The Trilemma of Meta-Blackmail: Is Conditionally Threatening Blackmail Worse, the Same, or Better than Blackmail Itself?

Russell Christopher
russell-christopher@utulsa.edu

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The Trilemma of Meta-Blackmail: Is Conditionally Threatening Blackmail Worse, the Same, or Better than Blackmail Itself?

Russell L. Christopher*

The criminal law, in a wide variety of contexts, prohibits attempting to obtain what we are not entitled to by issuing conditional threats. Generally, the criminal law grades the severity of these conditional threat crimes based on the severity of the act threatened. For example, if the threatener is attempting to obtain $1000, the severity of her criminal conduct will be a function of the severity of the act threatened. Just as murder is worse than disclosure of another’s embarrassing secret, so also threatening to murder upon nonpayment of $1000 is worse than threatening to disclose an embarrassing secret upon nonpayment of $1000. This is why robbery, which typically threatens unlawful acts, is a more serious level of criminality than blackmail, which typically does not.

For this same reason, meta-blackmail may be seen as more serious than blackmail. The threatened act of a meta-blackmail proposal is the unlawful act of blackmail itself. In contrast, the threatened act of a traditional blackmail proposal is a lawful act—for example, disclosure of another’s embarrassing secret. By prohibiting blackmail and by permitting disclosure of another’s embarrassing secret, the criminal law plausibly views blackmail as the comparatively more serious conduct. Therefore, just as blackmail is more serious than disclosing another’s embarrassing secret, so also threatening to blackmail upon nonpayment of $1000 may plausibly be viewed as more serious than threatening to disclose an embarrassing secret upon nonpayment of $1000. As a result, meta-blackmail is plausibly a more serious level of criminality than blackmail.1

* Associate Professor of Law, The University of Tulsa College of Law. © 2006, Russell L. Christopher. I thank Mitchell Berman and the editors of The Georgetown Law Journal for providing me with this forum to further elaborate and clarify my argument, and Peter Oh for his helpful comments.

1. See infra note 64 and accompanying text.

2. Meta-blackmail is best understood in contrast with conventional blackmail. A conventional blackmail proposal threatens some lawful act (for example, disclosure of an embarrassing secret) upon the threat recipient’s failure to comply with a stated demand (for example, payment of money). A corresponding meta-blackmail proposal, in contrast, threatens blackmail itself upon the recipient’s failure to comply with the stated demand. For an example of a meta-blackmail proposal and corresponding conventional blackmail proposal, see infra text following note 47.

3. More precisely, I argue that considering meta-blackmail to be more serious than blackmail is no less plausible, and no more problematic, than two other possible approaches to the comparative assessment of meta-blackmail. The other two approaches alternatively find meta-blackmail and blackmail to be equivalent, or meta-blackmail to be less serious than blackmail. I conclude that each of these
Mitchell Berman disagrees. In his thoughtful and challenging Reply, Berman declares the formalist conclusion\(^4\) that meta-blackmail is more serious than blackmail to be flat-out wrong.\(^5\) Why? Because Berman finds some meta-blackmail to be equivalent to some blackmail and some meta-blackmail to be less serious than some blackmail,\(^6\) but no meta-blackmail to be more serious than any blackmail.\(^7\)

Here is what Berman and I do agree on. First, considering meta-blackmail to be a more serious level of criminality than blackmail is, at least, somewhat problematic. Second, treating at least some meta-blackmail as equivalent to at least some blackmail is, at a minimum, no less plausible than two other approaches to the comparative assessment of meta-blackmail and blackmail.\(^8\)

But we also disagree on these very same three points. First, Berman finds no meta-blackmail to be more serious than any blackmail. I find the formalist approach—considering all meta-blackmail to be more serious than all corresponding types of blackmail—no more problematic, and no less plausible, than the other approaches. Second, Berman finds that some meta-blackmail is equivalent to some blackmail. I find the functionalist approach—treat all meta-blackmail as equivalent to all corresponding blackmail—no more problematic, and no less plausible, than the other approaches. Third, Berman finds that some meta-blackmail is less serious than some blackmail. I find the substantivist approach—maintaining that all meta-blackmail is less serious than all corresponding blackmail—no more problematic, and no less plausible, than the other approaches.

As a result, where I find a trilemma of equally plausible approaches to the comparative assessment of meta-blackmail and blackmail, Berman finds a

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4. Each of the three possible outcomes of the comparative assessment of meta-blackmail and blackmail—meta-blackmail is more serious, equivalent, or less serious, than blackmail—is supported by an interpretive strategy or perspective. A formalist perspective finds meta-blackmail to be more serious than blackmail, because meta-blackmail threatens an unlawful act while blackmail threatens a lawful act. For further discussion of the formalist perspective, see Russell L. Christopher, *Meta-Blackmail*, 94 GEO. L.J. 739, 770–74 (2006). A functionalist perspective finds meta-blackmail and blackmail to be equivalent on the basis that they have the same function or effect. For further discussion of the functionalist perspective, see id. at 774–77. Finally, a substantivist perspective finds meta-blackmail to be less serious than blackmail, because meta-blackmail is a threat to threaten while blackmail is a threat. For further discussion of the substantivist approach, see id. at 777–80.


6. Id. at 807–09.

7. Id. at 809.

8. For a summary of the three possible approaches to the comparative assessment of meta-blackmail and blackmail, see supra note 4. For a discussion of both the plausibility and difficulties of each of the three approaches, see Christopher, supra note 4, at 770–808.
resolution. Berman's resolution—that some meta-blackmail is equivalent to some blackmail and some meta-blackmail is less serious than some blackmail—might be thought to merely reduce the trilemma to a dilemma. However, for any given pair of meta-blackmail and blackmail proposals, Berman's account yields a determinate answer. Whether meta-blackmail is equivalent to blackmail or less serious than blackmail is a function of when each act threatened is threatened to be carried out. They are equivalent unless the act threatened by meta-blackmail is threatened to be carried out at a temporally more "distant remove."9

This resolution of the trilemma, however, is based on a fundamental misunderstanding. As I explained in Meta-Blackmail,10 and as I will explain further in Part II of this Surreply, the trilemma only arises by comparing corresponding meta-blackmail and blackmail proposals. I defined corresponding meta-blackmail and blackmail proposals as those in which the only difference between the two is the act threatened.11 Proposals in which the threatened acts will be carried out at significantly different temporal intervals are thus not corresponding. Accordingly, Berman's resolution is based on comparing noncorresponding proposals. This misunderstanding, however, is not fatal to Berman's account. Limited to comparing only properly corresponding proposals, Berman's account still reaches a determinate answer to the trilemma—meta-blackmail and blackmail are equivalent.

Though supplying a determinate answer, Berman's argument in support of that answer is insufficient to dispel the trilemma. Part I of this Surreply demonstrates that his argument fails to eliminate the view that meta-blackmail is more serious than blackmail as a horn of the trilemma. Part II establishes why considering meta-blackmail less serious than blackmail remains a horn of the trilemma. Part III, by analogizing from a comparative assessment of meta-robbery and robbery, illustrates both the difficulty of Berman's account and the difficulty of resolving the trilemma. I conclude that the trilemma withstands Berman's attempted resolution.12

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10. See supra note 4.
11. Christopher, supra note 4, at 770 n.213.

First, Berman's theory fails to successfully distinguish blackmail from permissible, but hard, bargains like Jeffrie Murphy's famous Baseball Example (the owner of a rare baseball proposes to sell it, at an exorbitant price, to the father of a dying boy to whom it will bring happiness in his final days). Referring to a similar example, Berman explained that, because the potential purchaser has no legally protected interest in the rare item, the owner's proposal does not constitute any "legally cognizable harm" and is thus lawful. Berman, Evidentiary Theory, supra, at 856. But under this reasoning, a blackmailer—threatening the lawful act of disclosing another's embarrassing secret—also would not cause any legally cognizable harm.
I. WHY META-BLACKMAIL IS PLAUSIBLY MORE SERIOUS THAN BLACKMAIL

Meta-blackmail may plausibly be viewed as more serious than conventional blackmail. The formalist intuition supporting this view is that a threat to commit a criminal/more serious act is more serious than a threat to commit a lawful/less serious act. Berman disagrees, concluding that no meta-blackmail is more serious than any blackmail. In this Part, I will demonstrate that Berman's Reply is unpersuasive and that it fails to address significant additional support for considering meta-blackmail to be more serious. Finally, I will present a new rationale supporting the view that meta-blackmail is more serious than blackmail.

A. FUNCTION DOES NOT ALWAYS TRUMP FORM

Berman bifurcates his argument against viewing meta-blackmail as more serious than blackmail according to whether my supporting intuition utilizes a "strong" or "weak" version of the ceteris paribus clause. I am not entitled to the strong version in claiming that a threat to commit a criminal (or more serious act) is more serious than a lawful (or less serious act), Berman contends, because the ceteris paribus clause cannot be satisfied—i.e., all other things cannot be equal. The use of the ceteris paribus clause requires nothing to be different between the two proposals save the criminal/more serious act versus the lawful/less serious act. But, according to the Reply, there are (or should be) additional differences—those that explain or justify why one act is criminal/more serious and the other act is lawful/less serious.

Second, Berman's account fails to establish that blackmail causes legally cognizable harm. Berman's Reply argues that disclosing another's embarrassing secret constitutes harm under "[the prevailing social judgment]." Berman, supra note 5, at 798. Maybe so, but "prevailing social judgment" does not transform the disclosure into a legally cognizable harm. The disclosure of another's embarrassing secret is not a crime.

Third, Berman's account depends on the bad motive of the blackmailer but is unable explain why blackmail for good motives—think of a Robin Hood of blackmailers—is nonetheless punished as blackmail. Berman responds that while Robin might have good motives for engaging in blackmail (wealth redistribution), "we are still permitted to infer that" Robin would have bad motives were he to disclose another's embarrassing secret upon nonpayment. Id. at 799. And it is the latter bad motive that is relevant to Berman's account. See id. But Robin's good motive of wealth redistribution would remain, even were he to disclose. Very little wealth redistribution would occur if word got around to Robin's potential blackmailees that their nonpayment was not met with disclosure. In order to effect his good motive of wealth redistribution, Robin would occasionally have to disclose upon nonpayment to make his threat credible. As Berman himself recognizes, credibility as a threatener "is extraordinarily valuable in the 'legitimate' business world." Berman, Evidentiary Theory, supra, at 805. Thus, Robin would have the same good motives even were he to disclose upon nonpayment. That Berman's account (stressing the bad motive of the blackmailer as the key to explaining blackmail's prohibition) cannot explain why blackmail with good motives is nonetheless punished—a significant difficulty for his theory.

14. Id. at 808.
15. Id. at 808–09.
16. Id.
There are a number of responses to Berman’s rejection of the strong ceteris paribus claim. First, it is simply implausible. According to the Reply, we cannot state that, all other things being equal, threatening an unlawful act is more serious than threatening a lawful act. As a result, we cannot state that, all other things being equal, robbery is a more serious level of criminality than blackmail. And, as a result, we cannot even state that, all other things being equal, murder or rape is more serious than jaywalking or daydreaming. Why? Because, according to the Reply, “there should always be differences—meaningful differences” between murder/rape and jaywalking/daydreaming. Murder and rape involve physical harm to another whereas jaywalking and daydreaming do not. In Berman’s view, “ceteris is not paribus.” According to the Reply, the only acceptable use of the ceteris paribus clause is the weaker sense of “ordinarily or presumptively.” Under this view, we can only permissibly state that ordinarily or presumptively murder or rape is a more serious level of criminality than jaywalking or daydreaming. This insistence on permitting only the weaker sense of the ceteris paribus clause seems quite implausible.

Second, the intuition underlying the view that meta-blackmail is more serious than blackmail can be easily, if more verbosely, rephrased to avoid the objection: a threat to commit a criminal/more serious act is more serious than a threat to commit a lawful/less serious act, all other things being equal, except for the facts and reasons that explain or justify why the criminal/more serious act is criminal/more serious and the lawful/less serious act is lawful/less serious. Though inelegant, the rephrased intuition avoids the objection and is still sufficiently powerful to generate the conclusion that meta-blackmail can properly be considered more serious. Since the premise of the rephrased intuition is now true even under the Reply’s view, and Berman agrees with the additional premise that meta-blackmail threatens a criminal/more serious act and blackmail threatens a lawful/less serious act, the conclusion now follows—meta-blackmail is a more serious level of criminality than blackmail.

According to Berman, the weak version of ceteris paribus—meaning ordinarily or presumptively—merely functions as a burden-shifting device. Although the Reply finds permissible my use of the weak sense of the ceteris paribus clause, it claims that it can meet the burden. Berman maintains that “[a] prerequisite to it being the case that a conditional threat to X is more serious

17. For support for the view that robbery is considered a more serious crime than extortion and blackmail (which is often considered a subset of extortion), see Christopher, supra note 4, at 778 n.251.
18. Berman, supra note 5, at 808.
19. Id.
20. See id. (internal quotation marks omitted).
21. Id. at 807 (“[T]he minor premise of the formalist argument is categorically true. If blackmail is defined as some unlawful subset of conditional threats to do something lawful, then the minor premise of the formalist argument is true by definition.”); id. at 807 n.58 (“I will assume arguendo that the act meta-blackmail threatens (blackmail) is ‘more serious’ than the act blackmail threatens (e.g., disclosure).”)
22. Id. at 808.
than (or should be treated more severely than) a conditional threat to \( Y \) is that the two conditional threats are not functionally equivalent.\(^{23}\) Berman states that the prerequisite is not satisfied because they are functionally equivalent. What support is elicited? The Reply merely reasserts the analysis of the functionalist approach from *Meta-Blackmail\(^{24}\) contending that meta-blackmail and blackmail are equivalent because they collapse into each other.\(^{25}\) But this argument does not even come close to shouldering the burden.

The Reply attempts to disprove the validity of the formalist approach by merely reasserting the validity of the functionalist approach. However, this is no more persuasive than an adherent of the formalist approach asserting that the functionalist approach is wrong because the formalist approach is right. An adherent of the formalist approach might well argue that a prerequisite for considering meta-blackmail and blackmail to be equivalent is that they not be formally different. Because meta-blackmail threatens an unlawful act and blackmail threatens a lawful act, however, they are formally different. As a result, they are not equivalent. This argument, as well as the Reply’s, is inadequate to resolve the trilemma because it merely reasserts the very reasons why a particular approach is plausible. What the Reply needs, but lacks, is a persuasive reason why one approach trumps the others. Merely reasserting the very reasons why the functionalist approach is plausible does not suffice. Doing so neither addresses nor defeats the reasons why the formalist approach is no less plausible.

The Reply also claims that although formal differences may ordinarily, or presumptively, provide a basis for one form of conduct to be considered a more serious level of criminality than another, where the two forms of conduct are functionally equivalent, any such presumption is overcome.\(^{26}\) What is the basis for this assertion? No argument is offered. Moreover, the Reply is incorrect: not all instances of functionally equivalent conduct are treated equivalently. Many instances of conduct might be said to be formally different, yet functionally equivalent, and the criminal law *does* treat them differently. Consider the following pairs of formally different, but functionally equivalent, conduct:

(i) killing a person vs. letting that person die

(ii) drowning a person vs. not saving that person from drowning

(iii) intentionally murdering a person vs. killing that same person in justified self-defense

In each of the above three pairs of conduct, the conduct is formally different

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\(^{23}\) *Id.* The Reply ultimately concedes that this assertion was “inadequate,” and that “[t]his claim was indeed too strong.” *Id.* at 809–10 n.64.

\(^{24}\) Christopher, *supra* note 4, at 774–77.

\(^{25}\) Berman, *supra* note 5, at 808.

\(^{26}\) *Id.* at 808–09.
but functionally equivalent. Regardless of the particular formal differences in the way the person dies, the outcome is the same because the person ends up equally dead. Despite the functional equivalence of the conduct in each of the examples, the criminal law often, but not always, treats them differently. Generally, the former conduct in each paired example is subject to criminal liability while the latter conduct is not. The particular form or path or way the very same consequence is achieved is often crucial in determining whether the conduct is lawful or unlawful.\footnote{For support for this view, see Christopher, supra note 4, at 770–71 n.216.}

The significance of form also inheres within the law of blackmail itself. Formally different, but functionally equivalent, blackmail proposals are treated differently by the criminal law. The following proposal constitutes the crime of blackmail: “If you do not give me $1000, I will disclose your embarrassing secret.” But the following proposal may not constitute the crime of blackmail and may be entirely lawful: “I will give you $1000 if you do not disclose my embarrassing secret.” The two proposals might be considered functionally equivalent in that each proposes exchanging money for concealment of a secret.\footnote{See Kathryn H. Christopher, Toward a Resolution of Blackmail’s Second Paradox, 37 ARIZ. ST. L.J. (forthcoming 2006) (manuscript on file with author) (citing 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 264 (1988) (referring to similar blackmailer-initiated and blackmailee-initiated transactions as “the same transaction”); Sidney DeLong, Blackmailers, Bribetakers, and the Second Paradox, 141 U. PA. L. REV. 1663, 1692 (1993) (noting the “substantive equivalence of the exchanges”); Henry Smith, The Harm in Blackmail, 92 NW. U. L. REV. 861, 906–07 (1998) (designating them as “mirror-image transactions”)).}

Despite this functional equivalence, the formal difference of who is the initiating party of the transaction determines whether the proposal is the crime of blackmail or a lawful transaction. The blackmailer-initiated proposal constitutes blackmail, but the blackmailee-initiated proposal (the proposal initiated by the party that wishes the secret to be concealed) does not.\footnote{For a discussion of the criminal law’s differential treatment of these formally different, but functionally equivalent, transactions, see Christopher, supra note 4, at 770–71 n.216.}

As a result, neither the law of blackmail nor the criminal law as a whole uniformly treats functionally equivalent conduct equivalently.\footnote{Berman acknowledges that as the “contrast between killing and letting die demonstrates, the law and conventional morality sometimes do assess functionally equivalent acts to be of differential seriousness” and admits he “should not have suggested that function or effect is the only basis upon which seriousness can be measured for purposes of the criminal law.” Berman, supra note 5, at 809–10 n.64.} Functional equivalence is insufficient to ensure that two forms of conduct will, or should, be treated equivalently. Moreover, where there are equally plausible reasons for treating the two forms of conduct differently as well as equivalently, assertion of their functional equivalence does not suffice to establish that the conduct should be treated equivalently. Sometimes formal difference trumps functional equivalence and sometimes not. To argue that one approach should prevail over the other requires a reason why. Just as formal difference alone is an insufficient reason to treat functionally equivalent conduct differently, so also functional
equivalence alone is an insufficient reason to treat formally different conduct equivalently. What the Reply needs, but lacks, is functional equivalence plus. What the Reply supplies is functional equivalence alone.

Even if we assume arguendo that Berman’s argument persuasively demonstrates that the formalist intuition is not presumptively correct, such a showing is insufficient to resolve the trilemma. By showing that the formalist intuition is not presumptively correct, has he shown that it is incorrect or any less plausible than the intuitions underlying the other approaches? No. By showing that it is not presumptively correct, the Reply has stripped only the presumption of validity from the formalist intuition. But it has not stripped the formalist intuition of validity itself. That is, the Reply has only demonstrated that it is not presumptively correct; it has not shown that it is incorrect. Thus, at most, the Reply demonstrates why the formalist approach is not clearly preferable to the other approaches. But this only serves to reaffirm the trilemma—no one of the approaches is clearly preferable to the others. A resolution of the trilemma is not attained by showing that one of the approaches is not clearly preferable to the others. A resolution of the trilemma requires a demonstration that one of the approaches is clearly preferable. And this the Reply does not demonstrate.

B. UNADDRESSED ARGUMENTS

While the Reply addresses the formalist intuition, it fails to address the additional support for considering meta-blackmail to be the more serious crime. First, as a threat to commit an unlawful act, meta-blackmail qualifies as robbery under the statutory formulations in at least four jurisdictions.\(^3\) Blackmail, as a threat to commit a lawful act, does not qualify as robbery in any jurisdiction. That meta-blackmail could qualify, but blackmail cannot, as the crime of robbery (a crime more serious than blackmail)\(^3\) provides some support for regarding meta-blackmail as more serious than blackmail. If robbery is more serious than blackmail, and meta-blackmail qualifies as robbery, then meta-blackmail is more serious than blackmail.\(^3\) True, the fact that four jurisdictions might treat meta-blackmail as the more serious crime does not conclusively establish meta-blackmail to be the more serious crime,\(^3\) but it does lend some support for the view that treating meta-blackmail as more serious is at least plausible.

Second, and more significantly, the Reply also fails to address how the

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31. For a discussion of how meta-blackmail qualifies as robbery, see Christopher, supra note 4, at 771–72.
32. See supra note 17.
33. For one denying the formalist approach of treating meta-blackmail as more serious, the following puzzle arises: How can that which qualifies as the more serious crime of robbery be equivalent to that which only constitutes the less serious crime of blackmail? Though the Reply categorically rejects the formalist approach, it fails to address both the significance of meta-blackmail qualifying as robbery, as well as this puzzle.
34. One might well declare that the statutory provisions defining the offense of robbery in these four jurisdictions are simply wrong.
consideration of coercion supports treating meta-blackmail as more serious than blackmail.\textsuperscript{35} Numerous attempts have sought to rest the justification of blackmail's prohibition on blackmail being coercive,\textsuperscript{36} but no such attempt has gained widespread acceptance. These attempts have foundered precisely because the threatened act in blackmail is neither unlawful nor clearly immoral. The only clear basis for considering a proposal to be coercive is that the threatened act is unlawful or clearly immoral. Unlike the act threatened in blackmail, the act threatened in meta-blackmail is unlawful. As such, meta-blackmail is clearly coercive, while blackmail is not.\textsuperscript{37} Meta-blackmail is coercive in the "plain vanilla" sense that robbery is coercive—both threaten unlawful acts.\textsuperscript{38} That meta-blackmail is clearly coercive, and blackmail is not, lends considerable support for treating meta-blackmail as more serious than blackmail. As a result, the comparative assessment of the coerciveness of meta-blackmail and blackmail lends supports to the plausibility of the formalist view that meta-blackmail is more serious than blackmail.

C. A NEW ARGUMENT: META-BLACKMAIL THREATENS TWO HARMS, BLACKMAIL THREATENS ONLY ONE

An additional argument, not originally voiced in \textit{Meta-Blackmail} but implicated by Berman's Reply, also supports viewing meta-blackmail as more serious. Berman "assume[s] that the harm threatened by the meta-blackmail proposal is the same harm that the corresponding blackmail proposal threatens"—disclosure of the embarrassing secret.\textsuperscript{39} But Berman acknowledges that the harm each threatens might be different. Berman suggests that "[a]lternatively, if less plausibly, the threatened harm of any meta-blackmail proposal is the harm of being blackmailed."\textsuperscript{40} According to the Reply, then, the harm threatened by a blackmail proposal is disclosure of the embarrassing secret; the harm threatened by a meta-blackmail proposal is either the same or the distinct harm of being blackmailed. Berman assumes that the harm threatened by meta-blackmail must be either one or the other. But why could it not be both?

The harm threatened by a meta-blackmail proposal might consist of both the harm of being blackmailed \textit{and} the harm of having an embarrassing secret

\textsuperscript{35} For a discussion of how the comparative assessment of the relative coerciveness of meta-blackmail and blackmail supports treating meta-blackmail as more serious than blackmail, see Christopher, \textit{supra} note 4, at 772–73.

\textsuperscript{36} For a discussion of attempts to establish blackmail as coercive, see \textit{id.} at 768–69.

\textsuperscript{37} If one denies the formalist approach of treating meta-blackmail as more serious than blackmail, the following puzzle arises: How can that which is clearly coercive be equivalent to that which is not clearly coercive? Though the Reply categorically rejects the formalist approach, it fails to address both the significance of meta-blackmail as clearly coercive, as well as this puzzle.

\textsuperscript{38} For a discussion of Leo Katz's helpful term, "plain vanilla" coercion, see Christopher, \textit{supra} note 4, at 768 n.206.

\textsuperscript{39} Berman, \textit{supra} note 5, at 804.

\textsuperscript{40} \textit{Id.} at 804 n.52.
disclosed. The specific act threatened by a meta-blackmail proposal is blackmail itself. Blackmail itself entails the threatened act of disclosing one's embarrassing secret. Therefore, the harms threatened by a meta-blackmail proposal are two: (i) blackmail and (ii) disclosure of the embarrassing secret. The harm threatened by a blackmail proposal is only one: disclosure of the embarrassing secret. A meta-blackmail proposal threatens the same harm as a blackmail proposal plus an additional harm—blackmail itself. As a result, meta-blackmail may plausibly be seen as more serious than blackmail because it threatens an additional harm that blackmail does not.

II. WHY META-BLACKMAIL IS PLAUSIBLY LESS SERIOUS THAN BLACKMAIL

I argue that any meta-blackmail proposal may plausibly be viewed as less serious than any corresponding blackmail proposal. Berman disagrees. He views only some meta-blackmail as less serious than some blackmail. In this Part, I will demonstrate that Berman's view is based on comparing noncorresponding meta-blackmail and blackmail proposals. Rather than comparing apples with meta-apples, Berman improperly compares apples with meta-oranges. In addition, I will reiterate the arguments in support of considering meta-blackmail to be less serious than blackmail, which Berman largely ignores. Finally, I will present a new rationale supporting the view that meta-blackmail is plausibly less serious than blackmail.

A. COMPARING APPLES WITH META-ORANGES

According to the Reply, whether meta-blackmail is equivalent to blackmail or less serious than blackmail is a function of when each threatened act will be carried out. If the threatened act of meta-blackmail and blackmail will be carried out at the same time, then the two are functionally equivalent and should be treated the same. Only if the threatened act of meta-blackmail will be carried out at a significantly later time, or at a temporally more "distant remove," will meta-blackmail be less serious. As a result, according to the Reply, neither the functionalist approach nor the substantivist approach is entirely correct. Thus Berman concludes that the trilemma can be resolved by the following answer: sometimes meta-blackmail is less serious than blackmail and sometimes meta-blackmail and blackmail are equivalent. But this resolution is attained by ignoring one of the preconditions giving rise to the trilemma.

The trilemma arises by comparing a blackmail proposal with its corresponding meta-blackmail proposal. I defined a pair of blackmail and meta-blackmail
proposals as corresponding if the “only difference between the two proposals is
the threatened act.”\footnote{Christopher, supra note 4, at 769–70 n.213.}
Consider the following pair of corresponding proposals:

**Blackmail:** “If you do not give me $1000, then I will disclose your embarrassing secret.”

**Meta-Blackmail:** “If you do not give me $1000, then I will blackmail you.”

The only difference between these two proposals is the threatened act. Whereas
the blackmail proposal threatens the act of disclosing an embarrassing secret,
the meta-blackmail proposal threatens the different act of blackmail itself. As a
result, the above proposals correspond in the sense that the only difference
between the two is the act threatened. I argued only that the trilemma arises
with respect to a comparative assessment of corresponding blackmail and
meta-blackmail proposals.\footnote{The purpose of comparing only corresponding blackmail and meta-blackmail proposals is the familiar one of making a meaningful comparison. To make the comparison meaningful we need to hold everything constant as we alter only one variable—the threatened act. Perhaps something can be learned by comparing apples with meta-apples, but not much can be learned by comparing apples with meta-oranges. Such a comparison introduces a confound: Any difference between the two could be the result of the difference between apples and meta-oranges or could instead be the difference between apples and oranges.}

In giving “[t]wo [c]heers”\footnote{Berman, supra note 5, at 802.} for the functionalist approach of treating blackmail and meta-blackmail as equivalent, Berman properly compares blackmail to its corresponding meta-blackmail proposal.\footnote{Berman compares the following pair of corresponding blackmail and meta-blackmail proposals:}

**Blackmail:** “A conditionally threatens $H$ that unless $H$ pays $A$ $10,000 within twenty-four hours, $A$ will, at the earliest opportunity thereafter, disclose the fact of $H$’s infidelity to $H$’s spouse, $W$.” \textit{Id.} (designating this proposal “B(c)”).

**Meta-Blackmail:** “A conditionally threatens $H$ that unless $H$ immediately pays $A$ $10,000, $A$ will immediately threaten that unless $H$ pays $A$ $10,000$ within twenty-four hours, $A$ will, at the earliest opportunity thereafter, disclose the fact of $H$’s infidelity to $H$’s spouse, $W$.” \textit{Id.} at 802–03 (designating this proposal “M-B(c)”).

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\footnote{Christopher, supra note 4, at 769–70 n.213.}

\footnote{The purpose of comparing only corresponding blackmail and meta-blackmail proposals is the familiar one of making a meaningful comparison. To make the comparison meaningful we need to hold everything constant as we alter only one variable—the threatened act. Perhaps something can be learned by comparing apples with meta-apples, but not much can be learned by comparing apples with meta-oranges. Such a comparison introduces a confound: Any difference between the two could be the result of the difference between apples and meta-oranges or could instead be the difference between apples and oranges.}

\footnote{Berman, supra note 5, at 802.}

\footnote{Berman compares the following pair of corresponding blackmail and meta-blackmail proposals:}

**Blackmail:** “A conditionally threatens $H$ that unless $H$ pays $A$ $10,000$ within twenty-four hours, $A$ will, at the earliest opportunity thereafter, disclose the fact of $H$’s infidelity to $H$’s spouse, $W$.” \textit{Id.} (designating this proposal “B(c)”).

**Meta-Blackmail:** “A conditionally threatens $H$ that unless $H$ immediately pays $A$ $10,000$, $A$ will immediately threaten that unless $H$ pays $A$ $10,000$ within twenty-four hours, $A$ will, at the earliest opportunity thereafter, disclose the fact of $H$’s infidelity to $H$’s spouse, $W$.” \textit{Id.} at 802–03 (designating this proposal “M-B(c)”.)
**Blackmail:** "A conditionally threatens $H$ that unless $H$ pays $A$ $10,000 within twenty-four hours, $A$ will, at the earliest opportunity thereafter, disclose the fact of $H$'s infidelity to $H$'s spouse, $W$."\(^{51}\)

**Meta-Blackmail:** "A conditionally threatens $H$ that unless $H$ pays $A$ $10,000 within ten years, $A$ will, at the end of that period, immediately threaten that unless $H$ pays $A$ $10,000 within twenty-four hours, $A$ will, at the earliest opportunity thereafter, disclose the fact of $H$'s infidelity to $H$'s spouse, $W$."\(^{52}\)

The Reply claims that these are corresponding blackmail and meta-blackmail proposals.\(^{53}\) But they do not satisfy the condition for correspondence that the only difference be the threatened act. Not only do the threatened acts differ, but also when the threatened act will be carried out differs. In the blackmail proposal, disclosure is threatened to be carried out shortly after twenty-four hours. In the meta-blackmail proposal, disclosure is threatened to be carried out shortly after ten years and a day. These are simply not corresponding blackmail and meta-blackmail proposals as defined in *Meta-Blackmail*.

As a result of comparing noncorresponding proposals,\(^{54}\) not surprisingly the

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51. *Id.* at 802 (designating this proposal "B(c)").
52. *Id.* at 804 (designating this proposal "M-B(c)\(_2\)").
53. *Id.*
54. In a footnote, the Reply ultimately concedes that it does not compare corresponding meta-blackmail and blackmail proposals. It acknowledges that *Meta-Blackmail*’s definition of corresponding meta-blackmail and blackmail proposals requires that the meta-blackmail proposal threatens blackmail and that the "‘only difference between the two proposals is the threatened act.’" *Id.* at 805 n.54. Instead, the Reply compares proposals that differ not only with respect to the threatened act, but also with respect to when the threatened act would be carried out. The threatened act of the Reply’s meta-blackmail proposal (M-B(c)\(_2\)) is to be carried out more than ten years after the threatened act of its "corresponding" blackmail proposal (B(c)). *Id.* at 804. Not surprisingly, the Reply finds the meta-blackmail proposal to be less serious because the threatened harm is temporally more remote. *Id.* at 804. In comparing these two proposals, Berman admits, "I did not adhere precisely to [Christopher’s] definition." *Id.* at 805 n.54.

Instead, the Reply proposes an alternative definition. *Id.* By considering proposals satisfying this alternative definition of correspondence, the Reply again attempts to demonstrate that some meta-blackmail proposals are less serious than some corresponding blackmail proposals. The Reply considers the following pair of proposals:

**Blackmail** (termed B(c)*): "If you do not give me $1000 within one year from today, I will at that time disclose your adultery to your spouse."

**Meta-Blackmail** (termed M-B(c)\(_2\)*): "If you do not give me $1000 within one year from today, I will at that time threaten B(c)*."

*Id.* According to the Reply, "M-B(c)\(_2\)* is a meta-blackmail proposal corresponding to B(c)*." *Id.* Because "the harm that M-B(c)\(_2\)* threatens is nontrivially more remote and unlikely than the harm that B(c)* threatens," the Reply concludes that the meta-blackmail proposal is less serious. *Id.*

But the Reply’s new proposals fail to correspond for the same reason the Reply concedes that its previous pair failed to correspond. The Reply concedes that M-B(c)\(_2\), because its threatened act would be carried out ten years later, does not correspond with B(c). *Id.* M-B(c)\(_2\)* similarly fails to correspond with B(c)*. The threatened harm of B(c)*—disclosure of the secret—is threatened to occur after one year. The ultimate threatened harm of M-B(c)\(_2\)* is threatened to occur after two years. That is, the meta-blackmail proposal threatens to carry out the threatened act of blackmail after one year, and that
Reply finds that some meta-blackmail proposals are less serious than blackmail and some are equivalent to blackmail. Limiting itself to comparing properly corresponding proposals, the Reply finds that meta-blackmail and blackmail are equivalent. The Reply finds them equivalent because, in part, it fails to address the very reasons articulated to support the conclusion that meta-blackmail may properly be considered less serious than blackmail.

B. UNADDRESSSED ARGUMENTS

The substantivist approach views blackmail as a threat and meta-blackmail as a threat to threaten. The harm of a threat to threaten is generally more remote, indirect, and attenuated than the harm of a threat. Generally, the more remote, indirect, and attenuated the prospect of harm resulting from conduct, the less serious the crime such conduct will constitute. This can be seen from the relationship between consummated crimes, attempts, threats, and threats to

(troubled act of blackmail) threatens disclosure of the secret after another year, making disclosure of the secret two years after utterance of the initial threat. M-B(c)_2*, because its threatened act would be carried out at a nontrivially later time than the threatened act of B(c)*, does not correspond with B(c)*.

To clarify what properly qualifies as a pair of corresponding proposals, we need only consider the following pair from Meta-Blackmail:

Blackmail: “If you do not give me $1000, then I will disclose your adulterous relationship.”

Meta-blackmail: “If you do not give me $1000, then I will blackmail you.”

Christopher, supra note 4, at 744, 746. These are corresponding because the meta-blackmail proposal threatens blackmail and the only difference between the proposals is the threatened act. Nonetheless, the Reply objects that these are not necessarily corresponding. Berman, supra note 5, at 805 n.54. The Reply supposes that the blackmail proposal is “the conditional threat to reveal the embarrassing secret that you are engaged in an extramarital affair” and that the meta-blackmail proposal “is the conditional threat to issue a conditional threat to reveal the embarrassing secret that you chew with your mouth open.” Id. The Reply maintains that these satisfy Meta-Blackmail’s definition for correspondence but are not in fact corresponding. Id.

To meet the Reply’s objection, we need only slightly modify the definition of correspondence. A pair of meta-blackmail and blackmail proposals is corresponding if (i) the meta-blackmail proposal threatens the act of blackmail and (ii) the only difference between the two proposals is that the initial threatened act differs. The Reply’s above proposals are thus not corresponding, because the final threatened act differs—the meta-blackmail proposal’s final threatened act (disclosure of your chewing technique) is different from the blackmail proposal’s final threatened act (disclosure of your affair). The Reply’s M-B(c)_2*/B(c)* pair is also not corresponding because of an additional difference between the initial threatened acts: the threatened acts will be carried out at nontrivially different times. The above pair of proposals from Meta-Blackmail is corresponding under this definition, because the only difference is the initial threatened act.

Unfortunately, the Reply never engages in a comparative assessment of the only pair of corresponding meta-blackmail and blackmail proposals advanced in Meta-Blackmail and this Surreply from which the trilemma arises. Instead, the Reply chooses to focus exclusively on noncorresponding proposals neither addressed in Meta-Blackmail nor this Surreply, and then claims, not surprisingly, there is no trilemma.

55. Berman, supra note 5, at 803.

56. The Reply also finds meta-blackmail and blackmail to be equivalent, because it categorically rejects viewing meta-blackmail as more serious than blackmail.

57. For a more expansive explication of the substantivist approach, see Christopher, supra note 4, at 777–79.
threaten. For example, because of the greater harm involved, murder is generally considered more serious than attempted murder, which, in turn, is more serious than making a terroristic threat to kill.\footnote{58} As a result, we might infer that a threat to threaten to kill is even less serious, if it is a crime at all. Similarly, meta-blackmail, which is a threat to threaten, could plausibly be viewed as less serious than blackmail, which is a threat.

The Reply seems to assume that the only measure by which a threatened harm may be more remote, indirect, and attenuated is temporal. For Berman, meta-blackmail is less serious than blackmail when it threatens a temporally more remote harm. What the Reply fails to address is that the threatened harm of meta-blackmail may be more remote, indirect, and attenuated for \textit{nontemposral} reasons. Where a threatened harm is of lower certainty and probability, we might plausibly treat it as less serious than where a threatened harm is of greater certainty and probability.

The harm of a threat to threaten is of lower certainty and probability than the harm of a threat. Upon issuing a blackmail proposal, there is only one step remaining for the ultimate harm to come to fruition—disclosure of the secret. Upon issuing a meta-blackmail proposal, two steps remain—utterance of the final threat and, if its demand is not met, disclosure of the secret. Because of the additional layer of uncertainty as to whether a meta-blackmail proposal will result in the disclosure of the recipient's secret, the harm of meta-blackmail is of a lower certainty and probability than the harm of blackmail. As a result, the harm of meta-blackmail might be plausibly viewed as more remote, indirect, and attenuated than the harm of blackmail. On this basis, meta-blackmail might plausibly be viewed as less serious than blackmail. And this basis has nothing to do with the temporal differences (that the Reply attempts to make relevant) as to when the threatened harm might come to fruition.

One might argue that the lower certainty and probability of the harm of meta-blackmail is a de minimis \footnote{59} difference. Not so, as the following example demonstrates. Upon receipt of a blackmail proposal, the recipient is faced with the difficult choice of whether she values her money more or less than the concealment of her secret. Upon receipt of a meta-blackmail proposal, the recipient does not confront this difficult choice. She might reason that she need not make this difficult choice until the meta-blackmailer issues the final threat—disclosure of an embarrassing secret. She might reason that she will worry about this when and if the meta-blackmailer actually utters the final threat. She might also reason that if she does not accede to the first threatened act (blackmail) the meta-blackmailer might, for a variety of reasons, not even make the final threat. Finally, she might think to herself: "What I care about is my embarrassing secret being disclosed. Am I being presently threatened with the disclosure of

\footnote{58} See id. at 777 nn.245-48.
\footnote{59} See Berman, \textit{supra} note 5, at 804 n.53 (finding de minimis differences in the remoteness of harm of two proposals to be an insufficient basis for treating one proposal as less serious than another).
my embarrassing secret? No. So, why should I care about being threatened with blackmail?" If she is particularly streetwise, she might even say to the meta-blackmailer, "Come back when you have a real threat." As the example illustrates, the lower certainty and probability of the harm of meta-blackmail constitutes a qualitatively significant, non de minimis, difference between meta-blackmail and blackmail. And this difference might be sufficient for the recipient to accede to a blackmail proposal, but refuse to accede to a meta-blackmail proposal. As a result, considering meta-blackmail to be less serious than blackmail is as plausible as the other approaches.

C. A NEW ARGUMENT: THREATENING BLACKMAIL IS LESS SERIOUS THAN ACTUALLY COMMITTING BLACKMAIL

An additional argument, not originally voiced in Meta-Blackmail, also supports viewing meta-blackmail as less serious. As noted, the substantivist perspective finds blackmail to be a conditional threat and meta-blackmail to be a conditional threat to threaten. But alternatively, we might view meta-blackmail and blackmail in a different, but related, way. Upon receipt of a conventional blackmail proposal, the victim is presently being blackmailed. Upon receipt of a meta-blackmail proposal, however, the victim is merely threatened with blackmail. Under this view, then, a conventional blackmail proposal is blackmail, while a meta-blackmail proposal merely threatens blackmail.

A threat to commit a crime is plausibly a less serious level of criminality than actually committing that crime. For example, a threat to commit murder may qualify as the crime of assault or the crime of making a terroristic threat. But a threat to commit murder is, obviously, a less serious crime than actually committing murder. Thus, we might generalize that a threat to commit crime X is plausibly less serious than actually committing crime X. Therefore, a threat to commit the crime of blackmail may plausibly be viewed as less serious than actually committing the crime of blackmail. As a result, meta-blackmail (as a...

60. The lower certainty and probability of the harm of meta-blackmail may also be seen quantitatively. Let us assume that not all threatened acts actually come to fruition. Let us arbitrarily suppose that the probability of any threatener carrying out his threatened act is 50%, or .5. Let us also "assume [as does the Reply] that the harm threatened by the meta-blackmail proposal is the same harm that the corresponding blackmail proposal threatens"—disclosure of the victim’s secret. Id. at 804. Thus, the probability of a blackmailer carrying out the threatened harm of disclosure of the victim’s embarrassing secret is 50%. The probability of the same harm occurring with respect to meta-blackmail, however, is less. The probability of a meta-blackmailer carrying out the threatened act of blackmail is 50% and the probability of the meta-blackmailer carrying out the final threatened act of disclosure is also 50%. In order for the threatened harm—disclosure—to come to fruition, the meta-blackmailer must carry out two threatened acts. Given that the probability of each occurring is 50%, the probability of both occurring is (.5 x .5 = .25) 25%. The probability of the harm threatened in a blackmail proposal occurring (50%) is twice as high as that for meta-blackmail (25%). As a result, the harm of meta-blackmail might plausibly be viewed as more remote, indirect, and attenuated than the harm of blackmail. Thus, meta-blackmail might plausibly be viewed as less serious.

61. See Christopher, supra note 4, at 777 nn.246–47.

62. See id. at 777 n.245, 778 n.253.
threat to commit blackmail) may plausibly be viewed as less serious than blackmail.

III. ANALOGIZING FROM META-ROBBERY

A comparative assessment of meta-robbery and robbery proposals both illuminates the trilemma of meta-blackmail and illustrates the difficulty in resolving it. Perhaps one measure by which to assess our intuitions regarding meta-blackmail is to see how they would apply to meta-robbery. Consider the following pair of corresponding robbery and meta-robbery proposals:

**Robbery:** “If you do not give me your money, I will imminently cause you serious bodily harm.”

**Meta-Robbery:** “If you do not give me your money, I will imminently commit robbery against you.”

Is meta-robbery more serious, equivalent, or less serious than robbery?

According to the Reply's approach, the two should be equivalent unless the threatened act of meta-robbery is threatened to be carried out later. Let us assume that the threatened harm of each will be carried out at approximately the same time. Under this assumption, then, the Reply would find them equivalent. According to Berman, a conditional threat to $X$ is equivalent to a conditional threat to $Y$ “when $X$ is itself a conditional threat to $Y$” because “[u]nder those circumstances, the two conditional threats can collapse into one.” The Reply’s approach would thus find the robbery and meta-robbery proposals to be equivalent because the meta-robbery proposal is a conditional threat to commit the robbery proposal; the two conditional threats would collapse into one and be equivalent.

The law of robbery, however, does not agree. Under most robbery statutes, the requisite threatened act is death or serious bodily harm. The act threatened in the meta-robbery proposal—robbery—does not qualify as death or serious bodily harm. Therefore, the meta-robbery proposal fails to qualify as robbery. As a result, in most jurisdictions, meta-robbery and robbery would not be equivalent. By threatening less than serious bodily injury, meta-robbery would only constitute the lesser crime of extortion. Thus, the Reply’s analysis of when conditional threats are equivalent fails with respect to most formulations of robbery.

In a significantly smaller number of jurisdictions, the requisite threatened act for robbery may be any felony, any *serious* felony, or any unlawful act. In

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64. See Christopher, *supra* note 4, at 745 n.28.
65. See id.
66. See id.
these jurisdictions, the act threatened by meta-robbery—robbery—would qualify as a serious felony or unlawful act. Thus, meta-robbery would qualify as robbery in these jurisdictions and meta-robbery and robbery would be equivalent. Under this minority conception of robbery, Berman’s analysis of equivalent conditional threats would be correct.

But even this limited validation for the Reply is problematic. In many of the same jurisdictions where meta-robbery qualifies as robbery, and meta-robbery and robbery are equivalent, meta-blackmail would also qualify as robbery. Meta-blackmail threatens the unlawful and felonious act of blackmail. In at least four of these jurisdictions, meta-blackmail qualifies as robbery, but blackmail (threatening a lawful act) does not. Where meta-blackmail qualifies as robbery and blackmail does not, meta-blackmail and blackmail cannot be equivalent. Meta-blackmail is the more serious crime.

The upshot for the Reply’s approach is that it is either incorrect with respect to meta-robbery or incorrect with respect to meta-blackmail. Where robbery requires a threatened act of death or serious bodily harm, meta-robbery and robbery are not equivalent. And in the smaller number of jurisdictions where the Reply’s approach is consistent with respect to meta-robbery, it is incorrect with respect to meta-blackmail. Jurisdictions requiring merely a felonious or unlawful threatened act for robbery both (i) allow meta-robbery to qualify as robbery and thus meta-robbery and robbery to be equivalent, and (ii) allow meta-blackmail to qualify as robbery and thus allow meta-blackmail to be more serious than blackmail. As a result, the Reply’s approach is wrong with respect to meta-robbery in most jurisdictions. And, in the limited number of jurisdictions where the Reply’s approach is right with respect to meta-robbery, it is wrong with respect to meta-blackmail.

While the consideration of meta-robbery is damaging to the Reply, it might also seem to undermine the trilemma of meta-blackmail. Meta-robbery is viewed by most jurisdictions as less serious or, in a smaller number of jurisdictions, as equivalent to robbery. But under no conception of robbery is meta-robbery considered more serious than robbery. No trilemma arises from the comparative assessment of meta-robbery and robbery. Nor does a dilemma arise. Any given jurisdiction will yield a determinate answer: meta-robbery is less serious where the requisite threatened act is death or serious bodily harm and equivalent to robbery where the requisite threatened act is a felony or an unlawful act. On this basis, one might argue that meta-blackmail must similarly be either less serious or equivalent to blackmail.

But there is one crucial difference between the comparison of meta-robbery to robbery and meta-blackmail to blackmail. Because the threatened act of meta-robbery (robbery itself) is less serious than the typical threatened act of robbery (death or serious bodily harm), there is no basis for meta-robbery to be more serious than robbery. But this is not true with

67. See id. at 771–72.
respect to the comparative assessment of meta-blackmail and blackmail. The threatened act of meta-blackmail (blackmail itself) is more serious than the threatened act of blackmail (disclosure of an embarrassing secret). The difference stems from the threatened acts in robbery being unlawful and the threatened acts in blackmail being lawful. By criminalizing, as the crime of blackmail, conditional threats to commit lawful acts, a threat to commit blackmail will necessarily threaten a more serious act than any lawful act threatened in blackmail. As a result, the act threatened by meta-blackmail will be more serious than the act threatened by blackmail. This difference explains why the comparative assessment of meta-robbery and robbery yields a determinate answer, but the comparison of meta-blackmail and blackmail results in a trilemma. And this difference also explains why meta-blackmail may plausibly be viewed as more serious than blackmail even though meta-robbery is never more serious than robbery.

CONCLUSION

Berman’s Reply does not dispel the trilemma of the comparative assessment of meta-blackmail and blackmail. If anything, thanks to Berman’s critique, the trilemma is even sharper and more problematic than how Berman found it.68

68. Berman’s Reply ultimately withdraws its only argument against the formalist view that meta-blackmail is more serious than blackmail. Initially, the Reply states that a prerequisite for considering meta-blackmail to be more serious is that meta-blackmail cannot be equivalent to blackmail. Berman, supra note 5, at 808. Asserting that they are equivalent, it concludes that meta-blackmail could not be more serious. Id. at 809. However, the Reply later admits that this argument is “inadequate” and “too strong,” id. at 809–10 n.64, and agrees that formal differences may sometimes trump functional equivalence, thereby allowing functionally equivalent conduct to be treated differently.

The Reply nonetheless argues that even if meta-blackmail is more serious than its corresponding and functionally equivalent blackmail proposal, no trilemma arises. The proposed solution is to qualify the functionalist intuition to include a ceteris paribus clause. Id. The result is that functionally equivalent proposals should be treated equivalently unless one is properly more serious or less serious than the other. Id. With this qualification, “the functionalist argument stands in essentially the same relation to the formalist argument as it does to the substantivist one.” Id. at 809–11 n.64. From this the Reply concludes “[t]here is no trilemma.” Id.

From this I conclude that the Reply’s argument only serves to reaffirm the trilemma. The Reply’s argument seems to amount to nothing more than concluding that meta-blackmail should be treated equivalently to blackmail unless it should not; and if not, it should either be treated as more serious or less serious. But this is not so much a resolution of the trilemma as a reiteration of it. Given a pair of corresponding proposals, is meta-blackmail more serious, equivalent, or less serious? The Reply provides no answer.

As to whether the functionalist or substantivist approach is preferable, the Reply similarly argues that this issue “is not easily resolved, but it also does not matter.” Id. at 809–10 n.64. Either meta-blackmail threatens a significantly more remote and less probable harm than blackmail or it does not. Id. “Both cannot be true, so there is no incompatibility between the functionalist and substantivist perspectives.” Id. But which is it? Does meta-blackmail threaten a significantly more remote and less probable harm or not? Is meta-blackmail less serious than blackmail, or equivalent to blackmail? Again, the Reply supplies no answer.

In addition, the Reply never engages many of the arguments advanced in support of the trilemma. In support of the formalist horn of the trilemma, I argued in Meta-Blackmail and reiterated again in this
Surreply, that (i) meta-blackmail qualifies as the more serious crime of robbery in some jurisdictions and blackmail does not, and (ii) meta-blackmail is clearly coercive while blackmail is not. See Christopher, supra note 4, at 771–73; supra 821–22. In this Surreply, I also argue that meta-blackmail is more serious, because it threatens two harms (blackmail itself and disclosure of another’s secret), whereas blackmail only threatens one harm (disclosure). See supra 822. In support of the substantivist horn of the trilemma, I argue in this Surreply that the victim of a blackmail proposal is actually blackmailed, while the victim of meta-blackmail is merely threatened with blackmail. As merely a threat to blackmail, meta-blackmail is therefore less serious. See supra 827–28. The Reply never engages these arguments. The Reply fails to even comparatively assess the only pair of corresponding meta-blackmail and blackmail proposals advanced in both Meta-Blackmail and this Surreply. See supra note 54.

That the trilemma of meta-blackmail still stands after a number of attempts to dispel it by such a distinguished and resourceful blackmail scholar and criminal theorist as Mitchell Berman suggests that a quick and easy resolution may prove elusive. Not only has the trilemma resisted resolution, but weathering Berman’s critique has strengthened it. New arguments, generated in response to the attempted resolutions, have only sharpened the trilemma’s formalist and substantivist horns.