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Blackmail

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BLACKMAIL

(Forthcoming, OXFORD HANDBOOK ON THE PHILOSOPHY OF THE CRIMINAL LAW,
John Deigh & David Dolinko, Eds.)

Mitchell N. Berman*

INTRODUCTION

Generally, the permissibility of a conditional threat tracks the permissibility of the conduct threatened. That is, if it is permissible to X, it is ordinarily permissible to conditionally threaten to X. Call this bargaining. And if it is impermissible to Y, it is ordinarily impermissible to conditionally threaten to Y. Call this extortion. But these relationships hold true only ordinarily, not invariably. In rare contexts, it might be permissible to conditionally threaten what it would be impermissible to do. Nuclear deterrence is the most salient example. And sometimes it is impermissible to conditionally threaten what it would be permissible to do. Call this fourth cell in our implicit two-by-two matrix *blackmail*: its central case, of course, consists of a threat to disclose embarrassing information that one has a right to reveal unless paid to remain silent.

What, if anything, justifies the criminalization of blackmail, and what should be the contours of the offense, have long been among the most delighting and devilish puzzles of

* Richard Dale Endowed Chair in Law, Professor of Philosophy (by courtesy), the University of Texas at Austin. For helpful reactions to this project and my general thesis, I am grateful to participants at the *Handbook* conference organized and sponsored by the University of Illinois Institute for Law and Philosophy, and to participants at a roundtable on blackmail and exploitation held at the University of San Diego Institute for Law and Philosophy. I am also indebted to the several scholars whose published criticisms of my account of blackmail have contributed to its possible improvement; to Peter Westen for his valuable challenges and generous encouragement; to Larry Alexander, Jonathan Dancy, and Ada Fee for critical reactions to earlier drafts; and to David Dolinko for excellent and careful editing.

criminal law theory. Indeed, one long-standing participant to the debate ventured some years ago that explaining why blackmail is properly criminalized remains “one of the most elusive intellectual puzzles in all of law.”¹ This essay presents an opinionated summary of the state of the literature. It has two principal aims, and a subsidiary one. Most ambitiously, I hope both to resolve the blackmail puzzle and to draw forth from that proposed solution some lessons of broader import. If I fail in pursuit of those first twinned objectives, I hope nonetheless to analyze the nature of the blackmail puzzle, and the successes and failures of other proposed solutions to it, in ways that will prove productive for future theorists of blackmail.

The essay proceeds in five parts. Part I clears ground by introducing distinctions, vocabulary, and simple hypotheticals that will aid the analyses that follow. It also provides a rudimentary account of the methodology I recommend for evaluating competing blackmail theories. Part II summarizes and criticizes many of the most notable contributions to the blackmail literature—those that seek to explain and justify blackmail’s criminalization, as well as a few contrarian theories that maintain that blackmail’s criminalization cannot be justified.

The next two Parts introduce, develop, and defend a version of the solution to the puzzle that I first put forth a decade ago—a coercion-centered account that I termed the “evidentiary theory of blackmail.”² Part III reviews previous coercion-centered accounts of blackmail and presents the evidentiary theory as an improvement that better explains and justifies what the literature generally treats as the paradigmatic case of blackmail: a conditional threat to reveal the target’s marital infidelities unless paid to remain silent. Part IV then applies the evidentiary account beyond this central case to types of blackmail whose criminalization might plausibly be

¹ James Lindgren, *Blackmail: An Afterword*, 141 U. Pa. L. Rev. 1975, 1975 (1993).

² See Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. Chi. L. Rev. 795 (1998).

thought either less secure or less well supported by the evidentiary theory, including threats to reveal criminal wrongdoing (crime-exposure blackmail), threats to sell one's information to ordinary media outlets (market-price blackmail), and threats to do things other than to reveal secrets (non-informational blackmail). Finally, Part V briefly explores some reasons to believe that the puzzle warrants the substantial intellectual attention it has received, partly by sketching out some implications the evidentiary theory bears beyond the case of blackmail.

I. PRELIMINARIES

Before we start, a few words about objective, vocabulary and methodology.

First, I have defined blackmail as an impermissible conditional threat to do that which is permissible. I have also suggested that the existence of this subclass of conditional threats is puzzling precisely because it frustrates our expectation that a conditional threat gains its normative character from the normative character of the conduct threatened—an expectation that reflects attachment to what we may call *the threat principle*. This needs to be more precise. What we call a conditional threat is (with rare exceptions I will put aside) a biconditional proposal consisting of a conditional threat and a conditional offer, and the proposal itself could take its normative character from the conduct threatened, the conduct offered, or even the condition imposed. So the threat principle provides that the proposal *qua* conditional threat is presumptively permissible *vel non* in virtue of the permissibility *vel non* of the conduct threatened. *Qua* conditional offer, the presumptive permissibility of the proposal derives from that of the conduct offered. And *qua* solicitation, the proposal takes its normative character from that of the action demanded or requested.

In any event, permissibility is not a free-floating concept; it makes necessary (if implicit) reference to a normative system. Thus do we frequently agree that some morally impermissible conduct ought to remain legally permissible, or perhaps criticize the state for making legally impermissible that which we deem morally permissible. Blackmail is not a uniquely legal concept; it is perfectly familiar to describe some conduct as blackmail when speaking in an extra-legal or wholly moral register. Accordingly, I propose to distinguish two different forms of blackmail: *legal blackmail* is the unlawful conditional threat to do that which is legal; *moral blackmail* is the morally wrongful conditional threat to do that which is morally permissible. Moreover, each form of blackmail presents an independent puzzle.

We can illustrate the distinct puzzles of legal and moral blackmail with the following simple paired cases, both of which represent paradigms of the offense.³

Gay-disclosure:

A is an adult gay man. The product of a religious and socially conservative upbringing, A struggles with feelings of shame about his sexual orientation, and has come out to only a few close friends. B, an acquaintance who sees A leave a gay bar in another town, outs A to his friends and coworkers.

Gay-threat:

Instead of disclosing A's sexual orientation, B threatens to do so unless A pays B \$10,000—a considerable sum to A.

Adultery-disclosure:

H is cheating on his wife, W. B, an acquaintance who learns of H's infidelity and suspects W's ignorance of it, tells W that H is unfaithful.

Adultery-threat:

³ Contemporary writers routinely treat the threat to disclose one's adultery as the modal case of blackmail. From the late 18th century through the better part of the 20th, the modal case involved a threat to accuse the blackmailee of homosexuality or of particular homosexual conduct. See Peter Alldridge, 'Attempted Murder of the Soul': *Blackmail, Privacy and Secrets*, 13 Oxford J. L. Stud. 368, 374-77 (1993).

Instead of disclosing H's adultery to W, B threatens to do so unless H pays B \$10,000—a considerable sum to H.

Plausibly, the following propositions best match existing law and widespread moral intuitions:

(1) *gay-disclosure* and *adultery-disclosure* are both lawful; (2) *gay-threat* and *adultery-threat* are both criminal; (3) *gay-threat* and *adultery-threat* are both morally wrongful; (4) *gay-disclosure* is morally wrongful; and (5) *adultery-disclosure* is morally permissible.

Assuming *arguendo* that these descriptions are accurate,⁴ then *adultery-threat* is legal blackmail and moral blackmail. *Gay-threat*, in contrast, is legal blackmail but moral extortion. (Keep in mind that “legal (moral) blackmail” does not signify blackmail that is legally (morally) permissible; it refers to a form of conditional threat that is wrongful from a legal (moral) point of view despite the fact that the conduct threatened is permissible from that same point of view.) *Gay-threat* presents only the puzzle of legal blackmail—why the law criminalizes only the wrongful threat and not the wrongful disclosure. *Adultery-threat* presents the puzzles both of legal blackmail and moral blackmail—how a threat to perform a morally permissible act becomes morally wrongful.

Legal theorists who have entered the debate over blackmail have concentrated on the puzzle of legal blackmail—i.e., the questions of whether and when we should outlaw conditional threats to do what is, and should remain, legally permissible. While this focus is understandable, we should not be satisfied with answers to those questions that do not also shed light on the puzzle of moral blackmail—i.e., the questions of when, and if so how, the conditional threat to perform a morally permissible action can become itself morally impermissible—either all things

⁴ It is not essential that you do agree with these claims. These four cases are put forth to illustrate the difference between (what I am calling) legal blackmail and moral blackmail. If you do not share the assessments offered—if, say, you believe that *adultery-disclosure* is morally wrongful or that *gay-disclosure* is morally permissible—then I invite you to substitute cases for which the characterizations in text would be apt.

considered, or pro tanto.⁵ Given the intimate yet complex relationship between law and morals, even those interested only in the legal puzzle and not the moral puzzle should hesitate to affirm any proposed solution to the former that leaves the latter untouched, for it may turn out that the key to the moral puzzle unlocks the legal puzzle as well.

By “blackmail theory,” I will mean any sort of argument that seeks to solve one or both of these blackmail puzzles, by explaining either what justifies criminalizing threats to perform lawful acts (or why criminalization of such threats cannot be justified) or how threats to perform morally permissible acts can become wrongful (or why they can’t). (Notice that the two puzzles call for different types of solution. An analysis that vindicates legal blackmail is normative or prudential; one that vindicates moral blackmail is, depending on one’s metaethics, metaphysical or perhaps conceptual.) In evaluating competing blackmail theories, my approach is broadly coherentist. Conceivably, a given theory will be defective for relying on faulty reasoning, say, or by generating absurd consequences. However, the (claimed) shortcomings of most theories are of a different sort. I expect that most readers of this essay start with strong intuitions that at least some conduct conventionally classified as blackmail is immoral and properly criminalized. Blackmail grabs our interest precisely because these judgments conflict with other initial judgments of ours—regarding, for example, the relationship between acts and threats, the content of various of our moral rights, and the principles that constrain the criminal sanction—and yet the confidence with which we hold them makes us reluctant to give them up.

⁵ An action is pro tanto wrongful if there is genuine moral reason against it, although its wrongmaking features can be overridden by other considerations that render the action permissible, or even obligatory, all things considered. To characterize an action as prima facie wrongful, in contrast, is to say that it appears to be wrongful, though it might turn out, when all the facts are in, not to be wrongful, not even pro tanto.

Very roughly, then, the task for a blackmail theorist is to work back and forth among our judgments about the rightness or wrongness of particular acts and threats and about the more general principles that govern criminal law and moral evaluation to reach a set of claims that maximally commands our assent.⁶ It is this coherentist approach to the subject that both permits us to deem it a mark against a particular theory that it cannot explain the moral impermissibility or the criminalizability of types of conduct that presently fall within the generally accepted contours of blackmail, and also reminds us to consider it *only* as a mark against—what I will often call a “difficulty”—but surely not as a decisive objection, or refutation. (When I charge a theory with being “underinclusive,” I am measuring its implications against the baseline of what I will take to be widespread judgments regarding which types of conditional threats are properly criminalized or are morally wrongful, as the case may be.) The most satisfactory theory of blackmail might well require us to revise particular pre-theoretical judgments regarding which conditional threats and which unconditional acts are permissible, but the satisfactoriness of a theory will vary depending upon just which pre-theoretical judgments it requires us to abandon.⁷

⁶ This description corresponds to the method of narrow reflective equilibrium. Wide reflective equilibrium would seek coherence with, as well, the yet more abstract theoretical considerations that shape or determine the principles. Ultimately, wide reflective equilibrium is what we should strive for, but it is a lot to demand of a blackmail theory.

⁷ I believe that most blackmail theorists share these methodological commitments. *See, e.g.*, George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. Pa. L. Rev. 1617, 1617 (1993) (expressly invoking the Rawlsian method of reflective equilibrium). Nonetheless, the approach is worth making explicit precisely because some participants seem otherwise not to appreciate the nature or grounding of some common critical moves. *See, e.g., infra* Section II.C.1.

II. A CRITICAL OVERVIEW OF BLACKMAIL THEORIES

Though the criminalization of blackmail is not, strictly speaking, a paradox,⁸ it is undeniably puzzling—puzzling enough to have seduced an array of distinguished commentators, including law professors and judges, moral philosophers and economists. This Part summarizes and critiques a broad sampling of the answers that these participants have supplied. Section A examines theories that justify criminalization of blackmail by reference to the supposedly adverse systemic consequences that could be expected in a regime that tolerated blackmail. Section B investigates several others according to which blackmail is criminalizable because it is a non-consequentialist wrong with which the criminal law is properly concerned.⁹ Section C discusses the efforts by some theorists to establish that current law and prevailing intuitions are wrong, and that blackmail's criminalization cannot be justified. Given the vast number of contributions to the debate and, in many cases, their subtlety, this overview is necessarily abbreviated notwithstanding its considerable length. Its ambition is not to canvass all theories or even to conclusively refute the many it does discuss, but to introduce the most influential or interesting existing accounts and to convey a strong flavor of what I view as the principal difficulties each confronts.¹⁰ (This is a long part. A reader who is less interested in a review of the literature yet wishes to understand my own account and its implications can safely skim this

⁸ James Lindgren's important 1984 article influentially characterized blackmail as a paradox. See James Lindgren, *Unraveling the Paradox of Blackmail*, 84 Colum. L. Rev. 670 (1984). The characterization is disputed in Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 U. Pa. L. Rev. 1741, 1742-43 (1993).

⁹ Sections I.A and I.B follow the dominant way of classifying blackmail theories, see generally *Symposium: Blackmail*, 141 U. Pa. L. Rev. 1565-1989 (1993), although to better situate my own evidentiary theory, I break out the prior coercion-based theories into Part III.

¹⁰ More comprehensive treatment of many of these theories appears in Berman, *The Evidentiary Theory*, *supra* note 2, at 799-833, and Lindgren, *supra* note 8, at 680-701. Exhaustive and nearly up-to-date citation to other critiques of various blackmail theories appears in Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 Conn. L. Rev. 1051, 1063 n. 21 (2007).

discussion or jump straight to Part III. Conversely, a reader uninterested in my account may content herself with this Part and Section III.A.)

A. Accounts that Justify Criminalization By Reference to Its Systemic Consequences

The most familiar consequentialist analysis of blackmail argues that it is properly criminalized because it is economically inefficient. Other consequentialist approaches view blackmail as justifiably criminalized because, and insofar as, it encourages force or fraud (on Richard Epstein's account) or invasions of privacy (on Jeffrie Murphy's).

1. Blackmail is economically inefficient. Following the most common line, I have located the blackmail puzzle in its constituting an exception to the general rule ("the threat principle") that the permissibility of a conditional threat tracks the permissibility of the act threatened. However, blackmail is unusual in another respect too. Ex post, the successful blackmail transaction looks like a garden-variety voluntary exchange: the blackmail "victim" buys the blackmailer's promise not to disclose certain information to which the blackmailer is privy. And, ex ante, the blackmailer's threat to disclose the information unless the deal is consummated looks just like any seller's threat to withhold a good or service unless the potential buyer meets the seller's price. But voluntary transactions are generally favored in the law. So a second blackmail puzzle concerns why it, in contrast to most other voluntary transactions, is illegal.

Because economists particularly value voluntary transactions, this second puzzle has attracted some of the most distinguished theorists of law and economics. Almost all have weighed in favor of continued criminalization of blackmail—at least in its paradigmatic case.¹¹

¹¹ For one exception, see Joseph Isenbergh, *Blackmail from A to C*, 141 U. Pa. L. Rev. 1905 (1993) (discussed *infra* notes 29-36 and accompanying text).

Of course, one route to this conclusion denies the premise that blackmail transactions are voluntary in the morally relevant sense. In fact, the evidentiary theory discussed in Part III takes this tack by conceiving of blackmail as a form of coercion: a moral wrong that potentially vitiates the consent of the offeree. This is not, however, the approach favored by economically minded theorists. Although adherents of the law and economics approach by and large approve criminalization of blackmail, few if any agree that the deal between blackmailer and victim is "involuntary."¹² Instead, they argue that blackmail, unlike most other voluntary transactions, is economically inefficient. This section presents the economic thesis and then raises three objections: that it does not, on its terms, justify criminalizing adventitious blackmail; that when supplemented to take adequate account of incentive effects, blackmail might be socially desirable; and that, even if not desirable (on the economists' relatively thin criteria of value), criminalization is not obviously the best means to reduce its incidence.

The economic defense of blackmail's criminalization was first advanced thirty years ago in a paper—unpublished but widely distributed and discussed—by Douglas Ginsburg and Paul Schectman,¹³ and endorsed some years later by Ronald Coase.¹⁴ Its central claim is that the usual blackmail transaction produces deadweight economic losses by redistributing real resources from the blackmailee to the blackmailer without making the victim better off. On the surface, this is obviously false: in exchange for money, the threatener does give something of

¹² See, e.g., Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. Pa. L. Rev. 1817, 1819 (1993) (“One alternative to economic analysis in . . . the blackmail cases is to play with the meaning of ‘voluntary,’ for example by confining ‘voluntary’ acts to those in which severe constraints are absent; but this just adds a layer of uncertainty.”); Jennifer Gerarda Brown, *Blackmail as Private Justice*, 141 U. Pa. L. Rev. 1935, 1950 n.32 (1993).

¹³ Ginsburg and Schectman subsequently published their paper, with a short postscript, as Douglas H. Ginsburg & Paul Schectman, *Blackmail: An Economic Analysis of the Law*, 141 U. Pa. L. Rev. 1849 (1993). An intellectual precursor was George Daly & J. Fred Giertz, *Externalities, Extortion, and Efficiency*, 65 Am. Econ. Rev. 997 (1975).

¹⁴ Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 Va. L. Rev. 655 (1988).

value to the victim: the promise not to reveal the information, and perhaps other things as well—letters, photographs, negatives. But this transfer is not supposed to count because it incorrectly accepts as a given that the threatener possesses the information. Instead, Ginsburg and Schectman urge us to

view the transaction at its outset; B is contemplating the venture and has yet to unearth the damaging information. B calculates that, for \$200 invested in research, he can uncover information for the suppression of which A will pay him \$300. . . . No rational economic planner would tolerate the existence of an industry dedicated to digging up dirt, at real resource cost, and then reburying it.¹⁵

And if it shouldn't be tolerated, these theorists conclude, it should be prohibited.

The first difficulty with the argument is that it seems not to justify criminalizing blackmail based on information that the blackmailer happened upon adventitiously—i.e., without expending resources with the intent to discover information that might be leveraged into a blackmail threat.¹⁶ This is a mark against the account insofar as adventitious blackmail strikes us, even on reflection, as wrongful and properly criminalized. But it is not a fatal flaw. As emphasized at the outset, until we settle on a persuasive account of blackmail's wrongfulness, we should not naturalize the contours of the offense under present law nor should we treat our case-specific intuitions as fixed. It is revealing, however, that the theorists do not bite this bullet.

Instead of agreeing that their theory could not explain the criminalization of adventitious blackmail, Ginsburg and Schectman argued that the transaction costs still justify prohibiting blackmail even when the information the blackmailer threatens to disclose is adventitiously

¹⁵ Ginsburg & Schectman, *supra* note 13, at 1860.

¹⁶ This argument was first advanced by Lindgren, relying on a typology of blackmail advanced in MIKE HEPWORTH, BLACKMAIL: PUBLICITY AND SECRECY IN EVERYDAY LIFE 73-77 (1975). See Lindgren, *supra* note 1, at 694-97.

obtained. “Although we focused attention on the resources that a potential B would expend in order to ‘dig up dirt’ about A,” they explained, their point was that “viewing the blackmail transaction *ex ante*” would make the waste obvious.

Thus, it is of no moment that a particular B may have come by compromising information accidentally. Should A refuse to pay him, B has no reason to begin incurring expenses, such as are necessary to secure publication of the information, except insofar as he is looking to future opportunities for blackmail. The resources he expends in order to publish the information (and presumably to get credit as the source of it) are justified only from his *ex ante* perspective on the *next* blackmailing opportunity -- regardless of whether B sets out to find it or waits for it again to come knocking at his door. Thus, assuming that the first blackmail opportunity arrives by accident, when B asks for payment to suppress what he knows, he has become an entrepreneur of blackmail; for B then to carry out his threat to reveal the information is an investment decision, not a part of the earlier accident.¹⁷

This response does not withstand scrutiny. First and least significantly, insofar as it rests on the premise that the blackmailer’s costs of carrying out his threat are substantial, it is likelier that, as Steven Shavell has observed, “[t]he direct cost to a blackmailer of actually carrying out his threat is ordinarily trivial; it takes almost no effort to mail a photograph or a document to someone.”¹⁸ Second, it is equally dubious that “B has no reason” to incur expenses except to bolster his reputation. To the contrary, if A rejects B’s proposal, B might carry out his threat out of spite. And as Ginsburg and Schectman themselves acknowledged, there is “no reason in economic theory to dishonor [B’s] preference for making A suffer.”¹⁹ Third, even if B incurs

¹⁷ Ginsburg & Schectman, *supra* note 13, at 1875-76.

¹⁸ Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. Pa. L. Rev. 1877, 1889 (1993). Shavell proceeds to note that “[t]he cost to a blackmailer of carrying out his threat probably inheres mainly in any resulting increase in the risk of his being caught and punished. But the blackmailer can usually reveal his information anonymously, using the mail or the telephone.” *Id.* Interestingly, Shavell’s point is actually even stronger than he seems to realize. The blackmailer’s costs of avoiding detection and punishment are not relevant when deciding whether blackmail *should* be punishable.

¹⁹ Ginsburg & Schectman, *supra* note 13, at 1864. They proceed to argue, however, that the rational economic planner can ignore B’s welfare interest in acting spitefully on the grounds that “some potential gains are not

nontrivial costs to carry out his threat and even if he does so solely in order to strengthen his reputation as a credible threatener, Ginsburg and Schectman are wrong to conclude that “[t]he resources [B] expends . . . are justified only from his ex ante perspective on the next *blackmailing* opportunity.”²⁰ Rather, any expenses incurred might well be justified by the blackmailer’s anticipation of the next *bargaining* opportunity, whatever it may be. Ginsburg and Schectman claim that “B’s only potential gain . . . in establishing his credibility as someone willing to incur a cost if not obliged. . . *is an asset only insofar as B* is an entrepreneur of blackmail, i.e., someone who expects to engage in similar future transactions”²¹ But this is unpersuasive. A reputation as someone willing to forego a benefit or incur costs if not obliged is extraordinarily valuable in the “legitimate” business world for it allows one to secure a disproportionately large share of the potential benefits of exchange. And such a reputation can be exploited in any transactional domain regardless of the specific contexts in which it was forged or reinforced. In sum, Ginsburg and Schectman have not effectively rebutted Lindgren’s objection that the basic economics argument cannot justify prohibition of participant or opportunistic blackmail.²²

realizable because they are not as great as the cost entailed in their identification.” *Id.* But if B’s pleasure in harming A counts in the welfare calculus, then a realistic appraisal of the costs incurred by the adventitious blackmailer becomes critical.

²⁰ *Id.* (emphasis added).

²¹ *Id.* at 1875 (internal quotation omitted; ellipses and emphasis in original).

²² Acknowledging that the economic responses to Lindgren’s challenge had been inadequate, Professor Richard McAdams proposed a “second-best” economic defense of the criminal ban against adventitious blackmail. *See* Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. Pa. L. Rev. 2237, 226-92 (1996). In McAdams’s view, absent social norms, adventitious blackmail produces a suboptimal distribution of adventitiously discovered information while a blackmail ban yields a superoptimal distribution of such information. However, he argues, norms favoring privacy correct the latter inefficiency better than norms favoring disclosure correct the former. Therefore, criminalization of adventitious blackmail is more efficient than legalization.

This analysis strikes me as doubtful, for it overlooks the social norms against blackmailing. That is, it seems unlikely that decriminalization of adventitious blackmail would eviscerate the social norms against the practice. But even granting its premise *arguendo*, the consequences of the argument are more far-reaching than McAdams acknowledges—and more expansive than I believe can be adequately defended. Ostensibly McAdams

A second respect in which the argument from efficiency is either infirm or incomplete is that a narrow focus on the resource gains and losses of the blackmailer and blackmailee alone cannot establish that the practice of blackmail (whether adventitious or non-adventitious) is inefficient, for the fact (if true) that a given transaction reduces the aggregate wealth of the actual parties to the exchange does not prove that the transaction reduces the overall wealth of society. If the threat and practice of blackmail encouraged socially useful activity or discouraged socially harmful behavior, then a regime that permitted blackmail might be wealth maximizing relative to a regime in which blackmail is prohibited. Although theorists of law and economics have been aware of this problem for decades—William Landes and Richard Posner explored one aspect of the question in their very first collaboration, nearly 35 years ago²³—they are far from persuasively demonstrating that blackmail is all things considered inefficient.

Consider, for example, Shavell’s own contribution. While agreeing that the criminality of adventitious blackmail “cannot be explained by the need to discourage wasteful efforts to obtain information,” Shavell has argued that “there is still an obvious incentive-based reason for making blackmail illegal: to avoid being blackmailed by [persons who happen upon information accidentally], potential *victims* will exercise excessive precautions or reduce their level of

claims only to “supplement[] the economic theory of blackmail.” *Id.* at 2287; *see also id.* at 2267 n.82. But, in fact, his analysis rests on a very different footing. The economic case against blackmail rests on the premise that it is appropriate to criminalize conduct that results in deadweight economic losses. McAdams recognizes that much adventitious blackmail cannot be justified on that principle. *Id.* at 2287. He also eschews reliance on any administrative difficulties of excepting adventitious blackmail from a general blackmail prohibition. *Id.* at 2270 n.93. Therefore, the unstated premise of his argument is that the fact that a legal prohibition would likely produce a more “efficient” social distribution of information constitutes a sufficient condition for criminalization. It follows that his theory would tolerate an elaborate regime of criminal laws mandating disclosure of certain categories of information and prohibiting concealment of others.

²³ *See* William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 42-43 (1975) (considering whether a blackmail threat to reveal that the blackmail victim committed a crime might increase social utility—and therefore warrant legalization—by reducing other crimes).

innocent, yet embarrassing, activities.”²⁴ It is unclear that the prospect of being blackmailed over innocent activities would be sufficiently great in a regime of legalized blackmail to have any significant effect on the incidence or manner of their performance. But even assuming that it would, Shavell’s account succeeds at most in justifying continued prohibition of adventitious blackmail *of innocent conduct the incidence of which society has no interest in reducing*. It provides no argument for prohibiting conditional threats to reveal information about socially undesirable behavior where such information was obtained costlessly.

Posner himself has undertaken the most thorough analysis to date of whether blackmail confers a countervailing social benefit.²⁵ Adopting a purportedly exhaustive seven-part typology of acts or conditions that a blackmailer might threaten to reveal,²⁶ he concluded that in none of the cases could we be confident that there would be a countervailing social benefit. On this basis, he agreed that blackmail is on average wealth-reducing and therefore should be prohibited by the criminal law.

Posner’s taxonomy is not as exhaustive as he suggests. He provides no account of threats to do anything other than disclose information or of demands for something other than pecuniary gain. Far more troubling, though, is the tentative, even dubious, nature of some of Posner’s central conclusions. For example, Posner concedes that the social welfare arguments against his “category two” and “category five” blackmail—threats to reveal that a victim has engaged either in a criminal act for which he was not caught and punished, or in disreputable or immoral acts

²⁴ Shavell, *supra* note 18, at 1903.

²⁵ See Posner, *supra* note 12.

²⁶ Posner’s categories are as follows: (1) criminal acts for which the blackmailer’s victim has been punished; (2) undetected criminal acts; (3) acts that are wrongful, perhaps tortious, but not criminal; (4) wrongful acts of which the blackmailer (or his principal) was the victim; (5) disreputable or otherwise censurable acts that do not, however, violate any enforced law; (6) involuntary acts or conditions that are a source of potential humiliation; and (7) any of the first six categories, except that the victim did not commit the act for which he is being blackmailed. *Id.* at 1820.

that do not violate any commonly enforced law—are inconclusive.²⁷ But he disfavors legalizing such forms of blackmail by privileging “a presumption against the expenditure of scarce political capital on an effort to change laws that are not demonstrably inefficient” over a contrasting “presumption against government intervention in private affairs that is not demonstrably efficient.”²⁸ That would be a fair conclusion were the question whether we should campaign for blackmail’s decriminalization (in whole or part). But it is nonresponsive to one who seeks theoretical understanding.

Finally, even if non-adventitious blackmail were shown to reduce social wealth, and even if the theory’s apparent failure to cover adventitious blackmail could be rectified or deemed appropriate on reflection, proponents of the argument from economic efficiency have not yet persuasively explained why the fact that the practice of blackmail is, on balance, wealth-reducing, justifies its criminalization. On the consequentialist assumptions that underpin the economic approach, recourse to the heavy artillery of the criminal law could not be justified if the incidence of blackmail could be comparably well reduced by means that incur less social cost, in terms, *inter alia*, of tax dollars expended and the human suffering of persons caught and punished. Put another way, criminalization of blackmail cannot be justified as a means to promote utility or wealth-maximization unless its marginal benefits—relative, say, to making blackmail agreements unenforceable as a matter of contract law (as is presently the case) and/or making blackmail a tort—outweigh the marginal social costs.

One commentator, Joseph Isenbergh, has concluded that they do not. Isenbergh begins by observing that “A gains no real control over disclosure from an unenforceable bargain with B.

²⁷ *Id.* at 1827, 1835.

²⁸ *Id.* at 1827; *see also id.* at 1835 (“once again, the argument for allowing blackmail is too speculative to make a strong case for decriminalizing this particular form of extortion”).

And if B cannot assure A of any increased control over disclosure, B cannot extract much from A, and therefore has little reason to invest much effort in bargaining.”²⁹ Therefore, there is likely to be little blackmail in a regime that seeks to deter blackmail simply by making blackmail agreements unenforceable as a matter of contract law.

Of course, there could be less blackmail still in a regime that made blackmail agreements unenforceable *and* barred blackmail through the criminal law. Noting the rarity of blackmail in the caselaw, Posner has speculated that the few reported cases accurately reflect a low incidence of the crime. Anticipating that their would-be victims would refuse to pay blackmail, he surmises, a vast number of would-be blackmailers choose not to risk the criminal penalty.³⁰ This is possible. However, an alternative hypothesis strikes me as more likely—namely, that blackmail is much more frequent than the incidence of reported cases would indicate, and that the low rate of prosecution reflects the substantial willingness of victims to pay. After all, an economically rational blackmailer should be able to conceive and propose a blackmail price low enough to substantially reduce the probability that his victim will report the blackmailer to the police rather than accept the deal. Thus, although the social cost of the blackmail prohibition is apparently low (commensurate with the infrequency of prosecution and conviction), the deterrent value of the criminal ban is likely to be as small or smaller. Because the goal from an economic standpoint is not to achieve *maximum* deterrence but *optimal* deterrence, taking account of all costs and benefits (as measured by utilitarian or wealth-maximizing metrics), it is hard to conclude that blackmail’s criminalization is a good buy.

²⁹ Isenbergh, *supra* note 11, at 1928. *See also* Posner, *supra* note 12, at 1841 (noting that the third of his proposed mechanisms by which criminalization deters blackmail “could be achieved without criminal law simply by making blackmail contracts unenforceable as a matter of contract law”).

³⁰ *Id.*

But the economic case *against* criminalization is even stronger, for the blackmail ban might be positively counter-productive. As Isenbergh has explained,

if blackmail is made a crime, A gains considerable control over disclosure from entering into a bargain with B, because B, by incurring the criminal exposure of a blackmailer, can now sell A a much higher likelihood of silence. . . . The criminal prohibition of blackmail, therefore, makes the blackmail bargains entered into across the threshold of prohibition highly enforceable.³¹

And if the would-be blackmailer anticipates that a consummated bargain will be reasonably enforceable, he is more likely to commit the resources necessary to undertake the activity. In short, making blackmail a criminal offense might deter some blackmail that would not be deterred in a regime that merely made the blackmail deal unenforceable as a matter of contract law. But, if so, its deterrent effect is likely to be small. The ban might be moderately economically efficient or moderately inefficient. On the other hand, criminalizing blackmail might actually increase its incidence. In that event, resort to the criminal law is necessarily inefficient, maybe substantially so.

In my view, the most comprehensive formal game-theoretic analysis of the question reaches equivocal results. Fernando Gómez and Juan-José Ganuza conclude in a recent article that making blackmail contracts unenforceable but voidable—so that a blackmailer who promises, for payment, not to disclose the blackmailee’s secret does not incur an obligation to pay damages for breach, but can be compelled in restitution to return the blackmailee’s payments—will not likely reduce the incidence of blackmail relative to a regime in which blackmail was lawful and blackmail contracts fully enforceable.³² This argument would lend

³¹ Isenbergh, *supra* note 11, at 1928.

³² Fernando Gómez & Juan-José Ganuza, *Civil and Criminal Sanctions Against Blackmail: An Economic Analysis*, 21 Int’l Rev. Law & Econ. 475 (2002).

some support to the economic case for blackmail's criminalization. But it confronts at least two significant problems.

First, Gómez and Ganuza's conclusion that criminalization would reduce blackmail relative to the particular alternative contract solution they consider (that contracts will be unenforceable but voidable) depends upon at least two dubious assumptions. The first dubious assumption is that if the blackmailer discloses after being paid for silence, the blackmailee incurs no disclosure-related costs in suing for restitution. But disclosure might not be a simple binary matter. For example, if the blackmailer discloses a husband's infidelity to his wife, the husband might nonetheless incur additional reputational costs were he to broadcast his indiscretions more widely by going to court. Their second assumption is that the blackmailee's financial costs of pursuing recovery are nil. To the contrary, given the American rule (not followed in Spain, from whence Gómez and Ganuza write) that litigants generally bear their own costs, and given anticipated difficulties in establishing that payments have been made, let alone in what amount, the blackmailee's expected financial payoff from filing suit will be substantially less than his actual payments, and possibly even negative. For both these reasons, Gómez and Ganuza are not warranted in concluding that, if the blackmailer discloses after payment, the blackmailee's clear dominant strategy is to file suit. Consequently, the presence or absence of the prospect of large damage awards might nontrivially affect the effective enforceability of blackmail deals, and thus the incidence of blackmail.

The second flaw in the Gómez and Ganuza analysis cuts at least as deeply. Their model, to repeat, compares the likely incidence of blackmail under two regimes—one in which blackmail is criminalized, the other in which it is lawful but blackmail contracts are unenforceable and voidable. There is, however, a second way that contract law might try to

reduce the incidence of blackmail: it could withhold all legal recognition of such agreements, meaning that a blackmailee who acceded to a blackmail demand could neither sue for damages in the event of disclosure nor recoup his payments in restitution. Because this would be the more effective way for contract law to try to combat blackmail, it would seem to provide the more illuminating comparison for those trying to determine whether, on economic principles, resort to the criminal law is justified. For reasons that are unclear, it is not the comparison on which Gómez and Ganuza focus. Still, they do consider this alternative contract regime as a qualification to their model. And when they do, their conclusions are revealing.

First, they rightly recognize that, in a static game, the blackmailer might have little or no incentive to keep his promise, thus giving blackmailee insufficient confidence to accept the blackmail deal—which was Isenbergh’s claim.³³ Whether the same conclusion would obtain in a dynamic setting, most notably if the blackmailer is a repeat player who might benefit from reputation effects in his dealings with other potential blackmailees, is less clear. Gómez and Ganuza claim, reasonably, that it doesn’t. But even if so, it is far from obvious that, on economic grounds alone, criminalization is warranted even in the case of repeat and professional blackmailers, for the state has other ways to discourage them. For instance, in addition to making blackmail contracts void, the state could possibly ban blackmail advertising³⁴ or withhold the benefits of incorporation from firms engaged in blackmailing. Finally, the authors suggest that blackmail might also survive its nonrecognition by contract law when the

³³ *Id.* at 492 (“[T]he static analysis of the blackmail puzzle in the absence of legal regulation could lead us to jump to the conclusion that no legal rule is the best legal rule.”).

³⁴ Admittedly, whether a ban on such advertising would pass judicial scrutiny under current First Amendment doctrine is uncertain. I have argued, though, that current commercial speech doctrine is flawed and that advertising regulations that can be understood as conditional offers of the form “you may engage in such-and-such commercial activity that we might otherwise prohibit on the condition that you not advertise it” should often be upheld. See Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 Vand. L. Rev. 693 (2002).

blackmailer and blackmailee have a long-term relationship in which the former reiterates relatively small demands at intervals, and if the blackmailee has a low discount factor. But they do acknowledge that this is complex and requires further analysis.³⁵ In light of all this, it seems to me that Gómez and Ganuza considerably overstate the extent to which their formal analysis undermines Isenbergh's argument that any inefficiency entailed by blackmail can be adequately discouraged simply by making contracts of silence entered into between a blackmailer and his victim either voidable or entirely unregulated, and by excepting contracts with an adventitious blackmailer.³⁶

2. *Blackmail as the "Hand-maiden to corruption and deceit."* Rejecting the problematic premise that the economic inefficiency of a practice provides a sufficient basis for criminalizing it, Richard Epstein argued some 25 years ago that blackmail is criminal because it has a necessary tendency to induce *other* acts of theft and deception, the criminalization of which is wholly *unpuzzling*.³⁷

Epstein "begin[s] with a brief account of the moral theory of criminal responsibility"³⁸—to wit, that there is no criminal liability without mens rea and actus reus. Blackmail easily satisfies the mens rea requirement. Blackmail's criminalization is problematic, then, because of the actus reus requirement which Epstein views as limited, in a manner not fully spelled out, to the threat or use of force or fraud.³⁹ Accordingly, the criminalization of blackmail is puzzling

³⁵ Gómez & Ganuza, *supra* note 32, at 497 n.42.

³⁶ In light of the difficulty in ascertaining whether given information was costlessly obtained, Isenbergh would, as a proxy, make all contracts to remain silent enforceable as a matter of contract law if the parties knew each other before the blackmail bargain. He would also make an exception to that exception in cases where the subject of the contract for silence is the commission of torts and crimes. Isenbergh, *supra* note 11, at 1925-32.

³⁷ Richard A. Epstein, *Blackmail, Inc.*, 50 U. Chi. L. Rev. 553 (1983).

³⁸ *Id.* at 555.

³⁹ *Id.* at 556-57. Although Epstein appears to locate his preferred moral limits on the criminal law in the actus reus requirement, his is not the orthodox understanding of that requirement. On the various meanings of actus reus, see

because (ordinarily) it entails neither force nor fraud.⁴⁰ Of course, one could "argue that the threat to disclose is illegal precisely because the disclosure itself, if made, *ought* to be illegal."⁴¹ But this argument won't do, Epstein concludes, for it "jettisons the basic theory of criminal responsibility by holding that deliberate acts, not involving the use of force or fraud, may themselves be regarded as criminal."⁴²

Epstein maintains that the solution to the blackmail puzzle appears when we consider "what . . . the world [would] look like if blackmail were legalized." Under such a regime,

there would then be an open and public market for a new set of social institutions to exploit the gains from this new form of legal activity. Blackmail, Inc. could with impunity place advertisements in the newspaper offering to acquire for top dollar any information with the capacity to degrade or humiliate persons in the eyes of their families or business associates.⁴³

And, Epstein proposes, the existence of Blackmail, Inc. would produce at least two undesirable consequences. First, the greater prevalence of blackmail would lead to more blackmail victims and, consequently, greater incidences of theft and fraud by victims desperate to obtain the funds necessary to pay the blackmailer.⁴⁴ Second, because Blackmail, Inc. would "recognize[] that its ability to extract future payments from V [the victim] depends upon T [the third party to whom the disclosure would be made] being kept in the dark," it would inevitably "instruct [V] in the

Paul H. Robinson, *Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?*, in *ACTION AND VALUE IN CRIMINAL LAW* 187, 190-202 (Stephen Shute et al. eds 1993). Still, we can understand Epstein as advancing a normative claim that the criminal law should only criminalize the use or threat of force or fraud, and some narrow "principled extension[s]." Epstein, *supra* note 37, at 555.

⁴⁰ Epstein notes that blackmail can incorporate elements of force or fraud, as for example, when the blackmailer threatens to disclose information gleaned from stolen documents. *Id.* at 558. But in such a case, criminalization of blackmail presents no puzzle for "[i]t is easy to regard blackmail as a criminal offense whenever the disclosure is itself regarded as wrongful." *Id.* With Epstein, let us put those cases aside.

⁴¹ *Id.* at 560.

⁴² *Id.*

⁴³ *Id.* at 562.

⁴⁴ *Id.* at 564.

proper way to arrange his affairs in order to keep the disclosures from being made."⁴⁵ In short, Epstein concludes, "[b]lackmail is made a crime not only because of what it is, but because of what it necessarily leads to. . . . [I]t is the hand-maiden to corruption and deceit."⁴⁶

This particular rendition of Epstein's conclusion is misleading. The real thrust of *Blackmail, Inc.* is that blackmail is properly made a crime *not* because of "what it is," but *only* because of "what it necessarily leads to." Epstein's assertion that force and fraud exhaust the concerns of the criminal law entails that criminalization of blackmail would be impermissible *but for* the frauds and thefts it engenders (given that blackmail does not itself constitute fraud or force). Now, lots of conduct that Epstein would never think justifiably criminalized leads to fraud and theft and other core moral wrongs. Some number of persons have stolen and robbed innocent victims for money to buy jewelry and electronics, for example, but it would be fanciful to think it consistent with Epstein's "moral theory of criminal responsibility" to criminalize the production or sale of such goods. Once Epstein qualifies his moral theory to permit the state to criminalize not only acts of force and fraud themselves, but also conduct that has some causal relationship to such acts, he must both insist that the linkage be of a fairly circumscribed sort and persuasively establish that blackmail satisfies whatever narrow causal standard he has in mind, lest his concession open the door to criminalization of just about everything.

Epstein does not, in his brief essay, specify just how closely or substantially or intimately given non-forceful, non-fraudulent conduct must cause or facilitate other forceful or fraudulent conduct to justify its criminalization. But he does repeatedly intimate—his theory relies, after

⁴⁵ *Id.*

⁴⁶ *Id.* at 566. For another account that, like Epstein's, grounds blackmail's wrongfulness in the harms that it proximately causes see Henry E. Smith, *The Harm in Blackmail*, 92 Nw. U. L. Rev. 861 (1998) (emphasizing that blackmail often provokes the blackmailee to suicide, fraud, theft and even murder).

all, on claims regarding what blackmail “*necessarily* leads to”⁴⁷—that blackmail’s relationship to such activity is close and substantial indeed. Recall that Epstein focuses on two ways that blackmail produces the wrongs with which the criminal law is properly concerned: it induces blackmail victims to steal and defraud to gain the funds to pay the blackmailer’s demands; and it coaches victims in how best to perpetuate the frauds they are already perpetrating against others. Let us consider these two mechanisms in reverse.

Plainly, the second argument depends on the assumption that the blackmail victim, V, is in fact engaged in fraud against some third-party, T. Epstein expressly so claims: “not to put too fine a point on it, V is engaged in a type of long term, systematic fraud against T that if disclosed would allow T some type of relief against V—be it a divorce or a money judgment.”⁴⁸ But that puts *much* too fine a point on it. Take, for example, our two paradigm cases: *adultery-threat* and *gay-threat*. The adulterer is engaged in fraud against his wife, but our hypothetical gay man is defrauding nobody. Not all deception is fraudulent. Indeed, not all secrets that a blackmailer might threaten to disclose are even deceptions. One example that recurs in the literature concerns a blackmail threat to reveal, to the man’s friends and co-workers, that some unfortunate soul is an inveterate bedwetter. Clearly the bedwetter is engaged in no fraud. And unless he has affirmatively denied bedwetting (perhaps he walks to work wearing a sandwich board that declares “I do not wet my bed”?), he has not even deceived anyone. He has simply not disclosed an embarrassing secret that he’d prefer people not know. I expect that most people would view as especially worthy of criminalization conditional threats to divulge embarrassing secrets the

⁴⁷ See *supra* text accompanying note 46. See also Epstein, *supra* note 37, at 565 (decrying blackmail’s “necessary tendency to induce deception and other wrongs”).

⁴⁸ *Id.* at 564. See also *id.* (claiming that Blackmail, Inc. will “participate in the very fraud that V is *necessarily* engaged in against T”) (emphasis added).

continued suppression of which would not wrong anybody else. But Epstein's second argument provides no support for their criminalization.⁴⁹

Epstein's first argument is hardly more successful, though for different reasons. To start, it cannot help justify criminalization of blackmail threats that involve demands for anything other than cash or its equivalent. So Epstein's theory would not support making it a crime to demand sexual compliance for the nondisclosure of embarrassing information the victim has no moral obligation to divulge (e.g., that she was born out of wedlock). But even when we turn to blackmail demands for money, Epstein's theory is infirm.

Epstein claims that the second of the two ways that blackmail breeds fraud and deception is bound to occur: "This is not a case, like driving, where we are uncertain whether a teenager will speed if granted a license. Continued fraud against T is a precondition for blackmail against V."⁵⁰ We have criticized that second argument not by denying that Blackmail, Inc. will very likely come to participate in the deception, but by denying that the deception in which it participates will necessarily constitute fraud (or even that it's necessarily properly described as deception). However Epstein's claims regarding the likelihood that Blackmail, Inc. will encourage its victims to engage in criminal activity to pay its bill are markedly—and appropriately—more modest. "What," he asks, "is to prevent Blackmail, Inc. from hinting, ever so slightly, that it thinks strenuous efforts to obtain the necessary cash should be undertaken? Do we believe that V would never resort to fraud or theft given this kind of pressure . . . ?"⁵¹ No, of course not. But the standard to which Epstein appeals is much too lenient. Surely nothing

⁴⁹ Unless, that is, the practical difficulties in excepting such cases from a general blackmail ban would be insurmountable or too costly, a contention Epstein does not make.

⁵⁰ *Id.* at 564.

⁵¹ *Id.*

prevents Jewelry, Inc. from hinting, ever so slightly, that a besotted young man should make strenuous efforts to purchase the ring his fiancée has admired. Nor do we believe that he would never resort to criminality given that kind of pressure.

My point is not to equate the two cases. Rather, it's to emphasize that Epstein cannot rest content with establishing merely that the practice of blackmail will predictably cause some increase in force or fraud by blackmailees. That is not good enough to justify subjecting to criminal sanction persons who do not themselves engage in force or fraud if Epstein's core principle of criminal responsibility—criminal sanctions must be limited, in the first instance, to actual instances of force or fraud—is to retain real bite.

3. *Blackmail encourages invasions of privacy.* A third theory, proposed by Jeffrie Murphy,⁵² exhibits similarities to both of the approaches already discussed. Like Epstein, Murphy focuses on the anti-social conduct that blackmail's legalization can be expected to encourage. Like proponents of the economic analysis, Murphy seems principally motivated to explain and justify the distinction between blackmail and "other hard economic transactions."⁵³ Like both earlier approaches, however, Murphy's theory does not comport with strong intuitions regarding proper outcomes.

Murphy's argument proceeds in three steps. He begins by pronouncing twin assumptions about the moral underpinnings of the criminal law:

The first is that immorality should be a necessary condition for criminalization but not a sufficient condition. The second is that utilitarian considerations, though unsatisfactory in explicating the concept of immorality, are a reasonable basis on

⁵² Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 *Monist* 156 (1980).

⁵³ *Id.* at 156.

which to answer the question “Which of all immoral actions should be criminalized?”⁵⁴

He then asserts that blackmail and hard economic transactions “are both intrinsically immoral (and immoral for the same reason—e.g., taking an unfair advantage of the victim’s vulnerability).” Lastly, he explains that utilitarian considerations provide good reasons for (1) criminalizing the blackmail of persons who are not public figures—namely, that were blackmail legalized would-be blackmailers would have incentives to invade the privacy of average persons where presently no such incentives exist;⁵⁵ and (2) not criminalizing hard economic transactions—namely, that there is no apparent way to draw sensible and enforceable lines between immoral and morally acceptable transactions.⁵⁶

Like the economic argument, Murphy’s theory is rendered underinclusive by its inability to justify criminalization of adventitious blackmail because any invasions of privacy such forms of blackmail occasion are unaffected by blackmail laws.⁵⁷ An even greater difficulty is that Murphy cannot rest on a bare assertion that blackmail is immoral because it takes unfair advantage of a victim’s vulnerability.⁵⁸ Consider the example Murphy offers of a paradigmatic “hard economic transaction”:

I know that your son, whom you love more than anything else in the world, is dying of leukemia. I also know two other things: (1) that he is a great baseball fan

⁵⁴ *Id.* at 163 (footnotes omitted).

⁵⁵ Murphy proceeds to qualify this rule for “public figures”: because there already exist substantial economic incentives to invade their privacy, blackmail of such figures at rates that do not exceed the market price for the information in question would be permitted. And he qualifies this qualification for “public officials”: because concealment of embarrassing information about public officials often disserves citizens’ legitimate interests, blackmailing them, even at market-price, should be disallowed. *Id.* at 164-65.

⁵⁶ *Id.* at 163-66.

⁵⁷ See Lindgren, *supra* note 1, at 689.

⁵⁸ In fairness, Murphy does not say that “taking an unfair advantage of the victim’s vulnerability” constitutes the whole of the immorality of blackmail and hard economic transactions; he says only that it is an *example* of their immorality. But if there are other ways in which blackmail is “intrinsically immoral,” Murphy does not hint at what they may be.

who would love to have a baseball autographed by Babe Ruth to cheer him during his final days and (2) that \$6000 is all the money you have in the world. Now I happen to own the last such baseball available in the world, and I will make you a proposition -- namely, to sell you this baseball for \$6000.⁵⁹

Well, yes, that does sound hard. And let's agree *arguendo* that it's immoral. But Murphy does not claim that the baseball's owner has a moral obligation to *give* it to the dying boy: presumably he is morally free to sell it to the boy's parents for a "fair" price. If so, and if the analogy holds, then the blackmailer should also be free to sell what he has to offer—his silence—whether that price is set by the "market" or by another means. That is, "fair-price blackmail" would seem to be morally unproblematic, and not permissibly criminalized (in principle). Neither conclusion is demonstrably erroneous. But, on balance, Murphy's analysis generates conclusions that do not cohere well with either present law or what I take to be widespread moral intuitions.

B. The Inherent Wrongfulness of Blackmail.

The consequentialist theories of blackmail are not entirely without merit. The practice of blackmail might well produce the costs on which these theories focus: greater invasions of individual privacy, more fraud and deception, waste of social resources. But the defects of these accounts also loom large: they generally fail to justify criminalization of large swaths of conduct (adventitious blackmail, for example) that strike other participants to the debate as properly criminalized; they frequently incorporate dubious empirical assumptions; and they often fail to ground their diagnoses of blackmail's harms in persuasive theories of the proper scope of the criminal law. Moreover, most readers are likely to feel that the accounts discussed in Section I.A. just have the wrong tone, for they fail to make sense of the widespread conviction that

⁵⁹ Murphy, *supra* note 52, at 156-57.

blackmail is morally wrongful. For all these reasons, it is no surprise that many theorists try to establish that blackmail is properly criminalized precisely because it is morally wrongful.

Broadly speaking, there are two routes to the conclusion that blackmail is morally wrongful: the first derives its wrongfulness from the wrongfulness of the conduct threatened (or offered); the second locates wrongfulness in the proposal itself such that blackmail can be morally wrongful even if it would not be wrongful for the blackmailer to do as he threatens (or as he offers). If the conduct that a blackmailer threatens can be assumed to be wrongful (think *gay-disclosure*), then the wrongfulness of the conditional threat follows from the threat principle, and the theorist's challenge is only to resolve the puzzle of legal blackmail: to explain why the unconditional performance of the conduct threatened and the making of the conditional threat, albeit both morally wrongful (even if not equally so), properly call forth different legal responses. If the conduct threatened might not be wrongful (think *adultery-disclosure*), then the challenge is greater: to explain both what renders the threat wrongful and why its wrongfulness is the type of wrongfulness that the state ought to (or may) criminalize, given that not all wrongdoing is properly subject to legal sanction.

1. The puzzle of legal blackmail. We have supposed that *gay-disclosure* and *gay-threat* are both morally wrongful and, furthermore, that the wrongfulness of the latter derives from (but is not necessarily reducible to) that of the former. What reasons could we have for criminalizing the threat if we decline to criminalize the unconditional disclosure? The existing literature suggests several.

First, the disclosure and the threat to disclose differently implicate free speech values. Although contemporary First Amendment doctrine nominally protects the freedom not to speak

as fully as the freedom to speak,⁶⁰ we might reasonably believe that the values undergirding the First Amendment are generally better served by more rather than less speech or, in any event, that they are implicated little, if at all, by the offered sale of one's silence. If so, this would be a reason to permit morally wrongful disclosures but not to permit those morally wrongful conditional threats to disclose.⁶¹

Second, while the unconditional disclosure is a one-shot affair, the conditional threat to disclose ordinarily lends itself to repetition. The repetitive nature of the blackmail proposal is likely to instill in the blackmailee continued fear and anxiety that the one-time disclosure cannot likewise create.⁶² Indeed, George Fletcher has argued that the blackmailer's continued power over the blackmailee permits him a dominance the deterrence and punishment of which are central purposes of the criminal law.⁶³

Third, the disclosure and the threat directly harm different types of interest. The disclosure inflicts emotional and reputational injuries; the conditional threat implicates interests in property. Conceivably, the latter sorts of interest are more important or more properly the concern of the state. Something like this idea seems to undergird Leo Katz's contribution to the blackmail literature.⁶⁴ In the context of *adultery-threat*, Katz poses the blackmail puzzle thusly: "If revealing the infidelities is only a minor immorality, then how can the taking of money which

⁶⁰ See, e.g., *Harper & Row Pub., Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985).

⁶¹ See, e.g., Hugh Evans, *Why Blackmail Should be Banned*, 65 Phil. 89, 92-94 (1990).

⁶² This is a theme that runs through Hepworth, *supra* note 16.

⁶³ George Fletcher predicated his proposed solution to the blackmail paradox on a novel and explicit theory of crime and punishment. See generally Fletcher, *supra* note 7. The core concern of the criminal law, he ventures, is to deter and negate conditions of dominance and subordination. *Id.* at 1635. If so, there is no reason to criminalize the mere disclosure of embarrassing information. It's over and done with. The blackmail threat to disclose the same information is another story. Precisely because of "the prospect of repeated demands," *id.* at 1626, blackmail tends to create a continuing relationship of dominance and submission. In consequence, blackmail "is not an anomalous crime but rather a paradigm for understanding both criminal wrongdoing and punishment." *Id.* at 1617.

⁶⁴ Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. Pa. L. Rev. 1567 (1993).

the victim prefers to that minor immorality be anything more than a minor immorality itself?”⁶⁵ And his answer follows from the following general principle (which Katz derives from a characteristically clever hypothetical involving a battery and a theft):⁶⁶ “when the defendant has the victim choose between either of two immoralities which he must endure, the gravity of the defendant's wrongdoing is to be judged by what he actually did (or sought to achieve), not by what he threatened to do.”⁶⁷ Blackmail is a serious offense because it is a form of robbery or (at the least) theft, a graver wrong than the disclosure of an embarrassing secret.⁶⁸

Fourth, the disclosure might implicate, to a far greater degree than the threat, a range of concerns related to the practical administration of the criminal laws. For example, it could be that wrongful disclosures (but not wrongful threats) are so common that “effective enforcement [of a law proscribing the disclosures] might be possible only by making demands on the criminal justice system that would significantly compromise its ability to deal with more serious offenses.”⁶⁹ Or we may believe ourselves unable to craft a law prohibiting the wrongful disclosures that does not incur an excessive risk of overdetering permissible disclosures or producing erroneous convictions.

⁶⁵ *Id.* at 1598 (emphasis omitted).

⁶⁶ Smithy the burglar breaks into Bartleby's house to commit larceny. Inside, he demands that Bartleby divulge the combination to his safe and threatens to beat Bartleby senseless if he does not comply. Bartleby declares that he could not bear to part with the items in his safe (which have only sentimental value) and regrets he'll have to submit to the beating. Smithy batters Bartleby savagely and leaves. When Louie the burglar breaks into Bartleby's house the next night, the identical scenario transpires -- with one exception. Just as Louie is about to strike Bartleby he spies a scrap of paper containing the safe's combination. Despite Bartleby's plea that he would rather be pummelled than lose his goods, Louie opens the safe and leaves with the contents. *Id.* at 1582-83. According to Katz, the law would and should punish Smithy the batterer more severely than Louie the thief. Whereas victims are concerned solely with harm, the law is concerned with the defendant's culpability, of which harm is but a minor ingredient. *Id.* at 1590.

⁶⁷ *Id.* at 1598 (emphases omitted).

⁶⁸ *Id.* at 1599. The same intuition is suggested by remarks in Michael Gorr, *Liberalism and the Paradox of Blackmail*, 21 *Phil. & Pub. Affairs* 43, 53-54 (1992).

⁶⁹ *Id.* at 53.

None of these answers is perfect alone. The free speech rationale would seem to predict a greater variation in blackmail laws across jurisdictions than we find and, moreover, would not address the puzzle of non-informational legal blackmail. The argument based on the threat's repetitive nature is underinclusive insofar as it cannot justify the criminalization of blackmail proposals that do not reasonably create apprehension of repeated demands.⁷⁰ The arguments that posit that threat to property interests is greater than threat to reputational and emotional interests are, to my mind, more asserted than defended. The arguments that emphasize different practical administrative concerns point to conceivable differences that would matter but require further development to establish that these conceivable differences are likely actually to obtain.

But if not perfect, they are pretty good, especially in combination. The biggest problem with these answers is that *they don't address the puzzle of moral blackmail*. Thus does Lindgren object that Katz's solution "merely assumes away the paradox, which is in part that often what the blackmailer threatens to do is a moral right."⁷¹ This oversight is problematic for at least two reasons. First and most obviously, it risks substantial underinclusiveness. If these accounts cannot be supplemented, we will be unable to explain and justify criminalization in cases like *adultery-threat*. Second, until we have resolved the puzzle of moral blackmail, we cannot have full confidence in proposed solutions even to the legal puzzle, for when the solution to the puzzle

⁷⁰ Consider a judicial nominee who has committed some minor indiscretion in his past—say, he smoked marijuana, and inhaled—for which he is not ashamed but which he (rightly) fears might doom his nomination if revealed. Assume that Blackmailer approaches Nominee on the eve of the confirmation vote and threatens to disclose his prior drug use to the Senate committee unless the Nominee pays \$10,000. Because he could hardly care less were the information to be revealed after he is confirmed, Nominee believes to a moral certainty that he may accede to the demand without thereby initiating a submissive relationship. Under Fletcher's theory, Blackmailer's conduct should not be criminalized—a conclusion contrary to prevailing law as well as, I'd suspect, to common moral intuition.

⁷¹ Lindgren, *supra* note 1, at 1977. As it turns out, Lindgren's latter claim demands qualification: the evidentiary theory aims to show that the moral status of the act threatened is far more complex and contingent than Lindgren recognizes. But Lindgren's first claim is surely right: whether the act threatened is a moral right or a moral wrong (or something else), neither proposition can be simply assumed without argument.

of moral blackmail does emerge it might provide us with resources, presently unseen, for a more satisfactory solution to the puzzle of legal blackmail as well.

2. *The puzzle of moral blackmail.* Unfortunately, few solutions have been specifically proposed to the puzzle of moral blackmail. That is not so surprising. After all, the distinctness of the two puzzles is almost universally overlooked. Moreover, the puzzle of legal blackmail alone—that is, the puzzle that arises if we assume the moral wrongfulness of the conduct threatened, and therefore of the threat—is by far the easier nut to crack. Even if controversial, it is not truly puzzling to explain or justify the criminalization of attempts to secure property of another by means of morally wrongful threats. So the puzzle of legal blackmail principally reduces to the question of why not to criminalize the wrongful act (usually an informational disclosure). But if that’s the question, at least some of the reasons just canvassed—e.g., the consideration sounding in free speech values, and concerns about practical administration of the law by the police and judiciary—should spring readily to mind. To be sure, we might also reasonably ask whether, given the decision to keep the acts threatened lawful, some potential victims of disclosure might not be better off in a regime that permitted conditional offers of silence, and thus whether it might not be utility-enhancing or otherwise prudent to legalize the conditional threats notwithstanding their conceded wrongfulness. But this is a very practical question, hardly a puzzle let alone a paradox. The puzzle of moral blackmail guards its secret much more securely.

One possible solution to the problem of moral blackmail was advanced by James Lindgren in his influential 1984 article. Lindgren began by noting (infelicitously) that “the heart of the [blackmail] problem is that two separate acts, each of which is a moral and legal right, can

combine to make a moral and legal wrong.”⁷² He then claimed to unravel this puzzle by observing that the blackmail threat differs from ordinary and legitimate threats in commercial transactions in that only the former entails using leverage properly belonging to another person (e.g., the adulterer’s spouse) for one’s own gain. What makes the blackmailer’s conduct distinct and wrongful, Lindgren argues,

is that he interposes himself parasitically in an actual or potential dispute in which he lacks a sufficiently direct interest. What right has he to make money by settling other people’s claims?

At the heart of blackmail, then, is the triangular nature of the transaction, and particularly this disjunction between the blackmailer’s personal benefit and the interests of the third parties whose leverage he uses. In effect, the blackmailer attempts to gain an advantage in return for suppressing someone else’s actual or potential interest. The blackmailer is negotiating for his own gain with someone else’s leverage or bargaining chips.⁷³

Lindgren’s approach has been subjected to extensive criticism that need not be repeated here in full. It is fair to conclude that his theory enjoys claims to rough—though surely not perfect⁷⁴—descriptive accuracy. But it is also true—as Lindgren has himself conceded⁷⁵—that the normative grounding of his bargaining-chip explanation is obscure. That is, Lindgren provides no reason why use of someone else’s leverage for individual gain should be made unlawful, let alone criminal. Furthermore, if the use of such leverage *is* wrongful, it’s not clear

⁷² Lindgren, *supra* note 8, at 670. This formulation of the puzzle is properly criticized in Benjamin E. Rosenberg, *Debate: Another Reason for Criminalizing Blackmail*, 16 J. Pol. Phil. 356, 356 n.3 (2008).

⁷³ Lindgren, *supra* note 8, at 702.

⁷⁴ Consider, for example, a threat by Nazis to march in Skokie unless the town’s residents buy them off with a large cash payment. I assume that this is blackmail. If so, the Nazis are merely leveraging their own constitutional rights which they are threatening to exercise as an instrument of cruelty towards the town’s many Holocaust survivors. (It could be argued that the Nazis in this hypothetical are really leveraging the informational interests of the public -- within or outside of Skokie -- that might wish to view the march. But this is a forced and artificial construction. The public could not, after all, compel the Nazis to march if they chose not to, nor could the Nazis be viewed as having even a weak moral obligation to march.)

⁷⁵ See Lindgren, *supra* note 1, at 1988.

why the *squandering* of another's chips—by deciding neither to threaten nor to make a given disclosure—is not likewise wrongful and thus properly criminalizable.

Another alternative is Fletcher's dominance theory. I earlier agreed that it can contribute to a solution to the puzzle of legal blackmail by helping to explain why a wrongful conditional threat can inflict greater harm than would unconditional performance of the wrongful conduct threatened. But perhaps Fletcher also means it to explain why the conditional threat is wrongful even if the conduct threatened would not be. If so, it faces a steeper hill to climb.

Plainly, that a relationship includes elements of dominance and subordination cannot suffice to justify intervention from the criminal law. Innumerable relationships—parent and child, employer and employee, teacher and student, etc.—exhibit aspects of dominance and subordination, yet raise no suspicion in the eyes of the law. Indeed some such relationships—e.g., prison guard and inmate—are products of the criminal law. So the existence of such a dynamic cannot be a sufficient condition for criminalization. As one of Fletcher's early critics objected, "It must be the case, therefore, that the blackmailer's actions are somehow intrinsically wrong and unjustified."⁷⁶ Fletcher appeared to agree with this observation, but thought the wrongfulness of blackmail obvious and overdetermined:

Many words and expressions at hand express what is wrong with blackmail. In fact, too many things are wrong with it. Blackmail represents coercion of the victim, exploitation of the victim's weakness, and trading unfairly in assets or chips that belong to others. It represents an undesirable and abusive form of private law enforcement. It leads to the waste of resources so far as blackmailers are induced to collect information that they are willing to suppress for a fee.⁷⁷

In short, Fletcher seems to suggest, *of course* blackmail is wrong and unjustified.

⁷⁶ Fletcher, *supra* note 7, at 1637 (paraphrasing an objection leveled by Stephen Latham).

⁷⁷ *Id.* (citations omitted).

But Fletcher's litany of blackmail's evils cannot fully do the work he expects of it precisely because each assertion is so hotly contested. What makes blackmail "coercive" or "exploitative" in a morally meaningful sense? Why is trading on another's chips "unfair"? What moral significance should we attribute to the fact, if true, that, on balance, blackmail wastes resources? These are challenging questions. And they weigh with particular force when, as in *adultery-threat*, the conduct threatened is presumptively morally permissible. Mere reference to theories that elicit, but do not convincingly resolve, these questions cannot satisfactorily answer what Fletcher seems to acknowledge is the crucial question for his own theory—namely, what about the blackmailer's actions creates a *wrongful* type of dominance?

C. *Blackmail is not Justifiably Criminalized*

The analysis to this point suggests the following provisional conclusions. First, we cannot adequately explain and justify blackmail's criminalization by attending only to its supposed social consequences. We reasonably expect that blackmail's (nonconsequentialist) moral wrongfulness should somehow feature into a satisfactory explanation of, and justification for, its criminalization. Second, if we assume that the conduct a blackmailer threatens is wrongful, then it is not terribly hard to provide reasons for treating the threat differently. Third, those reasons do not seem fully to account for the contours of the crime and (worse) do not yet explain the threat's moral wrongfulness if (as the puzzle supposes) the act threatened is not morally wrongful. That is, if we are close to a solution of the puzzle of legal blackmail, we remain very far from a solution to the puzzle of moral blackmail.

In light of these difficulties, several theorists have concluded that blackmail is not properly criminalized. The most familiar arguments are libertarian in nature. A second

argument, recently advanced by Russell Christopher, urges that decriminalizing blackmail is the only way to avoid a logical contradiction. In short, the first argument contends that decriminalization is demanded by a due respect for individual liberty, the second thinks it's demanded by a regard for logical consistency.

1. Liberty. In his 1962 classic, *Man, Economy, and State*, the Austrian economist Murray Rothbard observed in passing that libertarianism would not permit the criminalization of blackmail: “Blackmail would not be illegal in the free society. For blackmail is the receipt of money in exchange for the service of not publicizing certain information about the other person. No violence or threat of violence to person or property is involved.”⁷⁸ Libertarian writers since Rothbard have reiterated the claim.⁷⁹ One in particular, Walter Block, has pressed the argument with particular industriousness, producing nearly a score of papers over the past two decades.⁸⁰ These articles generally argue for decriminalization on two tracks. In predominant part, they aim to show that particular pro-criminalization theories fail for the usual sorts of reasons—because they rest on unsupported or implausible premises, employ fallacious reasoning, or the like. Additionally, they argue that decriminalization is compelled on general principle because (1) justice permits the state to criminalize only the use or threat of violence against person or property right, and (2) blackmail does not involve the use or threat of violence against person or property right.⁸¹ Recently, Block has complained that, while he has assiduously criticized the

⁷⁸ MURRAY N. ROTHBARD, *MAN, ECONOMY, AND STATE* 443 n.49 (1962).

⁷⁹ See, e.g., Eric Mack, *In Defense of Blackmail*, 41 *Phil. Stud.* 274 (1982); Ronald Joseph Scalise, Jr., *Comment, Blackmail, Legality, and Liberalism*, 74 *Tul. L. Rev.* 1483 (2000).

⁸⁰ For a listing of Block's many articles on blackmail, some co-authored, see his website: <http://www.walterblock.com/publications.php>.

⁸¹ See, e.g., Walter Block, *The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 *W. St. U. L. Rev.* 225, 237 (1997) (maintaining that “justice is the essence of law and that justice, in turn, consists mainly of protecting persons and property against violent incursions”); *id.* at 246 (concluding that “the proper basis of criminality [is] a violation of person or property right through initiatory force”). *But see* Walter Block, *Berman on Blackmail: Taking Motives Fervently*, 3 *Fla. St. U. Bus. Rev.* 57, 71 (2003) (criminal prohibitions can extend

arguments advanced by members of the pro-criminalization camp, his opponents have not returned the favor.⁸² I fear that that asymmetry in attention is likely to persist.

Libertarians' criticisms of particular theories purporting to justify blackmail's criminalization warrant careful attention and response in proportion to their cogency and force. (Of course, whether successful criticisms should drive the proponents of criminalization to accept that blackmail should in fact be decriminalized, rather than to try harder to unearth the justification for criminalization that they believe is waiting to be discovered, is a dicier matter—one that, I suggested in Part I, depends in large part on the strength of their pre-theoretical conviction that this is conduct the state should, or may, prohibit on pain of criminal punishment.) But the libertarians' affirmative argument for decriminalization does not demand equivalent attention, for the strength of the libertarian argument is also, in a sense, its weakness. The libertarian conclusion rests on a fairly straightforward, easily articulated and understood, major premise that the overwhelming majority of contemporary theorists of the criminal law simply reject.⁸³ Block seems to believe that his adversaries are obligated either to accept the libertarian premise regarding the very limited legitimate scope of the criminal sanction or to construct full-blown refutations of it in their writings on blackmail. But that is unreasonable to demand in papers directed to the blackmail puzzle. It seems perfectly acceptable for theorists to view their

beyond force in the ordinary sense, and that force and violence mean only “violating the rights of person or property”). If this is so, then “through initiatory force” appears redundant.

⁸² Block, *Berman on Blackmail*, *supra* note 81, at 59-63.

⁸³ Block's libertarian theory of punishment begins with the premise that “the essence of punishment theory” is an “attempt[] to render the victim whole again.” Block, *De-Criminalizing Blackmail*, *supra* note 81, at 235. On the mainstream view, this is not the essence of punishment theory, though of course many writers outside the libertarian tradition accept this as the essence of *tort* theory. Starting from this point of departure, libertarian punishment theory maintains “that whatever the miscreant does to this victim is done to him, only twice over.” Block, *Berman on Blackmail*, *supra* note 81, at 76. For example, a rapist would be sodomized with a broomstick, twice. *Id.* at 77. This is said to render the victim whole because she is permitted to negotiate with the perpetrator for monetary payment in lieu of punishment.

challenge as justifying blackmail consistent with mainstream theories of punishment; they should not be obligated in addition to argue for those theories against all competitors.⁸⁴

If blackmail theorists need not be expected to mount a frontal assault on libertarian criminal theory, it is not the case that they lack recourse to competing theories.⁸⁵ For example, the dominant contemporary Anglo-American theory of criminal punishment—the dominant answer to the question of what justifies the state in imposing criminal punishment—is almost certainly a retributively constrained pluralistic consequentialism. That is, it views the state as justified in imposing and threatening the criminal sanction to achieve a wide range of social goods (including realization of deserved punishment), while requiring that the state take substantial (but not absolute) pains not to punish individuals in excess of their ill-desert. A theory of this sort comfortably legitimizes punishment in cases like *gay-threat*: it is plausible to conclude (a) that aggregate welfare is promoted if the state can successfully reduce attempts to take property by threatening to wrong the property owner; (b) that cases like *gay-threat* represent

⁸⁴ Block takes me to task, *see* Block, *Berman on Blackmail*, *supra* note 81, at 62 n.12, for refraining from critiquing Rothbard’s argument beyond observing that it “stands or falls upon familiar libertarian premises.” Berman, *supra* note 2, at 800 n.10. But my point was to concede that the decriminalization conclusion follows if one accepts libertarian political theory and to suggest that challenging that theory—a theory about which most of my readers could be expected already to have a view—was beyond the proper ambit of a paper on blackmail. Some things must be bracketed to get on with the business at hand, even if the claims that are bracketed are not incontestable or even uncontested.

I rather suspect that Block thinks otherwise because he believes that a theory of blackmail must start from something in the vicinity of first principles. But that is precisely what coherentism denies. Block’s apparent failure to appreciate the coherentist methodology would also explain his peculiar claim that Joel Feinberg “arouses Berman’s ire since he actually has the audacity to maintain that at least one kind of blackmail, exposing adultery should be legalized. Instead of directly confronting Feinberg on this apostasy, [Berman] dismisses him on the ground that his ‘conclusion is startling.’” Block, *Berman on Blackmail*, *supra* note 81, at 72 (footnotes omitted). On coherentist principles, to point out respects in which a particular account generates conclusions likely not to accord with strong pre-theoretical case-specific judgments of one’s expected interlocutors *is* to “directly confront[]” the account; it’s just not to *refute* it.

⁸⁵ For my own ruminations on punishment theory, see Mitchell N. Berman, *Punishment and Justification*, 118 *Ethics* 258 (2008); Mitchell N. Berman, *Two Kinds of Retributivism*, in R.A. DUFF & STUART GREEN EDs., *THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* (2010).

precisely such an attempt; and (c) that by threatening to act wrongfully toward the blackmailee, the threatener in *gay-threat* is morally blameworthy, and thus has ill-desert.

Block asserts that “[b]lackmail no more ‘takes’ property from another than the baker ‘takes’ money from his customer in return for bread. In both the bakery and blackmail cases, there is not a ‘taking’ but rather a voluntary trade which was mutually agreed upon at the time of sale.”⁸⁶ Yet on mainstream premises, the asserted equivalence between the two cases is simply false. Block seems to agree (despite the puzzle of moral blackmail) that the blackmailer is not morally justified in doing as he threatens.⁸⁷ There is no reason to expect, however, that he thinks the same is true of the baker: presumably Block, like most people, believes that the baker is morally justified in doing as he threatens, namely to keep his bread. So the blackmailer extracts property by a threat to wrong the offeree, whereas the baker does not. On ordinary consequentialist and retributivist theories of the criminal law, this difference would provide prima facie justification for criminalizing the act of the blackmailer (in cases where the conduct threatened would be wrongful), and for describing the blackmailer’s acquisition of the blackmailee’s property as a “taking” in a morally freighted sense. To put this conclusion in rights terms, we could posit that an individual has a right that others not try to take his property by means of threats to wrong him.

I do not for a moment think that the case for mainstream theories of punishment is so strong that Block is compelled on pain of irrationality to accept them. But most blackmail

⁸⁶ Block, *De-Criminalizing Blackmail*, *supra* note 81, at 235.

⁸⁷ This is not quite as clear as it could be. Sometimes Block says blackmailer has a “perfect right” to do as he threatens, a locution that suggests a moral right as well as a legal right. Other times he cautions that he’s not concerned with the moral question one way or another. At at least one point, he denies having said the act threatened is immoral. At another, he says that gossiping about a person’s adulterous affairs would not be morally justified. *Id.* at 226 n.6. [citations to come]

theorists who try to develop accounts that might successfully justify blackmail's criminalization are not *trying* to persuade committed libertarians; we understand that we are employing a theory of the justifiability of the criminal sanction broader than they accept. The ambition of mainstream blackmail theorists is reasonably limited: it is to explain why it is consistent with mainstream theories of the justifiability of criminal punishment (which themselves must be argued for, albeit not necessarily by blackmail theorists themselves) to criminalize and punish conditional threats to do what is, and should remain, lawful. Libertarian theorists who advance arguments designed to show that we cannot achieve *that* ambition are as entitled as non-libertarian theorists to a response—no more, no less. But if they expect responses to arguments that are themselves based on libertarian premises,⁸⁸ they are apt to continue to be disappointed.

2. *Logic.* One might be skeptical that logic alone supplies the appropriate tools to resolve the normative question of whether blackmail should be criminalized. Yet that is just what Russell Christopher argues when introducing the imaginative conceit of “meta-blackmail”—i.e., the conditional threat to conditionally threaten what it is permissible to do—and issues a challenge that we determine how the law should treat it.⁸⁹ Logically, he says, there are only three possibilities. 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.

⁸⁸ See, e.g., Block, *supra* note 81, at 226 (acknowledging that his reply to pro-criminalization theorists is based on the libertarian principle that the law should concern itself only with protecting against “violation of person and legitimate property rights”).

⁸⁹ Russell L. Christopher, *Meta-Blackmail*, 94 Geo. L.J. 739 (2006). I published a reply to that article, to which Christopher penned a sur-reply. See Mitchell N. Berman, *Meta-Blackmail and the Evidentiary Theory: Still Taking Motives Seriously*, 94 Geo. L.J. 787 (2006); 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 (2006).

The problem for pro-criminalization theorists is that these three options are not merely logical possibilities. To the contrary, Christopher argues, each is supported by plausible—even “compelling”—intuitions. The intuition that a threat to perform an unlawful act is ordinarily worse or more serious than the threat to perform a legal act supports the formalist solution; the intuition that the two conditional threats are equivalent in purpose and effect supports the functionalist solution; and the intuition that the meta-blackmail proposal threatens more distant, remote, or attenuated harm than does the ordinary blackmail proposal supports the substantivist solution. Because these three solutions are mutually incompatible, the proponent of criminalization must choose one and provide 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 were itself legal then the formalist, functionalist, and substantivist perspectives would align in directing that meta-blackmail should be legal too. The only escape from the trilemma, then, is to legalize blackmail.

It’s a clever argument, but not a sound one. Christopher 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. Christopher implicitly assumes that the law must punish all meta-blackmail proposals the same way relative to the blackmail proposals that they threaten—more severely, less severely, or equally severely. But that assumption is mistaken. It

could be that different meta-blackmail/blackmail pairs warrant different treatment depending on which of the three intuitions each pair in fact vindicates.

To see this, consider two different meta-blackmail/blackmail pairs. Let Bm_1 be A's conditional threat to immediately reveal H's adultery to W unless paid \$X. The corresponding meta-blackmail proposal— $M-Bm_1$ —is A's conditional threat to immediately issue Bm_1 unless paid \$X. Let Bm_2 be A's conditional threat to reveal H's adultery to W in ten years unless paid \$X. $M-Bm_2$ is A's conditional threat to issue Bm_2 in ten years unless paid \$X.⁹⁰

Consider the latter pair first, and assume with Christopher that the harm threatened is disclosure. $M-Bm_2$ threatens that harm in 20 years, while Bm_2 threatens it in 10 years. So the meta-blackmail proposal threatens more remote and attenuated harm, thereby satisfying the substantivist premise. But for precisely that reason, the pair do not satisfy the functionalist premise: the two threats are not equivalent in function and effect. Matters are reversed with respect to Bm_1 and $M-Bm_1$. Any difference in the remoteness of the threatened harm in this case is truly *de minimis*, suggesting that the two proposals are equivalent in function and effect, and likely in all other respects that are relevant to the criminal law. So $Bm_1/M-Bm_1$ do satisfy the functionalist premise. Of course, for precisely that reason, they do not satisfy the substantivist one.

The point of these simple illustrations can be generalized: 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 premise obtains and the functionalist premise does not. One proposal cannot *both* threaten more remote or less probable

⁹⁰ For a discussion of some difficulties in determining precisely what conditional proposals Christopher would count as a meta-blackmail threat see Berman, *supra* note 89, at 805 n.54.

harm than another *and* be fully equivalent to the other on dimensions of purpose, function, and 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],"⁹¹ 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. They do not yield conflicting conclusions regarding the proper treatment of any given corresponding pair of blackmail and meta-blackmail proposals.

The formalist perspective does not change things. The reason why we think that a threat to perform an illegal act is more "serious" than a threat to perform a legal act is that we assume (defeasibly) that the illegal act is more "serious" than the legal one: it is precisely the greater seriousness of the one than the other that presumptively explains and justifies the decision to make one illegal and the other legal. But if a given meta-blackmail threat is functionally equivalent to the blackmail threat that it threatens, then it's simply *not* more serious. And if it is not functionally equivalent because it threatens more remote harm, then it would seem to be less serious. In neither case would it be sensible to adjudge the meta-blackmail threat more serious than the blackmail threat and to punish it more severely. I am open to the possibility (though I wouldn't bet on it) that Christopher can adduce criminal-law-relevant considerations in virtue of which a particular meta-blackmail threat would be more serious all things considered than its corresponding blackmail threat. Were he to do so, then we'd have to conclude that, for that pair, the substantivist and functionalist conclusions are not warranted. But whether he can do so or

⁹¹ Christopher, *Trilemma*, *supra* note 89, at 827.

not, the bottom line remains that the formalist, functionalist, and substantivist perspectives do not yield “jointly incompatible,”⁹² conclusions regarding the proper legal treatment of any given pair of corresponding meta-blackmail and blackmail proposals. There is no trilemma, and thus no logical tidiness to be gained by decriminalizing blackmail.

III. COERCION AND THE EVIDENTIARY THEORY

Although his meta-blackmail conceit is designed to demonstrate, by logic alone and without endorsing any contestable normative, conceptual, or empirical premises, that blackmail ought not to be criminalized, Christopher also surveys and critiques prior efforts to justify its criminalization. In the course of that effort, he opines that a coercion-based approach might work,⁹³ a view shared by others who think the puzzle not yet solved.⁹⁴ The evidentiary theory is just such an approach. Its merits—and possibly its demerits as well—will emerge more clearly after we review a brief and partial history of efforts to explain blackmail as the wrong of coercion.

A. Toward a Theory of Blackmail as Coercion

1. *Robert Nozick.* In *Anarchy, State, and Utopia*, Nozick argues that blackmail differs from ordinary voluntary transactions because blackmail is a species of what Nozick terms “unproductive exchanges.”⁹⁵ An exchange between A and B is unproductive for Nozick when two conditions are satisfied: (1) A is no better off as a result of the transaction than if he had

⁹² Christopher, *Meta-Blackmail*, *supra* note 89, at 747.

⁹³ *Id.* at 769.

⁹⁴ See, e.g., STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 212-34 (2006).

⁹⁵ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 84-87 (1974).

nothing to do with B; and (2) if B's part of the transaction consists solely of abstaining from performing some action, x, B proposed to perform x solely to sell A his abstention.⁹⁶

Now, it is not obvious that the first condition is satisfied in all cases of blackmail.⁹⁷ But waiving that objection and assuming that the blackmail deal is unproductive, the question remains why it should be illegal, let alone criminal. That consequentialists would disfavor such transactions is to be expected. But, as we've seen, not even the law and economics theorists have persuasively justified blackmail's criminalization. How such a justification might be forthcoming compatible with Nozick's brand of libertarianism is hard to fathom. Accordingly, Michael Gorr states the consensus view when concluding that "the reasons which Nozick offers for prohibiting 'unproductive' exchanges could not plausibly be made to cohere with the principles that are generally taken to underlie a libertarian society."⁹⁸

⁹⁶ Michael Gorr summarizes Nozick's definition in similar terms, although he does not present the second criterion as a conditional. Under Gorr's definition, it is a sine qua non of an unproductive exchange (in Nozick's sense) that one of the parties sells forbearance from an act. See Michael Gorr, *Nozick's Argument Against Blackmail*, 58 *Personalist* 187, 188 (1977). Nozick does not address this point explicitly. As note 102, *infra*, indicates, I think Gorr's is not the better view.

⁹⁷ Imagine that Adulterer dumps his Mistress who then decides to reveal their affair to his Wife. However, an advertisement for Blackmail, Inc. causes her to reconsider. Although she'd like to hurt her ex-lover, a possible windfall is attractive too. She sells her love letters to the professionals who in turn sell them to Adulterer. Adulterer's acceptance of the blackmail offer is arguably conclusive evidence that he's better off because of the blackmailer. Aware of such problems, Nozick responds: "To state the point exactly in order to exclude such complications is not worth the effort it would require." NOZICK, *supra* note 95, at 85 n.*. Perhaps Nozick means to agree that the blackmail agreement in such circumstances is not "unproductive." The further implication that such instances should be lawful would make this a profound concession, deeply inconsistent with prevailing law. More probably, Nozick means that he could recraft his test for unproductive exchanges so as to make the deal between Adulterer and Blackmail, Inc. unproductive by definition. But the difficulty in justifying blackmail's criminalization would be exacerbated.

⁹⁸ Gorr, *supra* note 96, at 187; see also, e.g., Murphy, *supra* note 52, at 158 (observing that Nozick argues that "blackmail should be prohibited because it is an unproductive economic exchange" and criticizing Nozick for failing to provide any argument for the proposition "that unproductive economic exchanges are immoral"). Gordon, *supra* note 8, at 1758 (remarking that Nozick, "usually thought of a deontologic theorist, has grounded his blackmail argument on the idea of 'unproductive exchanges,'" and complaining that the theory's "deontological rationale is opaque").

Indeed, the claim that the unproductivity of an exchange is a sufficient basis for it to be criminalized is so implausible, and Nozick's argument for that proposition so cryptic,⁹⁹ that it's worth questioning whether his readers have correctly grasped his intent. In fact, I think it likely that Nozick did not mean to contend that the fact that an exchange is "unproductive" provides sufficient reason for the state to make it criminal.

Before introducing the notion of unproductive exchanges, Nozick explores how much compensation is due individuals when the state prohibits conduct in which they might wish to engage. (Whether the conduct at issue threatens the types of harms with which the state may properly concern itself is a separate question.) When the state prohibits an *intentional* boundary-crossing, no compensation is due. The setting of a proper compensation level becomes difficult only when the conduct is itself morally permissible (on libertarian principles) but risks causing a cognizable harm to another. Ideally, the state should replicate the market price for the cessation of the risky conduct—that is, the price upon which the persons threatened by the risky conduct and the person who wishes to undertake that conduct would agree in a voluntary transaction.

However, the likely existence of a transactional surplus (i.e., the minimum price acceptable to the seller is less than the maximum price acceptable to the buyer) makes it impossible to ascertain the hypothetical market price. Nozick proposes the productive exchange test as a step toward resolving this difficulty. Put briefly, Nozick argues that where the hypothetical voluntary transaction would be an unproductive exchange, then the buyer of cessation from the risky conduct should be entitled to the entire transactional surplus. In this

⁹⁹ *Id.* at 1772 n. 137 (expressing uncertainty whether Nozick presents a deontological or consequentialist argument for the criminalization of blackmail); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1447 n. 140, 1449 n. 145 (1989) (noting both that Nozick has "used utilitarian grounds to defend the ban on blackmail" and that his theory "reflects conceptions of negative liberty").

circumstance, the state should compensate the individual whose morally permissible conduct it forbids only at a level that would keep him on the same indifference curve. But, to repeat, whether the hypothetical transaction would be productive has no bearing on the antecedent question of whether the conduct is proscribable. In short, then, not only is the productive exchange test an implausible basis for criminalizing blackmail, but perhaps Nozick should no longer be read to contend otherwise.

Even if this is correct, Nozick seems to have something to say about blackmail's criminalization. The definition of an unproductive exchange Nozick offers in *Anarchy, State, and Utopia* closely tracks the test of coercion he offered some years earlier. In that earlier article,¹⁰⁰ Nozick argued that a proposal is coercive if it's properly deemed a "threat" rather than an "offer." A proposal is a threat if it would put the recipient worse off than his expected baseline, where "[t]he term 'expected' is meant to shift between or straddle *predicted* and *morally required*."¹⁰¹ Insofar as we're seeking a justification for the criminalization of blackmail, this approach seems more promising.¹⁰² Roughly, coercion is the wrong of interfering with a

¹⁰⁰ Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440-72 (Sidney Morgenbesser et al. eds. 1969).

¹⁰¹ *Id.* at 447. Nozick proposes that the normal and morally required course of events usually coincide and, further, that when they do not, the latter ordinarily takes precedence over the former. *Id.* at 449-51.

¹⁰² In most cases, the tests for coercion and unproductive exchange come out the same. That is, a consummated exchange is "unproductive" if and only if the proposal that launched the exchange was a "threat." Such is the case, for example, with the illustration Nozick offers to elucidate the second criterion of his definition of unproductive exchange:

If your next-door neighbor plans to erect a certain structure on his land, which he has a right to do, you might be better off if he didn't exist at all . . . Yet purchasing his abstention from proceeding with his plans will be a productive exchange. Suppose, however, that the neighbor has no desire to erect the structure on the land; he formulates his plan and informs you of it solely in order to sell you his abstention from it. Such an exchange would not be a productive one; it merely gives you relief from something that would not threaten if not for the possibility of an exchange to get relief from it.

person's freedom by putting improper pressure on his range of alternatives. So if a blackmail proposal is coercive, there is at least *prima facie* reason to believe that it should be made illegal.

But if a coercion-based approach seems promising, Nozick's own analysis does not make fully good on its promise. Most commentators believe that *adultery-disclosure* is morally permissible. If they are correct, then the conditional proposal does not threaten to put the adulterer worse off than his morally required baseline. It may also fail to put him worse off than his expected baseline. But even if this latter case were otherwise, the moral significance of this expectation is obscure. Therefore, Nozick seems to leave us with the conclusion that *adultery-threat* is not wrongful and should not be criminalized. That could be the right answer. But the coercion-based approach would be more attractive if it could yield the intuitive conclusion that adultery blackmail is properly criminalized.

2. *Joel Feinberg*. Unfortunately, the first coercion-based theory of blackmail—Joel Feinberg's¹⁰³—reinforces concerns that such an approach might prove unable to resolve the puzzle of blackmail. Indeed, Feinberg initially suggests that not only will an appeal to coercion not resolve the puzzle of moral blackmail (exemplified by *adultery-threat*), it might not even resolve the seemingly more tractable puzzle of legal blackmail (exemplified by *gay-threat*). Unlike “other types of robbery by coercion,” Feinberg observes, the act a blackmailer threatens

NOZICK, *supra* note 95, at 84-85. As the last sentence suggests, the proposal leading up to the hypothesized unproductive exchange is a threat (i.e., coercive), not an offer.

But the equivalence between coercion and unproductive exchanges does not always hold. Imagine that your co-worker announces that his daughter is selling Girl Scout cookies and that he will be taking orders. You subscribe for four boxes of thin mints at \$4 per box. Truth is, you don't want the cookies, but you estimated that to decline the offer might cause you some reputational harm, and you valued the cookies and the preservation of your reputation more highly than \$16 plus a possible slight diminution of your office status. This is plainly an unproductive exchange -- you would have preferred that your co-worker had never mentioned his daughter and the cookies. But the proposal to sell you Girl Scout cookies is not a threat (because it doesn't propose to put you worse off than your expected or morally deserved baselines).

¹⁰³ See JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 238-76 (1988).

is lawful.¹⁰⁴ “To preserve the coherence of a criminal code,” he further maintains, “if we make disclosure independently illegal then we can ban blackmail because it uses the threat to do something illegal to extract a gain, and if we legalize the disclosure as such, then we must legalize blackmail.”¹⁰⁵ That is an unpromising start, to be sure. But—and here’s the heart of Feinberg’s solution to the legal puzzle—conduct ought not to be considered lawful just because it is not prohibited by the criminal law; “the law of torts too can be said to impose duties.”¹⁰⁶ Many of the acts a blackmailer threatens, while (by definition) not criminally prohibited, would be tortious or should be. *Gay-disclosure*, for example, should constitute an actionable invasion of privacy. Therefore, *gay-threat* is a threat to do something that is *not* legally permissible and can be unproblematically punished by the criminal law.

Adultery-threat, however, presents a different story. In accord with what I have assumed (in Part I) to be the dominant view, Feinberg argues that a person who comes to learn of another's adultery will often have neither a moral duty to reveal that fact nor a moral duty to remain silent. Consequently, society could not justifiably impose a legal obligation, criminal or civil, upon persons either to disclose or not to disclose the commission of adultery. It follows, Feinberg provisionally concludes, that the corresponding blackmail proposal must be decriminalized. And yet, he acknowledges,

There is an argument that deserves our respect for the judgment that all adultery-blackmail is immoral since it must necessarily violate someone or other’s rights. Either the cheated spouse has a right to know, the argument begins, or he does not. If he does have such a right then a third-party observer has a duty to transmit the unhappy news to him, and it would be wrong to conceal it in exchange for money. If he does not have such a right, the argument continues, then it would be wrong to violate the adulterer’s privacy by revealing her secrets spitefully if the

¹⁰⁴ *Id.* at 241.

¹⁰⁵ *Id.* at 246.

¹⁰⁶ *Id.* at 250.

blackmail threat fails. If the blackmailer has a duty to the husband (in this example) to inform him, then he does not have a duty to the wife to keep silent, and vice-versa, so once he undertakes the path of blackmail, he is bound to default a duty to one or the other.

This argument, Feinberg concludes,

has false premises. The third party observer may *neither* have a duty to inform the spouse *nor* a duty not to. It may be “morally risky” to intervene at all, but whether he does so is up to him. . . . So the blackmailer is within his rights morally, and ought to be within his rights legally, if he informs, and equally within his rights if he does not inform. . . .¹⁰⁷

In short, *adultery-threat* is neither immoral nor criminalizable.

3. *Michael Gorr*. Deeming this conclusion “astonishing,”¹⁰⁸ Michael Gorr has tried to salvage Feinberg’s basic approach to blackmail by showing why it actually supports the morally intuitive conclusion that *adultery-threat* is both morally wrongful and properly criminalized. Gorr agrees that society should not impose a legal duty either to disclose or not to disclose adultery, but bases his conclusion on epistemic uncertainty: we may not know whether the consequences of such a disclosure would be morally beneficial or would cause unnecessary misery;¹⁰⁹ and we may lack necessary information “about the prior distribution of moral rights and duties among the related parties.”¹¹⁰ But for these considerations, Gorr argues,

there would be a morally conclusive reason for imposing on third-party observers a legal requirement either to report the occurrence of adultery or (depending upon the circumstances) to refrain from reporting its occurrence. It follows that, in the

¹⁰⁷ FEINBERG, *supra* note 103, at 248-49. Feinberg continues: “*Either* the blackmailer should have a duty to inform (or a duty not to, as the case may be) in which case it would be consistent to prohibit him from threatening to violate that duty unless paid off, *or* he should have no legal duty one way or the other, in which case it would be incoherent to punish him for threatening to do what is within his legal rights.” Here Feinberg takes a strong stance on legal blackmail, not only on moral blackmail. As we have seen in Section II.B.1, the judgment that it would be “incoherent” to criminalize what it should not be criminal to do is not supportable, for there can be all sorts of pragmatic reasons not to criminalize conduct that is in principle criminalizable. For present purposes, the important point is Feinberg’s position on moral blackmail—in particular, that *adultery-threat* cannot be morally wrongful on the assumption that *adultery-disclosure* isn’t.

¹⁰⁸ Gorr, *supra* note 68, at 50.

¹⁰⁹ *Id.* at 55.

¹¹⁰ *Id.* at 56 (quoting FEINBERG, *supra* note 103, at 248).

absence of such concerns, there would also be a morally conclusive reason for prohibiting the corresponding blackmail proposals since these would constitute attempts to acquire some of the adulterer's assets either by offering to conceal what ought morally to be disclosed or by threatening to disclose what ought morally to be concealed. But, *ex hypothesi*, although such difficulties do serve to inhibit us from imposing duties with respect to the mere disclosure or nondisclosure of the adulterer's activities, they do not prevent us from imposing duties not to engage in the blackmailing of such persons.¹¹¹

In short, because one of the two acts that a blackmailer contemplates is morally wrongful (even though we don't know which one), the making of the biconditional proposal must also be morally wrongful—*either* a wrongful offer of silence *or* a wrongful threat to disclosure. Because the blackmailer employs this wrongful tool in an attempt to extract the blackmailee's property, his conduct is rightly criminalized as a form of theft. It is wrongful to “seek[] to acquire the resources of another either by threatening to disclose what ought to be concealed or by offering to conceal what ought to be disclosed.”¹¹²

Although Gorr's argument contains some missteps,¹¹³ I believe that he is on to something important. He is right, in my view, to focus, not on why the conditional threat is impermissible

¹¹¹ *Id.* at 56-57.

¹¹² *Id.* at 65.

¹¹³ For one thing, Gorr is surely incorrect to assert that, if we knew what the blackmailer's moral obligation was, we'd have a “morally conclusive reason” for imposing a legal obligation either to disclose or to remain silent. We properly refrain from criminalizing lots of conduct that we are confident violates moral obligations, including routine lying and promise-breaking. He is also mistaken about the positive law of invasion of privacy. Although he contends that disclosures of embarrassing but not wrongful behavior will usually be actionable, e.g., *id.* at 47, 62, recovery will generally be disallowed if the embarrassing information is at all a matter of public concern, which includes many matters concerning the private lives of public figures, or if the disclosure is made to a small number of persons, under circumstances in which the information is not likely to become public knowledge. *See* Restatement Second of Torts § 652D. In addition to these errors, Gorr expends seemingly undue effort analyzing the moral and legal character of the act of the blackmailee that the blackmailer might threaten to reveal. From a sensible intermediate conclusion that the blackmail proposal is likely to involve acts that are legally permissible but morally wrongful, he moves too quickly to the conclusion that the challenging cases for a blackmail ban involve threats to disclose actions that are legally permissible, morally wrongful, and “involve[] some significant harm to another person.” *See* Gorr, *supra* note 68, at 52. Consider behavior that plausibly satisfies the first two conditions but not the third—say, a wealthy person's serial purchase of important art for the sole purpose of secretly destroying it. As best I can tell, Gorr does not explain whether he thinks that there is no significant puzzle over the

given the permissibility of the act threatened, but on why the threatened act *is* permissible.¹¹⁴ As we will see, his focus on epistemic limitations is also salutary. But his account encounters at least two significant challenges—challenges that the evidentiary theory aims to meet.

First, as Scott Altman has objected, Gorr's account does not support the common intuition that *adultery-threat* wrongs the blackmailee, for as far as his analysis goes, the wrong is as likely done the blackmailee's spouse.¹¹⁵ Second, Gorr fails adequately to explain why embarking on a path that might lead to wrongdoing is itself wrongful. The linchpin of the explanation appears to involve the intent to gain resources belonging to another. But I do not believe that that factor can do the work Gorr demands of it.

Take an example Gorr discusses (from Feinberg) of a merchant who engages in lawful but "underhanded" practices. Gorr concludes that the law should not require people who learn of this fact to disclose it. But, he says, there are good reasons to prohibit conditional threats to disclose it. Because the proposal "involves an attempt by the blackmailer to acquire significant *resources* belonging to his victim," it is properly criminalized as "a form of *theft*."¹¹⁶ Maybe so.

permissibility of criminalizing a conditional threat to reveal such behavior because it is plainly criminalizable or plainly not criminalizable.

¹¹⁴ In Gorr's estimation,

most theorists have . . . tended to suppose that there is nothing especially problematic about the fact that we permit blackmailers to *do* what they threaten, and that all that really needs explaining is how, in light of this, it could ever make sense to prohibit the threats themselves. My contention, however, is that this is precisely the wrong way to view the matter and that the key to resolving the paradox of blackmail (and to meeting some of the other important objections to its continued criminalization) is to determine just *why* blackmailers are given the liberty to do the acts that they threaten.

Gorr, *supra* note 68, at 44. Gorr is concerned with why we give people a legal right to do the things that are leveraged into blackmail threats. I think it's more perspicuous to examine why (we believe that) they have a moral right to do those things.

¹¹⁵ Scott Altman, *A Patchwork Theory of Blackmail*, 141 U. Pa. L. Rev. 1639, 1652 (1993).

¹¹⁶ Gorr, *supra* note 68, at 53-54.

But the conclusion is not adequately supported; some critical step of the argument is missing. Just as the law shouldn't mandate disclosure, nor should it mandate silence: anyone who learns of the merchant's practices by means not themselves improper should have a lawful right to disclose or not. That being so, the proposal that Gorr characterizes as an attempt to acquire the victim's resources can also be recharacterized—say, by the offeror—as an offer to sell something of value to the offeree, namely the offeror's silence. An attempt to acquire resources from willing parties is not theft unless the means of acquiring the resources are in some fashion wrongful. But there's nothing in Gorr's analysis here that explains what makes this particular effort wrongful.

The fundamental problem, I believe, is that Gorr ignores the blackmailer's own beliefs and reasons for acting. This is brought out in Gorr's discussion of *adultery-threat*. Gorr assumes that B either has a moral duty to disclose or a moral duty to remain silent, but that “we” know not which. Suppose that B, however, does know. If he knows that he has a duty to disclose, then he is threatening to do what he knows he may not do. If he knows that he has a duty to remain silent, then he is offering to do what he knows what he may not do. So far, so good.

Now suppose, however, that B, like Gorr and his readers, lacks a belief regarding where his duty lies. On an objectivist or belief-independent view of moral duties, it follows that if B chooses wrongly, he violates his duty. (That, we will see, is not my view, but I am willing to accept its plausibility.) How should B decide what to do? Of course, he should think harder—by investigating the morally relevant facts and by reflecting further on the shape, weight, and grounding of moral principles. But suppose he does this and still doesn't know what morality demands in this case. He must decide somehow. Perhaps a true moral principle biases decisions

in favor of inaction: when in doubt, do nothing. However, that is not self-evident, and Gorr says nothing to suggest that he endorses it. (And even if it is and he does, we can massage the hypothetical to provide that B is in equipoise regarding whether the default presumption against inaction is overcome.) Absent that, what—flip a coin? Suppose that B does flip a coin, having decided that he will disclose if it lands heads and remain silent if tails. If the result of his flip leads him to the action that, *ex hypothesi*, violates his moral duty, then *that* action (silence or disclosure) is wrongful. On the other hand, if the flip directs him to what he ought to do (from the God’s eye perspective) then his action in conformity with (what we might describe as) the coin’s directive is not wrongful. Either way, I see no compelling reason to conclude that B had violated a moral duty by the action of flipping the coin itself, and Gorr offers none.

If the coin flip is not an independent ground of wrongdoing in this (admittedly exceptional) circumstance, it’s not because there is something special about coins. So suppose that B chooses a different decision-making protocol: he delegates the decision to a third party. That third party might be some uninvolved person, T. But if that would be permissible, then why not delegate the decision to H? To be sure, H is certain to opine that B ought not disclose. So maybe B structures his delegation differently. “I genuinely do not know what I should do,” he explains to H. “So if you pay me \$1000 I will remain silent; if you don’t, I won’t.”¹¹⁷ If H doesn’t pay, and B discloses, and B’s duty was to remain silent, then the disclosure violates a

¹¹⁷ This might seem fanciful, but I can make it modestly more attractive. Suppose B honestly doesn’t know what his duty is. So he determines that the right thing to do, given that uncertainty, is to give the information to the party who would value it most highly. Unfortunately, he can’t hold an auction between H and W because to do would be already to give the information to W. So B estimates the value that W would place on it: \$X. He then offers the information to H for \$X + n. If H accepts the deal, then B has some grounds for concluding that H values it more highly than does W, so he gives it to H not W. If H rejects, then B has grounds for concluding that W values it more highly than does H, so he gives it to W. Again, on an objectivist view of duties, B acts wrongfully if the final action—disclosure or silence—is the objectively wrong thing to do. But it is mysterious why this superficially sensible way of deciding on a course of action in the face of uncertainty is itself wrongful.

moral duty. Similarly, if H does pay, and B doesn't disclose, and B's duty was to reveal, then the non-disclosure violates a moral duty. But the matrix of possibilities includes two final outcomes that *comply* with B's duties—disclose or not, as the case may be—and we are given no reason to conclude that this decisionmaking strategy increases B's risk (relative, say, to flipping a coin) of ultimately doing the wrong thing. More generally, it's not at all clear why the proposal *itself* violates any moral duty. And if it doesn't, and if we may criminalize only violations of moral duties (as Gorr claims), then we are, on Gorr's own principles, prevented from imposing legal duties not to blackmail in cases such as these.

One obvious response to this puzzling case is to resist the supposition that B doesn't know, or have beliefs regarding, what he should do—to disclose or remain silent. Surely, you might say, it is a very rare case when we are truly in equipoise regarding what the balance of undefeated moral reasons requires—at least in cases when we are aware of pro tanto moral reasons for and against a course of conduct. I agree and will therefore bracket such cases in the development of my account. That is, my analysis will explicitly assume that the actor has a view about which he ought to do, and also acknowledge that the inference I wish to draw fails when the case is otherwise. But the unusualness of that situation becomes relevant only if the moral beliefs of the actor are themselves relevant. Because Gorr's analysis of the blackmail puzzle does not appear to make the actor's beliefs regarding what he morally ought to do relevant, he has no apparent basis for acknowledging that a different conclusion lies in this admittedly unusual situation.¹¹⁸ He therefore seems committed to the conclusion that this odd blackmailer

¹¹⁸ The basic point is that the unusualness of a particular variable (here, that the blackmailer is in equipoise regarding what he morally ought to do) is relevant only if the parameter that the variable instantiates is itself relevant (here, the blackmailer's beliefs regarding what he morally ought to do). A farfetched example might make this point clearer. Imagine that the blackmailer and blackmailee share the same birthday though they were born exactly twenty years apart, or that their full names are anagrams of each other. The rarity of such circumstances would provide a basis

does act morally wrongfully but without offering any reasons for that conclusion beyond the unsatisfactory observation that the blackmailer is seeking to acquire resources of another.

4. *Scott Altman*. Altman's own "patchwork theory" of blackmail contains elements of coercion, exploitation, and much else besides. The conception of coercion at its heart is a slight revision of Nozick's. Whereas Nozick had proposed that a proposal is coercive if it threatens to put the offeree worse off than either his moral baseline or his statistical one, Altman recommends that the moral baseline be supplemented with a counterfactual one. Thus, one who makes a conditional proposal engages in the moral wrong of coercion if he would have done as he offered—that is, would have given the benefit or withheld the harm—had he been unable to make the proposal, and if the benefit or harm-relief "was important to the recipient."¹¹⁹

I think this modification is unlikely to succeed. Suppose that, having tidied his garage in a burst of spring cleaning, A is preparing a load for the dump. Up walks B, a well-known collector of old lawnmowers. A, no fool, offers to sell B the lawnmower for \$100. By hypothesis, had he been unable to make the proposal—say, a local law prohibited the unlicensed sale of lawnmowers—A would have cheerfully given it to B for free. That is, Altman's counterfactual baseline test is satisfied. Yet surely A is morally entitled to try to secure for himself some of the benefits B would reap from the lawnmower. It seems quite implausible to suppose that A wrongs B by proposing a sale. Admittedly, Altman can endorse that intuitive conclusion. He need only stipulate that the benefit offered—the lawnmower—is not "important" to B. Likely it isn't. But perhaps it is. Perhaps, for example, B needs this particular model to complete a collection that has been a lifetime in the making. If this makes the benefit important,

for concluding that the moral outcomes in such cases differ from the norm only on an account that has resources for recognizing the moral relevance of birth dates or name spellings.

¹¹⁹ Altman, *supra* note 115, at 1642.

I fear that Altman is committed to the strongly counterintuitive conclusion that A coerces B. Alternatively, if the benefit remains unimportant, then we need an account of importance that prevents these judgments from being ad hoc and that also captures all the usual cases of blackmail.

B. Of Beliefs, Motives, and Conditional Offers

The fundamental problem with Altman's theory is the same as with Nozick's "expected baseline" test for coercion. The nonmoral baselines cannot do the moral work required of them. Consequently, the prevailing understanding conceives of coercion as the wrong of trying to induce a victim to act in accordance with the wrongdoer's wishes by conditionally threatening to wrong him if he does not.¹²⁰ It is a wrongful interference with the victim's freedom because it puts wrongful pressure on his liberty to do otherwise. This understanding of coercion holds true in any normative system, or across normative domains. 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. Indeed, it is precisely this understanding of coercion that is responsible for one half of the threat principle introduced in Part I—namely, the half that maintains that a threat is impermissible if the act threatened is.

What I have previously called the "evidentiary theory" aims to make good on these prior attempts to develop an account by which conditional threats to engage in morally permissible conduct can be morally coercive, hence properly criminalized. It relies on two components, in

¹²⁰ See, e.g., ALAN WERTHEIMER, COERCION (1987); Berman, *The Normative Functions of Coercion Claims*, 8 *Legal Theory* 45 (2002).

addition to the understanding of coercion just put forth and the distinction, already emphasized, between threats that are legally coercive and those that are morally coercive (which distinction underwrites the difference between the puzzles of legal blackmail and moral blackmail). First, the theory claims that the moral wrongfulness of an action can depend, not only upon objective or external judgments about the act and its likely consequences, but also upon such subjective or internal features as the actor's beliefs and motives. Second, it argues that a conditional proposal to engage in particular conduct can, under appropriate circumstances, have significant evidential bearing on what the threatener's motives or beliefs would likely be were he to engage in the act threatened (or the act offered). Call these two theses, vague though they are, the *subjectivist thesis*, and the *evidentiary thesis*, respectively.

Combining these two independent theses, the theory maintains that we are warranted in adjudging that a conditional threat to engage in presumptively or apparently morally permissible conduct is itself morally wrongful when the fact of the conditional offer of silence permits an inference that the act-token threatened would be wrongful because the proposal-maker would, in undertaking it, act upon the wrong sorts of beliefs or motives (or lack the right sorts). Uniquely among blackmail theories of which I am aware, my account is, first and foremost, a solution to the puzzle of *moral* blackmail. If it succeeds in explaining why cases like *adultery-threat* are morally wrongful—and morally wrongful *as threats*—then we can proceed to the puzzle of legal blackmail by considering when threats to engage in moral wrongdoing are properly criminalized even when the wrongdoing threatened reasonably remains lawful.

1. The moral puzzle—first take. Keep in mind that *adultery-disclosure* is a biconditional proposal: a conditional threat to disclose adultery if not paid, and a conditional offer to (promise to) remain silent if paid. I believe that Gorr is right that such a proposal is very likely to be

wrongful because it is either a conditional threat to wrongfully disclose or a conditional offer to wrongfully remain silent. I had objected not to this conclusion but to Gorr's failure to provide a satisfactory argument for it. I reach the same conclusion via a somewhat different route, by exploiting a subjectivist understanding of what morality commands.

In the past, I have advanced a version of the subjectivist thesis that focused on the actor's motives, or explanatory reasons for actions. To a first approximation, the claim was that an actor behaves in morally blameworthy fashion if he knows or believes that his conduct will cause harm to another unless (a) he also believes that the moral reasons in favor of the conduct outweigh or otherwise defeat the moral reasons against, and (b) those justifying reasons are among (or prominent among) the explanatory reasons for which he acts.

For reasons set out in the margin,¹²¹ I presently favor a version of that thesis that turns upon the actor's beliefs, not his motives (though I should note my belief that a sharp distinction between versions is probably overly stylized). The belief-centered version maintains—again, this is only to a first approximation—that it is wrongful to act in the face of apparent moral reasons to do otherwise if one does not genuinely believe, based on reasonable and appropriately thorough

¹²¹ There will be a large overlap between the belief-centered and motive-centered accounts. The latter encompasses the former: whenever an actor's beliefs make his conduct wrongful, he will almost invariably have bad motives too. But the converse is not true. My reason for preferring the belief-centered account is not that I think the motive-centered account does not satisfactorily resolve the blackmail puzzle, but only that it may not equally well solve that puzzle by showing blackmail to be a form of coercion. An actor who knowingly causes harm without being animated by morally justifying motives—whether he is animated by inherently bad motives like malice or spite, or inherently neutral motives like bolstering a personal reputation as a credible threatener—acts in a morally blameworthy fashion. I believe that it is permissible (if often imprudent) for the state to criminalize conduct that is both harm-causing and morally blameworthy. (This position is easily supported by retributivist and expressivist considerations, and also by many ordinary consequentialist considerations that would require a little spelling out.) See Berman, *supra* note 2, at 833-40. But I also think it plausible that A does not *wrong* B by causing him harm without justifying motives if in fact A ought to engage in the harm-causing conduct and A knows or believes this to be so (even if that knowledge or belief has no motivational force for him). And I think the wrong of coercion most plausibly requires a conditional threat to wrong someone (usually the threatenee, but possibly third parties). So even though I continue to believe that the motive-centered version of the subjectivist thesis can solve the blackmail puzzle, I believe that the belief-centered version better shows blackmail to be a form of coercion.

moral evaluation, that one's conduct is, at the least, permitted by the balance of undefeated moral reasons.¹²² Morality, on this view, does not (or does not always) command us to act (or not to act) in specified ways. It does not (always) say "do Φ " or "don't do Φ ." Rather, it can be understood to issue a two-part command of the following rough form: first, that we deliberate seriously and soberly about how the potentially relevant moral considerations bear on our choice predicament; and second, that we act in accordance with what judgments we reach upon due deliberation. Accordingly, an actor wrongs another if he knowingly causes him harm without reasonably believing that producing that harm is consistent with the balance of undefeated moral reasons under the circumstances.¹²³ I will employ this belief-centered version of the subjectivist thesis in illustrating the operation of the evidentiary theory, though I emphasize that what is integral to the evidentiary theory (in my view) is the more general subjectivist thesis and not any specific version of it. After all, the subjectivist thesis captures a family of related views (the

¹²² The qualification that the belief must be reasonable ensures that this account of wrongdoing is not subjectivist all the way down; it does not license idiosyncratic moral judgments. In effect, the subjectivist thesis recognizes that there are actions whose moral quality is indeterminate due to reasonable uncertainty regarding empirical and predictive matters and also due to the need for (inescapably individual) evaluative judgment. In such circumstances, the moral command is to do what you believe is right (or permissible) after due deliberation, entailing as a corollary that you act wrongfully only if you fail to heed that directive. This account is not, I think, viciously circular, for morality does not command, on this view, that the actor do as she believes morality commands. Rather, it commands her to reach judgments about what the balance of undefeated moral reasons requires, permits, or forbids (as the case may be), where such reasoning is not, on my view, an attempt to discover preexisting moral reality but, instead, is constructivist in a broad sense. (I am grateful to Jonathan Dancy for pressing the objection from circularity.)

¹²³ Several commentators have criticized my reliance on an under-specified account of harm. *See, e.g.*, Christopher, *supra* note 89, at ___; GREEN, *supra* note 94, at ___; Scalise, *supra* note 79, at ___; Block, *Berman on Blackmail*, *supra* note 81, at ___. I concede that I lack a developed account of this notoriously elusive concept. So a few quick remarks. *See also* Berman, *supra* note 2, at 797-98. First, I believe that harm is a moralized, not purely descriptive, concept. If, roughly, a harm is a setback to interests of a type that we have moral reasons of a particular character or of a particular stringency not to cause, then it seems no more problematic than other moral concepts that we must be allowed to employ without awaiting a fully adequate understanding of their content or contours. Second, I believe that the acts threatened in usual blackmail proposals (like the disclosure of embarrassing secrets) inflict what counts as harm under conventional moral standards. In any event, the structure of the subjectivist thesis recommends that if we doubt whether some setback or disutility constitutes a harm, we should conclude that it does, for if conduct inflicts only marginal harm it is extremely likely to be morally justified all things considered. That is, an error at the first step in the direction of finding too much to be harmful is likely to be corrected at the second.

doctrine of double effect, for example, is a member),¹²⁴ and I think it entirely likely that the particular version I've advanced will require further refinement.

With this proposed (loose and partial) account of moral wrongfulness in hand, it's easy enough to see why *adultery-threat* is overwhelmingly likely to be wrongful—one way or the other. Because the blackmailer cannot be reasonably unaware that a decision either to disclose or to remain silent is morally freighted, he is under an obligation to deliberate with seriousness regarding what the balance of undefeated moral reasons directs. If he satisfies that obligation he will come to believe either that he ought to disclose or that he ought to remain silent. If he believes that he ought not to disclose H's infidelity to W, then the proposal constitutes a wrongful conditional threat because it is wrongful to threaten what it's wrongful to do—and regardless of whether he has any genuine intent to carry out the threat. (The stick-up artist commits the wrong of coercion by threatening to shoot even if he plans not to, indeed even if his gun is unloaded or fake.) If he concludes that he ought to disclose, then his proposal constitutes a wrongful conditional offer because he proposes to bind himself to act (by his lights) wrongfully.¹²⁵ In this rather simple manner, the wrongfulness of the conditional proposal emerges clearly from the claim that one acts wrongfully by doing what he recognizes there is

¹²⁴Precisely what the doctrine of double effect (DDE) provides is controversial. In its motive-centered variant, it provides that an act that has good and bad effects is permissible if the good effects outweigh the bad effects; the actor merely permits, but does not will, the bad effects; and the good effects of the action are at least as causally immediate as are the bad effects. The causal-structure variant requires, *inter alia*, that the bad effect not be a means to the realization of the good effect. See generally "Doctrine of Double Effect," Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/double-effect/>. For an effort to resolve the blackmail paradox by appealing to a negative implication of DDE—namely, that beneficial side-effects do not redeem an action when the actor's direct intent is to do harm—see Gordon, *supra* note 8. Whereas, as we will see, the evidentiary theory inquires into the beliefs or motives the actor would have in carrying out the action he threatens, Gordon focuses on the blackmailer's motives for making his threat. This causes her to conclude—incorrectly, in my view—that blackmail is wrongful because the actor's "intent is directed to the money." *Id.* at 1765.

¹²⁵To put things differently, I am taking issue with Feinberg's claim that, when disclosure and silence are both "morally risky," what a third party chooses to do "is up to him." See *supra* text accompanying note 107. Rather, when in a "morally risky" situation, one has a duty to deliberate with seriousness and then not to act against what he determines to be the balance of moral reason. The choice of action, therefore, is not "up to him" in a phenomenologically robust sense.

moral reason not to do unless actually and reasonably believing the conduct is permissible all things considered, conjoined to the commonsensical further propositions that it is wrongful either to conditionally threaten or to conditionally offer what it would be wrongful to do.

If this is correct (and I will consider some objections shortly), then we are poised to address the next question: what, if anything, warrants the standard intuition that *adultery-threat* is especially likely to be wrongful one way and not the other—a wrongful threat, not a wrongful offer? Here is where the evidentiary thesis comes in.

We have already concluded that B is very likely to be engaged in some wrong when extending his conditional proposal—either the wrong of making a coercive threat or the wrong of making a wrongful offer. So if he is not making a morally coercive threat it is not because he is acting wholly permissibly but because he is engaged in a different wrong—the wrong of offering to engage in wrongdoing for a price. And he would be engaged in that wrong only if he has come to believe that he ought, all things considered, to tell W of H's infidelity. How would he have reached such a judgment?

Only, I think, by carefully identifying and weighing the sorts of possibly incommensurable factors that Gorr and Feinberg discuss—things like the probable consequences of disclosure for W, for H and for interested third parties (like their children), and the prior distribution of moral rights and duties as between H and W. Because this is not a simple assessment to make—what one ought to do in cases of this sort can rarely be read straight off the facts that are comfortably at hand—one will reach a responsible judgment only if motivated to look hard and think hard. And except for those rare souls who treat engaging in such careful moral evaluation as a consumption good, the motivation will be supplied (almost without

exception) by a commitment or strong disposition to act in accordance with the judgment reached. Yet the very fact of B's conditional proposal, *qua* conditional offer, substantially undermines the claim that he possesses any such disposition.¹²⁶ Simply put: if B is willing to do what he believes he ought not to do it is hard to fathom what reason he would have had for doing the hard work necessary to reach the judgment that he ought to disclose.

To be sure, you might suppose that the same could be said against the supposition that he believes he ought not to disclose: what reason would B have had to undertake the assessment necessary to reach *that* judgment? But for a variety of reasons the cases are not fully symmetrical. I'll offer three, though I doubt they are exhaustive. First, the weight of the moral reasons not to disclose are generally more salient, especially if (as will more often be the case) greater privacy obtains between B and H than between B and W. Moreover, even if there is no genuine moral force behind the act/omission distinction—and there may be—it seems true as a matter of empirical psychology that people overwhelmingly employ the distinction as a default principle of moral decisionmaking. Finally, we needn't entirely speculate as to what B believes disclosure would do to H. The very fact of the threat indicates that B believed that disclosure would be harmful to H. And the magnitude of the demand indicates B's belief that the harm to H would be substantial, for B could not otherwise have thought it reasonably likely that H would accede to it.

¹²⁶ Let me emphasize: the fact of the offer *undermines* such a proposition but doesn't *disprove* it. Perhaps B, a close friend of W, develops a pressing need for funds (say, B's child needs an emergency operation) in sudden coincidence with his discovery of H's adultery. Lacking any other source of income, B decides, after painful soul-searching, to blackmail H to obtain the desperately needed funds. When H rejects B's offer, B proceeds to spill the beans to W, believing as he had all along that W had a strong moral claim to the information, and even feeling somewhat relieved to be "freed" to perform what he viewed as his moral duty. In this scenario—and by hypothesis only—B does not act wrongfully and even has good motives when making his harm-causing disclosure, notwithstanding his unsuccessful blackmail proposal.

In short, B wrongs H if he conditionally threatens to reveal secrets about H that he believes he ought not disclose (or, to be more precise, that he does not affirmatively believe he ought or may disclose); and the fact of B's offer of silence is evidence that he does not affirmatively believe that he at least may disclose the secret because arriving at that belief would require a sincere and careful moral analysis and evaluation that one is ordinarily motivated to undertake only if committed or strongly disposed to act in accordance with what such analysis and evaluation deliver, as one who makes the conditional proposal has shown himself not to be.

The puzzle of moral blackmail, recall, asks how it can be morally wrongful to threaten what it would not be morally wrongful to do. The evidentiary theory does not, exactly, provide an answer. Instead, it solves the puzzle by identifying and curing an equivocation in the formulation of the question. In putative cases of moral blackmail, the act-type threatened is morally permissible, not in the sense that all tokens of the type are permissible, but in the different sense that many are, or that the act-type can be performed permissibly, or something of this sort. But some individual act-tokens of the act-type are morally wrongful: they are wrongful if they belong to a wrongful act-subtype described by reference to certain subjectivist features like the actor's beliefs or motives. Of course, by virtue of the threat principle (which itself, we have noted, partly derives from the concept of coercion), the conditional threat to engage in a morally wrongful token of the morally permissible act-type is itself morally wrongful. But by the evidentiary thesis, the very fact of the conditional threat is evidence in support of the proposition that the act-token threatened—that is, an act proposed to be undertaken by *this* person on *this* occasion—would be wrongful.

2. *The moral puzzle—objections.* That's the skeletal account of my solution to the puzzle of moral blackmail. Let us briefly consider two objections.

One might first resist my contention that B will believe either that he ought to disclose or that he ought to remain silent. Perhaps, the thinking goes, B has no view as to whether the balance of morally relevant considerations favors disclosure or silence. Now, the absence of such a view could arise in either of two principal ways: either B has given the matter serious and sustained thought but his deliberation has left him in perfect equipoise regarding what he morally ought to do, or B has simply not reflected on the question with the requisite care. I have already said, when assessing Gorr's account, that I consider the first possibility sufficiently unlikely as to be safely put aside. The second possibility cannot be dismissed in the same way. But a blackmailer who finds himself in this position has already defaulted on his moral obligations. While it would be lunacy to suppose that we are under an obligation to deliberate about *all* our actions, we do have such an obligation whenever we become aware of a *prima facie* or *pro tanto* moral reason not to do whatever we happen to be contemplating. And surely B must be aware of such reasons when he contemplates revealing deeply embarrassing information about another. Therefore, the fact, if true, that B hasn't reached a judgment regarding what he ought to do is insufficient to defeat the conclusion that he has issued a morally coercive threat by threatening to wrong H by knowingly causing him harm without reasonably believing that producing that harm is consistent with the balance of undefeated moral reasons under the circumstances.

A second possible objection is, in a sense, a diametric opposite to the first. Whereas the first maintained that B might have no view regarding what he ought to do, the second holds that B might genuinely believe that he has adequate moral reason to do *either* of the things he proposes—to keep silent if H pays up, or to tell W if he doesn't.

I have been assuming that the principal morally appropriate reasons to disclose H's infidelity to W are to promote supposed interests of W and perhaps also to satisfy one's supposed

obligations regarding truth-telling. The principal reasons to keep mum are to promote interests of H, and possibly of W as well. But that might not be how B looks at it. B might emphasize a wholly different reason to disclose—to wit, that H deserves to suffer for his transgressions. If B believes that giving H his just deserts constitutes the weightiest reason to disclose (perhaps he believes too that W would be more harmed than helped by disclosure), then he might also believe that that interest would be served comparably well either by disclosing H's adultery to W or by keeping silent but compelling H to, let's say, "pay through the nose." On this reasoning, B's biconditional proposal is not, on subjectivist principles, either a wrongful threat or a wrongful offer. To the contrary, it is a way to ensure that B will do as the balance of reasons dictates: cause H to suffer as he deserves.

I am prepared to grant that something like this could occur and that, if all relevant details fill out in the right way, B's issuance of the biconditional proposal we have called *adultery-threat* could be morally permissible. I'd merely caution that the likelihood is small and that B's heartfelt protest "but H deserved it!" is far from good enough to make out the case. Two obstacles loom especially large. First, even if (as many people deny) H's suffering or his being punished (in a strict or loose sense) would be a good, not a bad, any suffering or punishment beyond what he deserves is unquestionably a bad. And we have no reason for confidence, and much reason to doubt, that B will structure the proposal with concern not to inflict evil upon H in excess of his ill-desert. After all, B has a personal pecuniary interest in maximizing H's payment. Second, as antiretributivists have long argued, whether a wrongdoer deserves to suffer (or to be punished) and whether some other agent may purposely bring about that desert object are separate questions: an affirmative answer to the first does not entail an affirmative answer to

the second.¹²⁷ So B must believe not only that H deserves to suffer whatever humiliation or disgrace the revelation of his infidelity will likely cause him, but must also have an adequate account of why he, B, is an appropriate agent of H's distress.

To sum up: it is wrongful to threaten to engage in a wrongful act-token of a presumptively permissible act-type, and it is permissible to threaten to engage in a permissible act-token of a presumptively permissible act-type. But in contexts in which the evidentiary inference is sufficiently strong—*adultery-threat* is one—the very fact of the conditional threat helps support an inference that the act-token being threatened would be wrongful, not permissible. Morally speaking, then, blackmail is a conditional threat by B to harm A (or another party with whom A has a special relationship) under circumstances that (a) are sufficiently morally complex or fraught with factual uncertainty to preclude a confident external assessment regarding what B morally ought to do, and (b) would permit the reasonable inference that in carrying out his threat B would be acting wrongfully in virtue of his not actually believing that there existed adequate moral justification for his action.

3. *The legal puzzle.* I have just explained why, on the evidentiary theory, *adultery-threat* is likely to be morally wrongful (not *necessarily* wrongful) even if *adultery-disclosure* is likely to be permissible. The question remains whether one or the other ought to be criminalized. A recommendation to criminalize the former but not the latter requires a solution to the puzzle of legal blackmail.

To reiterate a point made earlier, there is nothing puzzling on this account about criminalizing *adultery-threat*. If the conditional threat is an effort to take property by morally

¹²⁷ For a powerful presentation of this argument see David Dolinko, *Some Thoughts About Retributivism*, 101 *Ethics* 537 (1991).

wrongful means then it's just one among the many species of theft, and the case for criminalization seems, at first blush, no more problematic than for, e.g., theft by fraud or deception. True, plausible political theories might conclude that this is an unjustifiably expansive use of the criminal sanction. But resolution of this dispute requires normative argument, not puzzle-solving. If there's any puzzle here it concerns only the differential treatment between *adultery-threat* and *adultery-disclosure*.

In fact, though, *adultery-threat* and *adultery-disclosure* differ in several respects that plausibly matter to the criminal law, most of which have already been mentioned. First, as just explained, act-tokens of the act-type represented by *adultery-threat* are much likelier than act-tokens of the act-type represented by *adultery-disclosure* to be morally wrongful. Second, morally wrongful tokens of the two act-types implicate different interests. The wrongful disclosure threatens reputational, emotional, and psychological harms. The wrongful threat trenches upon property interests (or, when what is demanded is sexual compliance, threatens interests in sexual autonomy). At least some theories of the state or of criminal punishment would think these differences meaningful. Third, disclosure is more likely than the threat to advance plausible social interests in the dissemination of information. Fourth and relatedly, overdeterrence worries are likely to weigh more heavily against criminalizing the disclosure, for any lawful conduct chilled by its proximity to the criminalized conduct is likely to be more valuable. Fifth, because the threat lends itself to repetition, it likely causes greater fear and anxiety and is more likely to create the relationships of dominance and submission that Fletcher helpfully emphasized. Sixth, even when the threat is not repeated, and even when repetition is not feared, the demand is often (probably usually) steep enough to constitute the moral wrong of exploitation, broadly understood as taking unfair or excessive advantage of the victim's

vulnerability. For all these reasons, and perhaps for others as well, it would be eminently defensible to criminalize *adultery-threat* while leaving *adultery-disclosure* unregulated. Indeed, a wag might suggest that the greater puzzle is why serious thinkers would continue to think otherwise.

But to say that differential treatment of the pair is defensible is not to conclude that it is optimal. Perhaps the law should criminalize “wrongful disclosure” and then criminalize the conditional threat to wrongfully disclose. Such a solution would dissolve even a hint of legal puzzle. It would, however, both confront the significant drafting challenge of defining “wrongful disclosure” in a satisfactory way and create significant prosecutorial challenges of establishing wrongfulness (however defined) in each case. Happily, the subjectivist and evidentiary theses together suggest that disclosure-after-threat is a rough proxy for wrongful disclosure. Though undeniably over- and under-inclusive, it is more easily administered and better advances the core values underlying the principle of legality. It might also better meet First Amendment concerns.¹²⁸ So perhaps the state should criminalize disclosure-after-threat as a proxy for wrongful disclosure, and then also criminalize the threat to engage in disclosure-after-threat. Doing so would neatly moot the puzzle of legal blackmail because the act threatened would no longer be lawful.

¹²⁸ Note, though, that we should not blithely assume that a law criminalizing wrongful disclosures of embarrassing secrets is unconstitutional. 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 “published with good motives and for justifiable ends.” *Garrison*, 379 U.S. at 70-72 & n.7. Although criminal libel was generally justified as a means to protect against breaches of the peace, *see id.* at 67-68, some jurisdictions had expressly conceived of the offense as a means to guard against injury to the libeled party. *See, e.g., Gardner v. State of Arizona*, 139 P. 474, 476-77 (Ariz. 1914). Many state courts invalidated these provisions after *Garrison*. But the *Garrison* Court explicitly left the question open, *see Garrison*, 379 U.S. at 72 n.8, and ten years later, it again refused to decide “whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments.” *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

Now, you might object that this is an empty formalism, a trick of some sort. But that verdict would be too harsh. This solution is not wholly equivalent to merely criminalizing the conditional threat. Rather, it is functionally equivalent to increasing the punishment for a blackmailer who carries out his threat after making it. And that, law and economics scholars have reasoned, helps augment the deterrent effect of the blackmail ban.¹²⁹ By prodding us to rethink our ways to characterize “the act threatened,” the evidentiary theory allows us to solve the puzzle of legal blackmail elegantly while also possibly achieving a marginal gain in crime reduction.

IV. BEYOND THE CENTRAL CASE

Part III has presented the basics of the evidentiary theory by focusing on the modal case of a threat to reveal a target’s adultery unless paid to remain silent. But blackmail is a broad class with a diverse membership. The act a (putative) blackmailer threatens need not be to disclose information, and his demand need not be for money (or equivalent). Furthermore, even the subclass of conditional threats to disclose information unless paid hush money is comprised of further subclasses that introduce additional complexities. Should it matter, for example, if the information B threatens to reveal is not merely embarrassing but relates to A’s commission of a crime? Or what if B “demands” of A no more than B could get from other market actors for the same information? Some of the evidentiary theory’s nuances will emerge, and its conformity

¹²⁹ Recall Isenbergh’s argument that the criminal ban might increase the incidence of blackmail (relative to a regime in which blackmail bargains are entirely void) because, by incurring potential criminal liability, the blackmailer can sell the blackmailee a higher likelihood of silence, increasing likelihood of acceptance. But the blackmailee is less likely to accept in proportion to the likelihood he anticipates that he can report the blackmailer to the police without thereby provoking disclosure. And that outcome becomes more probable if the blackmailer risks liability for disclosure beyond the liability he has already incurred for making the threat. *See* Gómez & Ganuza, *supra* note 32, at 481; Posner, *supra* note 12, at 1839.

with case-specific intuitions will be bolstered (or undermined), by applying the account to a range of such cases. In the discussion that follows I concentrate on whether particular proposals are moral blackmail, as defined above (see pp. [65-66]), and only secondarily on whether proposals of that subtype ought to be criminalized. The latter question implicates practical problems of legal drafting and institutional enforcement that cannot be resolved by essentially philosophical inquiry and analysis.

A. “Hard” Bargains

Explicitly or implicitly, every potential commercial transaction conforms to the same biconditional form as does blackmail. The proposition implicitly conveyed by your local retailer, for example, is this: If you pay me the listed purchase price for any good in my store, I will give it to you; if you do not, I won’t. Aside from a formal similarity of structure, that proposition does not look much like blackmail. Matters are thought to get a little murkier, however, in the case of the so-called “hard bargain,” like that presented by Jeffrie Murphy’s hypothetical owner of the Babe Ruth-autographed baseball.¹³⁰

These are easy cases under the evidentiary theory for the act threatened—to withhold the good or service on offer—is not plausibly wrongful and the content of the conditional proposal does not support an inference that the seller believes otherwise. To be sure, the price demanded is so steep as possibly to instantiate the wrong of exploitation. And it is this that makes the hard bargain look like blackmail, for many or most blackmail proposals are plausibly adjudged exploitative as well as coercive.¹³¹ But exploitation is usually a less serious moral wrong than coercion and almost certainly a less secure basis for criminalization. The evidentiary theory

¹³⁰ See *supra* text accompanying note ____.

¹³¹ This is a theme of Altman, *supra* note 113.

explains why blackmail is the moral wrong of coercion, and justifies its criminalization on this ground. It does not indict hard bargains.

B. Crime-Exposure Blackmail

A special case within informational blackmail arises when the secret that B threatens to reveal would not merely embarrass A, but would subject him to criminal penalty. This variation, which we may inelegantly term “crime-exposure blackmail,” has provoked particular attention from law and economics scholars, who query whether permitting blackmail of this type would benefit society as a form of private law enforcement. Their answers vary.¹³²

Whatever the uncertainty a utilitarian (or wealth-maximization) analysis might engender, that crime-exposure blackmail should be a crime is, I venture, obvious to most people. Indeed, under the reductivist approach advanced by Feinberg and Gorr, the matter is simple: Because it is wrongful to withhold information about a crime it is equally wrongful to offer to withhold it for payment.¹³³ Both the offer and the unconditional performance of the act offered may be criminalized. In fact, however, the criminal law treats the conditional offer substantially more severely. Under the common law, the mere failure to report information about a crime (including the identity of the perpetrator) was misprision of felony, a misdemeanor. Modern statutes have tended to ignore it entirely.¹³⁴ In contrast, the conditional threat to do so is

¹³² Compare, e.g., Brown, *supra* note 12 (arguing that legalizing blackmail of criminals would probably increase deterrence of other crimes), with Posner, *supra* note 12, at 1823-27 (concluding that the effects are ambiguous); Landes & Posner, *supra* note 23 (same); and Shavell, *supra* note 18, at 1899-1900 (contending that it is more efficient to maintain a ban on crime-exposure blackmail, supplemented by public authority to offer rewards for the identification of criminals).

¹³³ See, e.g., FEINBERG, *supra* note 103, at 243-45. As we noted in Part I, *qua* offer, a biconditional proposal takes its normative character from that of the act offered, not threatened.

¹³⁴ See P. Glazebrook, *How Long, Then, Is The Arm Of The Law To Be?*, 25 Mod. L. Rev. 301, 307 n.51 (1962) (“No court in the United States has been prepared to adopt the English doctrine in its simplicity, and hold that a mere failure to disclose knowledge of a felony is itself an offence.”). However, through the offense of

blackmail.¹³⁵ The evidentiary theory explains this difference exceedingly well, especially when we invoke both versions of the subjectivist thesis—motive-centered as well as belief-centered.

The critical step is to explore why a failure to expose a criminal is legally tolerated and, I believe, at least often not subjected to substantial moral criticism. Plainly, silence can significantly injure the public. It hampers society's efforts to punish and deter the commission of crime, and it permits criminals to reoffend. Our relatively lenient attitudes (in law and morals) toward the non-disclosure stems from our awareness that silence does not always bespeak a disregard for the common good and the welfare of actual and potential victims. It is often explained, at least in large part, by felt duties of friendship and loyalty toward the perpetrator, fear of criminal retaliation, and/or fear or distrust of the police. To some extent (and on some moral theories), these considerations can reduce or eliminate the wrongfulness of remaining silent. And even to the extent they don't affect wrongfulness, they surely reflect sympathetic motivations that mitigate the actor's blameworthiness.¹³⁶

Consider now the conditional proposal. Had B threatened to expose A unless paid off, we strongly infer that she did not believe that she had an overriding duty of silence and that her motives for violating her civic duty had nothing to do with either loyalty to, or fear of, the culprit. The fact of her blackmail proposal provides circumstantial evidence as to her mental

“compounding,” the Model Penal Code would make it a misdemeanor to accept money in consideration for failing to report to law enforcement authorities information about the suspected commission of a crime. MPC § 242.5.

¹³⁵ See, e.g., MPC § 223.4(2).

¹³⁶ This seems to be the very sentiment underlying Chief Justice Marshall's pronouncement in *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556, 575-76: “It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man.” And it might have been too harsh in the very case at hand, which involved “the attempt of a father-in-law to conceal the forgeries of a son-in-law, by paying off the notes he had forged.” 20 U.S. (7 Wheat.) at 575. Cf. *Haupt v. U.S.*, 330 U.S. 631, 641-42 (1947) (holding, in treason prosecution, that “[i]t was for the jury to weigh the evidence that the acts proceeded from parental solicitude against the evidence of adherence to the German cause” and that the jury could disbelieve defendant's contention that he “merely had the misfortune to sire a traitor and all he did was to act as an indulgent father toward a diabolical son”).

state: we now believe that she was *in fact* activated by more culpable motives than, absent this evidence, we had hypothesized *might have* motivated her. The conditional proposal is not coercive, because its wrongfulness stems from the wrongfulness of the act offered (silence) not from that of the act threatened (disclosure). But because we can infer that this act-token of silence is likely to be (considerably) more wrongful and more blameworthy than we often assume to be true for tokens of this act-type, crime-exposure blackmail should be both a crime and a more serious offense than mere misprision of felony.

Should the preceding analysis change if the individual who threatens to expose A's crime had been A's victim? Suppose B threatens to file a criminal complaint against A unless A provides B reasonable compensation for the harms B actually suffered? The Model Penal Code would grant an affirmative defense to prosecution for threatening to "accuse anyone of a criminal offense . . . that the property obtained by threat of accusation . . . was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation . . . relates."¹³⁷ This defense was added "in order to assure that one who had a civil complaint for damages against another could not be convicted of extortion for threatening during negotiations to file a criminal charge"—conduct "many regard as legitimate negotiating tactics."¹³⁸ Then again, many don't: The 1969 Model Code of Professional Responsibility, for example, provides that "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."¹³⁹

The short answer is that the fact that B is a victim of A and has a valid tort claim against him does not change the analysis. The threat to file a criminal complaint suggests, on the

¹³⁷ MPC §223.4.

¹³⁸ *Id.* Comment (f).

¹³⁹ DR 7-105A. The 1983 Model Rules of Professional Conduct lack any such specific proscription.

reasoning above, that B's silence would be wrongful, as a violation of civic duty. But this answer is a trifle too short. The longer answer is that, though B's identity as A's victim doesn't *change* the analysis, it does *add* to it in ways that might matter.

This longer answer depends upon a distinction mentioned in passing at the outset but not yet developed—that between all things considered and pro tanto wrongfulness.¹⁴⁰ If B's unconditional silence would be wrongful, then the offer of silence is wrongful pro tanto. So the question is whether use of this wrongful tool can be justified by the good its use aims to achieve. Characterizing the good to be achieved as personal advantage to B suggests a negative answer: gain to B is a good, but it lacks the particularly moral value necessary to justify what our analysis suggests is pro tanto wrongdoing. Additionally or alternatively, however, we might characterize the good that B seeks as the realizing of corrective justice, or something similar. This might have the moral character sufficient to justify the commission of the pro tanto moral wrong of offering the moral wrong of silence. *If* it does, then carrying out the offer, on satisfaction of the condition, would also be permissible because backed by the moral weight of promise-keeping. But *whether* it does will likely depend on such factors as the weight of the public's interest in criminal prosecution of this offender for this type of offense, the relative strength of our commitment to retributive and corrective justice, and the relative probabilities that each form of justice will be realized if B contacts the public authorities.

In sum, the moral permissibility of crime-exposure blackmail by the crime victim presents a hard question. The evidentiary theory can help clarify the structure of the analysis.

¹⁴⁰ See *supra* note 5. The argument that follows in text is overly stylized, but an adequate first pass at the problem.

Given reasonable disagreement about the particular moral judgments that enter into the analysis, however, any bottom line conclusions will inevitably be contestable.¹⁴¹

C. *Market-Price Blackmail*

Imagine B has an embarrassing photograph of celebrity A, for which a supermarket tabloid will pay \$1000. Assume no background factors would render B's agreement to sell the photo an uncontroversial moral wrong (e.g., B obtained the photo without committing an immoral act, and has no prior obligation of confidentiality to A). B now approaches A with this proposition: if you pay me \$1000 I'll give you this photograph and its negative; if you do not, I'll sell them on the open market. Theorists have divided over whether this proposal—"market-price blackmail"—should be lawful.¹⁴²

Focus first on whether the proposal is moral permissible. This is an easy call if you think that sale to the tabloid, although lawful, is morally impermissible. In that case, the conditional threat to sell to the tabloid constitutes the moral wrong of coercion. But suppose you believe unconditional sale to the tabloid permissible. Distinguish two routes to this conclusion: (1) although there are good moral reasons not to disclose (disclosure harms A in a morally relevant

¹⁴¹ Of course, the story is entirely different if what B threatens if not paid reasonable compensation is to file a tort suit, rather than to file a criminal complaint. The action threatened is entirely permissible on the assumption that B has a good faith belief that he has a legally enforceable claim for damages against A. And the offer is permissible too: it's A's claim, he can forego it if he wishes. The conditional proposal not to sue if A pays appropriate damages does not impugn the permissible beliefs or motives we might otherwise expect B to have. The proposal is morally kosher, and it's hard to see a sensible legal objection to it. Relatedly, however, scholars have objected that class action litigation constitutes blackmail. For a careful evaluation, and rejection, of the argument see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003).

¹⁴² Compare, e.g., Murphy, *supra* note 52, at 164-65 (proposing to decriminalize cases of blackmail in which the putative blackmailer seeks from his "victim" only the going market price), Ginsburg & Schectman, *supra* note 13, at 1860 (same), and FEINBERG, *supra* note 103, at 262-64 (deeming "[d]emands for fair compensation for considerate offers not to publish" instances of "plausibly justified blackmail"), with Lindgren, *supra* note 4, at 1987 (opining that market-price blackmail "seems like classic blackmail" and concluding that, "[g]iven the lack of agreement over the rationale for blackmail," its continued criminalization is sound).

sense), there are moral reason to disclose of equal or greater strength; or (2) even absent moral reason to disclose, there is no significant moral cost to doing so because, e.g., by seeking and achieving celebrity, public figures have assumed the risk of, and possibly even consented to, widespread invasions of their privacy.

Route (1) strikes me as fairly implausible in the mine run of cases, although it can certainly be true in some situations, as when the celebrity is either a public official or a non-official who has interjected himself into public or cultural debates and the photographs reveal that his actions are inconsistent with his public position. In cases such as these, the prior conditional offer of silence has at least some evidentiary value. It is probably mildly probative in support of the hypothesis that B does not believe that there is adequate moral reason to disclose (therefore that he acts wrongfully in disclosure) and significantly probative in support of the hypothesis that he would not be motivated by such reasons (therefore that he is morally blameworthy in making the disclosure). If you take route (2)—the unconditional disclosure would be permissible because there is no significant moral reason against it—then the prior conditional offer of silence has no probative value with respect to any morally material question. The act-token threatened is morally permissible, and so is the conditional proposal.

This analysis prevents us from reaching any simple conclusions regarding the moral permissibility of the conditional proposal: it all depends upon your view of the permissibility of the unconditional disclosure and, if you believe it permissible, your reasons for that judgment. But even if you conclude, on the basis of the evidentiary analysis, that the conditional proposal would likely be wrongful, whether it should be criminalized is a separate question. And the argument against is clear and weighty, so long as we assume that the unconditional sale to the tabloid remains lawful. Market-price blackmail simply gives a right of first refusal to persons

who are harmed and (by hypothesis) wronged by unconditional disclosure. It almost certainly makes them better off and thereby mitigates the moral harms associated with a regime of lawful sale and publication.

Legalization of market-price blackmail does not, however, entail legalization of “supra-market-price blackmail”—the offer to sell exclusive disclosure to A (i.e., non-disclosure to others) for a sum substantially in excess of what B could receive for selling the same information on the market. At some price, a supra-market-price blackmail offer can become exploitative. But even short of that level, the state can regulate the price B may charge A for non-publication—capping it at the market-price—for much the same reason the state regulates prices elsewhere. Price regulation, after all, is a common way of limiting the price a monopolist can charge to that which (presumably) would obtain were the market for the monopolist’s goods or services competitive. And the blackmailer (market-price, supra-market-price, or otherwise) must be a monopolist (or, at least, an oligopolist) of the information he threatens to reveal, else his offer of secrecy would have little value. However, B’s possession of information about A does not make him equally a monopolist with respect to the rest of the world as it does with respect to A himself. To be sure, if B is the only person with photographs of A in a compromising position, he is, by definition, a monopolist supplier. But his monopoly is economically meaningful only to the extent there are no adequate substitutes for those photos. As far as buyers of information about public figures are concerned, reasonably close substitutes for B’s photos of celebrity A do exist—namely, embarrassing or scandalous information (photographs, interviews, etc.) about celebrities C, D, and E. These are not substitutes as far as A is concerned, though. Consequently, consistent with well-established justifications for economic regulation of monopolies, the state could reasonably decide to protect A from monopolistic exploitation by

prohibiting B from charging A more than the hypothetical competitive price for the information in question, a price adequately approximated by the existing market price. This is a rationale for prohibiting supra-market-price blackmail that does not depend a conclusion that it is morally coercive.

D. Public-Interest Blackmail

The garden-variety blackmailer demands from his victim a cash payment to which he has no legitimate claim. But the blackmailer need not demand money. Nor need he even seek private advantage (narrowly defined). A recurring question, accordingly, is whether blackmail should be criminalized when the blackmailer's ostensible objective is a public, rather than private, good. We have already touched on this issue when considering the claim that the advantage demanded in a case of victim-initiated crime-exposure blackmail be conceived as the good that corrective justice be done. We now address the question in greater depth by examining three variations on a theme. In each case, assume that the putative blackmailer genuinely and correctly believes that the blackmailee's compliance with the condition would powerfully advance the public interest.

Revise *gay-threat* as follows: A is extremely wealthy, but miserly. B demands, for his silence, that A donate \$1 million for Alzheimer's research. We have already assumed *arguendo* that B acts wrongfully in the original *gay-threat*. I suspect that most people would conclude that B acts wrongfully in this variation (*gay-threat/Alzheimer's*) too, although the question is perhaps debatable—much as people might disagree about the permissibility of the actions of Robin Hood. The important point is that nothing about this case invites doubt that B would be acting wrongfully were he actually to do as he threatens. Accordingly, the making of the conditional

threat is morally wrongful, at least pro tanto, and the only question is whether the moral good that B aims to achieve by means of the threat is so great as to supply adequate moral justification, i.e., to render this pro tanto wrong not wrongful all things considered. Surely, coercive threats can sometimes be justified. (Consider: A is a brilliant but misanthropic scientist who has already devised a cure for Alzheimer's which he refuses to divulge for any payment, and B's demand is merely that A divulge it.)

In the second variation (*gay-threat/legislator*), A is a closeted gay Congressman who supports anti-gay legislation, L; B threatens to out A unless A changes his position on L. (L can be whatever you choose subject to the lone constraint that it morally ought not to be enacted.) Like *gay-threat/Alzheimer's*, the threat is plausibly made to promote the greater good. Both conceivably qualify as blackmail for the public interest. But in *gay-threat/legislator*, there are plausibly morally sound reasons to make the disclosure—namely, to expose A as a probable hypocrite and political opportunist—to be weighed against the usual moral reasons not to out somebody. Outing legislator A thus looks more like disclosing H's infidelity: a morally fraught decision that calls for careful and serious—and inescapably contestable—moral judgment. Finally, the content of the conditional offer lends support for the inference that, were B to out A, he would actually have the beliefs and motives necessary to render the disclosure morally permissible and not blameworthy. The offer, if accepted, tends to undermine the moral reasons in favor of disclosure: if A supports L, then he is no longer (or less) hypocritical, and the moral reason to out him disappears (or diminishes in force).¹⁴³ So even if we accept that B acts

¹⁴³ Fifteen years ago, the *Advocate*, a gay-oriented national magazine, threatened to out Arizona Congressman James Kolbe because of his support for the Defense of Marriage Act, which provides that states need not recognize same-sex marriages performed in another state. Kolbe preempted the *Advocate* by announcing his homosexuality in advance of the magazine. See John E. Young, *Rep. Kolbe Announces He Is Gay*, Wash. Post, Aug. 3, 1996, at A8. The *Advocate* explained its actions precisely as a way to challenge what they saw as Kolbe's hypocrisy. See *id.* Of

permissibly and for good reasons in both *gay-threat/Alzheimer's*, and *gay-threat/legislator*, there is this difference, born of the facts that the conditional proposal has evidentiary value in the latter case but not the former: in *gay-threat/Alzheimer's*, B might be engaging in morally justified coercion, whereas in *gay-threat/legislator*, he might be threatening to engage in a morally justified disclosure, in which case he does not even commit the pro tanto moral wrong of coercion.

In the third and last variation (*adultery-threat/Alzheimer's*), B threatens to reveal H's adultery unless H contributes \$1 million to Alzheimer's research. Like ordinary *adultery-threat* and unlike *gay-threat*, the act B threatens is not clearly morally wrongful. Like both *gay-threat/Alzheimer's*, and *gay-threat/legislator*, and unlike *adultery-threat* and *gay-threat*, *adultery-threat/Alzheimer's* is advanced to serve the public interest. Finally, like *gay-threat/Alzheimer's*, and unlike *gay-threat/legislator*, the conditional proposal itself lacks probative value regarding whether the particular disclosure threatened would be wrongful or permissible. Perhaps B (reasonably) believes disclosure to be wrongful, but also (reasonably) believes that using the wrongful threat for a greater good is justified all things considered, or perhaps he (reasonably) believes disclosure to be permissible, but decides to leverage the threat of a permissible action for an even greater good. I am simply unsure how strong an inference is warranted in a case like this.

course, this is not to say the magazine was correct. A gay politician can oppose a piece of (ostensibly) gay-friendly legislation without being hypocritical just as an African American politician can with integrity oppose legislation considered to be advantageous to the African American community as a whole or a Jewish politician can oppose, say, policies favorable to Israel. Indeed, Barney Frank, the openly gay Congressman from Massachusetts, declared that he approves of outing "in cases of gross hypocrisy," but opined that Kolbe's was not such a case. See *Kolbe Won't Be Gay Rights "Poster Boy"*, Worcester Tel. & Gaz., Aug. 4, 1996.

The upshot of this quick survey is that there are at least two distinct ways in which a putative blackmail proposal might be morally justified as in the public interest—either carrying out the threat would be permissible, or, although it wouldn't be, making the threat is—and that the first of these two ways may or may not gain advantage from the evidentiary inference. We can hardly expect widespread agreement regarding the moral permissibility of individual cases. Agreement on the optimal criminal statute is likely to be even more elusive.

E. Non-Informational Blackmail

Most people agree that the concept of blackmail is capacious enough to include some threats to do things other than disclose information. However, not only do they disagree over whether specific threat-tokens qualify, they also lack shared articulated criteria that would, in principle, resolve the disputes. The evidentiary theory explains very well what non-informational blackmail consists of, though the answer is not such as to promise much help in securing agreement about individual cases.

Here's a common example. A and B are neighboring landholders. B informs A that she intends to erect some structure on her land (e.g., a tall fence, an outdoor sculpture, a wind turbine) that has these two properties: it would adversely affect A's enjoyment of his property (e.g., by blocking access to light, or just by being ugly), and it is within B's property rights (i.e., e.g., it would not constitute an actionable nuisance). B then offers not to build the structure if A pays her \$X. A objects that this is blackmail, a charge that B denies. Both A and B understand themselves to be arguing about morals; A does not mean, and B does not take him to mean, that the proposal is a crime.

On the subjectivist thesis, whether B's construction of the structure would be permissible or wrongful depends upon the reasons B would be acting upon in building it. The anticipated harm (or, if you prefer, cost or disutility) to A supplies moral reason not to build. This is true notwithstanding that B would be within her rights to build: it is often wrong to exercise one's rights. So the moral permissibility of building depends upon there being actual reasons in its favor. Suppose that the structure would be a good in some fashion for B. (To a first approximation, the structure is a good for B if, for example, it serves her interests or advances her welfare, including by satisfying her preferences, though not morally discreditable preferences like that others be made worse off.) The good to B and the bad to A both count in the moral calculus. In circumstances such as these, B is entitled to value the good to her more highly than the bad to A, for that is part of what it means for B to have a right to build on her land. To a very large extent, then, B's valuing of the structure is precisely what confers upon it its moral value. If B really doesn't want it—if she values the structure only for its use as threat not for its use in actuality—then no moral reason weighs in favor of its construction and the existence of moral reason against it, in the form of the cost the structure imposes on A, renders its construction morally wrongful. (Notice that, in cases such as these, the motive-centered and belief-centered versions of the subjectivist thesis cannot be easily prised apart: B can believe that there is moral value in the structure, and thus that its construction is morally permissible all things considered, only if she would want it to be constructed.) Call the structure a "spite structure" if its construction would not be supported by permissible reasons.

Per our understanding of coercion (as reflected in the threat principle), the conditional proposal by B is wrongful if what she threatens to build would be a spite structure—a concept that is defined by reference to subjectivist features. But whether it would be is something we

ordinarily just don't know.¹⁴⁴ Indeed, I venture that it is precisely what is in dispute when A and B are arguing over whether the proposal is blackmail.

Whether the bare fact of the conditional offer to forbear construction if paid has substantial evidential bearing on that all-important question is uncertain. For example, if B proposes to erect a wind turbine and the price she “demands” for forbearance reflects the net discounted value of the energy savings it would earn her, there is precious little grounds to infer that, were A to reject the deal and B to build, B would lack the reasons (and therefore the beliefs) necessary to render construction permissible. In other cases, the evidentiary inference is stronger. If B offers not to install an outdoor sculpture if paid, A might well suspect that B doesn't really want the sculpture. Whether the inference is warranted, however, is hard to assess in the abstract. Perhaps B really would enjoy the sculpture, but thinks she'd be equally satisfied with a week-long pilgrimage to Bilbao, a trip that would cost \$X more than the sculpture.¹⁴⁵

¹⁴⁴ Consider one of Nozick's illustrations of an unproductive exchange: B proposes to erect a structure on his land “solely in order to sell [A, B's neighbor] his abstention from it.” See *supra* note 102. In my view, B does not merely propose an unproductive exchange but engages in the moral wrong of coercion, for the act-token he threatens would be morally wrongful because there is moral reason against it—the disutility that, by hypothesis, B knows A will suffer—and no moral reason in its favor. But we know that B's carrying out of the threat would be wrongful in this case only because Nozick pronounces, *ex cathedra*, that B would not have good reason were he to do as he threatens. (That, I take it is what Nozick means by specifying that B hatches the plan *solely* to sell abstention from it). In the ordinary case of putative non-informational blackmail, as in Nozick's, the act-type threatened is not presumptively wrongful. Accordingly, the question becomes whether the conditional proposal itself supplies sufficiently strong evidence about the beliefs and motives the proposal maker would have were he to do as he threatens to permit an inference that commission of this act-token would be wrongful (or that it wouldn't be).

¹⁴⁵ Sometimes the evidentiary value of the conditional proposal arises not from the formal elements of the proposition (the particular conduct threatened, the particular advantage or concession “demanded”), but from the precise terms in which it is presented. That is true, I think, in these hypotheticals crafted by Leo Katz: “Pay me \$10,000, or I will give your high-spirited, risk-addicted 19-year-old daughter a motorcycle for Christmas”; “Pay me \$10,000, or I will hasten our ailing father's death by leaving the Catholic Church.” See Katz, *supra* note 64, at 1567-68.

F. Bribery

A final puzzle is what Sidney DeLong calls the second paradox of blackmail:¹⁴⁶ why is a conditional offer that would be illegal if proposed by the blackmailer legal if initiated by the victim? DeLong locates the moral difference between blackmail and “bribery” (i.e., a proposal initiated by a potential blackmail victim) in the social meaning of the narratives paradigmatic of the respective transactions. “[T]he purpose of the law of blackmail,” DeLong proposes in a vein similar to Professor Fletcher’s, “is to protect the community against the conspiratorial agreement of blackmailer and victim, which isolates and subjects him to a submissive relationship with the blackmailer.”¹⁴⁷ In contrast, “[t]hrough bribery, the victim transforms the menace into an ally whose cooperation preserves the victim’s place in the larger community.”¹⁴⁸

No doubt this explanation touches on one common distinction between the consequences of blackmail and bribery. But it does not cut as forcefully as DeLong suggests, for the briber risks highlighting his vulnerability to disclosure, thereby increasing the risk that the recipient of his bribe will return for more—next time, as a blackmailer. If, as Fletcher has emphasized, “[d]ominance and subordination are states of anticipation,”¹⁴⁹ it is unclear how much security and peace of mind a potential blackmail victim purchases with his bribe. In any event, the evidentiary analysis reaches the same bottom-line conclusion as DeLong does, namely that the law may sensibly treat the same deal differently depending on which party proposes it.

¹⁴⁶ Sidney W. DeLong, *Blackmailers, Bribe Takers, and the Second Paradox*, 141 U. Pa. L. Rev. 1663 (1993). *See also, e.g.*, Kathryn H. Christopher, *Toward a Resolution of Blackmail’s Second Paradox*, 37 Ariz. St. L.J. 1127 (2005).

¹⁴⁷ DeLong, *supra* note 146, at 1691.

¹⁴⁸ *Id.*, at 1692.

¹⁴⁹ Fletcher, *supra* note 7, at 1638.

Of course, when the act the briber solicits is itself wrongful, there is nothing perplexing about making the bribe illegal and punishing both the giver and the receiver—hence the common law crimes of “bribery” (offering a government official payment for favorable treatment) and “extortion under color of public office” (solicitation or acceptance of payment by the official).¹⁵⁰ As noted in Part I, a biconditional proposal can be wrongful in virtue of the wrongfulness of what is demanded or solicited. At the other extreme, it seems reasonably clear that an offer of payment for desisting from an act is morally permissible and ought to be legal when performance of the act in question would be wrongful. Suppose that A, in *gay-threat* and *gay-disclosure*, learns that B has learned that he, A, is gay. If it would be wrongful (as we have supposed) for B to reveal this fact, surely it is permissible for A to ask B to keep mum. If, in addition to requesting, pleading, and cajoling, A offers to pay B to keep quiet, A does risk insulting B. But, at first blush, it does not seem that the offer of payment constitutes any greater wrong than that.

Now, we could imagine that the offer has this sort of evidentiary significance: it implies that A knows some unusual facts (say, that A has proposed marriage to a woman who thinks A is straight) that would make B’s outing of A under the circumstances not wrongful, and not merely permissible, but possibly even morally required or preferable. Conceivably. But that strikes me as a rather weak inference. It’s just as likely, I should think, that A makes the offer because he has some reason to fear that B would, without the monetary incentive, do the wrong thing. Finally, if the act that the briber offers to buy desistance from is morally uncertain—as when H offers B \$1000 for B’s promise not to tell W about H’s extramarital affair—then it seems plausible to believe that H compounds the underlying wrong of infidelity, by seeking to make B

¹⁵⁰ See generally James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. Pa. L. Rev. 1695 (1993); see also MPC § 240.1.

something like an accessory after the fact. Most likely this is a fairly marginal exacerbation of his initial wrong. Even if not, it is not the sort of wrong that essentially liberal political theories are apt to consider properly criminalized.

A separate question is whether *acceptance* of the bribe should be criminalized. If the nominal bribe really is just a payoff by a blackmailee to a blackmailer savvy enough to convey his threat by innuendo, the law need not respect the formal structure of the transaction; so long as a factfinder concludes that the nominal bribe taker intended to communicate a blackmail threat, he can be deemed a blackmailer and punished accordingly. If the idea of the bribe really did originate with the maker, then the offeree is being offered payment to refrain from what he might well have done in any event. My instinct is that acceptance is hardly virtuous, but nor is it wrongful. Again, it's hard to see what might justify its criminalization, except as a prophylactic rule to ensure that a genuine blackmailer not escape conviction by insinuating his demands with some subtlety.

V. IMPLICATIONS

Blackmail is a serious crime. Moreover, it exerts a grasp on the popular imagination almost surely out of proportion to the actual incidence of its occurrence. Still, one might think the amount of scholarly attention devoted to solving its puzzles disproportionate. (Notice, for example, that blackmail is the lone criminal offense discussed in this Handbook, otherwise

devoted to concerns of the general part of criminal law.) As Donald Dripps has quipped, there may be more articles on blackmail than prosecutions of it.¹⁵¹

Theorists' obsession with the blackmail puzzle is partly explained, I suggest, by a widespread intuition that a solution will require the development of sufficiently new tools or principles, or the deployment of principles and considerations in sufficiently novel ways, as to shed welcome light on other conundrums in law and morality. Thus have Katz and Lindgren opined that "one cannot think about coercion, contracts, consent, robbery, rape, unconstitutional conditions, nuclear deterrence, assumption of risk, the greater-includes-the-lesser arguments, plea bargains, settlements, sexual harassment, insider trading, bribery, domination, secrecy, privacy, law enforcement, utilitarianism and deontology without being tripped up repeatedly by the paradox of blackmail."¹⁵² While their hopes might be a tad extravagant, I too believe that blackmail sits at a theoretical crossroads of sorts, making it reasonable to expect that a solution to its puzzles will bear implications beyond its borders. Although it is well beyond the scope of this essay to detail all the lessons the evidentiary theory might teach outside the blackmail context, this final part offers a very few telegraphic suggestions designed to nourish optimism that broader lessons can be drawn from the evidentiary theory. Indeed, to illustrate the breadth of its possible implications, I start, provocatively, at a very distant remove.

A. Subjectivism and Abortion.

Some people, coming from two diametrically opposed perspectives, believe that abortion raises a relatively easy moral question. The first perspective maintains that fetuses have the

¹⁵¹ Donald A. Dripps, *The Priority of Politics and Procedure over Perfectionism in Penal Law, or Blackmail in Perspective*, 3 *Crim. L. & Phil.* 247, 249 (2009).

¹⁵² Leo Katz & James Lindgren, *Instead of a Preface*, 141 *U. Pa. L. Rev.* 1565, 1565 (1993).

same moral status or worth as do post-natal human beings, and therefore that any interests the pregnant woman might have in terminating the pregnancy, short of her interest in preserving her own life, cannot possibly outweigh the fetus's interest in not being killed. Abortion, on this view, is necessarily and unequivocally wrong (except when necessary to save the life of the mother). The second perspective holds that fetuses (at least during the early stages of pregnancy) lack significant moral status and therefore that the moral reasons not to terminate a pregnancy are trivial or nonexistent. On this view, abortion is unequivocally morally permissible.

A majority of people (at least in the contemporary United States) reject both views. They believe that weighty moral interests lie on both sides of the decision to terminate a pregnancy. The fetus is a living entity that can experience pain and has the potential to become a full human being, but is not yet entitled to moral status remotely approaching that of a neonate. Pregnancy and childbirth, on the other hand, can be painful and dangerous for the mother and can massively disrupt her life plans. On this view, abortion is morally uncertain in roughly the same way as is disclosing someone's marital infidelity (though with vastly greater moral stakes on both sides): it is a morally difficult decision that resists a simple verdict regarding what morally ought to be done. The subjectivist thesis dovetails with this common view about the morality of abortion in a given case: a pregnant woman's decision to terminate her pregnancy is morally permissible if and only if she reasonably believes that her particular reasons for terminating the pregnancy outweigh the reasons against.¹⁵³ It is precisely her serious reflection and evaluation that confers permissibility upon her action.

¹⁵³ Those who believe that abortion presents an easy moral question (one way or the other) can agree with this statement, though, for them, the requirement that the actor's own beliefs be reasonable will operate wholesale to rule out, or in, a great many individual cases that others would assess retail. Persons who view fetuses as persons in a morally relevant sense will conclude that a belief in abortion's permissibility will be unreasonable (almost) always;

This account also explains the permissibility of prohibitions on abortion.¹⁵⁴ As just suggested, a woman's decision to terminate a pregnancy can come about in either of two ways, or reflect either of two moral calculi. She can conclude either (a) that, although the interests of hers that would be advanced by abortion are slight, the fetus's interest in continued existence is sligher still; or (b) that, although the fetus's interests are significant, her own interests in avoiding the pain, discomfort, and life disruptions that come with pregnancy, childbirth, and (if the child is not put up for adoption) parentage, have overriding moral weight. Similarly, people who support broad prohibitions on abortion can reach that judgment in at least two very different ways. They can conclude: (a) that, although a woman's interests in avoiding pregnancy and childbirth are frequently substantial, as are the equality interests of women as a class, the killing of a fetus is such a profound moral wrong as to render termination (almost) always unjustified; or (b) that, although fetal interests are not terribly strong, whatever impact an unwanted pregnancy has on the life of the mother and on the equality interests of women are even less substantial. On this admittedly simplified picture, we can say that a law prohibiting abortion could be understood by its drafters and proponents as either high-cost/higher-benefit or low-cost/medium-benefit.

If all this is right, then the constitutionality of abortion prohibitions might depend on whether any of the component judgments—regarding the strength or moral quality either of the fetuses' interests or of the pregnant women's—can be regarded as correct or mistaken as a matter of constitutional law. My own view (to be asserted but not defended here) is that judges in the American constitutional regime are competent to reach or endorse judgments on some of these issues but not on others. In particular, the judiciary may—in fact, must—reach a judgment

persons who view fetuses as without moral status or significance will conclude that such a belief is (almost) invariably reasonable.

¹⁵⁴ The following discussion is drawn from Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 Const. Comment. 383, 398-99 (2007).

regarding the scope and magnitude of the liberty and equality interests of pregnant women; the proper judgment for them to reach is that such interests are substantial and can be infringed only for powerful reasons. In contrast, the judiciary is not competent to conclude either that fetuses have minimal interests or that fetuses have substantial interests. This is a claim about judicial decisionmaking, not more broadly about, say, Rawlsian public reason. I do not deny that individuals may reach judgments about the interests or moral character of fetuses and act on such judgments in their capacities as voters or legislators.

It follows that a law prohibiting abortion is unconstitutional (we might say it's constitutionally unreasonable) if it derives from a belief on the part of the measure's supporters that women's interests are flimsy or insubstantial, but constitutional (constitutionally reasonable, hence permissible) if based on the belief that fetuses' interests are morally weighty. To put the point differently, the state has a compelling interest in protecting against destruction beings that it reasonably believes have a moral status equivalent to, or close to, that of a neonate. So in this unusual case, the judicial question of whether the state's interest *is* compelling is parasitic upon what the state *actually believes* about the nature of the thing that it is endeavoring to protect (given that, under existing conditions of American pluralism, no actual belief on this subject can be dismissed as constitutionally unreasonable). It is also true that the state has reasons to misrepresent, even to itself, what its animating beliefs and judgments are. So the courts ought not to simply accept without question the state's representations as to its actual beliefs, for doing so would be to substantially underprotect the liberty interests of women at stake. Instead, courts must rely on evidence—including aspects of the provision's enactment history and features of the state's corpus juris—from which they can draw epistemically responsible inferences regarding the actual beliefs and motives that animate the challenged legislation.

The subjectivist view about what it means to act permissibly within a given normative discourse, and a proper focus on evidentiary inference, thus might shed light on matters as far removed from blackmail as the moral permissibility of individual decisions to terminate a pregnancy and the constitutionality of laws that would preclude women from making that choice.

B. Evidential Facts and the Criminal Law

The evidentiary thesis recalls Hohfeld’s distinction between “operative” and “evidential” facts. According to Hohfeld, “[o]perative, constitutive, causal, or ‘dispositive’ facts are those which, under the general legal rules that are applicable, suffice to change legal relations.”¹⁵⁵ In contrast, “[a]n evidential fact is one which, on being ascertained, affords some logical basis—not conclusive—for inferring some other fact . . . either a constitutive [i.e., operative] fact or an intermediate evidential fact.”¹⁵⁶ Plainly, the blackmailer’s conditional threat is an operative fact under the positive law of blackmail. Indeed, to ask why blackmail is a crime while the act threatened is not, is really only to inquire into *why* the threat is an operative legal fact. Ordinarily, a fact is operative under the criminal law because it has pre-legal constitutive or causal significance. That the deceased was a human being is an operative fact under the law of homicide, for example, because something of independent importance turns on the fact that it was a *person* (rather than, say, a chicken or a tomato plant) that was killed. The evidentiary theory of blackmail is distinguished by the recognition that the blackmail threat is not this type of operative fact.¹⁵⁷ Fundamentally, the conditional threat is not “operative” at all, but evidential—

¹⁵⁵ Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16, 25 (1923).

¹⁵⁶ *Id.* at 27.

¹⁵⁷ At least not first and foremost. But the threat can have a dual aspect: it is evidence of the beliefs and motives the threatener would have were he to do as he threatens, and can also exacerbate or amplify the moral wrong because of the fear and anxiety it creates due to its capacity for repetition.

it “affords some logical basis—not conclusive—for inferring some other fact . . . ,” namely, that, were the threatener to carry out his threat, he would lack the beliefs about the moral balance necessary to render his action morally permissible. One upshot of the evidentiary theory, then, is a general caution to guard against confusing evidential facts for operative facts.

1. Why results matter. The debate over moral outcome luck constitutes one context in which keeping this distinction in mind could be useful. Those who believe that the fortuitous realization or non-realization of harm is irrelevant to an actor’s moral blameworthiness are often thought committed to the proposition that the criminal law should punish complete attempts and complete target offenses the same. Of course, there are various ways to avoid this conclusion.¹⁵⁸ But one of the most powerful, I think, is to recognize that the occurrence or non-occurrence of harm is often good evidence regarding the actor’s culpability with respect to the prospect of harm—a consideration that those opposed to moral outcome luck recognize as the chief determinant of blameworthiness and desert.

The evidentiary value of results is particularly strong, I believe, when an actor acts recklessly with respect to the prospect of harm. Criminal law teachers often press students on the relevance of resulting harm with hypotheticals that posit that two persons act in an identically reckless manner, except that one has the ill-fortune to cause a harm. In the real world, though, we don’t have direct access to the riskiness of an actor’s behavior. All else equal, a reckless driver courts, or is aware of, greater risk the farther he drives, the worse the road conditions, the faster his speed, the more often he darts across lanes, the larger the number of pedestrians in the vicinity, even the greater the driver’s own ability. Surely the actual realization of harm will be

¹⁵⁸ For example, the theorist could agree that stiffer punishment for offenses that realize harm serves expressive functions. If she is a side-constrained consequentialist about punishment, she can then tolerate differential punishment so long as the attempter is punished less than what is deserved.

some evidence regarding these features, much as the outcome of a sporting contest is a strong indicator of the quality of a competitor's performance.¹⁵⁹ Naturally, it will be very far from perfect evidence. In the mine run of cases, however, it is not obvious that the criminal justice system will have access to lots of better evidence of the magnitude of a reckless actor's culpability with respect to harm.

2. *Limited duties to act.* A second and less familiar context in which a presumed operative fact might have overlooked evidential significance concerns the act/omission distinction. To take a standard hypothetical: A, a child, is drowning in a pool, while B (A's father), C (the lifeguard), and D (an Olympic swimmer) all relax poolside. Assuming that all three bystanders could save A but don't, only B and C are guilty of homicide if A dies; in most jurisdictions, D goes scot free because he, alone of the three, lacks a legal duty to act. The question is why this should be.

The most common answers emphasize line-drawing difficulties and also claim that persons have no moral duty to save a stranger. Both arguments strike me as overstated. It is true that a sensible statute should limit the situations in which one has an affirmative duty to those in which the threatened harm to another is grave and the cost or risk to the agent is minimal. Though this means that the resulting law would be more standard than rule, I rather suspect that the inescapable vagueness can be kept within acceptable bounds. And while B's and C's duties to A are almost surely greater than are D's, the claim that strangers have no affirmative moral obligations to others is hard to defend.

¹⁵⁹ As one philosopher of sport observed, usually "it won't do to separate winning and losing from how well one played the game, because the outcome of the game is an especially significant indicator of how well one actually played." ROBERT L. SIMON, *FAIR PLAY: THE ETHICS OF SPORT* 36-37 (2d ed. 2004).

Another partial possible explanation emerges if we imagine what the prosecution of D would look like under a well-drafted law. Surely the state will be required to prove that D had some level of culpability with respect to A's peril—probably knowledge, but recklessness at a minimum. In seeking to discharge that burden, the prosecution would be likely to rely heavily on evidence that suggests an ordinary person would have been aware, and on proof that others were in fact aware. That might be good evidence. The problem is that if D was in fact not aware of the peril—perhaps he was deeply engrossed in a book, or was snoozing—he will find it exceedingly difficult to rebut a reasonable inference of awareness, thereby producing erroneous convictions notwithstanding the state's burden of proof. (Consider: if we accept that 38 residents of neighboring buildings were aware of Kitty Genovese's peril, how will the 39th persuade us that *he* wasn't?)

If this captures a genuine concern, then we might view the status relationships that serve as predicates for an affirmative legal duty to act as partially evidentiary, not wholly operative. The fact that B was A's parent, or that C was contractually obligated to look out for A, affords (in Hohfeld's terms) "some logical basis—not conclusive—for inferring some other fact," namely, that B or C was in fact aware of the danger to A and therefore of the need to act. That is, the status relationship reinforces the formal requirement that the state prove awareness; it is a belt-and-suspenders approach to establishing knowledge or recklessness. Accordingly, scholars and law reformers who would like to expand the scope of affirmative duties in criminal law might be well advised to identify other circumstances that would plausibly serve this same evidential function.

C. The Evidentiary Theory and Unconstitutional Conditions

One concrete example of the evidentiary theory's potential relevance, this time from outside the criminal law, is provided by the so-called unconstitutional conditions problem—that is, the question of when it should be unconstitutional for a government to condition a benefit it is not compelled to provide on the recipient's relinquishment or waiver of a constitutional right. Here are some diverse examples. A sentence of Y years for crime X would be constitutionally permissible; the state offers sentence Y-n if a defendant waives his constitutional rights to contest his guilt at trial. The Fourth Amendment is held generally to grant persons a right not to be subjected to search absent particularized suspicion; the state offers aid to families with dependent children on the condition that recipients waive their right against suspicionless searches of their homes. The Twenty-First Amendment (let us suppose) authorizes the states to set minimum legal drinking ages at their discretion; Congress offers additional federal highway funds to states that raise their minimum drinking age to 21. Consistent with the Fifth and Fourteenth Amendments, states may not effect a physical occupation of private property without just compensation; zoning boards offer landowners variances from land use restrictions if they grant a public easement over their property. The First Amendment protects citizens' right to speak on matters of public concern; the federal government offers public broadcast funds to stations that refrain from editorializing.

Despite the frequency with which the problem arises, courts have yet to provide consistent standards for evaluating when the precept that a state may not do indirectly what it is prohibited from doing directly should take priority over the competing principle that the greater power entirely to withhold the benefit entails the lesser power to grant it on condition. And

scholarly commentary on the subject, despite a vast output,¹⁶⁰ has not clarified matters. While scholars broadly agree that the conditional tender of governmental benefits should sometimes be held legitimate and sometimes unconstitutional, there is no consensus regarding whether and why any particular proposition of this form should pass muster.

The evidentiary theory of blackmail has obvious and powerful application to this puzzle.¹⁶¹ Our conception of coercion dictates that a conditional proposal by the government constitutes a constitutional wrong if what it threatens would be unconstitutional to do. Putative “offers” not to inflict criminal punishment on people if they don’t advocate communism, or not to levy a special tax on the condition that an individual not worship Baal, are therefore unconstitutionally coercive (at least pro tanto). Such proposals are not thought to raise the unconstitutional conditions problem only because, as a doctrinal matter, the problem is limited to cases in which the state threatens to withhold a “benefit,” and not being imprisoned and not being subject to extraordinary taxes, are not generally conceived of as benefits. But what is a benefit turns out to be the conclusion to an argument, not a primitive. Functionally, then, limiting the scope of the problem to cases involving threats to deny benefits is really just a way to cabin inquiry to situations in which the unconstitutionality of the act that government threatens is not patent.

¹⁶⁰ Noteworthy contributions to the literature include Sullivan, *supra* note 99; Richard A. Epstein, *The Supreme Court, 1987 Term -- Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988); Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984); William Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968); and Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935).

¹⁶¹ The account in text is much simplified. For the fuller argument, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1 (2001).

So let us focus on situations where the government threatens to perform an act that appears, on first or second glance, to be constitutionally permissible—situations that represent the constitutional analogue to moral blackmail. Here is where the subjectivist thesis applies, in a motive-centered version. It counsels that the state may not treat a rightholder less well than it otherwise would for the purpose either of punishing the rightholder for exercising her right, or of discouraging exercise of the right in the future by this rightholder or by others.¹⁶² Call it a “penalty” when a disadvantage (relative to this counterfactual baseline) is imposed for one of these proscribed purposes. The state’s purpose for carrying out the act threatened (*not* its purposes for *making* the threat)¹⁶³ is a constitutive element of that act’s being a penalty. If the denial of a benefit would, in this case, be a penalty, then it would be unconstitutional. And, per our understanding of coercion, so too would be the conditional proposal.

But would the state in fact have the proscribed purposes were it to do as it threatens? Here is where the evidentiary thesis kicks in. It predicts that the fact and content of the conditional proposal will sometimes support an inference (not, recall, a deduction) that the state would in fact act on the bad purposes in carrying out its threat. In particular, we might think that a rebuttable presumption of bad purpose arises when the putative legitimate purposes for withholding the benefit unconditionally are not the same as the apparent purposes for issuing the conditional offer.

¹⁶² For the argument that the proposition in text is entailed (or nearly so) by the very concept of a constitutional right, see *id.* at 32-36.

¹⁶³ This is an essential distinction that critics of the evidentiary analysis of the unconstitutional conditions problem frequently overlook. See, e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 *Duke L.J.* 345, 378-80 (2008) (erroneously stating that “Berman treats a federal funding condition as imposing a penalty whenever *the law* has the purpose of influencing the states’ behavior,” and bizarrely attributing to me the view that “the Constitution should prohibit states from contracting away some of their freedom of action (for a temporary period) in exchange for what they deem to be adequate consideration”) (emphasis added; internal quotation and citation omitted).

That's a compact and abstract summary of the evidentiary theory's extension to the unconstitutional conditions problem. Here are just three concrete illustrations of its application. In each case, I mean only to provide a first-pass analysis, not to deny that counter-arguments to my provisional conclusions are possible and therefore that more detailed and nuanced investigation might be required.

The offer of welfare payments conditioned on the recipient's agreement to warrantless, suspicionless searches seems not to threaten a penalty, hence not to instantiate the constitutional wrong of coercion. The reasoning is this: the state has made the constitutionally acceptable decision to limit welfare payments to one-adult households. The condition permits welfare officials to spot-check to ensure that a recipient household does not contain a second adult. If an applicant rejects the condition, the state may conclude that it lacks adequate assurance that a constitutionally legitimate eligibility condition is satisfied.

In contrast, the federal government's offer of additional highway funds conditioned on a state's enactment of a higher drinking age does threaten a penalty, hence is presumptively unconstitutional. Congress has legitimate reason for seeking to induce states to raise their drinking ages. But if a state refuses to do so, then all the federal government's legitimate reasons for building or improving roads in that state still apply, and with equal force. Thus, Congress's reason to withhold some portion of otherwise available funds must be to punish or discourage a state's decision to stand on its constitutional authority over its own drinking age. That would be a penalty (in my stipulated sense). It may not be imposed and may not be threatened.

Third and last, consider the commercial speech doctrine—a region of constitutional law not usually understood to raise the unconstitutional conditions problem. May the state prohibit

advertisement of business activities that it could ban, but has not? In *Posadas de Puerto Rico Associates v. Tourism Co.*, a divided Supreme Court upheld extensive state regulation of casino advertising, reasoning that “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.”¹⁶⁴ Then-Justice Rehnquist’s naïve suggestion that the greater always includes the lesser has attracted justifiable academic scorn. But scholars are too quick to denounce the holding. We can reformulate the advertising ban as a conditional offer of permission to operate a casino on condition that it not be advertised in ways likely to attract the local populace. We might also suppose that, in deciding to permit casino gambling, the Puerto Rico legislature was walking a tightrope: it wanted to attract tourist dollars but only if it could keep gambling by its own citizens within reasonable bounds. The legislature thought it could accomplish these goals if casinos restricted their advertising in specified ways. But if they refused to do so, then the legislature was entitled to conclude that the benefits of legalized gambling would not exceed the costs. Insofar as this really was the legislature’s reasoning, then withholding a casino license from an entity that does not agree to abide by the advertising restrictions does not impose a penalty, and the regulations—reconceived as a conditional offer—are not coercive.¹⁶⁵

CONCLUSION

Blackmail’s criminalization does not puzzle the casual observer. Not only does it bear a family resemblance to other varieties of theft the criminalization of which rarely raises eyebrows, but blackmail just smells like a nasty practice. Theorists from a wide range of disciplines,

¹⁶⁴ 478 U.S. 328, 345-46 (1986).

¹⁶⁵ A fuller examination of *Posadas* appears in Berman, *supra* note 34.

however, have long identified a puzzle—that it should ever be illegal to threaten what it is legal to do—and have labored vigorously to propose solutions.

This essay has suggested that blackmail should be disambiguated into at least two concepts. As a legal concept, blackmail is the unlawful conditional threat to do that which would be lawful if done unconditionally. Analogously, as a moral concept, blackmail is the morally wrongful conditional threat to do that which would be morally permissible if done unconditionally. Some paradigmatic instances of the crime of blackmail involve threats that are not moral blackmail. These are conditional threats to do that which would be morally wrongful, although lawful. Plausible examples include the conditional threat to out a closeted lesbian or gay man, or to reveal that somebody wets his bed or has a peculiar, though not wrongful, sexual fetish. In cases such as these, the wrongfulness of the conditional threat flows unproblematically from the wrongfulness of the act threatened. Moreover, because the wrongful threat is employed to extract money or other valuable resources from the offeree, it's easy enough (if not absolutely uncontroversial) to see why a liberal society may punish it as a form of theft. If there's a legal puzzle lurking, it's only why not to criminalize the disclosure as well. But a range of considerations, including difficulties of statutory line-drafting and free speech values, can answer that question with relative ease.

The puzzle over blackmail's criminalization is much more profound if the act threatened is neither morally impermissible nor morally obligatory, but rather, we might say, morally uncertain. The paradigmatic example is the conditional threat to disclose someone's marital infidelity to his or her spouse unless paid for silence. I have suggested that explaining the propriety of criminalizing this sort of threat requires first that we understand whether, and how or why, the conditional threat is morally wrongful though commission of the act threatened might

not be. In other words, resolution of this region of the puzzle of legal blackmail piggybacks on a solution to the puzzle of moral blackmail.

The evidentiary theory of blackmail proposes that the act threatened in cases of moral blackmail would be wrongful if the actor does not himself actually believe that commission of the act (which almost invariably will incur significant moral costs) is morally permissible under the circumstances or (possibly) if he is not actually moved by the reasons that obtain and could supply moral justification. The theory claims in addition that the very fact of the conditional proposal is often good evidence that the actor would have the wrong beliefs or motives in doing as he threatens. The two fundamental bases of the evidentiary theory, then, are, first, that an actor's beliefs about the moral permissibility of his conduct can affect its permissibility ("the subjectivist thesis"); and second, that conditional threats can constitute powerful (albeit not conclusive) circumstantial evidence regarding what beliefs the actor would in fact have were he to do as he threatens ("the evidentiary thesis"). In contexts in which the evidentiary value of the conditional proposal is sufficiently strong, the state may treat the conditional threat as wrongful with confidence sufficient to justify its criminalization. While I hope that the evidentiary account is not demonstrably false, I am certain that it is not demonstrably correct. The essay has tried to show, however, that it coheres well with intuitions about subclasses of blackmail and also that it provides fertile ground for exploring other puzzles in law and morals.