to the threatener who demonstrates a willingness to carry out a threat despite it not being in his immediate interest. As Berman explains, these advantages accrue both to blackmailers and "legitimate" businessmen:

A reputation as someone willing to forego a benefit or incur costs if not obliged is extraordinarily valuable in the "legitimate" business world. It allows one to secure a disproportionately large share of the potential benefits of exchange. And, when it comes to exploiting that reputation, it should make no difference whether it was forged as an adventitious blackmailer, or as a used car salesman, or as a distributor of fava beans.

Berman, *supra* note 10, at 805.

102. Coase, *supra* note 3, at 674 (maintaining that wasted "resources would certainly be employed in the blackmailing transaction"). Lindgren disagrees: "[W]here no expenses have been spent seeking damaging information, the blackmail bargain proceeds much as any other. The blackmailer and her victim will enter into the deal only if each expects a net gain—and a gain large enough to offset the transaction costs of bargaining." James Lindgren, *Blackmail: On Waste, Morals, and Ronald Coase*, 36 UCLA L. REV. 597, 602 (1989).

103. Shavell, *supra* note 1, at 1889 ("The direct cost to a blackmailer of actually carrying out his threat is ordinarily trivial; it takes almost no effort to mail a photograph or a document to someone.").

104. Berman, *supra* note 10, at 803–04 ("The transaction costs, whatever they may be, are facilitative, not deadweight—and mirror transaction costs present in ordinary bargaining situations."); Lindgren, *supra* note 1, at 696–97 (noting that blackmail may entail less, not more, transaction costs than other lawful alternatives, such as a civil suit).

resources.<sup>105</sup> In contrast to Ginsburg and Shechtman, Steven Shavell concedes that the illegality of participant and opportunistic blackmail “cannot be explained by a need to discourage wasteful efforts to obtain information.”<sup>106</sup> Even so, “there is still an obvious incentive-based reason for making [those types of] blackmail illegal: to avoid being blackmailed . . . potential victims will exercise excessive precautions or reduce their level of innocent, yet embarrassing, activities.”<sup>107</sup> For example, out of fear of being blackmailed by the disclosure of embarrassing pictures, people might diminish the frequency of their showers or morally permissible sexual intercourse.<sup>108</sup> Thus, blackmail of innocent activity may produce a waste of resources sufficient both to constitute a net harm and to justify blackmail’s prohibition.<sup>109</sup>

The wasted resources of victims taking excessive precautions against being blackmailed, however, cannot satisfactorily explain the prohibition of opportunistic and participant blackmail where the threat is to disclose lawful but socially harmful conduct.<sup>110</sup> For an example of this type of blackmail, consider a blackmail threat to reveal the wasteful but lawful expenditure of church funds by a minister.<sup>111</sup> In contrast to blackmail of innocent but embarrassing activity, the minister’s aversion to being blackmailed for irresponsible use of church funds creates an incentive for his proper use of the funds which Shavell acknowledges is socially beneficial.<sup>112</sup>

The arguments justifying the prohibition of blackmail on economic grounds of inefficiency, waste of resources, and unproductivity have been severely criticized in the literature. First, a common assumption under these theories is that the information will not be disclosed and thus bargaining about its nondisclosure is wasteful.<sup>113</sup> But the prevalence of gossip and the endless recitation of people’s embarrassing acts in newspapers, television, and other media demonstrate that this empirical assumption is unfounded.<sup>114</sup> Second, arguments of

105. Shavell, *supra* note 1, at 1894 (“[P]recautions taken by potential victims avoiding threats reduce social welfare.”).

106. *Id.* at 1903.

107. *Id.*

108. *See id.* at 1897–98 (“[T]he efforts to guard against it [blackmail] are social wastes, and the reduction in the scale of potential victims’ activities is a social detriment since the activities are not harmful yet benefit those who engage in them.”).

109. *Id.* at 1898 (acknowledging that while revelation of information harms the victim it may enhance the welfare of third parties and thus, “the influence on social welfare . . . is ambiguous”).

110. If Shavell’s account is to succeed it must overcome the objection that there may be benefits to the precautions taken by potential blackmail victims. *See Isenbergh, supra* note 1, at 1931; Smith, *supra* note 20, at 891.

111. Shavell, *supra* note 1, at 1898–99.

112. *Id.*

113. For an example of this mistaken assumption, see *id.* at 1902 (“[P]eople usually have little reason to gather embarrassing information or to reveal it if they are not profiting from blackmail threats.”).

114. *See, e.g., DeLong, supra* note 43, at 1673 (“Given the very low costs of disclosure to most blackmailers, the social rewards of disclosure, and the blackmailer’s typical disregard for the victim’s feelings, it seems likely that many if not most people who would threaten blackmail would happily

inefficiency may be plausible but they are no more plausible than arguments that blackmail is productive.<sup>115</sup> Third, the economic arguments cannot satisfactorily distinguish permissible transactions from blackmail.<sup>116</sup> Fourth, efficiency arguments are overinclusive. If inefficiency is a sufficient condition for criminalization, then many other inefficient, but presently permissible, activities should also be criminalized.<sup>117</sup> Fifth, even if the economic-based theories satisfactorily explain some types of blackmail, they cannot account for participant and opportunistic blackmail.<sup>118</sup> Sixth, even if blackmail is unambiguously inefficient and wasteful, that alone is not sufficient justification for the criminalization of blackmail rather than some other less restrictive mode of regulation, such as civil penalties.<sup>119</sup> And seventh, under at least one economic analysis, it is not blackmail itself that is inefficient so much as its criminalization. Or, alternatively, even if blackmail is inefficient, criminalization is counterproductive in compounding the inefficiency.<sup>120</sup> Although James Lindgren has concluded that “the economic theories have considerably closed the gap between the crime of blackmail and their theoretical explanations,”<sup>121</sup> they are still unpersuasive in explaining blackmail’s prohibition.<sup>122</sup>

## 2. Subsidiary Harms of Blackmail

This group of consequentialist theories seeks to justify the prohibition of blackmail not on grounds of economic inefficiency but rather on the adverse consequences, extrinsic to the blackmail transaction, caused by blackmail.

*a. Blackmail, Inc.* Richard Epstein has envisioned a business, “Blackmail, Inc.,”<sup>123</sup> (which would arise if blackmail was lawful) in which entrepreneurial blackmailers would troll and advertise for information on which others could be blackmailed.<sup>124</sup> As a result,

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disclose their victim’s secret if blackmail were prevented.”); Lindgren, *supra* note 2, at 1976 (“[T]he empirical claim that the information otherwise wouldn’t get out is probably false.”); *see also supra* notes 99–101 and accompanying text.

115. *See supra* text accompanying notes 77–83; *see also* DeLong, *supra* note 43, at 1677; Smith, *supra* note 20, at 895–96.

116. *See supra* text accompanying notes 84–89; *see also* Smith, *supra* note 20, at 863.

117. *See, e.g.,* DeLong, *supra* note 43, at 1668–69; Fletcher, *supra* note 13, at 1618 & n.2; Smith, *supra* note 20, at 892–93.

118. *See supra* text accompanying notes 92–96, 110–12; *see also* Berman, *supra* note 10, at 810, 813; Lindgren, *supra* note 2, at 1988.

119. *See* Altman, *supra* note 51, at 1639; Berman, *supra* note 10, at 810, 813; Fletcher, *supra* note 13, at 1618; Murphy, *supra* note 6, at 162–64; Smith, *supra* note 20, at 890, 892.

120. Isenbergh, *supra* note 1, at 1928.

121. Lindgren, *supra* note 2, at 1988.

122. *See id.* (concluding that the economic theories have yet to satisfactorily explain blackmail’s prohibition).

123. Epstein, *supra* note 18, at 562.

124. *Id.* at 562–66.

there would then be an open and public market for a new set of social institutions to exploit the gains from this new form of legal activity. Blackmail, Inc. could with impunity place advertisements in the newspaper offering to acquire for top dollar any information with the capacity to degrade or humiliate persons in the eyes of their families or business associates. Thereafter, Blackmail, Inc., as a commercial organization, could negotiate contracts with its sources to suppress the information acquired.<sup>125</sup>

Epstein argues that undesirable consequences would arise from the activities of Blackmail, Inc. in two ways. First, the victim might turn to a life of crime to support his blackmail "habit."<sup>126</sup> Second, Blackmail, Inc., to preserve its revenue stream, would facilitate the concealment of the information, thereby joining the victim in perpetrating a fraud on those having a legitimate interest in the information (for example, an adulterer's spouse).<sup>127</sup> To avoid the adverse consequences stemming from the formation of such organizations, Epstein concludes that blackmail, as "the hand-maiden to corruption and deceit,"<sup>128</sup> is properly criminalized.<sup>129</sup>

*b. Blackmailee's Unlawful Self-Help.* Henry Smith has recently argued that Epstein's account is a good start, but does not go far enough.<sup>130</sup> First, according to Smith, since solicitation (of another to commit fraud) is already a criminal offense, Epstein's argument would render the prohibition of blackmail superfluous.<sup>131</sup> Second, the dangers of blackmailee self-help in the face of blackmail demands extend well past actions the blackmailee is solicited to commit.<sup>132</sup> For Smith, blackmail is the proximate cause of harmful and/or illegal self-help measures undertaken by the blackmailee in response to the blackmail proposal.<sup>133</sup> These types of harmful and illegal self-help measures include "killing the blackmailer, killing a third person, suicide, fraud, and theft" to avoid disclosure of the information.<sup>134</sup> Smith concludes that blackmail is properly prohibited because of the deterrent effect on harms resulting from illegal victim self-help measures.

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125. *Id.* at 562-63.

126. *Id.* at 564 (arguing that given blackmailees' paramount concern of concealing their embarrassing secrets, thereby precluding them from relying on loans from banks and friends who might inquire as to the purpose of the loan, blackmailees are particularly pressured to resort to crime to pay off their blackmail debts).

127. *Id.*

128. *Id.* at 566.

129. *Id.* at 565.

130. Smith, *supra* note 20, at 888.

131. *Id.*

132. *Id.*

133. *Id.* at 866-73.

134. *Id.* at 866.

Epstein's and Smith's accounts are subject to a number of criticisms.<sup>135</sup> First, they are underinclusive in failing to explain the wrong of blackmail where the blackmailee is neither induced to commit crimes nor is defrauding a third party. For example, a fellow employee threatens to reveal your embarrassing but harmless sexual interests to your employer unless you give his son golf lessons.<sup>136</sup> Though you are being blackmailed, you are neither defrauding your employer as to any information that she has a legitimate interest in nor will you be forced to turn to a life of crime to provide golf lessons. Second, Epstein's and Smith's accounts are overinclusive in providing a basis for criminalizing a significant amount of permissible conduct. Would not simple disclosures or unconditional threats to disclose information, both of which are permissible, also impel a shame-avoiding victim to illegal self-help measures? Smith answers that without a demand for money the victim would have no need to steal to raise the money.<sup>137</sup> But a shame-adverse individual might steal to raise the money to initiate an offer to the potential discloser not to disclose. Or, alternatively, being precluded from paying for concealment, one might be compelled to commit even more serious crimes like murder to prevent the disclosure. Third, many permissible activities may be the proximate cause of victim self-help. The relentless marketing campaigns targeting inner-city youths with \$200 basketball shoes have been claimed to induce theft to purchase the shoes and even murder of those wearing the shoes. Should the marketing or selling of such expensive shoes also be criminalized under Smith's approach?<sup>138</sup> Fourth, and most importantly, Smith's account fails to distinguish blackmail from permissible economic transactions.<sup>139</sup>

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135. For a variety of criticisms directed at Epstein's account, see Berman, *supra* note 10, at 815-17; Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. PA. L. REV. 1935, 1969-72 (1993); Katz, *supra* note 6, at 1578; and Lindgren, *supra* note 1, at 684-87.

136. The example is based on, and combines, an example given by Berman, *supra* note 10, at 815-16, and an example provided by Katz, *supra* note 6, at 1578.

137. Smith, *supra* note 20, at 880. Smith also replies that insufficient time exists prior to the disclosure for the victim to take any illegal self-help measures. *Id.* at 879. But what if there was enough time?

138. See Berman, *supra* note 10, at 816 n.67 (making a similar criticism of Epstein's theory).

139. Smith claims that his theory satisfactorily distinguishes blackmail from permissible transactions like the Baseball Example, see *supra* text accompanying note 59, for several reasons. First, because the baseball dealer is not using the victim's shame to his advantage and secrecy is not a factor, the victim can feel free to complain about the transaction and bring societal pressure to bear on the dealer. See Smith, *supra* note 20, at 912. But just as shame and secrecy may preclude the blackmail victim from complaining, fear that the dealer may refuse to sell or continue renting the baseball (which is a unique product under the terms of the hypothetical) out of spite may also prevent the father from complaining. Second, unlike with blackmail, in the Baseball Example "the transaction will be above board and so any illegal consequences will be more likely to be visible to the law." *Id.* But this begs the question of whether blackmail *should* be illegal. If blackmail was legal, then just as in the Baseball Example any illegal consequences would also be visible to the law. Here, Smith's argument actually supports the decriminalization of blackmail. Third, in the Baseball Example, the father has a broader and less harmful range of options; the blackmail victim will "be tempted to take more extreme measures." *Id.* at 912-13. But the blackmail victim's motive of avoiding the shame of disclosure may be less powerful

## B. NONCONSEQUENTIALIST

Nonconsequentialist theories of blackmail insist that consequentialist theories, even apart from their internal defects, fail to account for our intuitions that, quite apart from any undesirable consequences, blackmail is inherently wrong.<sup>140</sup> Even the economist Ronald Coase refers to blackmail as “moral murder” and “the foulest of crimes.”<sup>141</sup> As Jeffrie Murphy observes, consequentialist concerns are unnecessary in deciding that “‘Give me your money or I will shoot you’ is intolerable whereas ‘Give me your money (a fair amount) or I will not sell you my automobile’ is acceptable.”<sup>142</sup> An “intrinsic difference of principle” distinguishes them: “the former involves a threat to do something I have no right to do, whereas the latter does not.”<sup>143</sup> While nonconsequentialist theories have sought such an intrinsic difference of principle, Murphy concludes that “we have found nothing comparable for our blackmail problem.”<sup>144</sup> First, Murphy rejects coercion as the distinguishing feature of blackmail.<sup>145</sup> Though taking money through illegitimate threats is paradigmatically coercive, blackmail being coercive is problematic, because the illegitimacy of the threat is unclear.<sup>146</sup> Typically, the threatened act in blackmail is lawful. Murphy next dismisses privacy concerns.<sup>147</sup> Since the blackmailer has a right to actually disclose the embarrassing information, merely threatening to disclose the information unless money is paid is no more (and most likely less) a violation of the victim’s privacy than what the blackmailer has a right to do. And finally, blackmail as constituting a harm is rejected.<sup>148</sup> Even if blackmail constitutes a harm, it is unclear that blackmail constitutes an impermissible harm—not all harms are criminally prohibited.

There are two principal nonconsequentialist approaches. First, despite widespread agreement that neither the demand nor threat component alone is illegal or immoral, efforts have been made to locate the wrong of blackmail in one or the other of these components.<sup>149</sup> Second, through the combination or synergy of the components the wrong emerges—the whole is greater than the sum of its

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than the father’s motive of sustaining his son’s life. As a result, the blackmailee may be less likely to use illegal self-help than the father. What would not each of us do to sustain our son’s life?

140. Even some consequentialists find the consequentialist arguments attempting to justify blackmail’s criminalization to be inadequate. See Coase, *supra* note 3, at 674 (acknowledging that the argument that blackmail should be prohibited because of its misallocation of resources “does not explain why there is such general support for making blackmail not merely illegal, but a crime. After all, in public life we often observe great tolerance of, and indeed encouragement for, policies which waste resources on a grand scale.”).

141. *Id.* at 674–75.

142. Murphy, *supra* note 6, at 163.

143. *Id.*

144. *Id.*

145. *Id.* at 156–58.

146. For a more expansive discussion as to whether blackmail is coercive, see *infra* Part I.B.2.d.

147. Murphy, *supra* note 6, at 159–60.

148. *Id.* at 160–62.

149. See *infra* Part I.B.1.



parts.<sup>150</sup>

### 1. Wrong of Blackmail in One of Its Components

*a. Unlawful Threatened Acts.* Under Joel Feinberg's account, the justifiability of blackmail's prohibition must be a function of the impermissibility of the act threatened. For threatened acts that *could* be, or *ought* to be, the basis for a crime or tort, blackmail is properly criminalized.<sup>151</sup> But in the canonical case where the threatened act is permissible—for example, to reveal sexual indiscretions including adultery<sup>152</sup>—Feinberg concludes blackmail should be decriminalized.<sup>153</sup> According to Feinberg, the coherence of our criminal law can be maintained by either (i) criminalizing the threatened act of disclosure of the adultery and continuing to criminalize blackmail, or (ii) continuing to treat such disclosures as lawful and decriminalizing blackmail.<sup>154</sup> Feinberg rejects the first option, because we cannot “on liberal grounds” criminalize such disclosures, and “they do not wrongfully harm anyone.”<sup>155</sup> The only remaining option requires decriminalizing that type of blackmail.<sup>156</sup>

Commentators assessing Feinberg's self-termed “radical conclusion”<sup>157</sup> that the canonical case of blackmail should be decriminalized have termed it “startling”<sup>158</sup> and “a rather astonishing concession.”<sup>159</sup> In trying to rehabilitate Feinberg's argument to show that adultery blackmail's prohibition is justified,<sup>160</sup> Michael Gorr contends that only “practical and epistemic difficulties” preclude us from viewing the unconditional threat of disclosure (or offer of concealment) as morally and legally wrong.<sup>161</sup> But according to Gorr these same difficulties do not prevent prohibiting *conditional* proposals, because they either “offer[] to conceal what ought morally to be disclosed or . . . threaten[] to disclose what ought morally to be concealed.”<sup>162</sup>

Gorr's solution is problematic because his central premise that either disclos-

150. See *infra* Part I.B.2.

151. FEINBERG, *supra* note 1, at 258 (arguing that blackmail proposals threatening such acts are properly criminalized because “they threaten to do what is contrary either to the criminal law or to the civil law, or to what *ought* to be forbidden by a legal rule of one kind or another”).

152. See *id.* at 246 (“With the possible exception of homosexuality, more people have been blackmailed for marital infidelity than for any other reason.”).

153. *Id.* at 275.

154. *Id.* at 246.

155. *Id.*

156. *Id.*

157. *Id.* at 275.

158. Berman, *supra* note 10, at 821. Berman, however, fails to level any specific criticism against Feinberg's “startling” conclusion. See *id.*

159. Gorr, *supra* note 16, at 50. Gorr further comments that “[p]reviously only libertarians even more radical than Robert Nozick and Richard Epstein (both of whom generally *support* prohibiting blackmail in such cases) have been willing to defend such a view.” *Id.* (footnote omitted).

160. For a critique of Feinberg's approach as both underinclusive and overinclusive, see Katz, *supra* note 6, at 1580.

161. Gorr, *supra* note 16, at 56–57.

162. *Id.*

ing or concealing the information is the morally obligatory course of action<sup>163</sup> is unconvincing.<sup>164</sup> In many cases, neither disclosure nor concealment is required.<sup>165</sup> Rather, both disclosure and concealment may be permissible but not obligatory. For example, as a friend to a cuckolded spouse, it is morally permissible to disclose the other's spouse's infidelity. It is also permissible to refrain from disclosing the infidelity. But neither course of action is morally obligatory.

*b. Immoral Threatened Acts.* In contrast to Feinberg's account that the impermissibility of blackmail is a function of the impermissibility of the threatened act, Leo Katz argues that the wrong of blackmail inheres in the immorality of the attempt to acquire the victim's money.<sup>166</sup> According to Katz, "when the defendant has the victim choose between either of two immoralities which he must endure, the gravity of the defendant's wrongdoing is to be judged by what he actually did (or sought to achieve), not by what he threatened to do."<sup>167</sup> So also, the criminal law properly punishes the blackmailer based not on the minor immorality of what he threatened to do (for example, disclose the information),<sup>168</sup> but on the major immorality of what he sought to do (take the victim's money without the owner's consent).<sup>169</sup> In Katz's view, then, blackmail is a form of robbery or theft.<sup>170</sup>

The standard criticism is that Katz merely asserts, without demonstrating, the immorality of the threatened act.<sup>171</sup> Another difficulty is that Katz again seems to merely assert, without demonstrating, the immorality of the blackmailer "taking"<sup>172</sup> the blackmailee's money. That the blackmailer commits a theft is

163. *Id.*

164. Even if there was such a duty to disclose or not disclose, the wrong of violating the duty may not entirely explain what is considered the wrong of blackmail. As Scott Altman notes, the duty to disclose or conceal is often owed not to the blackmail victim but to a third party or perhaps the general public. But it is widely thought that the central wrong of blackmail is to the victim and not a third party. See Altman, *supra* note 51, at 1652; see also *infra* Part I.B.2.c.

165. Altman, *supra* note 51, at 1652 (noting that "revelation is sometimes permissible and nonmandatory" and Gorr's approach requires a "controversial commitment to the pervasiveness of obligations"); Berman, *supra* note 10, at 822 (terming Gorr's assumption that either disclosure or concealment of the information is morally obligatory as "dubious").

166. Katz, *supra* note 6, at 1598, 1615.

167. *Id.* at 1598.

168. *Id.* at 1582-98.

169. *Id.* at 1599.

170. *Id.*

171. See, e.g., Gergen, *supra* note 51, at 890 ("[T]he boundary of blackmail turns on a moral judgment or intuition that Katz does not try to justify within his theory of blackmail."); Lindgren, *supra* note 2, at 1977 ("[Katz] merely assumes away the paradox, which is in part that often what the blackmailer threatens to do is a moral right."); Julie Turner, Book Note, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* by Leo Katz, 84 CAL. L. REV. 1492, 1494-95 (1996) ("Katz seems to assume what he seeks to prove, namely that the paradox of blackmail can be resolved to find a crime because the act of blackmail is a crime.").

172. Katz, *supra* note 6, at 1599 (arguing that a blackmailer's goal is to "take money without the owner's consent").

based on the claim that the blackmailee is not consenting to the payment. Yet it is unclear how the threat of a mere “minor immorality”<sup>173</sup> is sufficient to negate the blackmailee’s consent.

None of the above accounts of blackmail successfully demonstrates that one of the components of a paradigmatic blackmail proposal is independently immoral or illegal. The next section considers attempts to justify blackmail’s prohibition, not through locating an independent wrong in one of the components of the proposal, but through the synergistic effect of the combination of the components.

## 2. Wrong of Blackmail in the Combination of Components

*a. Relations of Domination.* Ronald Coase and George Fletcher argue that by making the victim susceptible to repeated blackmail demands (after the victim has initially paid), the blackmailer commits “moral murder”<sup>174</sup> and reduces the blackmail victim to “a permanently subordinate position.”<sup>175</sup> The blackmailer effecting a state of domination over the victim is properly within the law’s ambit to counteract.<sup>176</sup> As Fletcher notes, his focus on the domination stemming from the prospect of repeated demands neatly accounts for why the transaction in the Baseball Example is permissible.<sup>177</sup> The father avoids being subjugated, because once the baseball is purchased, the dealer cannot effect a state of domination by making repeated demands.<sup>178</sup> But Fletcher’s account is overinclusive by supporting the criminalization of a variation on the Baseball Example, in which the dealer is only willing to rent the baseball<sup>179</sup> on a daily basis and makes escalating (and exorbitant) rental demands. Because the dealer effects a relation of domination over the father, Fletcher’s approach cannot explain that transaction’s permissibility.<sup>180</sup> Coase’s and Fletcher’s accounts are also underinclusive in failing to explain the wrong of a single, nonrepetitive instance of blackmail.<sup>181</sup>

173. *Id.* at 1598.

174. Coase, *supra* note 3, at 675 (“[I]n the ordinary blackmail case there is no end. The victim, once he succumbs to the blackmailer, remains in his grip for an indefinite period.”).

175. Fletcher, *supra* note 13, at 1626.

176. *Id.* at 1626–29.

177. *Id.* at 1627 (asserting that this domination/subordination “theory proves its mettle in neatly accounting for why a tough one-shot transaction cannot be considered criminal blackmail”).

178. *Id.* at 1627 (“Once the parent purchases the baseball, the seller . . . can demand nothing further. In no sense does the parent place herself in ongoing subordination to the seller, and there is thus no criminal wrong in demanding an exorbitant price for the baseball.”).

179. See Mack, *supra* note 21, at 273 (supplying a variation on the Baseball Example in which the baseball is rented rather than purchased).

180. If the impossibility of repeated demands precludes a state of domination from arising, then the continued repetition of the rental fee suffices for a relationship of domination to arise and thereby constitutes blackmail under Fletcher’s theory. See Smith, *supra* note 20, at 889 (critiquing Fletcher’s account on a similar basis).

181. See Fletcher, *supra* note 13, at 1626, 1637–38 (acknowledging this criticism). In addition, blackmailers may be foreclosed from effectively making repeated demands. See Berman, *supra* note 10,

Even if blackmailers' domination of victims was a sufficient account of blackmail's criminalization, victims might be better protected through decriminalization of blackmail. If decriminalized, a blackmail contract would be enforceable, the blackmailer's promise of concealment would be binding, and breaches would be remediable.<sup>182</sup> Therefore, a blackmailer would not be able to disclose the information, after the blackmailee paid once and refused a second demand for payment, without sustaining civil liability for breach of contract.<sup>183</sup>

*b. Evidence of Bad Motive.* Mitchell Berman has recently argued that blackmail harms, or threatens to harm, the victim and that utterance of the proposal evidences the blackmailer's bad motive or mens rea. Berman contends that but for First Amendment concerns and the difficulties of ascertaining motive, disclosures of embarrassing information might well be criminalized as legally cognizable harms.<sup>184</sup> As Berman explains, "blackmail is a conditional threat to perform a legal but harmful act under circumstances where the threat itself provides reason for making the act [of disclosure] criminal by suggesting that the actor would be inflicting harm knowingly and without good motives."<sup>185</sup> As a result, the prohibition of blackmail fits easily within the criminal law's province of prohibiting ill-motivated harms.<sup>186</sup>

There are a number of difficulties with Berman's approach. First, while it is clear that blackmail can, as Berman asserts, harm the victim, Berman's approach fails to establish that it constitutes an impermissible harm. In the Baseball Example, by threatening to not sell the baseball unless an exorbitant price is paid, the dealer harms the father financially. The harm is deemed permissible, however, because the father does not have a right to obtain the baseball at any particular price. Though harmed, the father does not have a right not to be harmed in that way. As Murphy explains, "a moral concept (*a right*) is required for the explication of the concept of harm. Thus it is this concept (*a*

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at 825 (supplying an example of a judicial nominee on the eve of Senate confirmation threatened with disclosure of an indiscretion that the nominee does not fear being disclosed after the confirmation vote); Smith, *supra* note 20, at 889 (offering an example of a victim threatened with disclosure of an embarrassing "nonreproducible and decaying photograph" but with little potential that the demand will be repeated, because the photograph is about to completely decompose).

182. Mack, *supra* note 21, at 284 n.13 ("Decriminalization would, incidentally, allow for the legal enforcement of contracts binding the blackmailer to silence. Thus, the blackmailer would no longer be able to sell his silence, 'again, and again, and again—endlessly.'" (quoting Murphy, *supra* note 6, at 166)); Owens, *supra* note 6, at 509 (discussing enforcement of blackmail contracts). Owens explains how victims would benefit by decriminalizing blackmail: "If such contracts were legally recognized, then any breach of the contract by the blackmailer would be followed by compensation for the blackmailee." *Id.*

183. For other criticisms of Fletcher's theory, see Fletcher, *supra* note 13, at 1635 & n.45 (conceding that domination is not always a sufficient condition for criminalizing conduct); Lindgren, *supra* note 2, at 1978 (noting that Fletcher's theory fails to distinguish between permissible and impermissible relations of domination).

184. Berman, *supra* note 10, at 851.

185. *Id.* at 848 (footnote omitted).

186. *Id.*

*right*) which must be at the center of attention.”<sup>187</sup> Thus the father is not harmed “in the morally loaded sense.”<sup>188</sup> Similarly, though a blackmail victim may be harmed by the disclosure, no right of the blackmailee is violated by being harmed in that way. Or, alternatively, a legally cognizable harm must not merely be a harm but a wrongful, impermissible, or rights-violating harm.<sup>189</sup> Because a blackmailer, the press, and others may have the right to disclose the truthful but harmful information,<sup>190</sup> the blackmail victim is harmed but is not *wrongfully* harmed.

Second, Berman’s account fails to distinguish blackmail from permissible transactions. In attempting to distinguish blackmail from a hard, but permissible, bargain, similar to the Baseball Example, Berman contends that the seller does not cause harm, because the purchaser has no legally protected interest in the item and thus the dealer cannot cause any “legally cognizable harm.”<sup>191</sup> But by this same reasoning, the blackmailer threatening a legal act, albeit one which may cause harm, is neither threatening nor causing any “legally cognizable harm.”<sup>192</sup>

Third, Berman’s rationale is underinclusive in failing to explain why blackmail for good motives is nonetheless punished. Think of a Robin Hood of blackmailers.<sup>193</sup> Blackmail may also involve mixed motives. For example, Max

187. Murphy, *supra* note 6, at 161.

188. *Id.* at 162.

189. See Lindgren, *supra* note 2, at 1981 (“[I]f one takes the standard idea that the criminal law is based on harm plus wrongful intent, I think that whether something counts as harm often turns on whether it’s wrong.”); see also Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1661–85 (1992) (distinguishing between harms and wrongs); Lamond, *supra* note 43, at 237 (distinguishing between harm and wrongful harm). For a critique of Berman’s account of harm, see Scalise, *supra* note 21, at 1493 (“Berman’s conception of ‘harm,’ however, is very broad, and it is applied in an ad hoc fashion.”).

190. See Murphy, *supra* note 6, at 162 (“[T]he fact that (e.g.) the press may reveal that you have performed acts of type *Y* [which are inconsistent with your good reputation] shows that your right to a good reputation is, at most, a fairly weak right.”).

191. Berman, *supra* note 10, at 856.

192. See Smith, *supra* note 20, at 886 (contending that the immediate harm to the blackmail victim can neither explain blackmail’s criminalization nor account for the distinction between the Baseball Example and blackmail).

193. Perhaps the prohibition against blackmail has flourished to prevent just such class-based wealth redistributions:

[T]he crime of blackmail is one which is so threatening, such a cause of anxiety (and consequently gets such enormous sentences) because it is a crime of empowerment by the powerless which disrupts and transgresses normal power relationships in a way which is far more serious (since it lingers) than a short act of violence. . . . The argument would be that blackmail is a crime to protect a particular class (people with money, who care about their reputations) from those from whom in the normal course of events their privileged position makes them immune. That is why it is so threatening and that is why it gets such heavy sentences.

Alldrige, *supra* note 4, at 373; see Murphy, *supra* note 6, at 167 n.1 (observing that blackmail “was originally perceived in class terms: the crime of a lower order person against a gentleman”); Smilansky, *supra* note 43, at 118–19 (“Part of the explanation for the perplexing attitude of common-sense morality on this issue is probably cynical, e.g. that the thought of being blackmailed in the ordinary

was a mean-spirited gossip who (unconditionally) disclosed true but embarrassing information causing much suffering among the victims of his gossip. A newspaper then hires Max to stop disclosing it for free and to publish it in the newspaper. Subsequently learning of the great suffering he was causing, Max would sometimes offer to not publish the gossip if the subject of the gossip would pay him the same amount as the newspaper. Everyone to whom Max made the offer was happy for receiving it and paid him. Max was then arrested for blackmail.<sup>194</sup> The difficulty this presents for Berman's emphasis on motive is that Max's motive is worst while his conduct is perfectly legal (spreading gossip for free or selling it to the newspaper). It is only when his motive is, in part, compassion for the victim of the gossip that his conduct become illegal, that is, blackmail.<sup>195</sup> Bad motive hardly seems to be the key to explaining blackmail's prohibition if threats involving mixed motives and good motives nonetheless constitute blackmail.

*c. Use of Another's Bargaining Chips.* James Lindgren's much-discussed account describes blackmailers as threatening "victims with harm and us[ing] other people's leverage for their own gain. While neither may always be wrong in itself, the combination is wrong."<sup>196</sup> Lindgren explains that the "blackmailer attempts to gain an advantage in return for suppressing someone else's actual or potential interest. The blackmailer is negotiating for his own gain with someone else's leverage or bargaining chips."<sup>197</sup> For example, a blackmailer seeking money from an adulterer upon penalty of disclosure to the adulterer's spouse is employing leverage not of his own but the information interests or bargaining chips of the adulterer's spouse.<sup>198</sup>

Lindgren's theory has provoked substantial criticism. First, as Lindgren acknowledges, why the use of someone else's bargaining chips is unlawful or criminal is not fully explained.<sup>199</sup> Moreover, even if the use of someone else's chips is immoral or criminal, Lindgren fails to account for how someone comes to acquire this leverage or bargaining chip apart from the effect of blackmail's criminalization.<sup>200</sup> Second, Lindgren's approach is underinclusive in accounting

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ways is frightening to the rich and powerful in society, who may be less concerned with [hard economic bargains] . . .").

194. Smilansky, *supra* note 43, at 116–17 (supplying the example).

195. *See id.* at 118.

196. Lindgren, *supra* note 2, at 1988.

197. Lindgren, *supra* note 1, at 702.

198. *See* Lindgren, *supra* note 2, at 1977–78.

199. *Id.* at 1988 (conceding that while his account is descriptively accurate, it is normatively weak). For similar criticisms of Lindgren's theory, see, for example, Berman, *supra* note 10, at 823–24 ("[I]ts normative appeal is extremely weak . . . because he provides no reason why using someone else's leverage for individual gain should be unlawful, let alone criminal."); and Hardin, *supra* note 23, at 1792 ("The chief weakness in Lindgren's claim is that he simply posits the chip argument as inherently moral. Perhaps it is. But the argument lacks demonstration in some moral theory.").

200. Isenbergh, *supra* note 1, at 1917–18 ("[Lindgren's] theory of blackmail starts by finding existing leverage in C[, a third party], but does not account for how or why it is there. What, beyond the

for examples which would seem to constitute blackmail despite the absence of misappropriation of another's bargaining chips: "Pay me \$10,000—or I will cause bad blood at our club, seduce your fiancé, persuade your son to enlist, give your daughter a motorcycle, or leave the Catholic Church."<sup>201</sup> And third, in some instances of blackmail there is no third party, and thus there are no chips to be leveraged.<sup>202</sup>

*d. Coercion.* As Jeffrie Murphy has noted, "coercion of one citizen by another is the very thing which it is the criminal law's primary job to prevent."<sup>203</sup> If coercion<sup>204</sup> is *prima facie* wrongful and if blackmail proposals are coercive, there is ample justification for blackmail's criminalization.<sup>205</sup> The focus has been on closing the gap between the "plain vanilla"<sup>206</sup> coercion in obviously coercive offenses such as robbery and the more subtle coercion, if any, in blackmail.<sup>207</sup> The gap is that while the robber threatens an unlawful act, the blackmailer threatens a lawful act.<sup>208</sup> According to Lindgren, what is needed, but is lacking, is a broader theory of coercion which could accommodate

prohibition of blackmail itself, gives C leverage that C would not otherwise have with respect to information concerning A[, the blackmailee]?"

201. Katz, *supra* note 6, at 1581 ("In none of these cases is it easy to see in what sense the perpetrator is playing with someone else's bargaining chips."); see Berman, *supra* note 10, at 823 n.93 ("Consider, for example, a threat by Nazis to march in Skokie unless the town's residents buy them off with a large cash payment. I assume that this is blackmail. If so, the Nazis are merely leveraging their own constitutional rights . . .").

202. See Lamond, *supra* note 43, at 235 ("[Lindgren's] analysis is unable to account for cases where no third party is involved, for instance where *P* proposes to do something to herself (such as commit suicide) . . ."). For a variety of other criticisms of Lindgren's approach, see FEINBERG, *supra* note 1, at 365 n.68; Block & Gordon, *supra* note 21, at 51–54; Brown, *supra* note 135, at 1965–66; DeLong, *supra* note 43, at 1681; Fletcher, *supra* note 13, at 1624–26; Smith, *supra* note 20, at 885–87.

203. Murphy, *supra* note 6, at 156.

204. Whether certain conduct or speech is sufficient to constitute coercion or impermissible coercion may depend on the specific means used in the coercion and what the person is coerced into doing. Generally, but not always, it is thought that threats, but not offers, are eligible to be coercive. This is because threats are generally defined as restricting a person's options or opportunities; in contrast, offers expand a person's options and opportunities. For general accounts of coercion, see Peter Westen, "Freedom and Coercion"—*Virtue Words and Vice Words*, 1895 *Duke L.J.* 541 (1985); 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 191–268 (1986); WERTHEIMER, *supra* note 54; Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45 (2002). For a comprehensive typology distinguishing coercive threats from related proposals, see Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 *Nw. U. L. Rev.* 1081, 1095–1102 (1983).

205. See Berman, *supra* note 10, at 831.

206. Leo Katz's helpful term "[p]lain [v]anilla' coercion" refers to the type of straightforward, uncontroversial coercion ascribed to offenses, such as robbery and extortion, that threaten unlawful acts. Katz, *supra* note 6, at 1574.

207. See *id.* at 1576 ("A number of scholars have offered ingenious suggestions seeking to supply the missing link between standard cases of coercion and blackmail.").

208. Katz explains how robbery is clearly coercive, but blackmail is not:

The robber coerces because he offers to sell you back what he has first unlawfully taken from you—the chance to go on living.

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... Not so the blackmailer threatening to disclose the victim's infidelity. The victim doesn't

blackmail.<sup>209</sup> But if existing approaches to coercion are underinclusive in failing to identify the coerciveness in blackmail,<sup>210</sup> broadening our conception of coercion to accommodate blackmail runs the risk of being overinclusive by construing hard, but permissible, bargains (like the Baseball Example) as coercive. As Jennifer Brown observes, “[t]hat the blackmailee may be faced with a hard choice . . . does not necessarily make the blackmail any more coercive than the choice facing many parties to wholly legitimate economic transactions.”<sup>211</sup> If blackmail’s prohibition is to rest on coercion, then what is needed (but which is lacking) is an account of coercion that includes blackmail as coercive but excludes permissible economic transactions.<sup>212</sup>

Though nonconsequentialist approaches insist that consequentialist explanations of blackmail are inadequate because blackmail is intrinsically—rather than instrumentally—wrong, nonconsequentialist accounts have similarly failed to satisfactorily explain blackmail. Nonconsequentialist theories have failed to (i) find an individual component which is, or should be, immoral or criminal, and (ii) explicate how independently permissible components have a synergistic or combinatorial effect of impermissibility.

## II. META-BLACKMAIL AS MORE SERIOUS THAN BLACKMAIL

Because, as was seen in Part I, none of the existing theories and accounts of blackmail address the phenomenon of meta-blackmail, or proposals threatening blackmail, the next three parts undertake a comparative assessment of blackmail and meta-blackmail. The three logically possible approaches consider whether meta-blackmail is a more serious, equivalent, or less serious level of criminality.<sup>213</sup> At considerable risk of oversimplification, proponents of consequentialist

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own the right to control the blackmailer’s communications with his wife; the blackmailer does. The blackmailer, unlike the robber, is selling something he owns.

*Id.* at 1574, 1576 (footnotes omitted). Katz, however, subsequently hints that blackmail might be coercive. *See id.* at 1599; *see also* Smith, *supra* note 20, at 888–89 (interpreting Katz’s theory as based on coercion, Smith argues that it fails to distinguish between permissible and impermissible coercion and thus cannot distinguish the permissibility of the Baseball Example from the impermissibility of blackmail).

209. *See* Lindgren, *supra* note 2, at 1986 (“Either blackmail isn’t coercive or most of the traditional definitions of coercion are too narrow. I choose the latter.”).

210. For notable attempts to establish blackmail as coercive, see WERTHEIMER, *supra* note 54, at 102–03, 219 (conceding that his account fails to establish blackmail as coercive); and Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440, 452 & n.34 (Sidney Morgenbesser et al. eds., 1969) (failing to reach a conclusion as to whether blackmail is coercive).

211. Brown, *supra* note 135, at 1950 n.32.

212. *See* Lindgren, *supra* note 2, at 1989 (“Perhaps a better understanding of coercion would unravel the mysteries of blackmail—or a better understanding of blackmail would unravel the mysteries of coercion.”).

213. One might argue that there is a fourth logically possible outcome of the comparison: meta-blackmail is not a crime at all. This possible outcome, however, is assumed to be encompassed within the third possible outcome—that meta-blackmail is a less serious level of criminality than conventional blackmail. That is, if meta-blackmail is not a criminal offense then it constitutes a less serious level of



accounts of blackmail will tend to favor the functionalist approach of treating meta-blackmail and conventional blackmail as equivalent.<sup>214</sup> Proponents of nonconsequentialist accounts of blackmail will tend to favor either the formalist approach of treating meta-blackmail as more serious or the substantivist approach of treating meta-blackmail as less serious.<sup>215</sup> Though each of the three approaches is plausible when considered individually, none of the approaches is plausible when considered jointly due to each approach's conflict with the other approaches.

#### A. THE FORMALIST APPROACH

The formalist approach focuses on the formal feature differentiating meta-blackmail and conventional blackmail.<sup>216</sup> Because meta-blackmail threatens an

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criminality than conventional blackmail. Another possible basis for questioning whether there are only three logically possible outcomes occurs when the meta-blackmail proposal and conventional blackmail proposal differ on a basis other than the threatened act. This objection can be neutralized by specifying that for any given conventional blackmail proposal and its *corresponding* meta-blackmail proposal (in other words, the only difference between the two proposals is the threatened act), there are only three logically possible outcomes as to the comparative assessment of their level of criminality.

214. See Pildes, *supra* note 36, at 609 & n.7 (equating consequentialism and law-and-economics scholarship with functionalism); see also Larry Alexander, "With Me, It's All er Nuthin'": Formalism in Law and Morality, 66 U. CHI. L. REV. 530, 556 (1999) ("No one disputes that consequentialist moralities . . . are nonformalistic.").

215. Compare Alexander, *supra* note 214, at 560 (explaining nonconsequentialism as substantive), with Leo Katz, *Form and Substance in Law and Morality*, 66 U. CHI. L. REV. 566, 570 (1999) (describing nonconsequentialism as "both substantive and formalistic").

216. Katz contends that the particular form or "path" of a transaction or some conduct may be crucial in determining its permissibility or impermissibility. Katz, *supra* note 6, at 1604–05. To demonstrate the significance of the form of the conduct in determining its permissibility, Katz considers two hypotheticals made famous by Judith Jarvis Thomson. In the first, the "trolley case," the brakes of a trolley fail and the driver has the choice of continuing on the present track where five people will be killed by the runaway trolley or the driver can turn onto another track where only one person will be killed. Most agree the trolley driver may permissibly turn the trolley onto the other track where only one will be killed. Here it is permissible (and preferable) to kill the one to save the five. But in the second case, the "transplant case," a surgeon has five patients who are about to die for lack of transplant organs unless an innocent, perfectly healthy patient's organs are extracted. In this second case most agree that the one should not be killed to save the five. Katz suggests that our intuitions on whether to kill the one innocent to save the five differ in the two cases because of the different form of each case. Thus in determining the permissibility of conduct or a transaction, "a lot can turn on form." *Id.* at 1605. For Thomson's comparison of the two cases, see Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, in RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 78, 80–93 (William Parent ed., 1986). For the first discussion of these cases, see PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 23–24 (Clarendon Press 2002) (1978).

The form of the blackmail transaction may be crucial in determining whether the transaction is permissible or criminal. For example, if Blackmailer merely shows Victim pictures of Victim engaging in adultery, *unconditionally* threatens to disclose them and Victim *offers* to pay for their nondisclosure, Blackmailer perhaps would not be guilty of blackmail or any crime whatsoever. But, of course, something like blackmail has nonetheless occurred. See, e.g., KATZ, *supra* note 1, at 169–71; Berman, *supra* note 10, at 867–70. *But cf.* Larry Alexander, *Is Morality Like the Tax Code?*, 95 MICH. L. REV. 1839, 1843–44 (1997) (reviewing KATZ, *supra* note 1) (suggesting that a similar transaction might constitute the criminal offense of blackmail). This is sometimes referred to as the "second paradox": why are blackmailer-initiated offers of concealment for money unlawful and blackmailee-initiated

unlawful act and conventional blackmail threatens a lawful act, meta-blackmail should be treated as a more serious level of criminality than conventional blackmail. This formal difference in the status of each proposal's threatened act allows meta-blackmail to be more easily justified (in a technical sense) as criminal,<sup>217</sup> to constitute the greater crime of robbery, and to be clearly coercive.

### 1. Meta-Blackmail as Robbery

Under some statutory formulations, meta-blackmail qualifies as the offense of robbery, a comparatively more serious offense than conventional blackmail. For example, the California statutory scheme defines robbery as a "felonious taking . . . accomplished by means of force or fear."<sup>218</sup> The "felonious taking" component is satisfied by "a specific intent to permanently deprive the victim of the property."<sup>219</sup> The requisite fear is "[t]he fear of an *unlawful* injury to the person or property of the person robbed."<sup>220</sup> Injury to property is best understood as "the incurring of a pecuniary loss."<sup>221</sup> By threatening to commit the unlawful act of blackmail, meta-blackmail places the recipient in fear of an unlawful

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offers of money for concealment lawful? See DeLong, *supra* note 43, at 1664–65 (terming the latter a "legal 'bribe'"). For a magisterial account of the law and history of bribes, see JOHN T. NOONAN, JR., *BRIBES* (1984). What is the difference? In both, the blackmailee exchanges money for the blackmailer's concealment of the information. Other than their different forms, there is no widely accepted, principled reason to account for the different legal status of the two proposals. For the view that the inability to satisfactorily distinguish the blackmailer-initiated transaction from the blackmailee-initiated transaction supports decriminalization of blackmail, see MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 125 (1998). For the view that the "second paradox" should not be resolved by criminalizing blackmailee-initiated exchanges, see Kathryn H. Christopher, *Toward a Resolution of Blackmail's Second Paradox*, 37 *ARIZ. ST. L.J.* (forthcoming 2006).

To further support the significance of the form or path of the conduct or transaction, Katz offers the following fascinating hypothetical:

[Anatole steals] a sack of money from a bank, containing \$100,000. . . . He sends the bank a note which reads: Promise to pay me a reward of ten percent for the money I shall be returning, or else you will see none of it ever again. The bank is only too happy to agree. . . . Under my analysis, he would now be guilty of the blackmail of \$10,000, in addition to the theft of the \$100,000. The reason that is apt to seem strange is this: Imagine that rather than asking for a ten percent commission, Anatole had simply removed \$10,000 from the bag, and returned \$90,000 to the bank. Now he would be guilty only of the theft, and quite possibly would have his guilt mitigated by the partial return of the money. The fact that he got \$10,000 out of it would not be considered to aggravate his guilt. How can the result be different if he returns the money in exchange for \$10,000, when in the end it really comes to the same thing?

Katz, *supra* note 6, at 1603–04. For Katz, the answer is that the permissibility or blameworthiness of two functionally equivalent transactions or courses of action may vary for no other reason than the particular forms they take.

217. See *supra* notes 27, 29–30 and *infra* Part V.B.

218. CAL. PENAL CODE § 211 (West 1999).

219. *People v. Torres*, 39 Cal. Rptr. 2d 103, 110 (Cal. Ct. App. 1995).

220. CAL. PENAL CODE § 212 (West 1999) (emphasis added).

221. See Note, *A Rationale of the Law of Aggravated Theft*, 54 *COLUM. L. REV.* 84, 90 (1954). The Note further explains that despite the lack of case law, "[c]learly within the ban are threats to commit acts independently criminal . . ." *Id.* at 91.

injury to his property—namely, the pecuniary loss entailed by paying the demanded sum. If the recipient of meta-blackmail fails to make the demanded payment, meta-blackmail would constitute attempted robbery which is classified as second-degree robbery.<sup>222</sup> If the recipient makes the demanded payment, then meta-blackmail might even constitute first-degree robbery.<sup>223</sup> Because the threatened act in conventional blackmail—disclosure of the secret—is not unlawful, conventional blackmail fails to place the recipient in fear of an unlawful injury. Therefore, conventional blackmail fails to constitute any type of robbery under the California statutory scheme. That meta-blackmail may constitute robbery, but conventional blackmail does not, is also true in a number of other jurisdictions.<sup>224</sup>

## 2. Meta-Blackmail as Coercive

Meta-blackmail shares the “plain vanilla” coerciveness<sup>225</sup> of unproblematically coercive offenses such as robbery because it threatens an unlawful act.

222. California sets out the following degrees of robbery and their respective punishments:

(a) Robbery is punishable as follows:

(1) Robbery of the first degree . . .

(2) Robbery of the second degree is punishable by imprisonment in the state prison for two, three, or five years.

(b) [A]ttempted robbery in violation of paragraph (2) of subdivision (a) is punishable by imprisonment in the state prison.

CAL. PENAL CODE § 213 (West 1999); *see also id.* § 212.5(c) (“All kinds of robbery other than those listed in subdivisions (a) and (b) are of the second degree.”). Thus, the mere utterance of meta-blackmail, even if the recipient did not make the demanded payment, would constitute second-degree robbery.

223. For example, if the meta-blackmail transaction takes place inside an “inhabited dwelling house,” it could constitute first-degree robbery. *See id.* § 212.5.

224. *See, e.g.,* IDAHO CODE ANN. § 18-6501 (2004) (defining robbery as a “felonious taking . . . accomplished by means of force or fear”); *id.* § 18-6502 (defining the requisite fear as “fear of an unlawful injury to the person or property of the person robbed”); OKLA. STAT. ANN. tit. 21, § 791 (West 2002) (defining robbery as a “wrongful taking . . . accomplished by means of force or fear”); *id.* § 794 (defining the requisite fear as “fear of an unlawful injury . . . to the person or property of the person robbed”). Both the Idaho and Oklahoma robbery statutes are similar to California’s robbery provisions. And under these statutes, the presence of a threat to commit an unlawful act in meta-blackmail would qualify meta-blackmail as robbery. The absence of a threat to commit an unlawful act in conventional blackmail would disqualify conventional blackmail as constituting robbery.

Examination of Montana statutes reaches the same result—meta-blackmail, but not conventional blackmail, constituting the offense of robbery—but in a different way. *See* MONT. CODE ANN. §§ 45-5-401(1), (1)(c) (2003) (defining robbery as “in the course of committing a theft, the person . . . commits or threatens immediately to commit any felony other than theft”); *id.* §§ 45-5-203(1), (1)(c) (defining the felony offense of Intimidation as a “threat to perform without lawful authority any felony”). Because meta-blackmail threatens to commit the act of blackmail, which may be classified as the nontheft felony offense of Intimidation, meta-blackmail may qualify as robbery. In contrast, conventional blackmail would fail to qualify as robbery in Montana because the threatened act of disclosure of a secret is neither a felony nor unlawful.

225. For a discussion of coercion, see *supra* Part I.B.2.d. For further discussion of “plain vanilla” coercion, see *supra* notes 206–08 and accompanying text.

Conventional blackmail is not clearly coercive precisely because it threatens merely a lawful act. Since meta-blackmail is clearly coercive and conventional blackmail is not, meta-blackmail should constitute the more serious level of criminality.

#### B. PUZZLES

Treating meta-blackmail as more serious than blackmail is supported by (i) the formalist interpretive strategy, (ii) the intuition that conditional threats to commit unlawful acts are more serious than those to commit lawful acts, (iii) meta-blackmail (but not conventional blackmail) constituting the greater crime of robbery, and (iv) meta-blackmail (but not conventional blackmail) qualifying as clearly coercive.<sup>226</sup> This support would seem to make the formalist approach a plausible, if not compelling, way to comparatively assess meta-blackmail and conventional blackmail.

Despite this support, however, the formalist approach generates two puzzles due to its conflict with the other two approaches. First, by virtue of its conflict with the functionalist approach,<sup>227</sup> how can meta-blackmail be a more serious level of criminality if meta-blackmail and conventional blackmail are functionally equivalent? Second, by virtue of its conflict with the substantivist approach,<sup>228</sup> how can a conditional threat to threaten be more serious, *ceteris paribus*, than a conditional threat? Or alternatively, why is threatening blackmail more serious than actually committing blackmail?

Treating meta-blackmail as more serious than conventional blackmail also generates anomalies within the family of conditional-threat theft offenses. Proposals threatening robbery are not more serious than committing robbery. For example, let us compare robbery proposals paralleling the form of conventional blackmail and meta-blackmail. A conventional robbery proposal is, "If you do not give me your money, then I will immediately kill or seriously harm you."<sup>229</sup> A meta-robbery proposal is, "If you do not give me your money, then I will immediately rob you." Under some robbery statutes, in which a (conditional) threat to commit a serious felony constitutes robbery,<sup>230</sup> meta-robbery would also constitute robbery. Under other robbery statutes, specifically requir-

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226. For an important additional argument in support of treating meta-blackmail as a more serious level of criminality than conventional blackmail, but which is not expressed in formalistic terms, see *infra* notes 236–42 and accompanying text.

227. For a brief introduction to the functionalist approach of treating meta-blackmail and conventional blackmail as equivalent in seriousness of criminality, see *supra* text following note 44. For a more expansive discussion of the functionalist approach, see *infra* Part III.A.

228. For a brief introduction to the substantivist approach of treating meta-blackmail as less serious than conventional blackmail, see *supra* text following note 45. For a more expansive discussion of the substantivist approach, see *infra* Part IV.A.

229. See *supra* note 28 and accompanying text.

230. See, e.g., MODEL PENAL CODE § 222.1(1)(c) (Official Draft and Revised Comments 1985).

ing a threat to commit homicide or serious bodily harm,<sup>231</sup> meta-robbery would not constitute robbery, but rather merely extortion. That is, threatening robbery would either be the same crime as robbery itself or a lesser crime. But unlike meta-blackmail as compared to conventional blackmail, in no way would meta-robbery be a greater crime than conventional robbery.

### III. META-BLACKMAIL AS EQUIVALENT TO BLACKMAIL

#### A. THE FUNCTIONALIST APPROACH

To avoid the difficulties of the formalist approach, meta-blackmail and conventional blackmail might be considered as equivalent in seriousness of criminality. Supporting their equivalence is the functionalist approach.<sup>232</sup> Rather than assessing the two proposals based on the presence or absence of a threat to commit an unlawful act, the functionalist approach views them from the perspective of their function or effect.<sup>233</sup> Though different in form, both proposals are functionally equivalent—both conventional blackmail and meta-blackmail propose, in effect, exchanging nondisclosure of the secret for money.

Their equivalence may be seen by unpacking meta-blackmail. Although formally meta-blackmail threatens blackmail, the threatened act of blackmail itself may be unpacked (in the context of the hypothetical) as a threat to disclose the secret. As a result, meta-blackmail may be understood as a threat to threaten to disclose the secret. In effect and function, a threat to threaten to disclose the secret arguably boils down to a threat to disclose the secret, which is no different than conventional blackmail. As functional equivalents, meta-blackmail and conventional blackmail should be treated as equivalent in seriousness of criminality.

Alternatively, their equivalence may be seen by construing meta-blackmail as a doubly conditional threat to disclose the secret. That is, meta-blackmail may be construed as, "If you do not give me \$1000, then (if you do not give me \$1000, then I will disclose your adulterous relationship)." Under this interpretation of meta-blackmail, the threatened act of disclosure of the secret is subject to not just one condition but two. But because the two conditions are identical—both conditions are nonpayment of the money—the second condition is duplicative and redundant. Arguably, a doubly conditional threat is equivalent to a singly conditional threat where, as here, all the conditions are identical. As a

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231. See, e.g., KAN. STAT. ANN. § 21-3426 (1995) ("Robbery is the taking of property from the person or presence of another by force or by threat of bodily harm to any person."); see also LAFAYE, *supra* note 28.

232. For a discussion of the significance of the distinction between form and function, see *supra* note 216.

233. For an example of the view that proposals different in form, but equivalent in function, may be treated equivalently, see ROTHBARD, *supra* note 216, at 125 (arguing that while different in form, both blackmailer-initiated proposals offering silence for money and blackmailee-initiated proposals offering money for silence should be treated equivalently—both should be lawful).

result, what may be understood as a doubly conditional threat (meta-blackmail) is equivalent to a singly conditional threat (conventional blackmail).

#### B. PUZZLES

Treating meta-blackmail and conventional blackmail as equivalent is supported by (i) the functionalist interpretive strategy, (ii) a conditional threat to threaten being equivalent to a conditional threat, (iii) a doubly conditional threat being equivalent to a singly conditional threat where all the conditions are identical, and (iv) the intuition that functionally equivalent proposals should be treated equivalently. This support would seem to make the functionalist approach a plausible, if not compelling, way to comparatively assess meta-blackmail and conventional blackmail.

Despite this support, however, the functionalist approach generates two puzzles due to its conflict with the other two approaches. First, by virtue of the functionalist approach's conflict with the substantivist approach,<sup>234</sup> how can a conditional threat to threaten be equivalent to, *ceteris paribus*, a conditional threat? Or alternatively, how can threatening blackmail be equivalent, *ceteris paribus*, to actually committing blackmail? Second, by virtue of its conflict with the formalist approach,<sup>235</sup> how can threatening an unlawful act be equivalent to, *ceteris paribus*, threatening a lawful act?<sup>236</sup> A defender of the functionalist approach might reply that the latter puzzle is only problematic from the perspective of an empty, legalistic formalism.

The puzzle, however, may be restated in nonformalistic terms. Consider the following argument that meta-blackmail is a more serious level of criminality than conventional blackmail:

1. If committing act *A* is more serious than committing act *B*, then a conditional threat to commit act *A* is more serious, *ceteris paribus*, than a conditional threat to commit act *B*.<sup>237</sup>

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234. For an expansive discussion of the substantivist approach (treating meta-blackmail as a less serious level of criminality than conventional blackmail), see *infra* Part IV.A.

235. For a discussion of the formalist approach (treating meta-blackmail as a more serious level of criminality than conventional blackmail), see *supra* Part II.A.

236. Alternatively, the puzzle might be expressed as how can conditionally threatening to do that which one has a right to do be equivalent to, *ceteris paribus*, conditionally threatening to do that which one does *not* have a right to do? That is, how can conventional blackmail (in which one threatens what one has a right to do—to disclose another's secret) be equivalent to meta-blackmail (in which one threatens what one *does not* have a right to do—to commit the crime of blackmail)?

237. This premise is supported by the intuition that given conditional threat proposals with the same demand, those proposals with a more harmful or wrongful threatened act will *properly* be considered a more serious a level of criminality. This intuition is consistent with the criminal law's treatment of robbery and extortion. Consider the following robbery and extortion proposals. Robbery: "If you do not give me \$1000, then I will kill you." Extortion: "If you do not give me \$1000, then I will burn down your business." Despite the same demand component in each proposal (the demand for \$1000), robbery is properly viewed as the more serious crime than extortion, see *infra* notes 249–52 and accompanying text, because the threatened act in robbery (homicide) is more serious than that threatened in extortion

2. The act of committing blackmail is properly considered more serious than the act of disclosing another's embarrassing secret.<sup>238</sup>
3. Therefore, a conditional threat to commit blackmail is more serious, *ceteris paribus*, than a conditional threat to disclose a secret.<sup>239</sup>
4. Therefore, meta-blackmail is more serious, *ceteris paribus*, than conventional blackmail.<sup>240</sup>

The argument advances the same conclusion as the formalist approach, but does so in nonformalistic terms. As a result, to opt for the functionalist approach that meta-blackmail and conventional blackmail are equivalent requires one to explain in what way this argument is wrong.<sup>241</sup> The second puzzle of the functionalist approach may then be reformulated as follows: how can a conditional threat to commit a more serious act be equivalent, *ceteris paribus*, to a conditional threat to commit a less serious act?<sup>242</sup>

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(arson). Thus, to deny this premise requires one to deny the typical way in which robbery and extortion are differentiated. As a result, few if any should find this premise objectionable.

238. See, e.g., Altman, *supra* note 51, at 1657 (noting that committing blackmail is more harmful than merely (unconditionally) disclosing another's embarrassing secret). This premise is supported by, though does not exclusively rely on, the act of committing blackmail being criminalized and the (unconditional) act of disclosing another's secret being entirely lawful. In addition, the premise is supported by the widely held view that the act of blackmail is *properly criminalized*, see *supra* notes 6, 21, and accompanying text, and that (unconditionally) disclosing another's embarrassing secret is properly lawful as governed by the First Amendment and other considerations. See *supra* text accompanying note 184. Thus, to deny this premise one must either believe that blackmail should be decriminalized or that the disclosure of another's embarrassing secret should be criminalized. Because there are only a few that would be willing to decriminalize blackmail and perhaps none advocating the criminalization of the unconditional disclosure of another's embarrassing secret, few (if any) should find the premise objectionable.

239. This step follows from the premises in steps 1 and 2. If a conditional threat to commit a more serious act will be more serious, *ceteris paribus*, than a conditional threat to commit a less serious act (step 1), and committing blackmail is more serious than disclosing another's embarrassing secret (step 2), then a conditional threat to commit blackmail is more serious than a conditional threat to disclose another's embarrassing secret. As a result, if one agrees with the presumably unobjectionable premises in steps 1 and 2, see *supra* notes 237–38, step 3 should be unobjectionable.

240. This step follows from step 3. A threat to commit blackmail (conditioned upon the nonpayment of the demanded money) we have termed meta-blackmail. A threat to disclose another's embarrassing secret (conditioned upon the nonpayment of the demanded money) constitutes conventional blackmail. Therefore, if a conditional threat to commit blackmail is more serious, *ceteris paribus*, than a conditional threat to disclose another's embarrassing secret (step 3), then meta-blackmail is more serious, *ceteris paribus*, than conventional blackmail. As a result, if one agrees with the presumably unobjectionable premises in steps 1 and 2, and agrees with the presumably unobjectionable reasoning in step 3, then step 4 is presumably unobjectionable.

241. Opting for the substantivist approach, see *infra* Part IV.A, would also trigger the burden to explain away this argument on behalf of treating meta-blackmail as the more serious level of criminality than conventional blackmail.

242. Even apart from its conflict with the formalist and substantivist approaches, an additional difficulty remains. If under the functionalist approach conventional blackmail and meta-blackmail should be treated as the same level of criminality, what should that level of criminality be? Because meta-blackmail constitutes the greater crime of robbery in some jurisdictions, see *supra* Part II.A.1, should both conventional blackmail and meta-blackmail be treated as robbery or should both be treated

## IV. META-BLACKMAIL AS LESS SERIOUS THAN BLACKMAIL

## A. THE SUBSTANTIVIST APPROACH

To avoid the difficulties of treating meta-blackmail as more serious than, or equivalent to, conventional blackmail, the only remaining option is treating meta-blackmail as less serious. The substantivist approach views conventional blackmail as a threat and meta-blackmail as a threat to threaten and thus supports treating meta-blackmail as less serious on the basis that a threat to threaten is less serious than a threat.<sup>243</sup>

Like the formalist approach, the substantivist approach views meta-blackmail and conventional blackmail differently; but like the functionalist approach, the substantivist approach disregards the differing surface forms of meta-blackmail and conventional blackmail.<sup>244</sup> But while the substantivist approach shares the functionalist approach's method of unpacking the threatened act in meta-blackmail, each approach draws different conclusions. Where the functionalist views a threat to threaten to disclose a secret as effectively collapsing into a threat to disclose a secret, the substantivist finds a significant difference between a threat to threaten and a threat.

To appreciate the possible substantive difference between a threat and a threat to threaten, understanding the relationship between consummated crimes, threats, and threats to threaten may be helpful. If I purposely or knowingly kill someone without any defense, for example, I have committed the crime of murder.<sup>245</sup> If instead of committing the consummated crime I merely (unconditionally) threaten to murder someone, I might be guilty of the lesser offense of simple assault<sup>246</sup> or making terroristic threats.<sup>247</sup> A threat to murder is a lesser offense than murder because there simply is less harm.<sup>248</sup> While a threat to murder may well

as blackmail? The functionalist approach can only inform that they should be treated as the same level of criminality; it cannot inform us of what that level of criminality should be.

243. For a discussion of the significance of the distinction between form and substance, see KATZ, *supra* note 1, at 10–12; Alexander, *supra* note 214, at 531; and Katz, *supra* note 215, at 570.

244. For an early example of the widely held view that substance should prevail over form, see *Barnes' Lessee v. Irwin*, 2 U.S. (2 Dall.) 199, 203 (1793), reasoning that “[t]he substance, and not the form, ought principally to be regarded.”

245. See, e.g., MODEL PENAL CODE § 210.2 (Official Draft and Revised Comments 1985) (“[C]riminal homicide constitutes murder when . . . it is committed purposely or knowingly . . . Murder is a felony of the first degree . . .”).

246. See, e.g., *id.* § 211.1 (“A person is guilty of assault if he [or she] . . . attempts by physical menace to put another in fear of imminent serious bodily injury.”). While murder is a felony of the first degree, see *supra* note 245, simple assault constitutes the lesser criminal offense category of misdemeanor. *Id.* § 211.1(1).

247. See, e.g., *id.* § 211.3 (“A person is guilty of a felony of the third degree if he [or she] threatens to commit any crime of violence with purpose to terrorize another . . .”). While murder is a felony of the first degree, see *supra* note 245, making a terroristic threat constitutes the lesser criminal offense category of third-degree felony. *Id.* § 211.3.

248. Almost every jurisdiction worldwide imposes greater punishment for murder than attempted murder. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 129 (rev. ed. 1988) (observing “the almost universal practice of legal systems of fixing a more severe



develop, down the road, into an actual murder, the harm of a threat to murder is more remote, indirect, and attenuated than actual murder.

This correlation between directness of harm and the seriousness of criminality explains the differentiation of robbery and extortion. Under most statutory formulations, robbery and extortion are distinguished, in part, based on whether the threat is to commit an act immediately or at some future time.<sup>249</sup> Even if two proposals demand the same amount of money under the same threat of death or serious bodily harm, the proposal purporting that the threatened act will be carried out immediately or imminently will constitute robbery<sup>250</sup> and be the greater offense.<sup>251</sup> If the same threatened act is purported to be carried out at a later point in time, the proposal qualifies only as the lesser offense of extortion.<sup>252</sup> Under these formulations of the offenses, extortion is treated as a lesser offense than robbery, because the threatened harm is more remote and temporally distant than in robbery.

But what if rather than actually making a terroristic threat to commit crime *X*, I merely threaten to make that terroristic threat? In a sense, I am threatening to threaten to commit crime *X*. Just as a threat to commit crime *X* is a less serious crime than actually committing crime *X*,<sup>253</sup> presumably a threat to threaten to commit crime *X* is an even lesser crime (if it is a crime at all). This is so for the

punishment for the completed crime than for the mere attempt"); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 119 (1995) (noting that "most legal practice throughout the world treats failed and successful attempts quite differently"). Because virtually every jurisdiction imposes greater punishment for murder than attempted murder, then a fortiori virtually every jurisdiction will punish murder more than threats to murder.

249. See, e.g., MODEL PENAL CODE § 222.1 explanatory note ("Robbery . . . is distinguished from extortion by the immediacy . . . of the threat."); LAFAVE, *supra* note 28, at 874 ("[I]t is the immediacy of the threat that escalates the theft from extortion to robbery.") (footnotes omitted); ROBINSON, *supra* note 28, at 788 ("Where the actor causes or threatens immediate serious bodily injury, the offense is robbery . . . . Where the actor threatens less than serious bodily injury or threatens future injury . . . the offense is extortion.").

250. See, e.g., MODEL PENAL CODE § 222.1(b), (c) (Official Draft and Revised Comments 1985) (requiring a threat of "immediate serious bodily injury" or a threat to "immediately . . . commit any felony of the first or second degree"); LAFAVE, *supra* note 28, at 873-74 ("The traditional view is that the threat must be of immediate harm, rather than of future harm. Some modern statutes are somewhat ambiguous on this point, but most of them expressly state that the threat must be as to 'immediate' or 'imminent' harm.") (footnotes omitted); ROBINSON, *supra* note 28, at 781 (noting that robbery, under the Model Penal Code, requires a threat of "immediate" force).

251. See, e.g., MODEL PENAL CODE § 222.1(2) (grading robbery as a felony of the first or second degree); *id.* § 223.1(2)(a), (b) (grading extortion by theft as either a third degree felony or a misdemeanor); LAFAVE, *supra* note 28, at 880 (explaining that extortion statutes "generally [carry] a penalty less severe than for robbery").

252. See, e.g., MODEL PENAL CODE § 222.1 explanatory note ("Robbery . . . is distinguished from extortion by the immediacy . . . of the threat."); LAFAVE, *supra* note 28, at 881 (noting, for example, that "a threat to kill the victim in the future, unless money is paid the threatener, constitutes the crime of extortion"); ROBINSON, *supra* note 28, at 781 (explaining that extortion, under the Model Penal Code, encompasses a "threat to use force at some future time").

253. For example, if I threaten to commit the crime of murder my conduct may qualify as the misdemeanor of simple assault, see *supra* note 246, or the third-degree felony of making a terroristic threat, see *supra* note 247. But if rather than merely threatening to commit the crime of murder I

same reason that a threat to commit crime *X* is less serious than committing crime *X*—the harm is more remote, indirect, and attenuated.

That the harm in a threat to threaten is more remote and indirect may also be seen as a function of the increased uncertainty of, and the additional step required for, the harm coming to fruition. If the harm of a threat to commit crime *X* is placing the recipient in fear that *X* will occur, the harm of a threat to threaten to commit crime *X* is more remote and indirect, because it requires an additional step in order for *X* to occur. Upon issuance of a threat to commit crime *X*, the threatener need only take one more step—commit crime *X*. In contrast, upon issuance of a threat to threaten to commit crime *X*, the threatener must take two more steps—issue the final threat *and* commit crime *X*. Just as there is some uncertainty upon issuance of a threat to commit crime *X* whether the threatener will actually commit crime *X*, there is an additional layer of uncertainty upon the issuance of a threat to threaten to commit crime *X*; not only may the threatener not commit crime *X*, but also the threatener might not even issue the final threat. Because of the additional step required in a threat to threaten for the ultimate harm to come to fruition, there is greater uncertainty (and thus, lower probability), *ceteris paribus*, that it will come to fruition. Thus, a threat to threaten should be considered a less serious level of criminality than a threat.

A similar analysis demonstrates that the harm of meta-blackmail (as a conditional threat to threaten), is of greater uncertainty and lower probability than conventional blackmail (as a conditional threat). Upon issuing the conventional blackmail proposal, the blackmailer has only one step remaining—disclosing the secret. In contrast, upon issuing a meta-blackmail proposal, the meta-blackmailer has two steps remaining—issue the final conditional threat (the conventional blackmail proposal) *and* disclose the secret. Because of the additional step required in meta-blackmail for the ultimate harm to come to fruition, there is greater uncertainty (and thus, lower probability), *ceteris paribus*, that it will come to fruition. Because the harm in meta-blackmail is of greater uncertainty and lower probability, *ceteris paribus*, than in conventional blackmail, the substantivist approach considers meta-blackmail a less serious level of criminality than conventional blackmail.

#### B. PUZZLES

Treating meta-blackmail as a less serious level of criminality than conventional blackmail is supported by (i) the substantivist interpretive strategy, (ii) the harm of a threat to threaten being more indirect, remote, and attenuated than a threat, and (iii) the intuition that a proposal threatening a comparatively less direct and less immediate harm is, *ceteris paribus*, a less serious level of criminality. This support would seem to make the substantivist approach a

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actually commit the crime of murder my conduct may qualify as the more serious criminal offense category of first-degree felony. *See supra* note 245.

plausible, if not compelling, way to comparatively assess meta-blackmail and conventional blackmail.

Despite this support, however, the substantivist approach generates two puzzles due to its conflict with the other two approaches. First, by virtue of its conflict with the formalist approach, how can a conditional threat to commit an unlawful act be, *ceteris paribus*, less serious than a conditional threat to commit a lawful act. If anything, we might think, at least from a formalistic perspective, the relationship should be reversed. Robbery is considered a more serious crime than blackmail precisely because robbery threatens an unlawful act and blackmail does not. In addition, meta-blackmail, but not conventional blackmail, may be classified or graded as the greater crime of robbery.<sup>254</sup> Because meta-blackmail qualifies as a greater crime than conventional blackmail, how can meta-blackmail be treated as if it were a lesser crime than conventional blackmail? Of course, a substantivist might reply, just as the functionalist might,<sup>255</sup> that this is puzzling only from the perspective of an empty, legalistic formalism. But the puzzle may be expressed in nonformalistic terms: how can a conditional threat to commit a more serious act be a less serious level of criminality, *ceteris paribus*, than a conditional threat to commit a less serious act?<sup>256</sup> Second, by virtue of the substantivist approach's conflict with the functionalist approach, how can meta-blackmail be less serious than conventional blackmail when the two proposals are functionally equivalent?

## V. CONSIDERING THE THREE APPROACHES

### A. HARMONIZING BLACKMAIL WITH ROBBERY

Harmonizing blackmail with robbery does not favor a particular approach to the comparative assessment of meta-blackmail and conventional blackmail. That meta-blackmail qualifies as robbery in some jurisdictions<sup>257</sup> is consistent with the formalist approach of treating meta-blackmail as more serious. But treating meta-blackmail as more serious is inconsistent with meta-robbery being less than or equal in seriousness to conventional robbery.<sup>258</sup> The functionalist and substantivist approaches of treating meta-blackmail as equivalent to, or less serious than, conventional blackmail are consistent with meta-robbery being equivalent to, or less serious than, conventional robbery. But the functionalist

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254. *See supra* Part II.A.1.

255. For a discussion of the functionalist's reply to the puzzle, as expressed in formalistic terms, generated by the functionalist approach's conflict with the formalistic approach, see *supra* text following note 236. For a discussion of the puzzle, expressed in nonformalistic terms, generated by the functionalist approach's conflict with the formalistic approach, see *supra* notes 237–42 and accompanying text.

256. That is, how can meta-blackmail (threatening the more serious act of blackmail) be a less serious level of criminality, *ceteris paribus*, than blackmail (threatening the less serious act of disclosing another's embarrassing secret)?

257. *See supra* Part II.A.1.

258. *See supra* text accompanying notes 229–31.

and substantivist approaches are inconsistent with meta-blackmail constituting the greater offense of robbery in some jurisdictions. Opting for either the functionalist or substantivist approach would necessitate a significant revision of robbery statutes in at least four jurisdictions.<sup>259</sup> As a result, none of the approaches to meta-blackmail would harmonize blackmail with robbery.

#### B. RESOLVING THE PUZZLE OF BLACKMAIL'S CRIMINALIZATION

Of the three approaches, the functionalist approach yields perhaps the best prospects for a justification of conventional blackmail's criminalization. If conventional blackmail and meta-blackmail are functionally equivalent, then conventional blackmail is functionally equivalent to a proposal containing an unlawful threatened act (meta-blackmail). And the justification for criminalizing proposals containing an unlawful threatened act is considered unproblematic.<sup>260</sup>

The justification for robbery's criminalization applies equally to meta-blackmail. The unproblematic justification for the criminalization of robbery is that obtaining the property of another by the utterance of a threat to conditionally commit an unlawful act constitutes a wrongful harm.<sup>261</sup> In other words, it is the *unlawfulness* of the threatened act that makes robbery a legally cognizable wrongful harm and supplies a permissible, uncontroversial basis for criminalizing robbery. The rationale for criminalizing robbery is thus a function of the unlawfulness of what is threatened. As one commentator notes, "it is relatively unproblematic to outlaw the making of a threat to do something that is illegal."<sup>262</sup> Consider the following rationale for robbery's criminalization, as contrasted with blackmail, expressed as a function of the robber selling something he does not own:

For the robber's wrong—his boundary-crossing—is easy to pinpoint. He sells back what he doesn't own, the victim's life and limb. Not so the blackmailer threatening to disclose the victim's infidelity. The victim doesn't own the right to control the blackmailer's communication with his wife; the blackmailer does. The blackmailer, unlike the robber, is selling something he owns.<sup>263</sup>

This rationale can be easily restated so as to justify meta-blackmail's criminalization. For the meta-blackmailer's wrong—her boundary crossing—is easy to pinpoint. She sells back what she does not own—the victim's right to be free of being threatened with the crime of blackmail. This rationale for robbery is no different than the proffered justification for criminalizing meta-blackmail; both

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259. See *supra* Part II.A.1.

260. See *supra* notes 27, 29–30 and accompanying text; *infra* notes 261–65 and accompanying text.

261. See *supra* notes 29–30; see also Lindgren, *supra* note 1, at 671 n.7 (explaining that if an act is unlawful, no one has the right to commit that act and, therefore, "no one should be allowed to profit by selling a right the law prohibits").

262. Smith, *supra* note 20, at 864; see also *supra* notes 27, 29–30.

263. Katz, *supra* note 6, at 1576.

obtain property via the threat of an unlawful act, “by selling a right the law prohibits,”<sup>264</sup> and by selling something the threatener does not own.<sup>265</sup>

Because the justification for criminalizing proposals containing an unlawful threatened act is unproblematic, and conventional blackmail proposals are functionally equivalent to such proposals, the justification for the criminalization of conventional blackmail proposals must be similarly unproblematic. Formally, conventional blackmail threatens a lawful act. But if functionally equivalent to meta-blackmail, conventional blackmail is functionally equivalent to threats to commit unlawful acts. The puzzle of blackmail—why it can be a crime to threaten to conditionally do what may lawfully be done—is thereby seemingly resolved. The puzzle of blackmail is only a puzzle from a formalistic perspective. From a functionalist perspective, conventional blackmail threatens an unlawful act.

The premise that affords the resolution of the puzzle of blackmail—the equivalence of conventional blackmail and meta-blackmail—is, however, unclear. For the asserted resolution of the puzzle of blackmail to be persuasive, two arguments are required: showing that the functional equivalence of conventional blackmail and meta-blackmail trumps both (i) the formal differences between the proposals suggesting meta-blackmail is more serious, and (ii) the substantive differences between the two proposals suggesting meta-blackmail is less serious. If those two arguments can be made, then the equivalence of conventional blackmail proposals and proposals containing threats to do unlawful acts (meta-blackmail) supplies the missing link between the coercion in conventional blackmail proposals and the “plain vanilla” coercion<sup>266</sup> found in threats to do unlawful acts, as well as the missing link between blackmail and offenses such as robbery for which criminalization is unproblematic.

Although the functionalist perspective may provide a technical solution to the puzzle of blackmail, it is not an altogether satisfactory justification of blackmail’s criminalization. The resolution bootstraps blackmail’s existing criminalization into a justification of blackmail’s criminalization. It fails to explain why blackmail constitutes a legally cognizable wrongful harm in the first place.<sup>267</sup>

### C. SUPPORTING DECRIMINALIZATION OF BLACKMAIL

None of the three approaches as to how meta-blackmail should be treated supports decriminalizing blackmail. However, support for decriminalizing blackmail may be drawn from both the difficulty of choosing among the three perhaps equally plausible approaches as well as the puzzles and difficulties generated by each approach. While *some* of these difficulties may be due to a

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264. Lindgren, *supra* note 1, at 671 n.7.

265. See Katz, *supra* note 6, at 1576.

266. See *id.* at 1574.

267. For a discussion of why a justification for criminalizing a type of conduct must not merely show that the conduct constitutes a harm but must also show that the conduct constitutes a wrongful harm, see *supra* notes 187–92 and accompanying text.

variety of reasons, decriminalizing blackmail resolves *all* of the difficulties.

The formalist approach (treating meta-blackmail as more serious) incurs the puzzle of how a threat to threaten (threatening blackmail) may be classified as a greater crime, and be more coercive, than a threat (blackmail). Decriminalizing blackmail resolves the puzzle. By decriminalizing blackmail, a threat to blackmail would no longer constitute a threat to commit an unlawful act, thereby eliminating the basis for a threat to blackmail to be classified as the greater crime, and be more coercive than, blackmail itself. By decriminalizing blackmail, both threatening blackmail and blackmail itself would be lawful and no puzzle arises.

The functionalist approach (treating meta-blackmail and conventional blackmail equivalently) generates the puzzle of how threatening an unlawful act can be no more serious than threatening a lawful act. Decriminalizing blackmail eliminates the puzzle. By decriminalizing blackmail, both the threatened act in meta-blackmail and blackmail itself would be lawful. No puzzle would arise by treating both meta-blackmail and conventional blackmail as (equivalently) non-criminal.

The substantivist approach (treating meta-blackmail as less serious) raises the puzzle of how threatening an unlawful act can be less serious than threatening a lawful act. Decriminalizing blackmail resolves the puzzle. By decriminalizing blackmail, threatening to disclose the secret would be lawful. *A fortiori*, threatening to threaten to disclose the secret would also be lawful. As a result, no puzzle arises.

Decriminalizing blackmail neatly resolves the trilemma of meta-blackmail. At the cost of abandoning the intuition that blackmail is properly criminalized, we preserve, without conflict, the following three compelling intuitions: (i) conditionally threatening an unlawful act (or more serious act) is more serious, *ceteris paribus*, than conditionally threatening a lawful act (or less serious act), (ii) functionally equivalent proposals should be treated equivalently, and (iii) conditionally threatening to threaten (or conditionally threatening a less direct and less immediate harm) is less serious, *ceteris paribus*, than conditionally threatening (or conditionally threatening a more direct and immediate harm).

If, instead, we wish to preserve the intuition that blackmail is properly criminalized, the cost of doing so is that any two of the above three compelling intuitions must be abandoned. That is, if we do not opt to resolve the trilemma by decriminalizing blackmail, the trilemma must be resolved by opting for one of the three possible approaches. But opting for one of the possible approaches entails abandoning the intuitions supporting the two rejected approaches. For example, suppose we opt for the functionalist approach of treating meta-blackmail and conventional blackmail equivalently. The cost of doing so is that we abandon the two intuitions supporting the formalist and substantivist approaches. And these two intuitions are the very principles by which we differentiate robbery from blackmail and extortion. Robbery is considered the more serious crime, because (i) it threatens a more serious act (typically death or

serious bodily harm), and (ii) the threatened act is typically required to be threatened to be carried out immediately.<sup>268</sup> The cost of preserving our intuition that blackmail is properly criminalized and resolving the trilemma by, for example, opting for the functionalist approach, is the abandonment of the two intuitions or principles underlying the differentiation of robbery from blackmail and extortion. But this cost may be too high. The intuitions that must be abandoned to preserve our intuition that blackmail is properly criminalized are more valuable and compelling than our intuition that blackmail is properly criminalized.

For both quantitative and qualitative reasons, decriminalizing blackmail is the preferable resolution to the trilemma. Because the intuition that blackmail is properly criminalized has stubbornly resisted justification, despite extraordinary scholarly attention, we might be skeptical about that intuition's validity. Therefore, the validity of the other three intuitions may trump the validity of the intuition that blackmail is properly criminalized. As a result, to preserve the qualitatively more-valuable intuitions, blackmail should be decriminalized. And even if we assume that the value of each intuition is the same,<sup>269</sup> resolving the trilemma by decriminalizing blackmail preserves a greater number of compelling intuitions.<sup>270</sup>

#### CONCLUSION

Justifying blackmail's prohibition has proven elusive because it conflicts with the intuition that what one has the right to do, one has the right to conditionally threaten to do. The comparative assessment of proposals threatening blackmail (meta-blackmail) with proposals of blackmail itself reveals that the law of blackmail is even more puzzling than previously realized. The trilemma of meta-blackmail demonstrates that criminalizing blackmail also conflicts with any two of the following three compelling intuitions: (i) conditionally threatening to commit an unlawful act (or a more serious act) is a more serious level of criminality, *ceteris paribus*, than conditionally threatening to commit a lawful act (or a less serious act), (ii) functionally equivalent proposals should be treated equivalently, and (iii) conditionally threatening to threaten (or conditionally threatening a less direct and immediate harm) is less serious, *ceteris paribus*, than conditionally threatening (or conditionally threatening a more direct and immediate harm). Criminalizing blackmail violates intuitions that are

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268. See *supra* notes 28, 249–52.

269. And this is most likely a dubious assumption.

270. The option of decriminalizing blackmail preserves the three compelling intuitions underlying the trilemma at the cost of abandoning the intuition that blackmail is properly criminalized for a net gain of two compelling intuitions preserved. The option of continuing to criminalize blackmail preserves the intuition that blackmail is properly criminalized and one of the three compelling intuitions underlying the trilemma at the cost of abandoning two of the three compelling intuitions underlying the trilemma for a net gain of zero compelling intuitions. Thus, decriminalizing blackmail preserves more compelling intuitions than continuing to criminalize blackmail.

more compelling than the intuition that blackmail is properly criminalized. Consequently, blackmail should be decriminalized. But, understandably, the intuition that blackmail is properly criminalized dies hard. If we wish to continue criminalizing blackmail, justifying that criminalization—already “one of the most elusive intellectual puzzles in all of law”<sup>271</sup>—just got harder.

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271. Lindgren, *supra* note 2, at 1975.



