Northwestern Journal of Law & Social Policy

Volume 18
Issue 2 *Spring*

Article 6

Spring 2023

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Volume 18 (Spring 2023)
Northwestern Journal of Law and Social Policy

The Limits of Wrongfulness: What Exactly is Prohibited by Hobbs Act Extortion?

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"[Extortion and robbery] have been construed a thousand times by the courts. Everybody knows what they mean."
– Representative Samuel Hobbs, sponsor of the Hobbs Act[1]

ABSTRACT

The Hobbs Act, 18 U.S.C. § 1951, prohibits, in interstate commerce, "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear." This Note addresses what makes an act "wrongful." First, this Note reviews the academic literature on what makes extortion morally and legally wrong and the Hobbs Act's legislative history. Then, it argues that there are four distinct types of threats under the Hobbs Act: violent threats, litigation threats, reputational threats, and economic threats. Each of these threats are judged by distinct standards for wrongfulness, with two circuit splits complicating the doctrine. This Note evaluates ways that these wrongfulness standards could be unified and finds them unsatisfactory. Instead, this Note suggests that prosecutors should be required to allege specific theories of threat in their indictments as a component of procedural due process.

Keywords: Hobbs Act, extortion, wrongful, Enmons, blackmail paradox

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* The author would like to thank the many people who have contributed to this Note. In particular, he would like to acknowledge his wife, Sara, Ellen Mulaney, Rebecca Perlmutter, Mohammad Khatib, Marion Percell, James Lindgren, Zachary Clopton, Joshua Kleinfeld, Deborah Tuerkheimer, Allie Lee, Shayna Roth, Tom Butcher, and Matt Choi. The author would also like to thank his sibling, parents, grandparents, and friends for their support and encouragement.
[1] 91 CONG. REC. 11912 (1945) (statement of Rep. Samuel Hobbs).

INTRODUCTION

The Hobbs Act prohibits robbery and extortion in interstate commerce. It defines extortion as "the obtaining of property from another, with his consent, induced by [the] wrongful use of actual or threatened force, violence, or fear, or under color of official right."[2] This definition prompts a question: what makes a threat "wrongful" under the Hobbs Act? When Congress uses the word "wrongful" to establish the boundaries of criminal conduct, where do courts, prosecutors, and defendants find those boundaries? Half a century ago, the Supreme Court began the modern jurisprudence of what "wrongful" means by considering both the means the defendant uses and the ends he or she seeks.[3] In the years since, lower federal courts have developed a confused and highly context-specific jurisprudence on the meaning of "wrongful." This Note aims to provide a synthesis and clarification of the law.

Currently, courts apply one of several legal standards for wrongfulness based on the facts of each individual case. The legal standard depends on whether the extortionist threatens the victim with violence, economic harm, reputational harm, or action in litigation. Ideally, courts could develop a uniform standard to fit all circumstances, but this Note concludes that no single standard is workable. Instead, I propose a reform to mitigate the complexity and uncertainty of the current doctrine. Currently, prosecutors do not have to allege a specific theory of wrongful threat in the indictment. I argue that prosecutors should be required to do so for several reasons. First, because different theories of wrongfulness result in the application of substantively different legal standards, due process requires that defendants be notified of the theory at the indictment stage. Second, including the theory of wrongful threat in the indictment would enable grand jury approval of the theory. Third, indicting the theory promotes efficiency by enabling defense attorneys to focus on only the theories that will be alleged at trial.

This legal analysis has real-world consequences. Hobbs Act violations involving threats of violence or economic harm carry a sentencing guideline range of at least 27–33 months in prison,[4] and violations involving reputational threats carry a range of at least 4–10 months.[5] In 2021, the Department of Justice (DOJ) filed 820 cases where a Hobbs Act violation was the lead charge,[6] making it the ninth most common lead charge prosecuted

[2] 18 U.S.C. § 1951.
[3] *See* United States v. Enmons, 410 U.S. 396 (1973).
[4] U.S. SENT'G GUIDELINES MANUAL § 2B3.2, ch. 5, pt. A (U.S. SENT'G COMM'N 2021).
[5] *Id.* at §2B3.3, ch. 5, pt. A. The guidelines' range also depends on the defendant's prior criminal history.
[6] *About the Data: Understanding the Terminology That Agencies Use*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, https://tracfed-syr-edu.turing.library.northwestern.edu/help/data/dataTerminology.html (last visited Nov. 1, 2022) (DOJ data is reported by federal fiscal year, which begins October 1st of the prior calendar year. So, Fiscal Year 2021 spanned October 1, 2020 to September 30, 2021). The Assistant U.S. Attorney handling each case determines the lead charge, which is the primary basis for referral. *Id.*

by the DOJ.[7] The number of Hobbs Act prosecutions has trended up over the past several decades, from an average of around 200 per year during the George H.W. Bush administration to about 450 per year during the Bill Clinton and George W. Bush years, about 750 per year under Barack Obama, and about 950 per year under Donald Trump, though these numbers may not accurately capture the true number of Hobbs Act extortion prosecutions.[8] The hefty sentences imposed and increasing number of Hobbs Act extortion prosecutions highlight the importance of wrongfulness determinations.

Part I explores the theoretical underpinnings of the crime of extortion by reviewing the literature on the "blackmail paradox." While this Note does not attempt to resolve the paradox, it concludes that the prohibitions on extortion and blackmail are inseparable from our societal moral intuitions. Part II reviews the Hobbs Act's legislative history and concludes that the enacting Congress focused so much on reversing the Supreme Court's decision in *United States v. Local 807, International Brotherhood of Teamsters*[9] that it intentionally made the statute less clear. Part III synthesizes the current Hobbs Act doctrine, identifying four distinct types of wrongful threats that the Act prohibits. Part IV evaluates potential uniform theories of wrongfulness and finds them unpersuasive. Finally, Part V argues for the recognition of a procedural due process right to have the wrongful threat theory specified in the indictment.

The author hopes this Note will be useful to judges, prosecutors, and defense attorneys in determining whether specific defendants' conduct was "wrongful."

I. THEORETICAL BACKGROUND

We begin our exploration of what "wrongful" means by asking why extortion is illegal and how it relates to similar crimes. Criminal law scholars have thoroughly considered these questions through their discussion of the "blackmail paradox." A review of their work will show how difficult it is to logically identify wrongful conduct.

As a starting point, extortion is distinct from robbery, bribery, and coercion.[10] Under the Hobbs Act, extortion is "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of

[7] *Prosecutions for 2021*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Mar. 29, 2022), https://tracfed-syr-edu.turing.library.northwestern.edu/results/9x2062431e8b63.html (last visited Nov. 1, 2022).

[8] *Criminal Enforcement: A Unique Source of Authoritative Information about the Federal Government's Enforcement Activities*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, https://tracfed-syr-edu.turing.library.northwestern.edu/index/index.php?layer=cri (to pull up this data, select Express; then choose Lead Charge; then click Trend; then select 18 U.S.C. § 1951 as the Lead Charge; and then submit request) (last visited Nov. 1, 2022).

These numbers may be inaccurate in two ways: they are underinclusive because they only capture cases where Hobbs Act extortion was the lead charge, not an additional charge. As it pertains to wrongfulness, they are also overinclusive because they include prosecutions for extortion and the two other offenses prohibited by the Hobbs Act—robbery and extortion under color of official right—which are outside the scope of this Note. Certain extortionate acts can also be charged under 18 U.S.C. §§ 875(d) and 1952, which prohibit certain kinds of interstate travel and communication, but these too are outside the scope of this Note.

[9] United States v. Loc. 807 of Int'l Bhd. of Teamsters, 315 U.S. 521 (1942).

[10] Coercion is a lesser offense than extortion proscribed in some states. *See* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 405–06, 408 n.13 (2003).

official right."[11] The Hobbs Act distinguishes extortion and robbery by whether the victim consents to part with his or her property.[12] This can be a very fine line: if a person surrenders their wallet at gunpoint, are they a victim of robbery or extortion? In addition, robbery and extortion historically differed in the immediacy of the threatened harm.[13]

Extortion is also distinct from bribery: the extortionist threatens a victim with loss; the bribe payor offers the payee an opportunity to gain.[14] Put another way, the bribe payee accepts the bribe voluntarily, while the extortion victim gives consent only under duress.[15] Where extortion differs from coercion is that extortion requires obtaining property. While the extortionist must take property from the victim and appropriate it in some way,[16] coercion only requires using threats to restrict another's freedom of action.[17]

Blackmail is a specific type of extortion based in a threat to expose the victim's prior bad acts to criminal or reputational sanction.[18] It is also the least intuitive type of extortion to prohibit. It is easy to see how threats of violence—"pay up or I will break your legs"—or threats to damage property—"pay up or I will smash your windows"—are illegal, because they threaten to do acts that are themselves crimes. The "blackmail paradox" is that blackmail is illegal even though its constituent elements are not crimes. The paradox asks: why is it legal to ask for money and legal to share damaging information about someone, but illegal to threaten to reveal damaging information unless paid money?[19] By focusing on this difficult problem, the extensive scholarly literature on the blackmail paradox helps explain why extortion generally is illegal. Numerous scholars have posited theories explaining the paradox, yet the consensus is that it remains unresolved.[20]

In a widely cited article, Professor James Lindgren advocates a theory based on blackmail's "triangular structure": blackmail is wrongful because the blackmailer uses leverage belonging to someone else.[21] For example, blackmailing an unfaithful spouse is wrongful because the blackmailer uses as his or her bargaining chip the cheated-on partner's interest in the spouse's infidelity.[22] Lindgren's theory applies equally to non-informational threats, such as a labor leader who threatens to call a strike unless he or she receives a personal payoff.[23] There, the leverage properly belongs to the union, not the leader personally.

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[11] 18 U.S.C. § 1951.
[12] United States v. Cain, 671 F.3d 271, 283 (2d Cir. 2012); 18 U.S.C. § 1951(b).
[13] *Extortion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting James Lindgren, "Blackmail and Extortion," *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 115, 115 (Sanford H. Kadish ed., 1983)).
[14] United States v. Collins, 78 F.3d 1021, 1030 (6th Cir. 1996); United States v. Capo, 817 F.2d 947, 952–54 (2d Cir. 1987) (en banc); United States v. Villalobos, 748 F.3d 953, 958 n.1 (9th Cir. 2014) (Watford, J., concurring) (noting that an offer to provide untruthful testimony cannot be extortionate because it is an offer, not a threat).
[15] United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1971).
[16] Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404 (2003).
[17] *Id.* at 408 n.13.
[18] *Blackmail*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[19] Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 564 (Mar. 2015).
[20] *See* Peter Westen, *Why the Paradox of Blackmail Is So Hard to Resolve*, 9 OHIO ST. J. CRIM. L. 585 (2012); Stuart P. Green, *Theft by Coercion: Extortion, Blackmail, and Hard Bargaining*, 44 WASHBURN L.J. 553, 554–55 (2005).
[21] James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 672 (Apr. 1984).
[22] *Id.* at 702.
[23] *Id.* at 672, 702–03.

Several other scholars attempt to explain the paradox using the moral impact of blackmail. One scholar argues that we prohibit blackmail because, like stalking or harassment, it causes the victim extreme fear or anxiety.[24] Another scholar argues blackmail is illegal because it creates an unacceptable relationship of dominance and subordination between blackmailer and victim.[25] Others raise an evidentiary argument: blackmail is illegal because the blackmailer's threat provides clear evidence of his or her morally wrong intent.[26]

Alternatively, some scholars focus on the moral valence of blackmail as a transaction. They posit that, while disclosing damaging information can be morally right or wrong in a given situation, blackmail is wrong because the blackmailer conditions his or her moral choice on payment.[27] Others argue that the blackmailer, by leveraging a mild wrong into a bargaining advantage, commits a larger wrong.[28] Some contend that one can legitimately contract away certain moral legal rights—such as control over one's property—but not other rights that are immoral—such as the right to reveal damaging information.[29]

Other theorists justify the prohibition on blackmail with economic rationality.[30] They argue that criminalizing blackmail reflects the societal judgment that certain assets are not marketable, including knowledge of another person's secrets.[31] Alternatively, some theorists conceptualize blackmail as a kind of forbidden private civil enforcement, where the blackmailer levies a private fine against the violator of a moral or legal rule.[32] Other scholars explore the paradox through the concept of coercion.[33]

Of these theories, Lindgren's "triangular structure" theory best aligns with federal circuit case law. Yet the paradox persists, perhaps because the prohibition on blackmail

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[24] *See* Ken Levy, *The Solution to the Real Blackmail Paradox: The Common Link Between Blackmail and Other Criminal Threats*, 39 CONN. L. REV. 1051, 1052 (Feb. 2007).
[25] George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1626 (May 1993).
[26] Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 800–20 (1998).
[27] Westen, *supra* note 20, at 614–15.
[28] Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. Pa. L. Rev. 1567, 1615 (May 1993).
[29] ARTHUR L. GOODHART, *Blackmail and Consideration*, *in* ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 178–89 (1931). Similarly, Joel Feinberg argued that the blackmailer either forces the victim to buy back his moral rights—such as his right to conceal his sexual orientation—or offers to sell the victim his complicity in the victim's moral misdeeds, such as his assistance in concealing a crime. 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 238–74 (1988).
[30] Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1860 (May 1993); Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 665, 673–74 (1988); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 84–86 (1974); Lindgren, *supra* note 21, at 682 (discussing Thorne v. Motor Trade Ass'n, [1937] A.C. 797 (H.L.) (appeal taken from Eng.)).
[31] Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 204–05 (Jan. 1965).
[32] William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 42–43 (Jan. 1975).
[33] *See generally* Ram Rivlin, *Blackmail, Subjectivity, and Culpability*, 28 CAN. J. L. & JURIS. 399 (July 2015) (arguing that there is no blackmail paradox because blackmail is always coercive); Stephen R. Galoob, *Coercion, Fraud and What Is Wrong With Blackmail*, 22 LEGAL THEORY 22 (2016) (arguing that the blackmail threat and blackmail agreement are wrongful for independent reasons); Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503 (2016); Katz, *supra* note 28, at 1573–80.

originates from societal moral intuitions, which need not be as intellectually consistent as the articles of esteemed law professors. We all face unpleasant choices in life; what makes coercion criminal is the wrongful imposition of constrained choices.[34] Thus, "'[w]rongful' is a function of social fact: what kinds of demands and constraints on choice are acceptable . . . in the particular market or other context in which an allegation of extortion has been leveled."[35] As we will see below, under the Hobbs Act the social context of wrongfulness matters not just for blackmail threats but for threats of litigation and economic harm too. The Act implicitly recognizes the importance of context by leaving wrongfulness for prosecutors and judges to define in each individual case.[36]

The prohibition on extortion, much like blackmail, is difficult to define exactly. Both courts and scholars have commented on the difficulty of drawing a line between wrongful and non-wrongful conduct.[37] Some have questioned whether the uncertain meaning of "wrongful" deprives defendants of their constitutional right to fair notice that their conduct is illegal,[38] though at least one federal circuit court (the Sixth) rejects this argument.[39] Still, courts sometimes invoke the rule of lenity—the principle that unclear criminal statutes should be construed in favor of the defendant—in Hobbs Act interpretation, suggesting that wrongfulness is ambiguous and difficult to determine.[40]

II. LEGISLATIVE HISTORY

The Hobbs Act's uncertain meaning stems from how it was enacted. The Act's drafters deliberately made it broader and less clear than its predecessor statute, the Anti-Racketeering Act of 1934 (ARA),[41] to ensure the new law overturned the Supreme Court's decision in *United States v. Local 807, International Brotherhood of Teamsters.*[42] In *Local 807*, the Supreme Court held that union members who obtained payments by threatening violence against non-union truck drivers had not committed extortion under the ARA.[43] To overturn this decision, an outraged Congress decided not to amend the ARA, but to repeal and replace the law entirely to ensure that the *Local 807* precedent would not apply.[44]

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[34] Buell, *supra* note 19, at 560.
[35] *Id.* at 563.
[36] *Id.* at 561.
[37] Tracy Greer, Note, *The Hobbs Act and RICO: A Remedy for Greenmail?*, 66 TEX. L. REV. 647, 668 (Feb. 1988); Buell, *supra* note 19, at 561, 600; United States v. Albertson, 971 F. Supp. 837, 843 (D. Del. 1997), *aff'd*, 156 F.3d 1225 (3d Cir. 1998); Rennell v. Rowe, 635 F.3d 1008, 1011 (7th Cir. 2011).
[38] Buell, *supra* note 19, at 598; *Albertson*, 971 F. Supp. at 849.
[39] United States v. Coss, 677 F.3d 278, 289–90 (6th Cir. 2012).
[40] Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 408 (2003); United States v. Enmons, 410 U.S. 396, 411 (1973); United States v. Burhoe, 871 F.3d 1, 20 (1st Cir. 2017).
[41] 18 U.S.C. § 420 (1940); 18 U.S.C. § 1951. The ARA is also referred to as the Copeland Act. *See, e.g.*, 91 CONG. REC. 11912 (1945) (statement of Rep. Samuel Hobbs).
[42] United States v. Loc. 807 of Int'l Bhd. of Teamsters, 315 U.S. 521 (1942).
[43] *Id.* at 530–33.
[44] 91 CONG. REC. 11912 (1945) (statement of Rep. Samuel Hobbs) (stating of the ARA "we wiped the whole thing out and substituted a bill that cannot be misunderstood . . . [W]e decline to become involved in a mass of language which the Supreme Court in the *Local 807* case held was not sufficient to support a conviction . . . [I]f we had left in title VI or any other part of the Copeland Act with all its phraseology burdening down the Supreme Court, we would have exactly the same situation we had in the *Local 807* case"); *id.* at 11904 (statement of Rep. Clarence Hancock) (saying "we thought it better to make this bill explicit, and leave nothing to the imagination of the court"); *id.* at 11914 (statement of Rep. John Jennings).

The ARA was a more fulsome statute than the Hobbs Act. Like the Hobbs Act, the ARA prohibited extortion affecting interstate commerce and defined extortion as the "obtain[ing] of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right."[45] Unlike the Hobbs Act, however, the ARA defined "wrongful" as "in violation of the criminal laws of the United States or of any State or Territory."[46] In two places, the ARA contained protections for bona fide labor organizing activity.[47] In its anti-robbery provision, the Act excluded from its definition of covered property "the payment of wages by a bona fide employer to a bona fide employee."[48] The Act further stated:

> [N]o court of the United States shall construe or apply any of the provisions of this Act in such a manner as to impair, diminish, or in any manner affect the rights of a bona fide labor organization in lawfully carrying out the legitimate objects thereof, as such rights are expressed in the existing statutes of the United States.[49]

The Act also provided a procedural protection to potential defendants by requiring that the Attorney General sign off on all prosecutions under the Act.[50] This protection was designed to shield labor unions from overzealous, anti-labor U.S. Attorneys.[51]

These labor protections created the issue that the Supreme Court confronted in *Local 807*. Members of Teamsters Local 807 were stopping trucks carrying goods into New York City. Through threats of violence, the Teamsters demanded that non-union drivers pay them the union's day wage rate before allowing the trucks to pass.[52] Upon payment, a Teamster driver sometimes took the wheel and completed the delivery themselves, or, in other cases, the union driver pocketed the money without performing the work.[53] Twenty-six union members were indicted under the ARA, and the Court had to determine whether their actions fell under the scope of the Act's "payment of wages by a bona fide employer to a bona fide employee" exception.[54]

In essence, the issue before the Court was whether to apply this exception where the Teamsters' conduct was both racketeering[55] and bona fide labor activity—here, the maintenance of union jobs. The Court reversed the convictions, holding that the test for guilt under the ARA was not whether the non-union driver, in paying the Teamster, intended to pay for labor or for protection, but whether the Teamsters intended, in

[45] H.R. REP. NO. 79-238, at 11 (1945).
[46] *Id.* at 12.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See* 91 CONG. REC. 11919 (1945) (statement of Rep. Charles LaFollette) (noting that eliminating this provision would reduce labor protection from anti-labor U.S. Attorneys).
[52] United States v. Loc. 807 of Int'l Bhd. of Teamsters, 315 U.S. 521, 526 (1942).
[53] *Id.*
[54] *Id.* at 527.
[55] Traditionally, racketeering is a type of organized crime where the victim pays to avoid a threat of violence. *Racketeering*, BLACK'S LAW DICTIONARY (11th ed. 2019).

demanding payments, to obtain wages or protection money.[56] Whether a union member offered to work or actually did work was not determinative, but merely evidence of the defendants' intent.[57] More broadly, the Court read the ARA's purpose to be combating professional racketeers, such as Depression-era gangster John Dillinger, while leaving labor unions unaffected.[58]

In resolving this "both racketeering and labor activity" dilemma, the Court prioritized protecting labor, but Congress prioritized prohibiting extortion. Congressional debate on the Hobbs Act focused almost entirely on the facts of *Local 807*, with numerous Congresspeople railing against the Teamsters and asserting the right of producers to deliver their goods free from highway robbery.[59] Members complained that state enforcement against the Teamsters and elsewhere was inadequate and asserted that federal enforcement was necessary to remedy the problem.[60] The House rejected two amendments to reinsert explicit labor protections in the bill,[61] and the only labor protection left was a provision leaving existing labor laws unmodified by the Act.[62] Congress manifested its belief, in the words of Representative Hobbs, that "extortion is extortion, whether or not the perpetrator has a union card in his pocket."[63]

In its fixation on *Local 807* and its desire to eliminate any language with which the Court could reassert its verdict, Congress made the Hobbs Act broad and unclear. The ARA defined "wrongful" as "in violation of the criminal laws of the United States or of any State or Territory," but Congress removed the definition of "wrongful" entirely in the new Act.[64] In the labor context, Congress's directive to respect existing labor law left the rule of decision unsettled for cases where violence occurred during a bona fide strike. When the Supreme Court later faced this labor violence scenario in *United States v. Enmons*, it fractured, with four Justices writing in the plurality, Justice Blackmun concurring, and four Justices dissenting.[65]

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[56] *Teamsters*, 315 U.S. at 532–33. The Court also held that the bona fide labor exception was not restricted to defendants who were already employed by the employer, as it also encompassed union members seeking employment on a particular job. Chief Justice Stone dissented, arguing that where, as here, the employer was paying for protection, the bona fide wage exception could not apply. *Id.* at 540.

[57] *Id.* at 534.

[58] *Id.* at 528–31, 535.

[59] 91 CONG. REC. 11903 (1945) (statement of Rep. John Gwynne); *id.* at 11911 (statement of Rep. John Jennings) (distinguishing a strike against an employer from robbery of a truck-driving stranger); *id.* at 11917 (statement of Rep. L. Mendel Rivers); *id.* at 11841 (statements of Reps. Graham Barden and Edward Cox).

[60] *Id.* at 11909–10 (statement of Rep. Hatton Sumners, Judiciary Comm. Chairman); *id.* at 11842 (statement of Rep. Earl Michener); *id.* at 11904 (statement of Rep. John Gwynne); *id.* at 11912 (statement of Rep. Samuel Hobbs); *but see id.* at 11916 (statement of Rep. Luther Patrick) (arguing that the existence of state laws made the Hobbs Act unnecessary and that judges and district attorneys can be biased against labor); *id.* at 1113 (statement of Rep. Alexander Resa) (arguing against federal offenses were duplicative with state law).

[61] *Id.* at 11913, 11917, 11919. The House also rejected a proposal to instead simply define "payment of wages by a bona fide employer to a bona fide employee" in the ARA, with Rep. Gwynne expressing concern that this approach would leave in place language on which the Supreme Court based its *Local 807* holding. *Id.* at 11919–21.

[62] *Id.* at 11912 (statement of Rep. Samuel Hobbs) (noting that the bill did not encompass conduct under the Clayton Act, National Labor Relations Act, Norris-LaGuardia Act, and Railway Labor Act).

[63] *Id.*

[64] H.R. REP. NO. 79-238, at 12 (1945).

[65] United States v. Enmons, 410 U.S. 396, 411–13 (1973).

Congress likely did not comprehend how much less clear it was making the Hobbs Act by removing the definition of "wrongful." Several Members expressed confidence that everyone knew what robbery and extortion meant[66] based on an existing body of New York state law.[67] From the debate, the House seemingly understood "wrongful" to be coterminous with "unlawful."[68] By removing the definition of "wrongful," Congress intended to deny the Supreme Court ammunition to reassert its holding in *Local 807*, while assuming that "wrongful" was so universally understood so as not to require definition.[69] This might be a rare instance where legislators repealed statutory language while understanding and intending that the repealed language would remain in effect as an implied part of the statute. One potential way to clarify the Hobbs Act would be to return to the ARA approach requiring a predicate unlawful act, as Part IV discusses below.

III. CURRENT DOCTRINE

Atop this uncertain legislative foundation, courts have constructed a complex and highly context-specific Hobbs Act jurisprudence. This Part examines the origins of this jurisprudence, the analysis of wrongful means and wrongful ends, and the types of threats courts have recognized. This Part will also address two circuit splits. The first regards whether Hobbs Act liability attaches only when both the means and ends are wrongful or if either is sufficient alone. The second concerns the scope of liability for litigation threats in civil and criminal contexts.

Current doctrine recognizes four types of threats—threats of violence, litigation, reputational damage, and economic harm—each of which is discussed in turn below. Violent threats are inherently wrongful unless they are made by organized labor for legitimate labor ends.[70] Litigation threats are subject to a circuit split but can be wrongful where the threatened litigation is a sham, meaning it is objectively baseless and brought with an improper motive.[71] Reputational threats are wrongful where "[1] there is no

[66] 91 CONG. REC. 11912 (statement of Rep. Samuel Hobbs) ("[Extortion and robbery] have been construed a thousand times by the courts. Everybody knows what they mean."); *id.* at 11914 (statement of Rep. Sam Russell) ("there is no use defining [robbery and extortion] because they are so well defined that their definition is now a matter of common knowledge"); *id.* at 11900 (statement of Rep. Clarence Hancock) ("[T]he courts of the States of this country have tried thousands of cases of robbery and extortion. They know what those crimes are.").

[67] *See supra* note 66; 91 CONG. REC. 11900 (statement of Rep. Samuel Hobbs) ("[T]he definitions in this bill are copied from the New York Code substantially."). At the time, New York defined extortion as "the obtaining of property from another, with his consent, induced by wrongful use of force or fear, or under color of official right." N.Y. Penal Law § 850 (Consol. 1909). New York further defined the types of threats that constitute extortion as "1) To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or any member of his family; or, 2) To accuse him, or any relative of his or any member of his family, of any crime; or, 3) To expose, or impute to him, or any of them, any deformity or disgrace; or, 4) To expose any secret affecting him or any of them." *Id.* § 851.

[68] 89 CONG. REC. 3213 (statement of Rep. Hobbs) ("[T]his bill takes off from the springboard that the act must be unlawful to come within the purview of this bill."); 91 CONG. REC. 11910 (statement of Rep. Raymond Springer) (noting that for conviction for robbery or extortion, "there must be an unlawful act on the part of the perpetrator"); *id.* at 11901 (statement of Rep. Francis Walter) ("[T]he taking [for a conviction] must be an unlawful taking.").

[69] *See supra* note 44.

[70] *Enmons*, 410 U.S. at 399–400.

[71] United States v. Koziol, 993 F.3d 1160, 1174–76 (9th Cir. 2021).

plausible claim of right and the only leverage to force the payment of money resides in the threat, where [2] actual disclosure would be counterproductive, and where [3] compliance with the threatener's demands provides no assurance against additional demands based on renewed threats of disclosure."[72] Economic threats are wrongful where (1) the defendant seeks payment for imposed, unwanted, superfluous, and fictious services, (2) the defendant seeks a personal payoff, or (3) the extortionist lacks a lawful claim to the property, either because the victim possesses a pre-existing right to be free from an economic threat, or the extortionist wrongfully pursues the property.[73]

A. Doctrinal Origins

In 1973, the Supreme Court's *Enmons* decision created the modern Hobbs Act jurisprudence by creating a distinction between wrongful *means* and wrongful *ends*.[74] Lower courts have adopted this means-ends distinction while widely discrediting *Enmons*'s holding and reasoning and not extending its precedent beyond its facts.[75] In *Enmons*, the Government charged striking employees of the Gulf States Utilities Company with extortion for blowing up Company property to obtain a more favorable collective bargaining agreement.[76] The Court held that the term "wrongful" limits the Hobbs Act's reach only to labor violence aimed at extracting personal payoffs or payments for "imposed, unwanted, superfluous and fictious services," not labor violence aimed at negotiating legitimate collective bargaining agreements.[77] Justice Stewart's plurality opinion based this conclusion on textual analysis and legislative history.[78] Justice Blackmun concurred only on the basis of legislative history and congressional intent.[79] Four Justices dissented, arguing that by removing the labor protection provisions from the ARA, Congress intended to cover all labor activity under the Hobbs Act.[80]

The plurality's reasoning evidences its concern with the impact of its decision on national labor policy. To take *Local 807*'s facts as an example, the Teamsters' threats to out-of-town delivery drivers were important to maintain the Teamsters' "closed shop" collective bargaining agreements with New York merchants, which provided that the merchants would only use union labor.[81] Recognizing that labor disputes could turn violent, the plurality expressed concern that throwing a punch on the picket line or slashing the boss's tires could lead to a maximum twenty-year sentence and a $10,000 fine.[82] The

[72] United States v. Jackson, 180 F.3d 55, 71 (2d Cir. 1999) (numbering brackets added).
[73] Levitt v. Yelp! Inc., 765 F.3d 1123, 1133 (9th Cir. 2014).
[74] *Koziol*, 993 F.3d at 1168 (quoting *Levitt*, 765 F.3d at 1130; Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 522 (3d Cir. 1998); United States v. Sturm, 870 F.2d 769, 772 (1st Cir. 1989).
[75] United States v. Burhoe, 871 F.3d 1, 8–9 (1st Cir. 2017) (collecting cases); Rennell v. Rowe, 635 F.3d 1008, 1012 (7th Cir. 2011); United States v. Daane, 475 F.3d 1114, 1119 (9th Cir. 2007); United States v. Markle, 628 F.3d 58, 62 (2d Cir. 2010); United States v. Debs, 949 F.2d 199, 201 (6th Cir. 1991); *Sturm*, 870 F.2d at 772 (collecting cases); United States v. Zappola, 677 F.2d 264, 269 (2d Cir. 1982) (collecting cases); United States v. Porcaro, 648 F.2d 753, 760 (5th Cir. 1981) (collecting cases); United States v. Cerilli, 603 F.2d 415, 419 (3d Cir. 1979).
[76] United States v. Enmons, 410 U.S. 396, 397–98 (1973).
[77] *Id.* at 400, 404.
[78] *Id*.
[79] *Id.* at 400, 404, 412 (Blackmun, J., concurring).
[80] *Id.* at 413–14 (Douglas, J., dissenting).
[81] *See* 91 CONG. REC. 11915 (1945) (statement of Rep. Franck Havenner).
[82] *Enmons*, 410 U.S. at 410. The plurality also invoked the rule of lenity. *Id.* at 411.

plurality demanded a clearer statement from Congress establishing that it "intended to put the Federal Government in the business of policing the orderly conduct of strikes."[83] Or, to put it another way, they demanded that Congress, not themselves, reconcile the conflicting imperatives of respecting existing labor law and prosecuting extortion.[84]

Using questionable linguistic analysis, *Enmons* laid the groundwork for modern Hobbs Act jurisprudence by creating a distinction between wrongful means and wrongful ends. The Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear."[85] The plurality argued that "wrongful" modifies each of "force," "violence," and "fear," and that it would be superfluous if it referred only to wrongful means, because uses of "force" and "violence" are inherently wrongful.[86] Therefore, "wrongful" must limit the Act to wrongful means and ends, where "the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property."[87]

This reasoning has several flaws. First, contrary to the plurality's claim, "wrongful" is not redundant when it modifies fear; not all use of fear is wrongful. For example, a mortgagor who uses the mortgagee's fear of foreclosure to obtain mortgage payments does not commit extortion. Thus, "wrongful" as applied to fear is not surplusage, which undermines the premise of the plurality's reasoning.

Second, the statute's plain meaning and grammatical structure suggest that "wrongful" modifies means, but not ends. "Wrongful" most directly modifies "use," which implies means, and more specifically implies one of the enumerated means: "force," "violence," and "fear." The prepositional phrase "by wrongful use . . ." modifies the verb "induce," and inducement is inherently about means. The definition of induce—"to lead on; influence, as by argument or offer of advantage"—describes a particular means and is agnostic on ends.[88] Most importantly, "wrongful" is located in the part of the sentence that addresses means, not ends. The phrase "induced by wrongful use of actual or threatened force, violence, or fear"[89] modifies *consent*, not property, and it covers how consent is obtained. The ends element—"obtain property from another"—is set off by commas earlier in the sentence, suggesting that wrongful does not modify ends.[90] Thus, the plurality's textual analysis is far-fetched at best. Despite these flaws, the plurality's reasoning germinated the concepts of a means–ends framework and a claim of right to the property. Both concepts remain foundational to Hobbs Act analyses.

B. Means and Ends

The First and Eleventh Circuits, following *Enmons*, require both the means and the ends to be wrongful to sustain a conviction. The Ninth Circuit deviates from this approach, sustaining convictions where either the means or ends are wrongful. The Ninth Circuit's

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[83] *Id*. The plurality described this result as an "extraordinary change in federal labor law" and "an unprecedented incursion into the criminal jurisdiction of the States." *Id.*
[84] To the dissenters, Congress had already reconciled that conflict in favor of the Hobbs Act. *Id.* at 415–17.
[85] 18 U.S.C. § 1951(b)(2).
[86] *Enmons*, 410 U.S. at 399–400.
[87] *Id*.
[88] *Induce*, WEBSTERS COLLEGIATE DICTIONARY (3d ed. 1925), https://babel.hathitrust.org/cgi/pt?id=uc1.31158004773643&view=1up&seq=544&q1=induce.
[89] 18 U.S.C. § 1951(b)(2).
[90] *Id.*

innovation facilitates more logical application than the *Enmons*, First, and Eleventh Circuit position, as explained below.

United States v. Villalobos[91] illustrates the Ninth Circuit view. In *Villalobos*, the attorney for a participant in an immigration fraud scheme threatened the scheme's ringleader that his client would provide truthful, incriminating testimony against the ringleader unless the ringleader paid off the client.[92] The majority held that courts should first consider whether the threat is inherently or circumstantially wrongful.[93] If the court finds the threat wrongful, it need not consider whether the defendant had a lawful claim to the property; the wrongful threat alone is sufficient to sustain a conviction.[94] For threats of economic harm, however, the Court explained that wrongfulness is contingent on the defendant's lawful claim to the property.[95] Thus, the conviction could be sustained in the Ninth Circuit either because the means or the ends were wrongful.

Following *Enmons*, the First and Eleventh Circuits have espoused the view that the means and ends must both be wrongful.[96] The problem is that this view becomes incoherent when applied to concrete cases. The First Circuit acknowledges that when a defendant pursues wrongful ends, his or her means are inherently also wrongful.[97] Thus, the wrongful ends satisfy both sub-elements.[98] Conversely, however, a defendant could use wrongful means to pursue a legitimate end, such as collecting a debt. For example, a defendant could harass a victim in an attempt to enforce a lawful contract. This is a paradigmatic case of extortion, and one the Third Circuit held to be illegal.[99] Yet, under the First and Eleventh Circuits' interpretations, this conduct would not be illegal, because the means were wrongful but the ends were not. Given this absurdity and the enormous factual variety in extortion cases, the flexibility of the Ninth Circuit approach produces more consistent results and is clearer to apply.

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[91] United States v. Villalobos, 748 F.3d 953 (9th Cir. 2014).
[92] *Id.* at 955.
[93] *Id.* at 956. In this case, the court held that Villalobos' threat was wrongful under these circumstances. *Id.* at 957.
[94] *Id.* at 956–57.
[95] *Id.* at 957.
[96] United States v. Enmons, 410 U.S. 396, 396 (1973); United States v. Burhoe, 871 F.3d 1, 8–9 (1st Cir. 2017); United States v. Pendergraft, 297 F.3d 1198, 1205 (11th Cir. 2002); *but see* United States v. Sturm, 870 F.2d 769, 773 (1st Cir. 1989) (noting the possibility of a conviction where the defendants used wrongful means for lawful ends or lawful means for wrongful ends).
Judge Sorokin of the District of Massachusetts has provided the clearest explanation for this position. *See* United States v. Brissette, No. 16-CR-10137-LTS, 2020 WL 718294, at *38 n.27 (D. Mass. Feb. 12, 2020). Judge Sorokin's reasoning is based on *Burhoe*, 871 F.3d at 9; United States v. Brissette, 919 F.3d 670, 685 (1st Cir. 2019) (Wrongfulness "turns, at least in part, on whether it was employed to achieve a wrongful purpose."); A. Terzi Prods., Inc. v. Theatrical Protective Union, 2 F. Supp. 2d 485, 505 (S.D.N.Y. 1998) ("Thus, for union misconduct to be actionable under the Hobbs Act, . . . it had to be wrongful both in its means and in its ends."). Judge Sorokin also based his view on *Enmons*'s reasoning that "wrongful" applies to means and ends, that the rule of lenity applies in Hobbs Act cases, and that a clear statement is needed before federal laws are interpreted to supplant the criminal jurisdiction of the States. *Brissette*, 2020 WL 718294, at *38 n.27.
[97] United States v. Kattar, 840 F.2d 118, 123 (1st Cir. 1988) (quoting United States v. Clemente, 640 F.2d 1069, 1077 (2d Cir.1981)).
[98] Viacom Int'l Inc. v. Icahn, 747 F. Supp. 205, 210 (S.D.N.Y. 1990), *aff'd*, 946 F.2d 998 (2d Cir. 1991).
[99] United States v. Tobin, 155 F.3d 636, 640–41 (3d Cir. 1998) ("Tobin did not have the right to seek to enforce her alleged oral contract through a campaign of telephone terrorism.").

C. Types of Threats

Outside of the labor context, Hobbs Act cases contain four distinct types of threats, each with a different wrongfulness standard: violent threats, litigation threats, reputational threats, and threats of economic harm. Prosecutors often charge one of these specific theories of threat, though this is not universal practice.[100] Where a theory is specified, that theory controls how the jury is instructed; instructing the jury that it can convict on any other theory constructively amends the indictment in violation of the Fifth Amendment.[101] As discussed in Part V, courts ought to recognize a defendant's procedural due process right to have a theory of the threat specified in the indictment.

This Part proceeds to discuss the law regulating each type of threat.

1. Threats of Violence

Outside the labor context, the law governing violent threats is straightforward. Actual and threatened violence is inherently wrongful.[102] The federal circuit courts broadly agree that violent threats outside the labor context support a conviction without considering the defendant's claim of right to the property demanded.[103] This is notwithstanding *Enmons*, which courts typically acknowledge as controlling in the labor context before setting its conclusions aside.[104] This is a primary way courts have cabined *Enmons* to its facts.

In the labor context, courts continue to honor *Enmons*' holding that violence in pursuit of "legitimate labor ends" is not wrongful and that "legitimate labor ends" do not include imposed, unwanted, superfluous, and fictitious services or personal payoffs.[105] Legitimate labor ends include bargaining for higher wages,[106] demanding that an employer who has discriminated hire more minorities,[107] and seeking to make non-union jobs subject to collective bargaining.[108] Yet, even in labor cases, courts limit *Enmons*' scope: "Legitimate labor ends" exclude disputes between two unions[109] and the conduct of union elections.[110] Courts have also denied *Enmons*' protection where a defendant employer individually coerces agreement from union members outside the collective bargaining

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[100] *Compare, e.g.*, Indictment at 1, United States v. Williamson, 2018 WL 10612524, No. 2-18 CR 89 (N.D. Ind. Aug. 15, 2018) (charging economic harm and violent threat) *with* Indictment at 1, United States v. Nikoghosyan, No. 1:21-CR-00421 (E.D.N.Y. Aug. 12, 2021) (charging no specific type of threat).

[101] *See* United States v. Cusmano, 659 F.2d 714, 719 (6th Cir. 1981) ("[W]hen one means of extortion is charged, a conviction must rest on that charge and not another, even if it is assumed that under an indictment drawn in general terms a conviction might rest upon a showing of either form of extortion."). However, offering evidence that allows the jury to infer threats other than the one charged does not impermissibly alter the indictment. *See* United States v. Russo, 708 F.2d 209, 213–14 (6th Cir. 1983).

[102] United States v. Enmons, 410 U.S. 396, 399–400 (1973); United States v. Burhoe, 871 F.3d 1, 9 (1st Cir. 2017); United States v. White, 810 F.3d 212, 224 (4th Cir. 2016); United States v. Daane, 475 F.3d 1114, 1119–20 (9th Cir. 2007); United States v. Sturm, 870 F.2d 769, 772 (1st Cir. 1989).

[103] *Daane*, 475 F.3d at 1119–20; *White*, 810 F.3d at 224; United States v. Zappola, 677 F.2d 264, 269 (2d Cir. 1982); United States v. Castor, 937 F.2d 293, 299 (7th Cir. 1991); United States v. Kattar, 840 F.2d 118, 123 (1st Cir. 1988); United States v. Warledo, 557 F.2d 721, 729–30 (10th Cir. 1977).

[104] Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 523 (3d Cir. 1998).

[105] United States v. Mulder, 273 F.3d 91, 104 (2d Cir. 2001).

[106] *Enmons*, 410 U.S. at 397–401.

[107] United States v. Taylor, 92 F.3d 1313, 1319 (2d Cir. 1996).

[108] United States v. Burhoe, 871 F.3d 1, 16 (1st Cir. 2017).

[109] United States v. Markle, 628 F.3d 58, 62 (2d Cir. 2010).

[110] United States v. Debs, 949 F.2d 199, 201 (6th Cir. 1991).

process.[111] While *Enmons*' core holding continues to control, it is subject to limitation through the narrowing of "legitimate labor ends."

2. Litigation Threats

Litigation threats encompass both direct threats to litigate and threats that worsen the victim's legal position, such as a threat to accuse a victim of a crime or to provide or withhold evidence for or against them in an ongoing legal proceeding. When litigation threats are at issue, courts balance the Hobbs Act against the First Amendment's Petition Clause and prudential concerns. The Ninth Circuit and Eleventh Circuit differ on how to strike this balance.

In *United States v. Pendergraft*, the Eleventh Circuit held that threats to file litigation, even if made in bad faith and supported by false affidavits, are not "wrongful" within the meaning of the Hobbs Act.[112] The court reasoned that the defendant had no claim of right because he fabricated his allegations but found that his means (threatening to file a lawsuit) were not wrongful.[113] The court cited numerous civil cases holding that threats of bad-faith litigation do not establish Hobbs Act extortion.[114] These civil cases arose under the Racketeer Influenced and Corrupt Organizations Act (RICO),[115] which provides civil remedies for the victims of certain kinds of predicate criminal activity.[116] The *Pendergraft* court also expressed concern that allowing the Hobbs Act to cover civil litigation threats would discourage reliance on courts, violate the First Amendment, intimidate witness testimony, and result in collateral, retaliatory RICO claims.[117] Subsequent civil cases have reaffirmed *Pendergraft*'s position.[118]

In contrast, the Ninth Circuit addressed this issue by importing the sham litigation exception to the *Noerr-Pennington* doctrine from antitrust law.[119] This exception holds that litigation is a sham—and therefore not protected by the First Amendment—where it is objectively baseless and brought with an unlawful or improper motive.[120] In the civil context, the Ninth Circuit applied this test and held that asserting weak legal claims that fall short of a sham is not extortion for the purposes of civil RICO.[121]

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[111] United States v. Russo, 708 F.2d 209, 215 (6th Cir. 1983); United States v. Cusmano, 729 F.2d 380, 383 (6th Cir. 1984).
[112] United States v. Pendergraft, 297 F.3d 1198, 1208 (11th Cir. 2002).
[113] *Id.* at 1205–06.
[114] *Id.* at 1205.
[115] *Id.*
[116] 18 U.S.C. § 1964.
[117] *Pendergraft*, 297 F.3d at 1206–08.
[118] Raney v. Allstate Ins. Co., 370 F.3d 1086, 1088 (11th Cir. 2004) (holding that *Pendergraft* applies to both threatened and actual litigation); Deck v. Engineered Laminates, 349 F.3d 1253, 1258 (10th Cir. 2003) (applying *Pendergraft* to a threat to tie plaintiff up in expensive litigation and reiterating many of the same prudential concerns as *Pendergraft*); Town of Gulf Stream v. O'Boyle, 654 F. App'x 439, 444 (11th Cir. 2016).
[119] United States v. Koziol, 993 F.3d 1160, 1171 (9th Cir. 2021) (citing Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60–61 (1993)); Sosa v. DIRECTV, Inc., 437 F.3d 923, 932 (9th Cir. 2006).
[120] *Sosa*, 437 F.3d at 938. "Unlawful" and "improper" motives are used interchangeably. *See Koziol*, 993 F.3d at 1171.
[121] *Sosa*, 437 F.3d at 939–40.

In a criminal case, *United States v. Koziol*, the Ninth Circuit criticized *Pendergraft* and held that threats of sham litigation are criminally wrongful.[122] Defendant Benjamin Koziol fabricated a sexual harassment allegation against a prominent entertainer and repeatedly sent the entertainer emails threatening a lawsuit and demanding a settlement.[123] Critically, Koziol never actually filed a complaint.[124] The court held that, because of his fabricated claims, Koziol had no lawful claim to a settlement and so his actions were wrongful, without reaching the wrongfulness of his means.[125] Koziol's failure to file the lawsuit was incriminating because it showed he "sought to enforce his claim through the *threat* of litigation rather than through actual litigation, and therefore sought to achieve his aims through the litigation *process* rather than through the *result* of that process."[126] Koziol's conduct thus fell within the sham exception to *Noerr*.[127]

Koziol distinguished *Pendergraft* first by noting that private litigants' civil RICO claims differ from prosecutions because a prosecutor's duty to seek justice ought to prevent them from bringing frivolous cases.[128] The court dismissed *Pendergraft's* prudential concerns about the impact on civil litigation as inapposite and distinguished bad-faith conduct in ongoing civil litigation from sham litigation threats.[129] Finally, the *Koziol* court cited precedents upholding convictions for sham litigation threats.[130]

Most precedent supports *Pendergraft*'s position that extortion claims based on bad-faith litigation do not satisfy the predicate requirements of civil RICO.[131] This is sensible because RICO requires that the predicate racketeering activity be related and continuing and proximately cause the plaintiff's injury.[132] Practically, a litigant would have to undertake a concerted campaign of litigious harassment to satisfy these requirements, which ameliorates *Pendergraft*'s prudential concerns. Further, Congress's intent in enacting RICO was to address ongoing criminal conspiracies, not to address abuses of civil litigation.[133]

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[122] *Koziol*, 993 F.3d at 1174–76.
[123] *Id.* at 1165–67.
[124] *Id.*
[125] *Id.* at 1170.
[126] *Id.* at 1172 (emphasis in original) (internal quotations omitted). This is a classic application of the sham exception. *See* City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380 (1991) (noting "the 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon") (emphasis in original).
[127] *Koziol*, 993 F.3d at 1172.
[128] *Id.* at 1174 (citing RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 346 (2016)).
[129] *Id.* at 1175.
[130] *Id.* at 1175–76. The court cited United States v. Cuya, 724 F. App'x 720, 723–24 (11th Cir. 2018) (holding that a scheme to defraud victims using threats that they would get in legal trouble violated the Hobbs Act) and United States v. Tobin, 155 F.3d 636, 640 (3d Cir. 1998) (affirming extortion conviction based, in part, on threatening to file a false sexual harassment lawsuit); United States v. Sturm, 870 F.2d 769, 774 (1st Cir. 1989) (noting that a party could be convicted of extortion for threatening litigation only if the party knew they had no right to the property).
[131] United States v. Pendergraft, 297 F.3d 1198, 1205 (11th Cir. 2002) (collecting cases); Deck v. Engineered Laminates, 349 F.3d 1253, 1258 (10th Cir. 2003) (collecting cases); Joe Schroeder Legacy, LLC v. Serv. 247 of Ill., Inc., No. 20 C 3201, 2022 WL 408272, at *6 (N.D. Ill. Feb. 10, 2022).
[132] Vemco, Inc. v. Camardella, 23 F.3d 129, 133 (6th Cir. 1994); Sosa v. DIRECTV, Inc., 437 F.3d 923, 932, 941 (9th Cir. 2006).
[133] *Vemco*, 23 F.3d at 134.

In the criminal context, however, *Pendergraft*'s categorical bar to criminal liability is misguided. First, as even the *Pendergraft* court admitted, fabricating evidence is "certainly not 'rightful.'"[134] The plain meaning of "wrongful use of fear" in the Hobbs Act—whether "wrongful" means unlawful, morally blameworthy, or socially undesirable—includes fear produced with fabricated evidence. Further, *Koziol* distinguished the danger of civil litigants using extortion to collaterally attack each other from criminal charges, which are limited by prosecutorial discretion.[135] Any collateral civil RICO claim must satisfy RICO's other elements—particularly the requirements that (1) there be at least two instances of racketeering activity as defined by the statute and (2) these instances proximately cause plaintiff's injury.[136] A retaliatory bad-faith litigation would struggle to meet these requirements, making these collateral attacks unlikely.

Pendergraft's position that we cannot prosecute clearly wrongful conduct to protect other constitutional values overstates the threat to those values. Surely, many civil parties send each other questionable demand letters, and these letters generally are not and should not be punished as extortion. Demand letters, while not directly protected by the First Amendment, are important to establish the "breathing space" necessary for parties to exercise their Petition Clause rights and are an important procedural tool in resolving disputes.[137] Respecting these protections does not require a categorical bar on criminal liability. Prosecutorial judgment can secure constitutional rights while selecting only egregious cases for prosecution, such as claims based on fabricated evidence. Categorical protection is not appropriate for defendants such as Koziol, who was far closer to a blackmailer than a serious litigant.

3. Reputational Threats

The Hobbs Act encompasses extortion by reputational threat.[138] Reputational threats are not inherently wrongful but can be deemed wrongful under some circumstances.[139] For example, if an airline were to cancel your flight at the last minute, you could criticize the airline on social media and demand a refund without committing extortion. However, a reputational allegation's truth alone is not a defense to extortion.[140] And although reputational threats may cause emotional distress, emotional harm alone is not a sufficient basis for extortion liability.[141]

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[134] *Pendergraft*, 297 F.3d at 1207.
[135] *Koziol*, 993 F.3d at 1174.
[136] 18 U.S.C. §§ 1961, 1962, 1964. *See* Brown v. Cassens Transp. Co., 546 F.3d 347 (6th Cir. 2008) for an example of the elements required for a civil RICO claim.
[137] *Sosa*, 437 F.3d at 933–36.
[138] *Koziol*, 993 F.3d at 1181–82 (rejecting an argument that the Hobbs Act does not cover reputational threats); United States v. Brank, 724 F. App'x 527, 529 (9th Cir. 2018) (citing United States v. Nardello, 393 U.S. 286, 296 (1969); *but see Brank*, 724 F. App'x at 530–31 (Reinhardt, J., dissenting) (arguing the Hobbs Act does not encompass reputational threats).
[139] United States v. Jackson, 180 F.3d 55, 70 (2d Cir. 1999); United States v. Coss, 677 F.3d 278, 284 (6th Cir. 2012) (adopting *Jackson*'s reasoning). Although *Jackson* and *Coss* decided the meaning of 18 U.S.C. § 875(d), the *Jackson* court interpreted extortion in that statute to have the same meaning as in the Hobbs Act. *Jackson*, 180 F.3d at 70. For further support of the interchangeability of extortion in the two statutes, *see* United States v. White, 810 F.3d 212, 224 (4th Cir. 2016).
[140] United States v. Von der Linden, 561 F.2d 1340, 1341 (9th Cir. 1977); *Jackson*, 180 F.3d at 66.
[141] Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393, 407 (6th Cir. 2012).

The leading case in this area is *United States v. Jackson*.[142] Defendant Autumn Jackson was allegedly the non-marital daughter of actor Bill Cosby.[143] For 20 years, Jackson's mother received payments from Cosby, and Cosby paid for Jackson's college education.[144] When she was 22, Jackson demanded $40 million from Cosby and threatened to sell the story of his alleged paternity to a tabloid magazine if he did not pay.[145] The *Jackson* court found this threat to be wrongful and held that a reputational threat is wrongful where "[1] there is no plausible claim of right and the only leverage to force the payment of money resides in the threat, where [2] actual disclosure would be counterproductive, and where [3] compliance with the threatener's demands provides no assurance against additional demands based on renewed threats of disclosure."[146] The court illustrated this test by describing threats it considered not to be wrongful, such as a private club posting a list of members behind on dues or a customer threatening to contact a consumer protection agency after purchasing a defective product.[147] In these hypotheticals, (1) there is a nexus between the rightful claim and the property sought, (2) disclosure aids payment, and (3) payment satisfies the claim and therefore closes the matter.[148] In contrast, Jackson's demand for $40 million exceeded any rightful claim based on paternal obligations and was instead a wrongful claim about Cosby's sexual indiscretion.[149]

The *Jackson* test aligns with *Koziol*'s process–outcome distinction. Under both tests, a doctor who is unable to collect a patient's legitimate debt and threatens to denounce the patient's non-payment would not commit extortion. Under *Jackson*, this is because disclosure aids final resolution of a rightful, related claim. Under *Koziol*, it is because the doctor is seeking to use the outcome of disclosure—the patient being known in the community as financially unreliable—rather than the process of disclosure, hurting the patient's reputation generally. In contrast, if the doctor threatened to publish the patient's medical information to compel payment, such a threat would be wrongful under both tests. Under *Jackson*, this threat would be wrongful because it relies on an unrelated disclosure and the leverage evaporates once the disclosure is made. Under *Koziol*, it would be wrongful because it seeks to use the process of disclosure (infringing on patient's medical privacy) rather than the outcome (patient's medical records being public).

4. Threats of Economic Harm

The fundamental challenge for threats of economic harm is to distinguish between extortion and permissible hard bargaining. As a starting point, numerous courts have observed that the Hobbs Act extends to threats of economic harm,[150] and that threatening

[142] *Jackson*, 180 F.3d at 55. For the relevance of *Jackson*, *see* United States v. Avenatti, No. S119CR373PGG, 2020 WL 70951, at *5 (S.D.N.Y. Jan. 6, 2020).
[143] *Jackson*, 180 F.3d at 69.
[144] *Id.* at 59.
[145] *Id.* at 62–64.
[146] *Id.* at 71 (numbering brackets added).
[147] *Id.* at 70–71.
[148] *Id.*
[149] *Id.* at 71.
[150] United States v. Burhoe, 871 F.3d 1, 9 (1st Cir. 2017); United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't, AFL-CIO, 770 F.3d 834, 838 (9th Cir. 2014); United States v. Collins, 78 F.3d 1021, 1030 (6th Cir. 1996); United States v. Albertson, 971 F. Supp. 837, 841 (D. Del. 1997), *aff'd*, 156 F.3d 1225 (3d Cir. 1998).

economic harm is not inherently wrongful.[151] This is because, as the Third Circuit put it, "the fear of economic loss is a driving force of our economy that plays an important role in many legitimate business transactions."[152] Just as the *Enmons* Court had to accommodate the Hobbs Act to existing labor law, in the economic realm courts accommodate the Act to accepted commercial practices. A foundational case in this area is *Viacom v. Icahn.*[153] Engaging in a practice known as "greenmail," investor Carl Icahn purchased a 17% stake in the media company Viacom and threatened to purchase enough stock to take over the company unless Viacom bought his shares at a markup.[154] Viacom purchased Icahn's shares at a premium in exchange for Icahn's agreement not to attempt a takeover for eleven years.[155] Viacom then filed a civil RICO claim against Icahn predicated on Hobbs Act extortion.[156]

After holding that greenmail is not an inherently wrongful means, the *Viacom* court devised a framework to determine whether Icahn sought wrongful ends.[157] Under the *Viacom* framework, the first question is whether the victim receives something of objective value[158] as consideration for his or her property; if not, the conduct is wrongful under the "imposed, unwanted, superfluous and fictious services" category in *Enmons*.[159] If the consideration has objective value, the conduct is wrongful only if the defendant has no lawful claim to the property he or she sought to obtain. [160] A defendant's assertion that they have a lawful claim to the property is often called the claim of right defense.[161]

What constitutes a lawful claim to property is "by no means self evident."[162] In business relationships, a party may lawfully attempt to extract more economic value from the other side, and many hardball negotiating tactics are not wrongful.[163] For example, a landlord may threaten to raise a tenant's rent if the tenant does not immediately renew their lease.[164] Against this background rule that pursuing an economic advantage is acceptable, courts attempt to determine which tactics cross the line into criminal liability.

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[151] United States v. Brissette, 919 F.3d 670, 685 (1st Cir. 2019); *Carpenters*, 770 F.3d at 838; United States v. Vigil, 523 F.3d 1258, 1262–63 (10th Cir. 2008); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 523 (3d Cir. 1998); *Jackson*, 180 F.3d at 70 (quoting United States v. Clemente, 640 F.2d 1069, 1077 (2d Cir. 1981)); United States v. Sturm, 870 F.2d 769, 772–73 (1st Cir. 1989).

[152] *Brokerage Concepts*, 140 F.3d at 523.

[153] Viacom Int'l Inc. v. Icahn, 747 F. Supp. 205 (S.D.N.Y. 1990), *aff'd*, 946 F.2d 998 (2d Cir. 1991). For the relevance of *Viacom*, *see Brokerage Concepts*, 140 F.3d at 524 ("drawing instruction" from *Viacom*).

[154] *Viacom*, 747 F. Supp. at 207, 211. The practice is called "greenmail" because, while a blackmailer threatens the victim with damaging information, a greenmailer threatens the victim with a flood of cash.

[155] *Id.* at 208.

[156] *Id.* at 209.

[157] *Id.* at 211–13.

[158] The consideration must be objectively, not subjectively, of value to the victim. *Carpenters*, 770 F.3d at 839; *see also Viacom*, 747 F. Supp. at 212 n.7 (citing Deem v. Lockheed Corp., 749 F. Supp. 1230 (S.D.N.Y. 1989)).

[159] *Viacom*, 747 F. Supp. at 212. Here, Viacom received something of objective value, Icahn's agreement not to try to acquire the company.

[160] *Id.* at 213.

[161] United States v. Daane, 475 F.3d 1114, 1119–20 (9th Cir. 2007) (referring to the claim of right defense); Rennell v. Rowe, 635 F.3d 1008, 1014 (7th Cir. 2011) (same); United States v. Sturm, 870 F.2d 769, 773 (1st Cir. 1989) (same); *but see Carpenters*, 770 F.3d at 844 (arguing claim of right is not an affirmative defense, but an element of extortion).

[162] Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 524 (3d Cir. 1998).

[163] *Id.* at 501, 526.

[164] Rothman v. Vedder Park Mgmt., 912 F.2d 315, 318 (9th Cir. 1990).

When an extortionist makes an economic threat, they have a lawful claim to the property unless (1) the victim has an affirmative right to be free from economic pressure or (2) the extortionist "had no right to seek" the property.[165] This doctrine is an extension of the "superfluous and fictitious services" principle: when the consideration an extortionist offers is to respect a right the victim already holds, the extortionist exchanges something for nothing.[166]

How a victim obtains a right to freedom from an economic threat is not entirely clear, but courts identify such a right in several circumstances. First, a victim has a right to be free from an economic threat if they have a pre-existing contractual right to the consideration offered.[167] Second, an individual creates a right to be free from threat by winning competition on a fair playing field, such as by being the best qualified bidder on a city contract.[168] Individuals also possess commercial rights, including rights to solicit business, exercise control over business property, and choose with whom to do business.[169] Employees possess a right to continue an employment relationship for as long as they and their employer both desire the relationship.[170] In addition, to satisfy the "obtain property" element of the Hobbs Act, a defendant must both deprive the victim of an economic right and acquire the right for themselves in some way.[171] In most commercial contexts, the defendant's profit motive satisfies this requirement, such as when a company seeks to prevent a competitor from soliciting customers so that it can maintain its business without competition.[172]

A defendant also lacks a claim of right when he or she wrongfully pursues property. This includes where a defendant imposes unwanted, superfluous, and fictitious services or seeks a personal payoff.[173] This also includes where the defendant's claim is based on false facts,[174] an unenforceable contract,[175] or a contract term the defendant had no legal authority to demand.[176]

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[165] Levitt v. Yelp! Inc., 765 F.3d 1123, 1133 (9th Cir. 2014); *Viacom*, 747 F. Supp. at 213. According to one court, the defendant must also know that he or she is not legally entitled to the property. *Sturm*, 870 F.2d at 774.

[166] *Viacom*, 747 F. Supp. at 213.

[167] *See Sturm*, 870 F.2d at 773; United States v. Cusmano, 729 F.2d 380, 382–83 (6th Cir. 1984); United States v. Russo, 708 F.2d 209, 215 (6th Cir. 1983).

[168] United States v. Addonizio, 451 F.2d 49, 73 (3d Cir. 1971).

[169] United States v. Gotti, 459 F.3d 296, 321, 327 (2d Cir. 2006); United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980).

[170] *Gotti*, 459 F.3d at 326.

[171] Sekhar v. United States, 570 U.S. 729, 734 (2013) (quoting Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404 (2003)); *Gotti*, 459 F.3d at 323.

[172] *Gotti*, 459 F.3d at 324–25.

[173] United States v. Enmons, 410 U.S. 396, 400 (1973); Viacom Int'l Inc. v. Icahn, 747 F. Supp. 205, 213 (S.D.N.Y. 1990), *aff'd*, 946 F.2d 998 (2d Cir. 1991); United States v. Vigil, 523 F.3d 1258, 1265 (10th Cir. 2008); United States v. Clemente, 640 F.2d 1069, 1078 (2d Cir. 1981). A personal payoff occurs when defendants negotiate for payment directly to themselves, not to the economic entity they represent in the negotiations. *See* United States v. Knotek, 925 F.3d 1118, 1129–31 (9th Cir. 2019).

[174] United States v. Pendergraft, 297 F.3d 1198, 1206 (11th Cir. 2002).

[175] United States v. Kattar, 840 F.2d 118, 124 (1st Cir. 1988) (holding there was no claim of right based in a contract to provide false, defamatory information).

[176] *Vigil*, 523 F.3d at 1265 (defendant, the New Mexico State Treasurer, was not entitled to direct the disposition of proceeds from a contract with the state).

Conversely, there is no extortion where the defendant compels an exchange of property rights and the victim has no pre-existing right to be free from an economic threat.[177] For example, a business does not possess a right to have positive reviews displayed on the consumer review website Yelp. Thus, there was no extortion where plaintiffs alleged that Yelp conditioned display of positive reviews on purchasing advertisements from Yelp.[178] Or, returning to *Viacom*, Icahn's threat was not wrongful because he exchanged a valuable promise not to attempt a takeover for eleven years, and Viacom had no right to pursue its business free from a takeover attempt.[179] Without more, courts will not find extortion in a commercial relationship where two parties have exchanged property, even if one side strong-arms the other.

Economic threat cases have also required courts to distinguish between bribery—which is not covered by the Hobbs Act—and extortion, which is. Courts have based this distinction on whether the victim pays for an opportunity to compete for an economic benefit on a level playing field (extortion) or whether the victim pays for special economic treatment (bribery).[180] For example, a government procurement officer who demands a personal payment to even consider a bid commits extortion, but if she demands a payment in exchange for awarding the contract, that is bribery.

This extortion–bribery distinction can become murky for legitimate business referral arrangements. In these cases, someone may lawfully sell influence over the economic actions of others but may not do so for a corrupt or unlawful purpose, such as a personal payoff.[181] Relatedly, Judge Posner mused that which party initiates a transaction might distinguish extortion from conduct akin to bribery.[182] Where a newspaper editor published critical articles about a community leader and solicited money from the leader to stop publishing the articles, the editor committed extortion.[183] On the other hand, if the leader sought to pay the editor to stop the criticism, the editor, by accepting, would have "violat[ed] journalistic ethics" in conduct akin to bribery, but not committed extortion.[184]

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[177] *See* Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 501, 525–26 (3d Cir. 1998) (holding that it was not extortion for a health maintenance organization to condition acceptance of a pharmacy into its network on the pharmacy doing business with the organization's subsidiary because pharmacy had no right to access the network); Rennell v. Rowe, 635 F.3d 1008, 1012–13 (7th Cir. 2011) (transaction was not extortionate where defendant's threat to terminate a joint venture was within his contractual rights); George Lussier Enters., Inc. v. Subaru of New Eng., Inc., 393 F.3d 36, 51 (1st Cir. 2004) ("[Distributor's] conditioning of access to cars to which dealers had no pre-existing entitlement represents lawful hard-bargaining, not unlawful extortion."); Rothman v. Vedder Park Mgmt., 912 F.2d 315, 318 (9th Cir. 1990).

[178] Levitt v. Yelp! Inc., 765 F.3d 1123, 1133 (9th Cir. 2014).

[179] Viacom Int'l Inc. v. Icahn, 747 F. Supp. 205, 213 (S.D.N.Y. 1990), *aff'd*, 946 F.2d 998 (2d Cir. 1991).

[180] United States v. Albertson, 971 F. Supp. 837, 845–46 (D. Del. 1997), *aff'd*, 156 F.3d 1225 (3d Cir. 1998); United States v. Addonizio, 451 F.2d 49, 72 (3d Cir. 1971); United States v. Garcia, 907 F.2d 380, 383–84 (2d Cir. 1990) (rejected on other grounds by Griffin v. United States, 502 U.S. 46, 57 n.2 (1991)); *see* United States v. Rivera Rangel, 396 F.3d 476, 483–84 (1st Cir. 2005) (comparing United States v. Collins, 78 F.3d 1021, 1030 (6th Cir. 1996), which upheld a conviction based on the fear of losing a level playing field, with United States v. Capo, 817 F.2d 947, 952–54 (2d Cir. 1987) (en banc), which reversed a conviction where supposed "victims" willingly paid bribes for jobs).

[181] United States v. Clemente, 640 F.2d 1069, 1078 (2d Cir. 1981).

[182] United States v. Castillo, 965 F.2d 238, 241 (7th Cir. 1992).

[183] *Id.*

[184] *Id.*

This consideration notwithstanding, courts generally stick to the undue benefit–level playing field test, which is often easy to apply in practice.

In summary, threats of economic harm in the business context are frequently not deemed wrongful. But these threats can be wrongful where the defendant seeks payment for a wrongful purpose—for imposed, unwanted, superfluous, and fictitious services, a personal payoff, or some other wrongful purpose—or where the victim possesses a pre-existing right to be free from a threat of economic harm.

This standard might not align with our moral intuitions. Consider, as a colorful example, the case of the ancient Roman statesman Marcus Licinius Crassus. Ancient Rome did not have a public fire department, so the enterprising Crassus created a private fire company. He deployed the company to put out fires, but only after the building owner sold him the property at a cut-rate price.[185] As coercive and morally reprehensible as this is, Crassus would not have committed Hobbs Act extortion.[186] He took advantage of the victim's fear of their home and belongings burning, but he offered the victim valuable firefighting services, and the homeowner had no pre-existing right to a fair price for firefighting. This example highlights the difficulty of squaring moral intuitions about coercion with the doctrinal demands of prosecuting extortion based on economic threat.

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This Part has shown how *Enmons* spawned four distinct standards for wrongfulness based on four types of threats. These standards exist along a spectrum of lenience roughly corresponding to societal moral standards. Courts are the least tolerant of violent threats, moderately tolerant of litigation and reputational threats, and most forgiving of economic threats. With scarce direction from Congress, courts have balanced their interpretations against competing legal principles and their perceptions of common sense.

IV. TOWARDS A CLEARER HOBBS ACT JURISPRUDENCE

Given the many standards at play under the Hobbs Act, a uniform test for wrongfulness would clarify the law. This Note examines three of the most promising universal tests but finds each unsatisfactory.

One possibility would be to return to the ARA approach of defining "wrongful" as "unlawful," making the Hobbs Act require a predicate offense like RICO does. With this approach, the Hobbs Act would perform a mostly jurisdictional function, enabling federal enforcement of state anti-extortion law. This option has been endorsed by one scholar[187] and is consistent with the comments of some Members of the enacting Congress.[188] However, this approach is unworkable because of 18 U.S.C. § 875, which criminalizes various kinds of inter-state communications. Specifically, § 875(d) provides:

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[185] Apple Podcasts, *035 – Crassus and Pompey*, HISTORY OF ROME, at 6:45 (Feb. 27, 2010), https://podcasts.apple.com/us/podcast/035-crassus-and-pompey/id261654474?i=1000343455211.

[186] Like Yelp, Crassus created an opportunity for the victim—whether it be a firefighting company or a platform for restaurant reviews—and so he did not commit extortion. *See* Levitt v. Yelp! Inc., 765 F.3d 1123, 1133 (9th Cir. 2014).

[187] Green, *supra* note 20, at 554–55.

[188] United States v. Loc. 807 of Int'l Bhd. of Teamsters, 315 U.S. 521, 527 (1942).

> Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

This prohibition encompasses almost all existing Hobbs Act extortion liability and contains no wrongfulness requirement at all. If "wrongful" under the Hobbs Act means illegal under § 875(d), courts would either have to read § 875(d) literally and criminalize *all* threats, even the mortgagor who threatens to foreclose on the delinquent homeowner, or else read an implicit wrongfulness requirement into the statute. Any implicit wrongfulness requirement would raise the same questions of how to define wrongfulness that occupy this Note. For this reason, among others,[189] defining "wrongful" as unlawful is unworkable.

Another approach would be to apply the reasoning of *Koziol* and *Jackson* that a threat is wrongful when carrying out the threat would eliminate its leverage. This has some appeal in reputational and litigation contexts but falls apart in violence and economic contexts. Following through on a violent threat does not eliminate the threat's leverage, because the extortionist may commit additional violence in the future. Carrying out violence demonstrates that the threat is credible, which may increase, rather than decrease, the victim's fear of future violence. In the economic context, consider a professional baseball team which threatens to trade a player unless he signs a favorable contract extension: if the team carries out its threat to trade him, it eliminates its leverage, but such a threat is within the team's rights and is not wrongful.[190] For these reasons, this theory too, is unworkable.

A third option is Lindgren's "triangular structure" test, which assesses whether the extortionist bargains with someone else's leverage. Here, the problem is overinclusion. Consider the case of Kenneth Brissette, a City of Boston staffer who was indicted for extortion because he conditioned city permits for a music festival on the festival organizers hiring union labor.[191] In a lengthy order, the district court dismissed the indictment as a matter of law, holding that on several grounds the conduct was not wrongful.[192] But, under Lindgren's test, the employee used the City's permitting authority as leverage to demand unrelated concessions and therefore committed extortion. Or, consider the neighborhood activist who offered to end his public opposition to a development project in exchange for a $20,000 sponsorship for his semi-pro football team.[193] He bargained with the zoning board's leverage to approve or disapprove the project for his personal benefit.[194] This too was held not to be wrongful under *Viacom*'s economic threat framework because the developer had no right to be free from community opposition, and by offering to drop his

[189] If "wrongful" were held to incorporate state law, as the ARA once did, such a ruling could produce inconsistent federal criminal enforcement across state lines.
[190] Telephone Interview with James Lindgren, Professor of L., Nw. U. Pritzker Sch. of L. (Mar. 15, 2022).
[191] United States v. Brissette, No. 16-CR-10137-LTS, 2020 WL 718294, at *2–3 (D. Mass. Feb. 12, 2020).
[192] *Id.* at *14; s*ee also* United States v. Brissette, 919 F.3d 670, 685 (1st Cir. 2019) (not reaching the issue, but nonetheless expressing skepticism that Brissette's conduct was wrongful).
[193] United States v. Albertson, 971 F. Supp. 837, 844 (D. Del. 1997), *aff'd*, 156 F.3d 1225 (3d Cir. 1998).
[194] *Id.*

opposition, the activist exchanged something of value.[195] Lindgren's test, despite its appeal, is overinclusive of what courts will find to be punishable under the Hobbs Act. As these example show, Lindgren's test may over-criminalize public officials, constrain their discretion too tightly, and cause them to fear prosecution for the ordinary conduct of their jobs.

No unifying test, at least that I can conceive, adequately identifies wrongful behavior in all cases. Instead, we must live in the second-best world of different legal standards for different circumstances. This necessarily means, however, that defendants face varying legal standards depending on the facts of the charged offense.

V. THE DUE PROCESS RIGHT TO KNOW THE THEORIES OF WRONGFULNESS

This Note proposes that prosecutors should be required to charge specific theories of threat in their indictments. Legally, the principles of fair notice and due process require this reform and, practically, it would increase fairness in Hobbs Act prosecutions.

The Fifth Amendment protects a defendant's right to a grand jury indictment for serious crimes.[196] The Sixth Amendment adds that defendants have the right "be informed of the nature and cause of the accusation" against them.[197] The Supreme Court requires that an indictment "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend."[198] The indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements" necessary to the charge.[199] This Note shows how the standard for wrongfulness varies substantially based on the type of threat. Any indictment that does not specify the theory of the threat contains "uncertainty or ambiguity."[200] Although the nature of the threat is technically a component of wrongfulness,[201] not its own element, the variety of legal standards at play justifies greater specificity so that a defendant and his or her attorney may adequately prepare for the legal standards they will face at trial.

The Fifth Amendment also prohibits trying a defendant while adding or subtracting facts from those on which the grand jury indicted.[202] In Hobbs Act cases, altering the theory of threat could involve adding or subtracting facts, or both. Still, the Fifth Amendment principle applies: the indictment at trial must be the same as one approved by the grand jury.[203] A few cases also hold that, where courts modified the interpretation of statutory elements, as they have with the Hobbs Act, the prosecutor must plead the indictment as the statute has been interpreted.[204] It may technically suffice for the grand jury to simply find

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[195] *Id.* at 845.
[196] U.S. CONST. amend. V.
[197] U.S. CONST. amend. VI.
[198] United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007) (quoting Hamling v. United States, 418 U.S. 87, 117, (1974)).
[199] *Hamling*, 418 U.S. at 117.
[200] *Id.*
[201] *See id.* at 119 (noting that "component parts" of a legal term of art, such as in *Hamling*, the term obscenity, need not be spelled out in an indictment).
[202] Stirone v. United States, 361 U.S. 212, 216–17 (1960).
[203] *Id.*
[204] *See* United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999) (dismissing indictment in Hobbs Act extortion case because indictment failed to charge implied mens rea element); United States v. Keith, 605

the defendant's conduct wrongful, but, again, the variety of legal standards involved in determining wrongfulness means that the law should require the grand jury to approve each specific theory.

On a practical level, recognizing that a Hobbs Act defendant has the right to indictment upon specific theories of threat would increase fairness and efficiency for defendants and pose a minimal burden on prosecutors. At the time of the indictment, the prosecution has a significant head start over the defense: the prosecution has already had ample opportunity to research the law, investigate the facts, execute search warrants, and plan its case.[205] Meanwhile, the defense has limited time and resources to catch up.[206] Providing clarity on the specific theories of threat would enable defense attorneys to more efficiently focus their time and resources. Further, tying the prosecution to the theories it advanced in the indictment would mean its argument on each theory must be robust enough to pass the grand jury's scrutiny.[207] This would deter prosecutors from taking indefensible positions and restrict them from moving the goalposts throughout litigation. Practically, this reform's aim would be to streamline criminal prosecution and defense.

Requiring prosecutors to specify their theory or theories of the threat would only be a marginal burden. Prosecutors typically engage in substantial fact and legal preparation before filing an indictment and have likely already considered their allegation of a wrongful threat, at least implicitly. My proposed requirement thus imposes little additional work before an indictment is ready. Further, prosecutors already plead either the Hobbs Act's "wrongful force, violence, or fear" prong or the "color of official right" prong. The proposed reform is a straightforward extension of this existing practice and should not be burdensome.

I recognize that prosecutors could comply with the letter of my proposed reform while ignoring its spirit. Prosecutors may plead in the conjunctive; for example, "defendant committed extortion through threat of violence *and* economic harm *and* threat to reputation," and prove their case in the disjunctive, meaning they only have to prove one type of threat at trial.[208] A wily prosecutor could plead all four theories of wrongful threat and then later select which to pursue at trial.[209] Prosecutors would thus obtain an advantage by avoiding the constructive amendment rules which bind the prosecution to the theories it pleaded.[210] While this practice may technically be permissible, it should be discouraged as inconsistent with justice. Such a practice defeats the benefits of constitutional notice to the defendant and efficiently winnows the issues for the defense attorney.

F.2d 462, 463–64 (9th Cir. 1979) (where element of manslaughter statute had been judicially redefined, indictment could not simply use the statutory language).

[205] Charles Eric Hintz, *Pleading for Justice: Why We Need a More Exacting Federal Criminal Pleading Standard*, 52 SETON HALL L. REV. 711, 729–30 (2022).

[206] *Id*. at 730–31.

[207] *Id.* at 738.

[208] United States v. Howard, 742 F.3d 1334, 1349 n.3 (11th Cir. 2014).

[209] United States v. Agostino, 132 F.3d 1183, 1191 (7th Cir. 1997) (holding that an indictment which sets forth the relevant time, person, entity, and currency involved in a criminal transaction was constitutionally sufficient, and that a defendant's "constitutional right is to know the offense with which he is charged, not to know the details of how it will be proved") (internal citation omitted).

[210] Stirone v. United States, 361 U.S. 212, 216–17 (1960).

CONCLUSION

The scope of "wrongful" behavior under the Hobbs Act is complex. By deleting the definition of "wrongful" from the ARA, Congress made the Hobbs Act more unclear than they comprehended. In this vacuum, courts created a highly fact-specific set of legal standards. These standards balance the Hobbs Act against countervailing priorities, including labor law, the First Amendment, and accepted business practices. These standards also align the law with social intuition about what behavior is wrongful. As the discussion of the blackmail paradox showed, identifying the logic behind certain extortion crimes can be impossible—sometimes these cases are about societal gut instinct. Perhaps for these reasons, I was unable to identify a uniform theory of wrongful conduct; all potential theories are unsatisfactory.

The variety of legal standards creates a problem for Hobbs Act defendants. Unless the indictment specifies a theory or theories of a "wrongful" threat, the defendant and their counsel may not know the legal standards they will face at trial. Under the Fifth and Sixth Amendments, courts should require prosecutors to specify the theories of the threat in their indictments so the defense can adequately and efficiently prepare its case. Such a reform would only be a minimal burden to prosecutors and would account for the complicated doctrine that defines the meaning of "wrongful."