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# REPLY

## Meta-Blackmail and the Evidentiary Theory: Still Taking Motives Seriously

MITCHELL N. BERMAN\*

The law ordinarily permits us to conditionally threaten what it permits us to do. It also ordinarily prohibits us from conditionally threatening what it prohibits us to do. Sometimes, however, the law prohibits us from conditionally threatening what it permits us to do.<sup>1</sup> This we call blackmail. For generations the challenge of explaining why this should be—why or how, and under what circumstances, it can be wrong to threaten what it is not wrong to do—has constituted one of the great intellectual puzzles in all of law.

Now comes Russell Christopher promising to deepen the puzzle further.<sup>2</sup> His tool is a characteristically clever thought experiment or imaginary device: the conditional threat to conditionally threaten what it is permissible to do. Dubbing this conditional threat to blackmail “meta-blackmail,” Christopher challenges us to figure out how the law should treat it. Logically, he says, there are only three possibilities.<sup>3</sup> What he terms the “formalist” solution would punish meta-blackmail more severely than the blackmail proposal upon which the meta-blackmail proposal is predicated; a “functionalist” solution would punish the two proposals the same; and a “substantivist” solution would punish meta-blackmail less severely than its corresponding blackmail proposal.

The problem is that these three options are not mere logical possibilities. To the contrary, Christopher argues, each is supported by plausible—even “compelling”—intuitions.<sup>4</sup> Defenders of blackmail’s criminalization thus confront a trilemma. Because these three solutions are mutually incompatible, the defender must choose one and provide convincing arguments sufficient to defeat the intuitions that support the other two. Skeptical that this can be accomplished, Christopher urges that the only way out is to decriminalize blackmail. If a conditional threat to perform a legal action

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\* Bernard J. Ward Centennial Professor in Law, The University of Texas at Austin. © 2006, Mitchell N. Berman. I am grateful to Russell Christopher and the editors of *The Georgetown Law Journal* for graciously allowing me this reply, to John Deigh for valuable conversations, and to Daniel Salgado for helpful research assistance.

1. These remarks about the conditional threat and the act threatened suggest a 2x2 matrix of possibilities. For sake of completeness, it is perhaps worth mentioning that the fourth box (permissible to threaten what it is impermissible to do) is likewise occupied. On many accounts, nuclear deterrence is the paradigmatic example.

2. Russell L. Christopher, *Meta-Blackmail*, 94 *Geo. L.J.* 739 (2006).

3. *See id.* at 769 n.213.

4. *See id.* at 747.

were itself legal, then the formalist, functionalist, and substantivist perspectives would unite in support of the obvious conclusion that meta-blackmail should be legal too.

Meta-blackmail is a delightful conceit, another provocative product of Christopher's fertile imagination. But much as I admire Christopher for birthing it, I do not think it undermines the intuition—widely and deeply held, as I believe it to be—that some conditional threats to perform legal acts are properly criminalized. Quite the contrary, consideration of meta-blackmail does nothing to undermine one of the existing theories of blackmail's criminalization—namely, the “evidentiary theory” I advanced nearly a decade ago.<sup>5</sup> Or so I shall argue.

### I. THE EVIDENTIARY THEORY

Nominally, *Meta-Blackmail* is divided into five parts. It is more perspicuous, however, to distinguish two. The first, comprising nearly two-thirds of the Article, is a critical review of the existing theories of blackmail. After all are found wanting, the second part sets off to deepen the blackmail puzzle by introducing the concept of meta-blackmail. Christopher kindly includes my own effort to solve the blackmail puzzle among those he canvasses.<sup>6</sup> But it appears from his brief discussion that he does not quite understand the account I offer. So before I explain why Christopher's three specific objections to the evidentiary theory do not stick, I will offer readers a much fuller explication of that theory than the single-paragraph summary Christopher provides.

Recall Christopher's taxonomy of theories that purport to explain or justify blackmail's criminalization. Following convention, his first cut divides consequentialist from nonconsequentialist approaches. He then subdivides the nonconsequentialist theories of blackmail's criminalization into two subcategories: those that locate the wrongfulness of the conditional proposal in one of its components (either the threat or the demand), and those that locate its wrongfulness in a combination of components. He classifies my evidentiary theory among the latter, along with George Fletcher's “domination” theory<sup>7</sup> and James Lindgren's “bargaining chip” theory.<sup>8</sup> The subcategory is then rounded out with a fourth type of theory that Christopher labels “coercion.”<sup>9</sup> Citing Lindgren and Jeffrie Murphy with approval, Christopher suggests that if (contrary to his ultimate conclusion) a satisfactory justification for blackmail's criminalization is to emerge, it will

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5. Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795 (1998) [hereinafter Berman, *The Evidentiary Theory*].

6. Christopher, *supra* note 2, at 766–67.

7. *Id.* at 764–66.

8. *Id.* at 767–68.

9. *Id.* at 768–69.

likely be one that shows blackmail to be coercive: “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>10</sup>

The evidentiary theory is precisely such an account: it explicitly purports to explain why blackmail is coercive and why ordinary economic transactions are not.<sup>11</sup> I emphasize this not to imply that the evidentiary theory’s status as a coercion-based theory of blackmail necessarily counts in its favor, let alone suffices to render it correct. It is, of course, entirely fair to question whether my account *succeeds* in establishing both that blackmail is coercive and that hard economic bargains are not. But Christopher’s failure to properly classify my account casts doubt on his grasp of its logic.<sup>12</sup>

#### A. THE THEORY

Coercion is a species of wrong.<sup>13</sup> According to the most common view, which I share, coercion is the particular wrong that consists in the conditional threat to commit a wrong.<sup>14</sup> This understanding of coercion holds true in any normative system or from any normative perspective. That is to say: (1) it is presumptively morally wrong to conditionally threaten what it is presumptively morally wrong to do; (2) it is presumptively criminally wrong to conditionally threaten what it is presumptively criminally wrong to do; (3) it is presumptively unconstitutional to conditionally threaten what it would be presumptively unconstitutional to do; etc.

It is definitional of the crime that the act a blackmailer threatens is not illegal or, at the least, is not criminal.<sup>15</sup> As Christopher observes, whether the act threatened is illegal is precisely what distinguishes robbery and extortion on the

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10. *Id.* at 769.

11. See Berman, *The Evidentiary Theory*, *supra* note 5, at 851–52, 855–56; see also Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45, 81–82 (2002) [hereinafter Berman, *Coercion Claims*].

12. This oversight of Christopher’s is especially puzzling given that he entertains the possibility that Leo Katz’s theory of blackmail might be based on coercion despite Katz’s own apparent protestation to the contrary. See Christopher, *supra* note 2, at 768 at n.208. Other than Katz’s, the only “notable attempts to establish blackmail as coercive” that Christopher identifies are attempts that even the authors themselves seem to acknowledge fail. See *id.* at 769 n.210 (citing works by Alan Wertheimer and Robert Nozick).

13. That is not *all* coercion is. Not only do we employ coercion talk in a variety of non-normative contexts, but we employ it to serve two discrete normative functions: to mark a wrong and to excuse conduct undertaken in the face of certain types of pressure. I have argued elsewhere that what constitutes coercion for these two purposes differs. See generally Berman, *Coercion Claims*, *supra* note 11. I am here concerned only with coercion as a wrong.

14. It might be more precise to conceive of coercion as the wrong of conditionally threatening to wrong the person threatened. To conform with the space constraints allotted this reply, I will ignore this nuance and others like it that do not bear significantly either on the adequacy of the evidentiary account of blackmail, or on my critique of Christopher’s analysis of meta-blackmail.

15. This is a second subtlety that I, like Christopher, ignore for the sake of brevity. I will assume that the act a blackmailer threatens is neither criminal nor otherwise illegal.

one hand from blackmail on the other.<sup>16</sup> It follows that blackmail cannot constitute the *legal* wrong of coercion. But that does not resolve whether blackmail constitutes the *moral* wrong of coercion. I argue that it does (at least in its paradigmatic instances). I argue further that blackmail's status as a form of (morally wrongful) coercion can explain and justify its criminalization.

Of these two steps, the former is both more interesting and more difficult. That is not to say that the latter is unworthy of comment or reflection, for not all moral wrongs are properly criminalized. But if we can agree that the blackmail threat is (ordinarily) an instance of the moral wrong of coercion, I venture that at least a *prima facie* case for its criminalization will be obvious to just about everyone, regardless of the theory or theories of punishment to which they adhere. After all, the blackmailer aims to get something from his victim (usually money) in a morally illegitimate way. Preventing a (morally) forced transfer of this sort would seem to fall squarely within the consequentialist objectives of the criminal law. And if blackmail is a moral wrong, then the retributive case for its criminalization is also well within our grasp. Furthermore, insofar as blackmail is widely perceived to be morally wrong, then we have an expressive reason to criminalize it. We could, but need not, go on.

The difficult task, to repeat, is to establish that blackmail constitutes the moral wrong of coercion. Recall my claim that a conditional proposal is coercive, morally speaking, if and only if the act threatened would be wrong, morally speaking, to carry out.<sup>17</sup> It follows that if a given instance of blackmail is morally coercive then the act the blackmailer threatens must be morally wrongful. This is the difficulty for my account, for the acts customarily leveraged into blackmail proposals are generally thought morally permissible. To be sure, the contours of blackmail, properly so called, are unclear. One who seeks to explain and justify both the intuition that blackmail is a moral wrong and the proposition that it is properly criminalized may fairly limit her defense to some subset of the conduct that plausibly fits within its parameters. It could well be that only core cases of blackmail are morally wrongful and that, by a process of unreflective seepage, moral opprobrium has attached unjustifiably to neighboring cases. It could also be that line-drawing difficulties and kindred sorts of administrative considerations rightly counsel that the law reach some types of conditional proposals that might not or do not constitute blackmail, morally speaking, but cannot be easily excluded from the criminal ban. But these possibilities are of no help to me, for my claim that the act a blackmailer threatens is morally wrongful confronts difficulty not just at the periphery but at

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16. Christopher, *supra* note 2, at 745.

17. My reference to "the act threatened" should not drive you to wonder whether blackmail really is a threat as opposed to an offer. In a biconditional proposal, the proposal-maker is always advancing both a "threat" (to tell your wife, to shoot you dead, to withhold a good or service) and an "offer" (to remain silent, to let you live, to provide the good or service). Which of the two labels attaches more felicitously to the proposal as a whole is a separate question that need not distract us. See Berman, *Coercion Claims*, *supra* note 11, at 55–59.

the core. The central case of blackmail, Christopher and I agree,<sup>18</sup> includes a conditional threat to reveal that the recipient of the threat has committed adultery. Let us then take the following case as representative of blackmail's core: *A* conditionally threatens *H* to disclose the fact of *H*'s infidelity to *H*'s spouse, *W*, unless *H* pays *A* \$10,000. If this proposal is coercive, morally speaking, then *A*'s subsequent disclosure of *H*'s infidelity, on *H*'s nonpayment to *A*, must be morally wrongful. But that, we think, is mistaken. Surely it is morally permissible for *A* to do as he threatens. Indeed, some might think that *A* should tell *W*, perhaps is even morally obligated to do so.

The superficial implausibility of contending flatly that *A*'s disclosure to *W* would be morally wrongful has led many theorists to locate the moral wrongfulness of *A*'s conduct in the threat itself, as opposed to the act threatened. The evidentiary theory contends otherwise. Its core insight is that the moral character of *A*'s conduct in disclosing *H*'s infidelity to *W* is not a function merely of what we often call "objective" facts. Rather, the wrongfulness *vel non* of *A*'s disclosure depends on *A*'s actual motivating reasons for so acting. Of the actions that a blackmailer threatens, most strike us as morally indeterminate in the sense that we recognize moral reasons both for and against.<sup>19</sup> Under these circumstances, the morality of the choice depends upon the reasons for which one *actually* acts, not the reasons that bear on how one *should* act—what Razians call the actor's explanatory reasons, rather than the guiding reasons.<sup>20</sup> And the fact of a prior conditional offer of silence is evidence (not conclusive) that the blackmailer would not in fact be motivated by right reasons were he to do as he threatens. The conditional threat does not, accordingly, *make* the proposal wrongful. Rather, it tends to *reveal* the wrongfulness of the act threatened. And if the act threatened would be wrongful, because not rightly motivated, then the wrongfulness of the conditional threat follows unproblematically from the logic of coercion.

This account depends critically upon two propositions: first, that the wrongfulness of an act can depend upon an actor's motives; and second, that, in the context of such paradigmatic cases of blackmail as the conditional threat to disclose the victim's adultery, the conditional offer of silence is reasonable evidence (i.e., of nontrivial probative weight) in support of the proposition that the actor would have the wrong sorts of motives—or, more precisely, would lack the right sort—were he subsequently to engage in the act threatened.

Admittedly, the first proposition is contested. Indeed, the conventional view in ethics is that act evaluations like right and wrong are motive-independent and

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18. See Berman, *The Evidentiary Theory*, *supra* note 5, at 821; Christopher, *supra* note 2, at 743–44.

19. If the balance of moral reasons clearly weighs against the act, then the moral coerciveness of the conditional threat is plain. Such cases raise the question of why the law does not prohibit the unconditional act, but this is rarely a very deep puzzle. A range of considerations—from difficulties of proof to free-speech concerns—might serve, singly or in combination, to supply an answer.

20. See generally JOSEPH RAZ, *On Reasons for Action*, ch. 1 of PRACTICAL REASON AND NORMS (Princeton Univ. Press 1990) (1975).

that motives are relevant only to agent evaluations. With others,<sup>21</sup> I think that is just mistaken, but I cannot fully defend that view in this space. So let me put the claim another way by breaking the big idea of *wrong* into the possibly more manageable component ideas of *harm* and *justification*. Let us say—and this must be to a first approximation only—that it is wrong to knowingly cause harm without justification.

What sorts of disutilities rightly qualify as “harms”—how to distinguish between genuine harms and merely putative harms—is controversial. But that the answer depends on some form of normative or evaluative judgment, not a bare descriptive one, is common ground. Suppose that *A* punches *B* in the arm and that *C* refuses to go with *D* to the prom. Very plausibly, *D* will suffer more keenly from *C*’s refusal than *B* will suffer from *A*’s punch. Nonetheless, *B* is thought to suffer harm while *D* does not, the upshot being that *A* is thereby obligated to provide reasons for his conduct, while *C* is not. No doubt we can give reasons to defend this two-part conclusion.<sup>22</sup> For purposes of resolving the blackmail puzzle, though, I think it unnecessary to delve deeper. Whatever the precise bases of contemporary moral judgments regarding what types of setbacks do and do not constitute harm, that disclosing someone’s infidelity to his or her spouse causes the adulterer what society deems a harm seems hard to deny. The disclosure infringes morally recognized interests in privacy and reputation. That the adulterer’s previously good reputation might not have been deserved, that he might richly deserve to suffer from the disclosure, is not to the point. Were the justifiability of imposing a badness sufficient to render the badness not a harm, then the notion that a harm might have been imposed justifiably would be incoherent, which it is not.<sup>23</sup> If *B*, acting in self-defense, forcibly repels an unprovoked attack by *A*, causing *A* injury, we would not, in response to a subsequent complaint by *A*, assert that *B* did not harm *A*. Rather, because *B* acted with justification, the mere fact that *A* was harmed leaves him with no grounds for complaint.

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21. See Steven Sverdlik, *Motive and Rightness*, 106 *ETHICS* 327 (1996) (arguing that motives can affect the “rightness” or “wrongness” of an action).

22. Following Jeffrie Murphy, Christopher asserts that such reasons would have to make use of the concept of a *right*. Christopher, *supra* note 2, at 765–66 (citing Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 *MONIST* 156, 161 (1980)). I am disposed to believe, in contrast, that the idea of a right may, but need not, feature in a satisfactory account of the moral concept of harm.

23. I thus disagree with Joel Feinberg’s suggestion that “[t]o say that *A* has harmed *B* in this [normative] sense is to say much the same thing as that *A* has wronged *B*” and that “[o]ne person *wrongs* another when his indefensible (unjustifiable and inexcusable) conduct violates the other’s right.” 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 34 (1984). Feinberg is surely correct that “not all invasions of interest are wrongs, since some actions invade another’s interests excusably or justifiably, or invade interests that the other has no right to have respected.” *Id.* at 35. But precisely because there exist these *two* ways that an invasion of interest is prevented from constituting a wrong, it would be helpful to have a vocabulary adequate to capture the difference. A first-pass characterization of wrong as the knowing risking of harm without justification allows us to say that not all invasions of interests are wrongs since some invasions constitute no harm and some harms are excused or justified.

So I hope we can agree that when disclosing *H*'s infidelity to *W*, *A* harms *H*, in a morally significant sense. (I will argue later<sup>24</sup> that such a disclosure produces legally cognizable harm as well, but the evidentiary theory does not depend upon that stronger claim.) The second question is whether *A* acts with or without justification. In answering this question, three things are potentially relevant—the objective facts, the actor's beliefs, and the actor's motivations.<sup>25</sup> Criminal theorists are divided over whether an actor can be justified (as opposed to merely excused) if he mistakenly believes that facts obtain which would unproblematically confer justification were the beliefs true. But, regardless of whether the actor's beliefs in the justifying facts must be true or merely genuine (and reasonable), most agree that, in order to render the actor morally justified, those beliefs must form part of what motivates him.<sup>26</sup> Because *A* knowingly causes *H* harm when disclosing to *W*, he acts wrongly<sup>27</sup> in doing so unless he is actually motivated by one or more of some relatively small number of beliefs and values—things like a belief that *W* has a right to the truth or that the knowledge would likely help *W* make life decisions that better promote her interests and welfare. If *A* makes the disclosure so that *H* will suffer, or on a lark, or because he had threatened to do so and now wants to develop a reputation as a credible threatener, or because *C* had offered *A* \$100 to tell *W*, then *A* acts without justification and therefore wrongly. It is not that *A* necessarily has “bad motives” such as spite or malice, but that he lacks good motives and that one must act for good motives when knowingly risking harm.<sup>28</sup>

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24. See *infra* note 32.

25. For a recent elaboration, see Mitchell N. Berman, *Lesser Evils and Justification: A Less Close Look*, 24 *LAW & PHIL.* 681 (2005).

26. See, e.g., John Gardner, *Justifications and Reasons*, in *HARM AND CULPABILITY* 103, 107–14 (A.P. Smith & A.T.H. Simester eds., 1996) (arguing that, to be justified, the guiding reasons for taking a particular course of action must be among the explanatory reasons for having taken it). Although I agree with Gardner that right motivations are necessary to confer moral justification, I disagree with his position that right motivations, along with nonculpable beliefs, are not jointly sufficient. But that is a separate matter, as is whether right motivations are or should be necessary to confer legal justification under the general defense of necessity.

27. Our language is sufficiently nuanced to allow us to describe *A*'s disclosure in various ways. Those who insist that the rightness or wrongness of an action is independent of the actor's reasons or motives for engaging in that action may nonetheless allow that by virtue of his failure to be rightly motivated, “*A*'s action was not wrong, but he nonetheless acted wrongly” or that “*A* acted wrongfully but did not engage in wrongdoing,” or something of this sort. I do not want to fight those battles here. Instead, I propose to amend my definition of coercion to accommodate whatever description of *A*'s conduct in making his disclosure that would render the conditional threat to make that disclosure, under that description, the wrong of coercion. That is, for example, if the best characterization of *A*'s not-well-motivated disclosure of *H*'s infidelity is that “*A* acted wrongly in doing right,” then let us say that coercion is the wrong of threatening *either to do wrong or to act wrongly in doing what is not wrong*.

28. Christopher describes my account as one based on the presence of “bad motives.” I cannot fault him for that, as I used that description myself at times. But I did so as a shorthand, specifically defining “bad motives” as knowingly risking harm without good motives. See Berman, *The Evidentiary Theory*, *supra* note 5, at 839–40, 848. This is an important distinction because the claim that, were he to engage in the disclosure he threatens, a blackmailer is apt to *have* a pro attitude toward the *bad*, is rather



This is all enough to conclude that *A* wrongs *H* in disclosing *H*'s infidelity to *W* if and only if *A* does not act for the right reasons. The final question is whether the conditional threat is evidence that were *A* to disclose, his motivating reasons would in fact not be the right ones. Surely yes. Rightly or wrongly, most people mind their own business. Reasonably, then, Christopher suggests at one point that one who informs someone about the infidelity of the latter's spouse may be a friend.<sup>29</sup> Certainly, bonds of friendship might motivate such a disclosure. But bonds of friendship could also, in at least two ways, motivate silence. First, and especially if the friend believes that learning the truth will not, in fact, cause the wronged spouse to engineer an improvement in her marital relationship, the friend might conclude that her greater duty is to avoid causing *W* unnecessary pain. Second, the friend of one spouse might well be the friend of the other as well, and hence feel conflicting obligations of loyalty.

All of this explains why people who discover information about a friend's infidelity are likely to feel so deeply torn and to reason that the proper path (to tell the wronged spouse or to remain silent or to confront the adulterer) depends on a host of factors: the history and character of his friendship with each spouse; whether the infidelity was a single incident or a longer affair; whether, if the latter, the affair has been terminated or remains ongoing; whether the offending spouse appears genuinely repentant; whether the wronged spouse is likely to use the information in a way that is productive for her (including by dissolving the marriage) or to experience the information as gratuitously painful; etc. It is also why the innocent spouse who comes to believe that her friend chose wrongly (spoke when she would have preferred not to know or remained silent when she would rather have learned the truth) can nonetheless accept that her friend *is* her friend, that he acted consistent with the duty, born of friendship, to act with loving regard for her interests. What appears *inconsistent* with the duties of friendship is for the putative friend to have offered to sell the offending spouse his silence. So if *A* tells *W* after having made a blackmail proposal to *H* which *H* rebuffed, it seems highly unlikely that *A* is, at the time of disclosure, actually motivated by friendship with *W*.<sup>30</sup> Had *A* concluded that, all

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stronger than the claim that he is apt to *lack* a pro attitude toward the *good*. The evidentiary account relies on the latter, weaker claim.

29. See Christopher, *supra* note 2, at 763 (“[A]s a friend to a cuckolded spouse, it is morally permissible to disclose the other’s spouse’s infidelity.”).

30. Naturally, much depends upon what *A* demanded as the price for his silence. The argument in text assumes that *A* demands that *H* pay *A* money. Had *A* instead conditionally threatened to tell *W* unless *H* immediately broke off his affair with *B*, then the hypothesis that (when making the disclosure upon *H*'s noncompliance with the demand) *A* would be motivated by friendship to *W* would be bolstered rather than undermined. There exist a range of intermediate cases in which the strength of the evidentiary inference is debatable or unclear.

This analysis suggests a (large) kernel of truth behind Lindgren's “bargaining chip” theory. See *id.* at 767–68. See generally James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 702 (1984). It is not that there exists a general moral duty not to exploit other people's interests for your benefit. It is that such exploitation is likely inconsistent with having a certain status (like friend) vis-à-vis the person whose “chips” they are, and that the hypothesis that one had the motives adequate

things considered, his duty of friendship militated in favor of disclosure, he would not have offered to remain silent for payment.<sup>31</sup>

Of course, the assumption that *A* is, or claims to be, *W*'s friend helps illustrate the evidentiary analysis, but is not essential. The more general point is that whenever *A* discloses an embarrassing secret of *B*'s, an objective factfinder whose job it was to determine whether *A*'s motives were good would find it probative to learn that, prior to the disclosure, *A* had offered to sell *B* his silence. The factfinder would want evidence of the prior conditional threat to be admissible, so to speak.

In summary, and generalizing from the case of adultery-blackmail to conditional threats to disclose embarrassing information, the evidentiary explanation for the criminalization of blackmail rests on the following eight steps: (1) it is morally coercive to conditionally threaten what it would be morally wrong to do; (2) it is morally wrong to knowingly cause (or risk) harm without justification; (3) it is a necessary condition for the realization of a justification that the facts that could support the justification be among (or prominent among) the explanatory reasons for which an actor acts; (4) the sense of harm at work here is moralized (or at least evaluative); (5) absent unusual circumstances, disclosing an embarrassing secret about an individual causes what our culture recognizes as harm (in the morally relevant sense); (6) the fact that, *prior* to making such a harm-causing disclosure, the actor had conditionally offered his silence for a fee is ordinarily evidence of nontrivial probative value that, when subsequently making the disclosure, the reasons that could supply justification were not among the actor's explanatory reasons; (7) therefore, blackmail proposals predicated on a threat to reveal embarrassing secrets are ordinarily (or frequently) morally coercive; and (8) because blackmail proposals predicated on such threats are ordinarily (or frequently) efforts to obtain property belonging to another by morally coercive means, society has *prima facie* reason to criminalize them (even though the criminal ban would cover instances of conduct that are not morally coercive).<sup>32</sup>

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to justify engaging in the harm-causing disclosure could come close to presupposing that status relationship.

31. A more-detailed and formal analysis of the evidentiary inference appears in Berman, *The Evidentiary Theory*, *supra* note 5, at 844–48.

32. This presentation of the evidentiary argument follows the relatively modest line taken in *Coercion Claims* by treating blackmail as criminalizable because it is coercive in a *moral* sense. In *The Evidentiary Theory*, I took the stronger position that blackmail proposals could be viewed as conditional threats to engage in constructively unlawful conduct, in which case the proposals themselves could be viewed as constructively coercive in a *legal* sense. I offer a condensed version of that argument here for sake of completeness. It bears emphasis, though, that while I still believe this argument to be correct, it is more aggressive than necessary to solve the blackmail puzzle.

Christopher characterizes what the blackmailer threatens (in central cases) as “the act of disclosing another’s embarrassing secret.” Christopher, *supra* note 2, at 71. Let us label the act-type of disclosing an embarrassing secret *D*. *D* can be broken into various act-subtypes. Consider two to start: the act-subtypes of disclosing embarrassing secrets after having made a prior conditional offer of silence (*D*<sub>CO</sub>), and of disclosing embarrassing secrets without having made a prior conditional offer of silence

This is a sketch of the evidentiary analysis of central-case blackmail. Whether the evidentiary analysis likewise justifies the criminalization of *other* conditional threats (involving conditional demands other than the payment of money and/or involving threats to engage in lawful activities other than the disclosure of a person's infidelity) depends, in the first instance, both on whether the conduct threatened would cause harm (in the morally relevant sense) and on the strength of the evidentiary inference captured by proposition (6). Some conditional threats that are candidates to be labeled blackmail will thus appear to be morally coercive—some will not. How, finally, the law ought to respond is yet a further question. Because of concerns of a practical or administrative nature, we should expect that the optimal legal solution would likely involve both the criminalization of some conditional threats that are not morally coercive and the noncriminalization of some conditional threats that are.<sup>33</sup>

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( $D_{NCO}$ ). These two subtypes are jointly exhaustive of act-type D, for every act-token (d) that falls within D is also a token either of  $D_{CO}$  or  $D_{NCO}$ . With this refinement, we can say that the act-type a blackmailer threatens is not simply D, but rather  $D_{CO}$ . As the conditional threat to engage in  $D_{CO}$ , we can denominate blackmail itself CT- $D_{CO}$ .

Now notice a second way of subdividing D—between the act-subtype of disclosing embarrassing secrets with good motives ( $D_{GM}$ ) and the act-subtype of disclosing embarrassing secrets without good motives ( $D_{NGM}$ ). Just like the subtypes  $D_{CO}$  and  $D_{NCO}$ ,  $D_{GM}$  and  $D_{NGM}$  are also jointly exhaustive of D. I take it that, First Amendment considerations aside,  $D_{NGM}$  can be criminalized consistent with basic principles of Anglo-American criminal law, which is essentially to say that the harm that  $D_{NGM}$  produces is not only morally cognizable but legally cognizable too. (In *The Evidentiary Theory*, I offer both theoretical and historical reasons in support of this claim. The historical support, very briefly, is that for much of the nation's history,  $D_{NGM}$  was a crime. Until the Supreme Court's decision in *Garrison v. Louisiana*, 379 U.S. 64 (1964) (holding that the First Amendment prohibits the prosecution of alleged libels absent proof of knowing or reckless falsehood, when such publications relate to public affairs), a majority of states, by constitution or statute, provided that a valid defense to a criminal libel prosecution required the defendant to establish not only the truth of the libelous publication but that it was actually published with good motives. See *id.* at 70–72 & n.7. And if  $D_{NGM}$  were a crime, then the conditional threat to  $D_{NGM}$  (call this CT- $D_{NGM}$ ) would be coercive legally speaking and would constitute an unproblematic instance of robbery or extortion.

But a central insight of the evidentiary theory—represented by proposition (6)—is, in effect, that  $D_{CO}$  is an imperfect but fair proxy for  $D_{NGM}$ . So instead of criminalizing  $D_{NGM}$  and CT- $D_{NGM}$ , the state might sensibly choose to criminalize  $D_{CO}$  and CT- $D_{CO}$ . Were the law to do so, we would have achieved what Christopher deems “the holy grail of blackmail scholarship—the identification of an independently unlawful component of blackmail.” Christopher, *supra* note 2, at 19. But we do not need to criminalize  $D_{CO}$  and CT- $D_{CO}$ . Criminalizing CT- $D_{CO}$  alone does all the work.

33. Two other aspects of the evidentiary analysis are worth noting. First, only step (8) addresses why blackmail should be criminalized; the first seven steps tackle the more fundamental puzzle of explaining why blackmail is morally wrongful. As Christopher observes, the most common argument for blackmail's decriminalization is libertarian. Christopher, *supra* note 2, at 743 n.21. But the libertarian scholars who press this case rarely challenge the widespread, almost universal, judgment that blackmail is morally wrongful. Indeed, they often concede the moral wrongfulness of the practice and argue only that it is an immorality with which the state should not be concerned. See, e.g., Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225, 225–26 (1997). Perhaps this is right. But it is unsettling that this position leaves the heart of the puzzle on the table: why should it be morally wrongful to conditionally threaten what it is not morally wrongful to do? The evidentiary analysis explains not only why the criminal law treats blackmail the way it does, but why conventional morality does too.

Second, although the evidentiary theory explains both why central-case blackmail is a moral wrong

## B. CHRISTOPHER'S CRITICISMS

Christopher raises three criticisms of the evidentiary approach. According to him, my theory (1) "fails to establish that [blackmail] constitutes an impermissible harm"; (2) "fails to distinguish blackmail from permissible transactions"; and (3) "is underinclusive in failing to explain why blackmail for good motives is nonetheless punished."<sup>34</sup> Individually and collectively, these criticisms miss the mark.

The first two objections are two sides of the same coin. I am thought to need, but lack, a theory of harm<sup>35</sup> pursuant to which two things are true: (1) blackmail proposals threaten it, and (2) hard commercial bargains, extending even to cases like Jeffrie Murphy's famous Baseball case, do not.<sup>36</sup>

Christopher emphasizes that harm is a moral concept. As already explained, I agree: harm is a setback to a normatively recognized interest. (From a legal perspective, harm is a setback to a legally recognized interest; from a moral perspective, it is a setback to a morally recognized interest.) Indeed, I am disposed to think that the principal significance of the moralized concept of harm is functional—it marks the type of setback to interests the causing of which, if done by a moral agent, imposes a demand of reason-giving. It follows that what counts as a harm in any given culture is contingent. The content given to the concept of harm, or its extension, will likely vary depending on the underlying theory of the good.

As it happens, in our time and place, prevailing moral judgments recognize an individual's interest in her reputation, as well as a privacy interest in maintaining personal secrets. At the same time, they do not recognize an interest in property owned and possessed by others. To make this concrete, suppose

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and why it is properly made a criminal wrong, it does not address how grave or serious a moral or legal wrong it is. On the question of gravity, it is certainly relevant that the repetitive nature of blackmail causes frustration, anxiety, even fear. Cf. George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1626–39 (1993) (emphasizing that the fact that blackmailers can and often do repeat their demands places their victims in positions of subordination). Put in Christopher's terms, there are plausible constructions of "seriousness" in which blackmail is more serious than the act it threatens even if carrying out the act would be wrongful—indeed, even were the act threatened criminalizable. See *supra* note 32.

34. Christopher, *supra* note 2, at 765–67.

35. Christopher says that I need a theory of "wrongful" or "impermissible" harm. But the nomenclature is not important. The critical point is that not all injuries, deprivations, disutilities or setbacks that are sometimes called "harms" count as harms *in the morally relevant sense*. Whereas Christopher would mark this distinction by applying qualifiers like wrongful or impermissible to those harms that are morally significant, I prefer to reserve the unmodified term "harm" for the morally significant types of setback, and apply such qualifiers as "putative" or "claimed" to the others. This is quite literally a nominal difference; nothing of substance turns on it. Even if we adopt Christopher's terms, however, I do not claim that blackmail "*constitutes* an impermissible harm." *Id.* at 765 (emphasis added). Key to the evidentiary theory is the claim that blackmail *threatens* (impermissible) harm.

36. See *id.* at 751. In the Baseball case, it is supposed that possession of a Babe Ruth-autographed baseball will bring happiness to a dying boy whose final days would otherwise be filled entirely with misery, that the baseball's owner offers to sell it to the boy's parents for all of their money, and (implicitly) that the price demanded is far above what the market would bring.

these several things are true of *M*: he likes to wear women's undergarments and very much wishes this not to become publicly known; he also takes great pleasure in viewing an outdoor sculpture displayed in his neighbors' yard. One day, *M*'s neighbor *N* does two things: he throws out the sculpture, and also reveals *M*'s embarrassing secret at a neighborhood party. Both actions by *N* set back interests of *M*'s—his interest in viewing the sculpture, and his interest in maintaining privacy or reputation. *M* might experience both setbacks as harms. But society does not. The prevailing social judgment is that *N* harmed *M* by disclosing *M*'s transvestism but that *N* did not harm *M* when junking his (*N*'s) sculpture. This is true even if *M* felt the latter to be more disagreeable or painful and even if we know that *M* views his interests this way. Functionally, this view of which interests do and do not count (morally speaking), and therefore of which felt injuries qualify as harms (morally speaking), entails that *N* is morally obligated to provide reasons for the one action—disclosing *M*'s secret—but not for the other—junking his own sculpture. In other words, if all *N* can say to explain either action is “I just felt like it,” he will be adjudged to have acted wrongfully in the former case but not in the latter. These are socially and historically contingent facts; our valuations could be different and might yet be.<sup>37</sup>

It should be apparent, then, that my account rests both on a conceptual claim about what harm means, and on an empirical claim about the content of the category of harm in our particular culture. Christopher agrees with my conceptual claim, and I discern no basis for suspecting that he disagrees with the empirical one. His objection, then, appears to be that I do not advance a normative account that justifies these judgments: I do not show that the prevailing judgments that (1) disclosing embarrassing secrets does cause harm, and (2) refusing to part with, and even destroying, property belonging to oneself does not, are *correct*. This is true. And it would be folly to attempt the effort in this brief space. Take the evidentiary account, therefore, as a *conditional* justification of the law of blackmail: Taking as a given these collective moral judgments, central-case secret-disclosure blackmail is properly considered morally coercive and central-case hard bargains are properly considered not morally

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37. For respects in which the American conception of privacy differs from the conception that prevails in France and Germany, see James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151 (2004). For changing views in the United States regarding one's right to destroy one's own property, see Lior Jacob Strahilevitz, *The Right To Destroy*, 114 *YALE L.J.* 781 (2005).

The Baseball hypothetical, *see supra* note 36, presents arguably a borderline case even under contemporary norms because of the character and intensity of the offerees' interest in the property that the baseball owner threatens to withhold. It is not crazy to characterize the owner's refusal to part with the ball as harmful to the dying child and his parents, which is why we would consider it a plausible complaint, I think, were the parents to denounce the baseball owner's proposal as “blackmail.” At the same time, though, we would understand that the parents would be using the word in its moral—as opposed to legal—sense, and we would also appreciate the practical imperatives, in our capitalist society, against making such instances of morally coercive proposals criminal. *See* Berman, *The Evidentiary Theory*, *supra* note 5, at 855–56.

coercive.

Christopher's third objection is beset by a confusion regarding the discrete acts with respect to which the actor's motives are thought to matter. Every blackmail proposal implicates three actions: the action of communicating the proposal itself ("I will tell your spouse if and only if you don't pay me"), the action that is threatened (telling the spouse), and the action that is offered (remaining silent). The motives of interest to the evidentiary theory are those for the act threatened.<sup>38</sup> The theory says that were the actor to engage in *that* behavior without good motives, he would be acting wrongfully. It says further that the communicating of the conditional proposal is some (defeasible) evidence that he would in fact lack good motives for performing the act threatened, and that, under such circumstances, the conditional proposal is a conditional threat to do wrong, and hence constitutes the moral wrong of coercion.

Now consider Christopher's objection that the account seems unable to explain or justify punishing those who engage in "blackmail for good motives," such as a "Robin Hood of blackmailers." Although Christopher is a little telegraphic here, I suppose he has in mind someone who collects embarrassing or scandalous information about wealthy folks and threatens them with disclosure unless paid for silence. But instead of keeping the proceeds for himself, he distributes them to the poor, elderly, or infirm. Given his good motives for engaging in blackmail, Christopher reasons, a motive-based account should be unable to justify punishing him.

But this objection rests on a mistake. The motives that matter in my analysis, I have explained, are the motives one has, or would have, when engaging in the act threatened. The good motives harbored by the Robin Hood of blackmailers, in contrast, are those that drive him to engage in the blackmail. But notwithstanding *those* good motives, we are still permitted to infer that, were Robin's wealthy victim to refuse his demand, and were Robin then to carry out his threat, he would not *then* be animated by reasons adequate to justify him in knowingly causing harm. And assuming that he would act wrongfully in *carrying out* the threat, he engages in the wrong of coercion when *making* it.

True, that need not be the end of the inquiry. For even if the Robin Hood of blackmailers is engaged in the presumptive moral wrong of coercion, there is a separate question whether he might be able to justify this presumptive wrongdoing, all things considered. It is at this stage that his good motives could become legally relevant. They could, but they needn't. To see why, forget about Christopher's imagined Robin Hood of blackmailers and think instead about a Robin Hood of robbers. Call him, well, Robin Hood. Robin Hood says that he has good reasons for conditionally threatening to injure or kill his wealthy victims. The law *could* view those reasons as conferring justification. But it doesn't. And

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38. That is true for garden-variety blackmail. For blackmail threats to reveal an individual's criminal wrongdoing to the proper authorities, the motives of interest are the motives for engaging in the action offered—namely, remaining silent. See Berman, *The Evidentiary Theory*, *supra* note 5, at 860–62.

the reasons why it does not are rather too obvious to warrant discussion here. The Robin Hood of blackmailers is in the very same boat.

If Christopher's example of the Robin Hood of blackmailers misconceives the details of my account, his example of Max, the malicious gossip, misunderstands the nature of my enterprise.

Think of Max as a split personality, or as three different personae over time. Max<sub>1</sub> is the malicious gossip: he gathers and spreads embarrassing information for the sheer pleasure of causing his victims to suffer. Max<sub>2</sub> is the mercenary seller of gossip to supermarket tabloids: he gathers and sells the information because he can make a buck doing so, wholly indifferent to the suffering he (knowingly) causes. Max<sub>3</sub> is the mercenary seller of gossip with a heart: he (sometimes) offers to remain silent if his victim will pay what the tabloid would. Whereas Max<sub>1</sub> is motivated by malice and Max<sub>2</sub> is motivated by callous indifference, Max<sub>3</sub>'s indifference is tempered by some compassion for the suffering of his victims. (Not too much compassion, mind you: he does not choose to steer clear of the gossip-mongering business entirely.) Of the three, accordingly, Max<sub>3</sub> seems the least blameworthy. Yet Max<sub>3</sub> will be punished for blackmail while his two alter egos go free. And that, Christopher thinks, cannot be right.

Well, who says that Max<sub>3</sub> *should* be punished? Am I supposed to think so? Christopher seems to assume that because the law of most jurisdictions would count this as blackmail, any theoretical defense of blackmail's criminalization must likewise. But this is an entirely unjustified assumption, for it simply misunderstands the central-case method of analysis in which I have been engaged.<sup>39</sup> A theorist who employs that method—which strikes me as the only sensible strategy for resolving the blackmail puzzle—starts by seeking to explain or justify the central case. If successful, she then asks how that analysis applies to cases beyond the core. It is always open for the practitioner of this method to explain why some peripheral cases of the phenomenon under review appear, from the perspective offered by a new account of the central case, to be properly subject to different treatment. Accordingly, I think I am entitled to defang the objection that the Max case presents by agreeing that the law of blackmail should be revised to exclude market-price blackmail.

In fact, I am not just *entitled* to do so, I *have* done so. In *The Evidentiary Theory*, I remarked that market-price blackmail presents “one of the most complex riddles” of all the subordinate or peripheral cases,<sup>40</sup> and I devoted three pages of analysis trying to resolve it. In the end, though I reached no confident conclusion about whether market-price blackmail should be *decriminalized*, I did observe that if conditional threats like those issued by Max<sub>3</sub> were to remain criminal, they should nonetheless not be classed as a form of

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39. For a discussion of the method, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 9–16 (1980).

40. Berman, *The Evidentiary Theory*, *supra* note 5, at 857.

“blackmail.”<sup>41</sup> I will not try the reader’s patience by reprising my arguments here; the interested reader can review them for herself. The important point at present is that the evidentiary analysis can comfortably accommodate Christopher’s intuitions about the Maxes and the problem of mixed motives.<sup>42</sup>

## II. META-BLACKMAIL

While I am disposed to conclude that Christopher marginally overstates the case when asserting that nobody has been able to explain “how or why blackmail should be criminalized,”<sup>43</sup> confidence in my conclusion is not yet justified. Like any account that seeks to justify blackmail’s continued criminalization, the evidentiary theory must face down the meta-blackmail challenge.

Pay careful attention to Christopher’s argumentative strategy. Christopher does not claim that anybody has ever actually engaged in meta-blackmail. Presumably, meta-blackmail is solely a product of Christopher’s imagination, unknown in the wild. Accordingly, it would be odd indeed to suppose that people will have strong intuitions about how the law should treat meta-blackmail relative to blackmail—let alone that any such intuitions would exert sufficient force as to dislodge our intuitions about the actual and culturally salient practice of blackmail itself. To his credit, Christopher does not suppose this; he does not appeal to claimed intuitions about meta-blackmail *per se*.

41. *Id.* at 859 n.209.

42. In addition to these three explicit criticisms, a theme runs throughout *Meta-Blackmail* that could be understood to function as a stand-in, or promissory note, for additional objections. I am thinking of Christopher’s repeated invocation of a supposed scholarly consensus regarding the infirmity of all extant theories. See, e.g., Christopher, *supra* note 2, at 750 (“It is widely acknowledged that no resolution of the blackmail puzzle has been found acceptable.”); *id.* at 741 n.6, 742 n.7, 743 n.20 & 745 n.32 (quoting authorities). That refrain, taken together with his assertion that “a number of difficulties” afflict my theory, *id.* at 765, might be taken to imply that the three specific criticisms Christopher adduces are representative, but not exhaustive, of the many reasons scholars have given for finding the evidentiary theory unsatisfactory. I am not so bold as to claim that the evidentiary theory is immune to further criticism, that no plausible objections could yet be waiting in the wings. But readers should not be misled into supposing that the potentially awaiting criticisms are actual, or that they have already been voiced and found meritorious by the community of criminal law theorists. To be sure, many authorities have declared that the blackmail puzzle remains unsolved. But all such declarations that Christopher quotes appeared before publication of the evidentiary theory.

Although criminal theorists had not weighed in on the evidentiary theory prior to Christopher, one student commentator had. See Ronald J. Scalise, Jr., Comment, *Blackmail, Legality, and Liberalism*, 74 TUL. L. REV. 1483 (2000). It is safe to say that he was not impressed. While the author adjudges aspects of my analysis “unclear,” “amorphous,” “puzzling,” “dubious,” “ad hoc,” “cursor[y],” and “unfai[r],” the account as a whole is said to “assum[e] away the paradox,” to provide “no guidance,” and to “fai[l] to advance the theoretical ball down the blackmail playing field.” Worse than offering “little insight,” and transparently “attempt[ing] to provide a crutch to an ailing theory,” in fact the evidentiary account “only serves to obfuscate.” Notwithstanding these numerous and grave flaws, however, I am generously credited for a “valiant effort.” Still, readers are firmly warned to steer clear of this “sinister” theory. *Id.* at 1491–1501. A second critical review of the evidentiary theory came to the author’s attention just as this Reply was going to page proofs. See Walter Block, *Berman on Blackmail: Taking Motives Fervently*, 3 FLA. ST. U. BUS. REV. 57 (2003).

43. Christopher, *supra* note 2, at 743.



Instead, he appeals to more general intuitions, claims that each of them entails a particular conclusion about how meta-blackmail ought to be treated, and observes that the three conclusions that our intuitions thereby generate are mutually incompatible. The only way to avoid the incompatibility of the resulting conclusions, Christopher reasons, is to reject some of the intuitions: we can either reject (at least) two of the intuitions that undergird the formalist, functionalist, and substantivist solutions, or we can reject the single intuition that blackmail should be criminalized.<sup>44</sup> Given this choice, Christopher is confident in recommending the latter course, for “the intuitions that criminalizing blackmail violates are more compelling than the intuition that blackmail should be criminalized.”<sup>45</sup>

Here Christopher errs. There *is* a way to indulge the intuition that blackmail should remain a crime and to escape the contradictory conclusions regarding how meta-blackmail should be treated, while accepting all three intuitions that undergird the formalist, functionalist, and substantivist perspectives: Deny that the intuitions entail the conclusions. After all, the relationship between the contradictory perspectives on meta-blackmail (that it should be treated more seriously than blackmail, equally seriously, and less seriously) and the intuitions to which Christopher claims we are attached (functionalist, formalist, and substantivist) is essentially the syllogistic relationship between conclusion and major premise. This is represented in the following chart:<sup>46</sup>

Focus first on the conclusions, not the intuitions. They plainly conflict. Which if any is correct?

#### A. TWO CHEERS FOR THE FUNCTIONALIST PERSPECTIVE

At this point, it will pay to have a more concrete pair of blackmail and meta-blackmail proposals in mind. Adding detail to our earlier example of central-case blackmail, let us suppose that *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*. As a concrete representation of blackmail's core, call this proposal B(c). What—precisely—is the corresponding meta-blackmail proposal? Christopher does not quite say, but what I think he has in mind is this: *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

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44. *See id.* at 784–85.

45. *Id.* at 743.

46. The various intuitions, factual claims, and conclusions in the chart are not verbatim quotations from *Meta-Blackmail* (though often very close). To maintain fidelity with Christopher's arguments I felt myself bound by two constraints: first, that the three conclusions are mutually incompatible; and second, that each of the three intuitions is, at a minimum, plausible and arguably compelling.

47. *Id.* at 748, 784–85.

48. *Id.* at 748–49, 775, 784–85.

49. *Id.* at 748–49, 779, 784–85.

	<i>Formalist perspective</i>	<i>Functionalist perspective</i>	<i>Substantivist perspective</i>
(1) Intuition	Ceteris paribus, a threat to perform an unlawful (or more serious) act is more serious than, and should be treated more severely than, a threat to perform a lawful (or less serious) act. <sup>47</sup>	Functionally equivalent proposals should be treated equivalently. <sup>48</sup>	Ceteris paribus, the more remote, indirect, and attenuated the threatened harm of a proposal, the less severely the proposal should be treated. <sup>49</sup>
(2) Factual claim(s)	Any given meta-blackmail proposal is a threat to perform an unlawful (more serious) act, and any given blackmail proposal is a threat to perform a lawful (less serious) act.	Any given blackmail proposal and its corresponding meta-blackmail proposal are functionally equivalent.	The threatened harm of any given meta-blackmail proposal is more remote, indirect and attenuated than the threatened harm of its corresponding blackmail proposal.
(3) Conclusion	Therefore, any given meta-blackmail proposal should be treated more severely than any given blackmail proposal.	Therefore, any given blackmail proposal and its corresponding meta-blackmail proposal should be treated equivalently.	Therefore, any given meta-blackmail proposal should be treated less severely than its corresponding blackmail proposal.

opportunity thereafter, disclose the fact of *H*'s infidelity to *H*'s spouse, *W*.<sup>50</sup> Call this proposal M-B(c)<sub>1</sub>.

Whatever might be said of other blackmail and meta-blackmail proposals, this particular pair—B(c) and M-B(c)<sub>1</sub>—sure do seem functionally equivalent: they demand the same amount of money, they threaten the same disclosure, to the same person, at the same time. Their functional equivalence is further suggested by the fact that it is hard or impossible to imagine why any real-life *A* would ever issue a meta-blackmail threat of this form except as an opportunistic exploitation of a legal rule that treated this meta-blackmail proposal less severely than the corresponding blackmail proposal. Accordingly, let us provisionally endorse the functionalist solution and propose that B(c) and M-B(c)<sub>1</sub> should be treated the same.<sup>51</sup>

50. That the meta-blackmail proposal of Christopher's imagination demands immediate compliance is suggested by analogy to his hypothetical meta-robbery proposal, *id.* at 773 ("If you do not give me your money, then I will immediately rob you."), as well as his subsequent construal of meta-blackmail, *id.* at 774 ("If you do not give me \$1000, then (if you do not give me \$1000, then I will disclose your adulterous relationship).").

51. Elsewhere, Christopher puts the functionalist intuition differently: "[I]f 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." *Id.* at 747. To this nobody should give assent. Our central case, B(c), is represented by the following threat, uttered by *A* to *H*: "If you don't pay me \$10,000 within twenty-four hours, I will, at my earliest opportunity thereafter, disclose your infidelity to your wife." Compare B(c) with these two variations: "If you don't pay me \$10,000 within twenty-four hours, I will, at my earliest opportunity thereafter, disclose your infidelity to your barber"; and "If you don't pay me \$10,000 within ten years, I will, at my earliest opportunity thereafter, disclose your infidelity to your wife." Compared with B(c), both variations "propose exchanging the concealment of the same secret in return for the

This position commits us to deny both that this particular instance of meta-blackmail should be treated more severely than its corresponding instance of blackmail (as per the formalist approach), and that it should be treated less severely (as per the substantivist approach). But as we will see, it does not commit us to deny the *intuitions* that ground those two alternative conclusions.

#### B. ONE CHEER FOR THE SUBSTANTIVIST PERSPECTIVE

The central defect of the substantivist argument is clear, and it has nothing to do with the substantivist intuition. The substantivist conclusion fails because the argument's factual claim is false. The threatened harm of B(c) is the disclosure of *H*'s adultery to *W*. I assume that the harm threatened by the meta-blackmail proposal is the same harm that the corresponding blackmail proposal threatens. In the case of M-B(c)<sub>1</sub>, that threatened harm would be, again, the disclosure of *H*'s adultery to *W*.<sup>52</sup> If so, M-B(c)<sub>1</sub> and B(c) would then threaten disclosure to occur at the same time, in which case the harm threatened by the meta-blackmail proposal is not "more remote" than the threatened harm of B(c).<sup>53</sup>

The analysis to this point depends heavily on the precise content of the meta-blackmail that I have supposed to correspond to our paradigmatic blackmail proposal, B(c). But an infinite number of meta-blackmail proposals correspond to, or threaten, B(c). Consider the following possibility, which we can designate M-B(c)<sub>2</sub>: *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*. Unlike the case for M-B(c)<sub>1</sub>, the harm that M-B(c)<sub>2</sub> threatens is more remote than the harm threatened by its corresponding blackmail proposal, B(c), indeed considerably so. In other words, the pair of proposals M-B(c)<sub>2</sub> and B(c) do

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same amount of money to the same person," but neither is "functionally equivalent" to B(c), and there is no reason to believe that they should all be treated the same by the criminal law.

52. Alternatively, if less plausibly, the threatened harm of any meta-blackmail proposal is the harm of being blackmailed. That is, M-B(c)<sub>1</sub> threatens the harm of being subject to B(c). If so, then the threatened harm of M-B(c)<sub>1</sub> is *less* remote than the threatened harm of its corresponding blackmail proposal because B(c) gives *H* twenty-four hours before harm will be inflicted, whereas M-B(c)<sub>1</sub> gives *H*, in effect, no time at all: *A* demands immediate payment, and threatens to issue B(c) immediately upon noncompliance.

53. Christopher's elaboration of the substantivist approach, *see id.* at 777–79, suggests that he might resist this contention. He might argue that the disclosure threatened by M-B(c)<sub>1</sub> is more remote than the disclosure threatened by B(c) by the amount of time it takes to utter B(c), and is also more indirect because the utterance of B(c) constitutes an additional intervening step. This is strictly true, but to call it a quibble would be to overstate its importance. By that reasoning, the threat "I will punch you in the nose at the count of ten" threatens more remote harm than does the threat "I will punch you in the nose at the count of nine" because the feared punch will occur later in time. For that matter, the harm threatened in the first case is more indirect as well, because "it requires an additional step," *id.* at 779, of uttering the number ten. Well, perhaps so. But surely Christopher does not suppose his readers would find compelling the intuition that the latter threat should be treated less severely by law. This reveals that, in order for the intuition that undergirds the substantivist perspective to be deemed compelling, it must be construed to exclude de minimis differences of remoteness, directness, and attenuation.

manifest the factual relationship that the substantivist intuition contemplates, and the substantivist conclusion seems compelling as a consequence. As robbery is to extortion, we might reason, so too is M-B(c)<sub>2</sub> to B(c).<sup>54</sup>

One might think that reimagining the meta-blackmail proposal as M-B(c)<sub>2</sub> creates the conflict between the substantivist and functionalist conclusions that Christopher needs for his argument to prevail and that M-B(c)<sub>1</sub> denied him. Not so. Rather, the prospect of M-B(c)<sub>2</sub> shows that the factual premise needed to support a categorical endorsement of the functionalist conclusion is false. So our provisional endorsement of the functionalist approach was, when unquali-

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54. In his Surreply, Christopher objects that M-B(c)<sub>2</sub> is not a true meta-blackmail proposal corresponding to B(c). Whereas he had “defined a pair of blackmail and meta-blackmail proposals as corresponding if the ‘only difference between the two proposals is the threatened act,’” Russell L. Christopher, *The Trilemma of Meta-Blackmail: Is Conditionally Threatening Blackmail Worse, the Same, or Better than Blackmail Itself?*, 94 GEO. L.J. 813, 822–23 (2006) [hereinafter Surreply], the pair M-B(c)<sub>2</sub> and B(c) “not only differ as to the threatened act, but also differ as to when the threatened act is threatened to be carried out.” *Id.*

Admittedly, I did not adhere precisely to this definition. But that is because the definition does not work. Christopher defines a meta-blackmail proposal as a proposal that threatens blackmail. Christopher, *supra* note 2, at 746. And he contends that a given meta-blackmail proposal corresponds to a given blackmail proposal if the only difference between the two proposals is the threatened act. Consider then the pair of proposals that Christopher claims do represent a blackmail proposal and its corresponding meta-blackmail proposal: “If you do not give me \$1000, then I will disclose your embarrassing secret” and “If you do not give me \$1000, then I will blackmail you.” Surreply, *supra*, at 823. Call the former proposal B(rc) and the latter M-B(rc). Is M-B(rc) really a meta-blackmail proposal that corresponds to B(rc)? Not necessarily. Suppose that B(rc) is the conditional threat to reveal the embarrassing secret that you are engaged in an extramarital affair, and that M-B(rc) is the conditional threat to issue a conditional threat to reveal the embarrassing secret that you chew with your mouth open. Surely Christopher would not affirm that this particular meta-blackmail proposal corresponds to this particular blackmail proposal, and yet they do satisfy his definition.

Precisely because Christopher’s discussion of corresponding blackmail and meta-blackmail proposals was overly schematic and because his proposed definition was infirm, I sought, in B(c), M-B(c)<sub>1</sub>, and M-B(c)<sub>2</sub>, to provide examples with detail sufficient for readers to assess whether the minor premises of the formalist, functionalist, and substantive arguments were sound—to assess, in other words, whether a given meta-blackmail proposal is likely to be more serious than, equivalent to, or less serious than its corresponding blackmail proposal. M-B(c)<sub>2</sub> in particular was designed to illustrate (as I thought might not be obvious from Christopher’s own discussion) that a conditional threat to conditionally threaten X *can* be more remote and attenuated than the simple conditional threat to X. If Christopher prefers to withhold the “meta-blackmail” label from that pair, that is his prerogative. But his assertion that my use of M-B(c)<sub>2</sub> reflects a “fundamental misunderstanding” is hard to take seriously.

Consider this proposed formal definition of a “corresponding meta-blackmail” proposal: For two conditional proposals, B and MB, MB is a meta-blackmail proposal that corresponds to B if and only if B is itself a blackmail proposal of the form  $\sim y$  iff  $x$ , and MB is a conditional threat of the form  $\sim B$  iff  $x$ . Working with *this* definition, I agree that M-B(c)<sub>2</sub> is not a corresponding blackmail proposal of B(c). But the point that I aimed to make with that pair can be made with a slight revision. Let B(c)\* be the following proposal: “If you do not give me \$1000 within one year from today, I will at that time disclose your adultery to your spouse.” Let M-B(c)<sub>2</sub>\* be this: “If you do not give me \$1000 within one year from today, I will at that time threaten B(c)\*.” By this friendly revision to Christopher’s definition of corresponding blackmail and meta-blackmail proposals, M-B(c)<sub>2</sub>\* is a meta-blackmail proposal corresponding to B(c)\*. Furthermore, the harm that M-B(c)<sub>2</sub>\* threatens is nontrivially more remote and unlikely than the harm that B(c)\* threatens. Therefore, as between this pair of proposals, the substantivist minor premise holds and the functionalist minor premise does not, thereby supporting the substantivist conclusion and not the functionalist one.

fied, premature. The very same considerations that drive us to think that the law should treat M-B(c)<sub>2</sub> less severely than B(c)—that the harm threatened by M-B(c)<sub>2</sub> is more remote, hence less likely to occur—necessarily entail that M-B(c)<sub>2</sub> and B(c) are not “functionally equivalent.” Christopher rightly observes that “the functionalist approach views [the two proposals] from the perspective of their function or effect.”<sup>55</sup> But insofar as “the harm of meta-blackmail . . . is of greater uncertainty and lower probability than conventional blackmail,”<sup>56</sup> then it will predictably cause its victim less anxiety, hence is not equivalent in function or effect.

An unfortunate ambiguity in Christopher’s analysis now emerges. He is right that, for any given pair consisting of a particular blackmail proposal and a particular corresponding meta-blackmail proposal, there exist only three possibilities: the latter should be treated more severely, the same, or less severely than the former. It does not follow, however, that there exist only three possible ways for the law to treat the *class* of blackmail proposals relative to the *class* of their corresponding meta-blackmail proposals. There are, to start, the three possibilities that every meta-blackmail proposal should be treated (1) more severely than its corresponding blackmail proposal, (2) the same as its corresponding blackmail proposal, or (3) less severely than its corresponding blackmail proposal. But there are four more: (4) some meta-blackmail proposals should be treated more severely than their corresponding blackmail proposal, and some should be treated the same; (5) some meta-blackmail proposals should be treated more severely than their corresponding blackmail proposal, and some should be treated less severely; (6) some meta-blackmail proposals should be treated less severely than their corresponding blackmail proposal, and some should be treated the same; and (7) some meta-blackmail proposals should be treated more severely than their corresponding blackmail proposal, some should be treated less severely, and some should be treated the same.

Together, the cases of B(c) and M-B(c)<sub>1</sub> constitute a concrete example in which a meta-blackmail proposal is functionally equivalent to its corresponding blackmail proposal and thus should be treated the same. Meanwhile, the paired case of B(c) and M-B(c)<sub>2</sub> illustrates a meta-blackmail proposal that threatens more remote harm than its corresponding blackmail proposal and should, as a consequence, be treated less severely.<sup>57</sup> We can therefore rule out possibilities

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55. Christopher, *supra* note 2, at 774.

56. *Id.* at 779.

57. Consider too M-B(c)<sub>3</sub>: A conditionally threatens *H* that unless *H* immediately pays A \$1000, 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*. This meta-blackmail proposal is also less serious than the blackmail proposal it threatens because it permits *H* to escape the harm of disclosure more cheaply.

It is tempting to suppose that if a meta-blackmail proposal can be rendered less serious than the blackmail proposal it threatens just by demanding less money than the blackmail proposal demands, meta-blackmail can be rendered more serious by demanding more than its threatened blackmail proposal. In fact, though, our taste for symmetry will be disappointed. Were *A* to conditionally threaten

(1) through (5): *At least in principle*, some meta-blackmail proposals should be treated the same as the blackmail proposals they threaten, and some should be treated less severely. It remains to determine whether meta-blackmail should sometimes be treated more severely than its corresponding blackmail proposal, in which case possibility (7) demands our endorsement, or whether we are left with possibility (6) instead.

### C. A BRONX CHEER FOR THE FORMALIST PERSPECTIVE

The reason the categorical forms of the functionalist and substantivist conclusions fail is because neither minor premise is categorically true. Some conditional threats to make a blackmail proposal are functionally equivalent to the threatened blackmail proposal and therefore do not threaten more remote, indirect, or attenuated harm. Conversely, some conditional threats to blackmail do threaten more remote, indirect, or attenuated harm than their corresponding blackmail proposal, and therefore are not functionally equivalent. But the minor premise of the formalist argument *is* categorically true.<sup>58</sup> 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.

Unfortunately for Christopher, that is not quite good enough to justify the formalist conclusion, for the formalist argument is invalid. Thanks to that pesky *ceteris paribus* clause, the formalist intuition combined with the facts that blackmail is unlawful and that the act blackmail threatens is lawful do not jointly entail the formalist conclusion that meta-blackmail is always more severe than blackmail.<sup>59</sup> For the formalist argument to be valid, Christopher needs the additional premise (2a) that all else is equal.<sup>60</sup> He

to issue the blackmail proposal B(c) unless paid, say, \$100,000, then *H*'s obvious course is to refuse the demand. The meta-blackmail threat is a one-way ratchet: it can ameliorate the seriousness of the blackmail threat it threatens, but cannot exacerbate it.

58. At least the premise is true when the intuition is given its primary meaning of turning on the lawfulness and unlawfulness of actions. As the presentation of the formalist argument in the chart reveals, Christopher gives that argument a secondary meaning as well—a meaning that is, in fact, *nonformalist*, *id.* at 775–76—in which the predicates are more and less serious rather than unlawful and lawful. I will assume *arguendo* that the act meta-blackmail threatens (blackmail) is “more serious” than the act blackmail threatens (e.g., disclosure). *See supra* note 33.

59. For the same reason, the substantivist argument is invalid too. But in light of the more glaring falsity of the substantivist minor premise, we did not have to examine possible problems raised by the *ceteris paribus* clause.

60. Christopher cannot escape the problem by deleting the *ceteris paribus* requirement because then the formalist intuition would no longer be plausible, let alone compelling. Lots of conduct that the law permits is more dangerous, antisocial, and worthy of moral condemnation than conduct that the law forbids. Compare, for example, the refusal of an Olympic swimmer to rescue a drowning child even though he is aware of the child's peril and knows that a rescue could be effectuated at virtually no cost or inconvenience with the feeding of an expired parking meter. The former is lawful in most jurisdictions, while the latter is often unlawful. But it hardly follows that the conditional threat to feed the meter is “more serious” and should be treated more severely than, the conditional threat not to undertake the easy rescue. By any reasonable standard of seriousness, the conditional threat not to rescue is the more serious, and it would be perfectly sensible for the law to punish it more severely. Yet

needs it, but is not entitled to it.

*Ceteris paribus* clauses are tricky beasts; they can mean many things. As used in the formalist intuition, the clause appears intended to set out a law-like claim: if the *only* difference between act *X* and act *Y* is that *X* is unlawful whereas *Y* is lawful, then it is always true that the threat to *X* is more serious than the threat to *Y*. But the requirement of all else being equal will presumably *never* be satisfied in this context because a difference in legal treatment is not foundational; there should always be differences—meaningful differences—between *X* and *Y* that explain or justify the facts that *X*, but not *Y*, is made unlawful. So if the formalist argument is given its formalist construction, then the *ceteris paribus* requirement is not satisfied, and the conclusion does not follow. Furthermore, Christopher is no more entitled to premise (2a) when the nonformalist variant of the formalist intuition is relied on. Even assuming that the act meta-blackmail threatens is more serious than the act blackmail threatens, that is not the only difference between the two. Because what meta-blackmail threatens is itself a conditional threat whereas what blackmail threatens is an act that is not itself a threat, *ceteris* is not *paribus*.

As such, Christopher's formalist argument runs into a fatal obstacle if *ceteris paribus* is given its strict (or strong) meaning. However there is a softer or weaker version of *ceteris paribus* in which it is essentially synonymous with "ordinarily" or "presumptively" and functions as a burden-shifting device.<sup>61</sup> When *ceteris paribus* is employed in this way, one who would avoid the force of the premise in a given case must provide reasons why the customary relationship or conclusion does not obtain. But even if we allow Christopher this weak version of *ceteris paribus*, our analyses of the functionalist and substantivist arguments provide us with all we need to shoulder that burden.

A prerequisite to it being the case that a conditional threat to *X* is more serious than (or should be treated more severely than) a conditional threat to *Y* is that the two conditional threats are not functionally equivalent. But as Christopher cogently explains,<sup>62</sup> that condition can fail when *X* is itself a conditional threat to *Y*. Under those circumstances, the two conditional threats can collapse into one so that the conditional threat to *X* = the conditional threat to conditionally threaten to *Y*  $\Leftrightarrow$  the conditional threat to *Y*. It seems, therefore, that whenever *X* itself is a conditional threat to *Y*, then a conditional threat to *X*

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such a law could comfortably coexist with a continued refusal to criminalize the simple (unconditional) failure to undertake easy rescues. The decision not to impose a general duty to rescue might be justified, for example, by a fear that some bystanders who were genuinely unaware of the peril might be wrongly prosecuted and even convicted—a worry that disappears when the potential rescuer issues his conditional proposal thereby evidencing his awareness of the peril. As this example demonstrates, the formalist intuition cannot stand without the qualification that the *ceteris paribus* clause aims to supply.

61. Cf. John R. Searle, *How To Derive "Ought" from "Is,"* in READINGS IN ETHICAL THEORY 63, 65–66 (Wilfrid Sellars & John Hospers eds., 2d ed. 1970) ("[U]nless we have some reason to the contrary, the *ceteris paribus* condition is satisfied . . .").

62. Christopher, *supra* note 2, at 775.

(call such a threat *Z*) has the capacity to be functionally equivalent to a conditional threat to *Y*. In that event, the conditional threat to *X* cannot be more serious than the conditional threat to *Y*, i.e., *Z* cannot be more serious than *X*.

I have said that a conditional threat to *X* has the *capacity* to be functionally equivalent to *X* itself where *X* is a conditional threat. Our discussion of the substantivist argument prevented me from saying that, in such a case, the conditional threat to *X* necessarily *is* functionally equivalent to *X*: When *Z* threatens the prospect of *X* at some distant remove, then the anchoring harm that *X* and *Z* alike threaten—*Y*—is more remote and less probable from the perspective of *Z* than from the perspective of *X*, rendering *Z* less serious than *X*. At the same time, a conditional threat to *X* cannot speed up the prospect of the harm that *X* threatens and cannot thereby become more serious.<sup>63</sup>

In short, I have provided reasons why, in the unusual circumstances where the unlawful (or more serious) act conditionally threatened, *X*, is itself a conditional threat to perform the lawful (or less serious) act, *Y*, the conditional threat to *X* is not more serious than the conditional threat to *Y*. In some such cases, the conditional threat to *X* can be functionally equivalent to *X* itself. In other cases, the conditional threat to *X* is less serious (under plausible understandings of seriousness) than *X*. In neither event would it be at all sensible to punish the conditional threat to *X* more severely. The formalist intuition is sound. But in the case of meta-blackmail, we can give reasons, as the *ceteris paribus* clause demands, why the usual conclusion should not obtain.

#### CONCLUSION

Think of meta-blackmail as a parlor game. Here is the challenge: Can we resolve the conflict between competing conclusions regarding how the law should treat conditional threats to conditionally threaten without having to abandon the intuitions or premises upon which those conclusions are said to rest? I have endeavored to show that we can. As a result, the meta-blackmail device does not support Christopher's conclusion that blackmail should be decriminalized. Instead, it leaves the blackmail puzzle just as Christopher found it. And how he found it, quite possibly, was "solved."<sup>64</sup>

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63. See also *supra* note 57 (explaining why, in other respects as well, a meta-blackmail proposal could be less serious than the blackmail proposal it threatens, but not more serious).

64. In his Surreply, Christopher observes that this Reply does not engage every argument in *Meta-Blackmail*. That is true: space constraints required that I concentrate on the core of Christopher's argument. For the same reason, I cannot offer a point-by-point rebuttal of his Surreply. Instead, I will briefly address those arguments that most clearly exhibit Christopher's failure to grasp the central reason why meta-blackmail presents no trilemma. That failure reveals itself most plainly in Part II of Christopher's Surreply, where he contends that I "largely ignor[e]" his arguments designed to show that meta-blackmail can be less serious than its corresponding blackmail proposal, Surreply, *supra* note 54, at 822, and that I "assume that the only measure by which a threatened harm may be more remote, indirect, and attenuated is temporal." *Id.* at 826. I think that both charges are mistaken.

Far from denying that meta-blackmail can be less serious than its corresponding blackmail proposal,



I offered concrete examples designed to show this is so. (Although Russell quibbles, fairly, with my discussion of M-B(c)<sub>2</sub>, I have now revised the example to meet his objection. See *supra* note 54.) Furthermore, while I believe that temporal remoteness illustrates this point most effectively, I agree that the substantivist conclusion follows for any corresponding pair of blackmail and meta-blackmail proposals insofar as the harm that they alike threaten is less likely to occur, or likely to occur at a greater temporal remove, in the latter case than the former. (In my view, “indirectness” is a proxy for either or both of these factors but lacks independent significance. I confess not to have a clear idea of what “attenuated” is meant to capture beyond remote and unlikely.) But I also believe that nontrivial differences in remoteness and probability (and indirectness and attenuatedness as well, if it matters) will be rare. Here is where Christopher and I do appear to differ. Whereas he contends that “[t]he harm of a threat to threaten is *generally* more remote, indirect, and attenuated than the harm of a threat,” *id.* at 825 (emphasis added), I think that, when the “threat to threaten” and the “threat” are, respectively, a meta-blackmail proposal and the blackmail proposal to which it corresponds, the exceptions to this generality are likely to swallow the rule. This disagreement is not easily resolved, but it also does not matter. Anyone who agrees with Christopher on this issue should feel free to reverse my orderings by awarding two cheers to the substantivist solution and only one to the functionalist.

The critical point is that whenever meta-blackmail threatens a more remote or less probable harm than does the simple blackmail proposal to which it corresponds (however rare or common that may be), the substantivist minor premise obtains and the functionalist minor premise does not. One proposal cannot *both* threaten more remote or less probable harm than another *and* be fully equivalent to the other from the perspective of function or effect. Put in Christopher’s terms, either “the lower certainty and probability of the harm of meta-blackmail constitutes a qualitatively significant, non de minimis, difference between meta-blackmail and [its corresponding blackmail proposal],” *id.* at 827, in which case the proposals are not functionally equivalent, or the differences in probability and remoteness are de minimis in which case the proposals are functionally equivalent. Both cannot be true, so there is no incompatibility between the functionalist and substantivist perspectives. Although both intuitions are sound, they do not yield conflicting conclusions regarding the proper treatment of any given corresponding pair of blackmail and meta-blackmail proposals. Nothing in Christopher’s Surreply addresses this central and seemingly decisive objection.

Do matters differ when we turn attention to the formalist perspective? Nestled among what I view as several distractions in Part I of the Surreply lies a sound and important objection. Although Christopher does not put the challenge in quite these terms, its thrust is to deny my assertion that “[a] prerequisite to it being the case that a conditional threat to X is more serious than (or should be treated more severely than) a conditional threat to Y is that the two conditional threats are not functionally equivalent.” *Id.* at 818. This claim was indeed too strong. As Christopher’s apt contrast between killing and letting die demonstrates, the law and conventional morality sometimes do assess functionally equivalent acts to be of differential seriousness.

So I should not have suggested that function or effect is the *only* basis upon which seriousness can be measured for purposes of the criminal law. Unfortunately, despite his repeated references to the “seriousness” of corresponding proposals, Christopher does not tell us what the criminal-law-relevant criteria of seriousness *are*. The most likely candidates, I suppose, are blameworthiness and wrongfulness. Accordingly, Christopher is free to argue that, notwithstanding the fact that a meta-blackmail proposal is functionally equivalent to its corresponding blackmail proposal and therefore cannot be more serious by virtue of its effects, it is more “serious” *all things considered* because, for example, the person who engages in meta-blackmail is more blameworthy than one who engages in blackmail or because meta-blackmail violates a more stringent deontic command.

I am highly skeptical that even remotely persuasive arguments of this sort can be advanced. (Recall Christopher’s ruminations about why the recipient of a meta-blackmail proposal is likely not to be especially concerned. *Id.* at 826–27. Are we really supposed to accept that the meta-blackmail proposal is meaningfully less anxiety-provoking than its corresponding blackmail proposal but that, nonetheless, its issuance is more blameworthy or more wrongful?) But I need not insist upon this view, because even were Christopher to adduce such arguments, that would not save his thesis.

Let us suppose that, for whatever reason, a meta-blackmail proposal that is functionally equivalent to its corresponding blackmail proposal is, all things considered, more “serious” in criminal-law-relevant respects. (Although I have suggested that this can be true only if the meta-blackmail proposal is more

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wrongful or is apt to be undertaken by a more blameworthy actor, my analysis holds true for whatever standards of “seriousness” Christopher might want.) Would this create a dilemma between the formalist and functionalist perspectives? Not at all. It would simply require that the functionalist intuition (*see supra* chart accompanying notes 46–49) be qualified to include a *ceteris paribus* clause. Or, in lieu of that, and at somewhat greater precision, the functionalist intuition (or major premise, as I prefer to think of it) can be rewritten thus: “Functionally equivalent proposals should be treated equivalently, except if the proposals differ on the balance of criminal-law-relevant criteria of seriousness.” That a modification along these lines would be necessary should not be surprising: revision to the functionalist major premise is demanded for the very same reason that rendered inadequate my assertion that “[a] prerequisite to its being the case that a conditional threat to X is more serious than (or should be treated more severely than) a conditional threat to Y is that the two conditional threats are not functionally equivalent.” That statement of mine, and the unqualified form of the functionalist intuition, stand or fall together.

By now, you should know what follows. Christopher can stick to his guns that some (even all!) meta-blackmail proposals are more “serious” than their corresponding blackmail proposals, but only at the cost of abandoning the functionalist conclusion that the fact they are functionally equivalent necessarily justifies equivalence of treatment. That is, the functionalist conclusion that a pair of corresponding meta-blackmail and blackmail proposals should be treated the same will not follow merely from the premise that the two proposals are functionally equivalent. It must be established as well that the corresponding proposals do not differ on the balance of criminal-law-relevant criteria of seriousness. But if that additional premise is true, then the formalist conclusion is not. So once the functionalist intuition is suitably qualified, then the functionalist argument stands in essentially the same relation to the formalist argument as it does to the substantivist one.

The bottom line is that the formalist, functionalist, and substantivist perspectives do not yield “jointly incompatible,” Christopher, *supra* note 2, at 747, conclusions regarding the proper legal treatment of any given pair of corresponding meta-blackmail and blackmail proposals. There is no trilemma.