Competing Theories of Blackmail: An Empirical Research Critique of Criminal Law Theory

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The crime of blackmail has risen to national media attention because of the David Letterman case, but this wonderfully curious offense has long been the favorite of clever criminal law theorists. It criminalizes the threat to do something that would not be criminal if one did it. There exists a rich literature on the issue, with many prominent legal scholars offering their accounts. Each theorist has his own explanation as to why the blackmail offense exists. Most theories seek to justify the position that blackmail is a moral wrong and claim to offer an account that reflects widely shared moral intuitions. But the theories make widely varying assertions about what those shared intuitions are, while also lacking any evidence to support the assertions.

This Article summarizes the results of an empirical study designed to test the competing theories of blackmail to see which best accords with prevailing sentiment. Using a variety of scenarios designed to isolate and test the various criteria different theorists have put forth as "the" key to blackmail, this study reveals which (if any) of the various theories of blackmail proposed to date truly reflects laypeople's moral judgment.

Blackmail is not only a common subject of scholarly theorizing but also a common object of criminal prohibition. Every American jurisdiction criminalizes blackmail, although there is considerable variation in its formulation. The Article reviews the American statutes and describes the three general approaches these provisions reflect. The empirical study of lay intuitions also allows an assessment of which of these statutory approaches

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(if any) captures the community's views, thereby illuminating the extent to which existing law generates results that resonate with, or deviate from, popular moral sentiment.

The analyses provide an opportunity to critique the existing theories of blackmail and to suggest a refined theory that best expresses lay intuitions. The present project also reveals the substantial conflict between community views and much existing legislation, indicating recommendations for legislative reform. Finally, the Article suggests lessons that such studies and their analyses offer for criminal law and theory.

The crime of blackmail has risen to national attention as a result of the highly public scandal involving David Letterman.[1] Yet as titillating or colorful as the details of one notorious case may be, they hardly provide the only reason to take an interest in this wonderfully curious crime. Indeed, blackmail has long been the favorite offense of clever criminal law theorists. It criminalizes the threat to do something that would not be criminal if one did it. If your acquaintance is having an affair, it is no crime to tell his wife of his infidelity. However, if you *threaten* to do so unless he pays you $100, that threat is criminal—even if he would consider it a bargain and quickly accept your offer. Unlike the similar but uncontroversial category of extortion—which involves conditional threats to engage in *criminal* acts, such as a threat to injure someone unless paid—this disparate legal treatment of the threat and the threatened activity makes blackmail seem like a puzzle or, in a well-known and often-repeated characterization, a "paradox."[2]

Though blackmail is not extortion, something about the use of coercion might seem to comprise the gravamen of the offense. But then, many forms of coercion are not criminal. A source pressed by a reporter to provide information or else face an unflattering portrayal, or an employer pressured to either give her best salesman a raise or watch him quit, may feel as much coercion as the recipient of a blackmail threat, yet this coercion is not criminal. What is it about the nature or circumstances of a threat that make it blackmail and not mere "hard bargaining"?

There exists a rich literature on the issue, with many prominent legal scholars jumping in to offer their accounts.[3] Each theorist has his own expla-

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1. *See* Bill Carter & Brian Stelter, *Extortion Case Raises Questions for Letterman and His Network*, N.Y. TIMES, Oct. 3, 2009, at A1 (describing Robert Halderman's attempt to obtain two million dollars from Letterman in exchange for not revealing Letterman's lurid sexual history); Bill Carter, *Inside CBS, Disbelief at an Arrest*, N.Y. TIMES, Oct. 8, 2009, at B1 (chronicling CBS employees' astonished reactions to the Halderman allegations); Lizzie Widdicombe, *Brainteaser: You've Got Mail*, NEW YORKER, Oct. 19, 2009, at 28 (using the Letterman case as springboard to a discussion of the intellectual riddle of blackmail).

2. *See, e.g.*, James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 671 (1984) (contemplating the paradox that a blackmailer combines a legal means and a legal end to achieve an illegal result).

3. *See, e.g.*, 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 240 (1988) (noting that "the exploitation principle provides a rationale for blackmail laws where the liberal's unsupplemented harm principle finds only a 'paradox'"); Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 797–98 (1998) (proffering a theory of blackmail where the overt act of blackmail serves only the evidentiary function of helping a fact finder separate disclosures of embarrassing information based on acceptable motivations from disclosures based on unacceptable motivations); Ronald H. Coase, *The 1987 McCorkle Lecture: Blackmail*, 74 VA. L. REV. 655, 674–75 (1988) (noting a variety of distinctions between blackmail and business negotiations, such as the fact that instances of blackmail are not constrained by market competition or the hope of future business relations); Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 566 (1983) (arguing that blackmail is

nation as to why the blackmail offense exists. Some theories are instrumentalist, explaining the criminalization of blackmail solely in terms of its positive practical effects rather than the wrongfulness of the underlying conduct.[4] Many theories, however, seek to justify the position that blackmail is a moral wrong.[5] It is typical for such theories to defend their moral judgments or assertions by relying on the claim that a stated moral position accords with widely shared moral intuitions. Indeed, the standard methodology for these blackmail theories is to seek a "reflective equilibrium" between general normative principles and shared intuitions about the proper outcome of particular cases.[6]

Blackmail theories thus place considerable reliance on claims about lay intuitions. Yet different theorists make different claims about "our" shared moral judgments regarding particular blackmail scenarios and do so without offering empirical data to support their favored intuition or to refute any other proffered intuition. So who is right? Which theory, if any, accurately captures people's shared moral intuitions about the contours of blackmail? Or are there no such shared intuitions at all? This Article summarizes the

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criminalized because the demand is usually "part of an overall scheme of abuse, itself rife with coercive and fraudulent elements," and that "[b]lackmail is made a crime not only because of what it is, but because of what it necessarily leads to"); George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1626 (1993) (suggesting that "the proper test [for whether an act should constitute blackmail] . . . is whether the transaction with the suspected blackmailer generates a relationship of dominance and subordination"); Douglas H. Ginsburg & Paul Shechtman, *Blackmail: An Economic Analysis of the Law*, 141 U. PA. L. REV. 1849, 1873 (1993) (arguing that blackmail prohibition is an "economically rational rule" because "[i]f such threats were lawful, there would be an incentive for people to expend resources to develop embarrassing information about others in the hope of then selling their silence"); Leo Katz, *Blackmail and Other Forms of Arm-Twisting*, 141 U. PA. L. REV. 1567, 1615 (1993) (defining blackmail as a situation in which the circumstances lead the victim to "prefer to be subjected to a greater rather than a lesser wrong"); Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 163–66 (1980) (turning to the social policies of preventing invasions of privacy, protecting the free press from being out-priced by private negotiation, and increasing the availability of information on public officials to justify the distinction between legal economic transactions and illegal instances of blackmail); Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1820 (1993) (stating that blackmail "diminishes social wealth" and is a "sterile redistributive activity" comparable to "(simple) theft"); Steven Shavell, *An Economic Analysis of Threats and Their Illegality: Blackmail, Extortion, and Robbery*, 141 U. PA. L. REV. 1877, 1903 (1993) (stating that "there is still an obvious incentive-based reason for making blackmail illegal: to avoid being blackmailed by [persons] who might by chance be present, potential *victims* will exercise excessive precautions or reduce their level of innocent, yet embarrassing, activities").

4. *See, e.g.*, Ginsburg & Shechtman, *supra* note 3, at 1850 (applying an economic analysis to the criminalization of blackmail and finding the criminalization consistent with economic rationality).

5. *See, e.g.*, Berman, *supra* note 3, at 798 ("[S]ociety can punish the blackmailer . . . because the [blackmailer] causes (or threatens) harm while acting with morally culpable motives.").

6. Mitchell N. Berman, *Blackmail* (manuscript at 6, 7 & n.7) (on file with authors) (embracing the reflective equilibrium approach and expressing the belief "that most blackmail theorists share these methodological commitments"), *in* OXFORD HANDBOOK ON THE PHILOSOPHY OF THE CRIMINAL LAW (John Deigh & David Dolinko eds., forthcoming 2010).

results of an empirical study designed to test the various competing moral theories of blackmail to see which best accords with prevailing sentiment. Part I reviews the alternative theories, while Part III compares these to the results of an empirical test of lay intuitions.

Blackmail is not only a common subject of theoretical discussion but a common object of criminal prohibition. Every American jurisdiction criminalizes blackmail, although there is considerable variation in statutory formulation. Part II reviews the American statutes and describes the three general approaches these provisions reflect. The empirical study of lay intuitions reported in Part III also allows an assessment of which of these statutory approaches, if any, captures the community's views.

The analyses provide an opportunity to evaluate and critique the existing theories of blackmail and ultimately, perhaps, to develop a refined theory that best expresses lay intuitions. The present project also reveals the substantial conflict between community views and much existing legislation and indicates possible avenues for legislative reform. The Article's conclusion suggests lessons that this study offers and that other similar studies might offer for criminal law and theory.

I.   Competing Theories of Blackmail

Theories of the proper basis for the criminal prohibition against blackmail differ profoundly from one another. One reason for this is that, unlike many other crimes, it is not entirely clear whom (if anyone) blackmail harms or victimizes. On one level, the "victim" of a blackmail threat seems to be the person receiving the threat who is forced to pay money (or give up something else of value) to prevent the blackmailer from carrying out the threat. Some theories of blackmail, which we discuss in subpart A, are based on this notion that the threat recipient is properly seen as the crime's victim.

Yet being blackmailed is arguably *less* harmful to that "victim" than if the blackmailer were simply to perform the threatened activity without first making the threat, as the blackmailer is entirely at liberty to do. If the recipient of the threat accedes to the blackmailer's demand, presumably he does so because he finds that preferable to having the blackmailer carry out the threat, as would occur if the demand were rejected. He is therefore in a better situation by virtue of having the option to pay than he would be if the blackmail threat—or, as it could also be seen, the blackmail *offer*—were never made. Some theories, following this logic, conclude that the true victim of blackmail is some other party who, because of the blackmail transaction, is losing access to what the blackmailer would provide that party (typically information) if the blackmailer could not extract value from the threat recipient by engaging in blackmail instead. Subpart B discusses these theories.

Some theories do not depend on any claim that individual cases of blackmail necessarily harm anyone at all. Rather, they defend the criminali-

zation of blackmail on the ground that if blackmail were legal, some overall social harm would ensue, such as a general loss of privacy or an inefficient allocation of resources to investments in protecting secrets.[7] We did not include such theories in our empirical survey because their premises are such as to make them unconcerned with whether any particular case of blackmail, or even the practice of blackmail as a whole, is wrongful or merits blame. Accordingly, these theories make no claim about relying on (or being able to predict) popular views as to when blackmail deserves punishment.

Even without their explicit reliance on lay intuitions of justice to justify themselves, we might nonetheless be interested to see whether such economic theories accord or conflict with lay intuitions. However, the nature of most such theories, at least as expressed in the current literature, lacks sufficient content to actually formulate an offense. That is, these theories may offer a basic explanation of why some form of blackmail offense should exist, but they typically do not tell us with any precision what such an offense should look like.[8] We discuss these theories more fully in subpart C.

Finally, there is the position that the criminalization of blackmail lacks any sound basis and is therefore inappropriate. We discuss this abolitionist position in subpart D.

A. Theories of Blackmail as a Crime Against the Threat Recipient

Two major theories of blackmail see it as fundamentally a crime that victimizes the person being threatened. The first view, set forth at different times and in somewhat different variations by Mitchell Berman and Leo Katz, claims that blackmail is truly a species of extortion, i.e., a threat to engage in a wrongful act. Accordingly, the putative blackmail "paradox" vanishes because both the act and the threat are wrongful. The second view, espoused by George Fletcher, finds blackmail to be a harm to the recipient not by virtue of the threat per se but because of the threat's potential for repetition, which creates the possibility that the recipient will be forced into an ongoing relationship of subordination to the blackmailer.

1. The Wrongful Intention Theory.—Over a series of articles, Mitchell Berman has elaborated and slightly refined what he calls the "evidentiary"

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7. *See, e.g.*, Epstein, *supra* note 3, at 566 ("[T]he [blackmail] demand will not take place in isolation, but will be part of an overall scheme of abuse, itself rife with coercive and fraudulent elements. . . . Blackmail should be a criminal offense even under the narrow theory of criminal activities because it is the handmaiden to corruption and deceit."); Posner, *supra* note 3, at 1832 ("In the face of this uncertainty [if blackmail were legal], the safest guess is that allowing the blackmailing . . . would yield a net social loss equal to the resources expended in blackmailing and in defending against blackmailing [to protect secrets].").

8. Given this limitation, one may wonder about the value of such theories as they relate to the development of substantive criminal law.

theory of blackmail.[9]   For Berman, blackmail is wrongful if and only if it would be wrong for the blackmailer to carry out the threatened act.[10]   Where the threatened act is inherently harmful or wrongful, as where one threatens to injure another unless paid, the threat presents a routine case of extortion, for which it is relatively easy to justify assigning blame or punishment.   Yet even where the threatened act is not wrongful per se, it might also be wrongful based on the actor's culpability in performing it—and this, Berman claims, is the case with blackmail.[11]   Further, Berman contends that the threat itself provides evidence of the blackmailer's culpability, i.e., evidence that he knows carrying out the threat will harm the recipient and that, were he to carry out the threat, he would be doing so for that very reason.   In earlier writings, Berman described the offender's culpability as rooted in his motivations;[12] in more recent work, Berman discusses culpability in terms of the offender's knowledge and beliefs.[13]

Berman's explicit goal for his theory is that it should track common intuitions regarding blackmail as closely as possible: he is engaged in a process of "reflective equilibrium" in which the general theory is meant to track general intuitive reactions to specific cases.[14]   (Berman also thinks this process of rationalizing and seeking to track common moral intuitions is the norm for blackmail theorists.[15])

Somewhat like Berman, Leo Katz advances a test for blackmail that asks whether the threatened activity is itself wrongful.[16]   The harm of blackmail for Katz is in forcing the recipient of the threat to choose between two "immoralities," namely, facing the prospect of (1) having to pay for the blackmailer's silence or (2) having the blackmailer carry out the threat.[17]   Importantly, and again similar to Berman's view, carrying out the threat

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9. *See* Berman, *supra* note 3, at 848–51 (summarizing the evidentiary theory); Mitchell N. Berman, *Meta-Blackmail and the Evidentiary Theory: Still Taking Motives Seriously*, 94 GEO. L.J. 787, 789 (2006) [hereinafter Berman, *Meta-Blackmail*] (arguing that the evidentiary theory explains why blackmail is coercive); Mitchell N. Berman, Book Review, *On the Moral Structure of White Collar Crime*, 5 OHIO ST. J. CRIM. L. 301, 322–25 (2007) [hereinafter Berman, *White Collar Crime*] (putting forth an abridged version of the evidentiary theory); Berman, *supra* note 6 (manuscript at 58–59) (discussing how the evidentiary theory relates to morality).

10.   Berman, *supra* note 6 (manuscript at 36).

11.   Berman, *White Collar Crime*, *supra* note 9, at 323.

12.   Berman, *supra* note 3, at 839–40; Berman, *Meta-Blackmail*, *supra* note 9, at 791.

13. *See* Berman, *supra* note 6 (manuscript at 55, 56 n.118) (dispelling Michael Gorr's blackmail approach by discussing the importance of the actor's belief and knowledge regarding what he "morally ought to do" in the blackmail puzzle).

14. *See id.* (manuscript at 6–7) (discussing individual intuitions in terms of blackmail).

15. *Id.* (manuscript at 7 & n.7).

16. *See* Katz, *supra* note 3, at 1599 (stating that blackmail requires a threat of at least mildly wrongful conduct).

17. *Id.* at 1598.

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might be "immoral" not only because of its objective harmfulness but also because of the blackmailer's motivations—such as a spiteful or vindictive decision to expose a secret in retaliation for not having one's demand satisfied.[18]

Like Berman, Katz explicitly relies on moral intuitions he expects readers to share and seeks to generate a theory of blackmail that accords with those intuitions. For example, he rejects Richard Epstein's social-harm account of blackmail on the ground that it does not reflect "our instinctive revulsion at the practice."[19] He summarizes his own account as capturing conduct that is "deemed by us a very major wrong."[20]

Both Berman and Katz, then, think blackmail is wrongful if and only if carrying out the threat would be wrongful. They also have detailed and nuanced views of what would make a threat, or any other conduct, wrongful— and on this broader score, their views sometimes (though not often) differ from one another. Importantly, however, their broader views about wrongfulness are not directly relevant to the project at hand. The present task is to determine the extent to which their view of when and why blackmail specifically is wrongful tracks common lay views of that same issue. As to blackmail in particular, Berman and Katz take the same position: the wrongfulness of blackmail depends on the wrongfulness of the threatened act. Significantly, this view of blackmail could be "right" (in the sense of tracking lay intuitions) even if neither Berman nor Katz is right in his broader positions as to what makes actions wrongful. In other words, if laypeople consistently give the same answer to the questions (1) "is this blackmail?" and (2) "would carrying out this threat be wrongful?" then they are employing the Berman/Katz approach to blackmail, even if they do not share Berman's or Katz's views regarding *why* carrying out the threat would be wrongful. If the driving criterion behind lay assessments of blackmail is

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18. *See id.* (noting the case where a threatened act "is immoral only because, if it were to be done, it would be done for purely retaliatory reasons—retaliation for [the victim's] refusal to pay"); *id.* at 1600 (discussing the nonhiring of a job applicant who refuses to have sex with her employer as wrongful because it would be retaliatory); *id.* at 1602. Katz has a similar response when addressing the situation of reporting information to the IRS out of a retaliatory motivation:

> Feinberg is incorrect about such cases as the proposal to withhold damaging information from the IRS, because a retaliatory reporting of such information to the IRS, (i.e., the reporting of such information not to help the government, but to settle a score) strikes us as quite immoral, not immoral at the level of criminality or tortiousness, but immoral all the same. Leveraging such immoral conduct into a substantial gain then becomes blameworthy at the level of theft.

Id.

19. *Id.* at 1578; *see also id.* at 1580 (finding fault with Feinberg's theory because it fails to include a case that "is viewed by many as the quintessential blackmail case"); *id.* at 1581 (assessing Lindgren's theory by noting that it "pretty closely matches our intuitions at the descriptive level, although it seems perhaps a bit underinclusive" as it fails to "account for several cases which many would agree clearly reek of blackmail").

20. *Id.* at 1615.

rooted in a moral assessment of the wrongfulness of carrying out the threat, then lay intuitions agree with Berman and Katz about blackmail, even if they disagree about other aspects of moral theory.

    2. The Continuing Domination Theory.—George Fletcher has put forth a theory according to which blackmail is wrongful because it creates a relationship of "dominance and subordination" between the blackmailer and the recipient of the threat.[21] What distinguishes blackmail from other situations of hard bargaining between parties to a transaction is the potentially ongoing duration of the threat: it may involve not just one demand of money for silence but repeated demands because the blackmailer remains privy to the damaging information and can continue to extract money or other value from the threatened party. Like Berman, Fletcher aims to track shared views of what constitutes blackmail, explicitly seeking "reflective equilibrium" between theory and intuition, which Fletcher describes as "requir[ing] a convincing fit between . . . agreed-upon outcomes . . . and general principles that can account for these outcomes."[22]

    However, Fletcher does not fully address whether the threatened act must involve a certain degree of coercion or whether the blackmailer's demand must reach a certain magnitude for the threat to create a relation of dominance and subordination. As to the first of these, Fletcher seems to answer in the negative because he thinks a proposal can be viewed as blackmail whether it is considered a "threat" or an "offer."[23] Elsewhere Fletcher seems to suggest that only certain kinds of demands qualify as blackmail, however, because he asserts that "no one can dominate someone else by asking for money to do or not to do that which is in one's recognized domain of freedom. . . . [T]here is no blackmail in demanding payments to do or not to do that which one has a right to do."[24] Yet that statement surely cannot be accurate as written, for any classic case of informational blackmail presents a situation where the blackmailer has the freedom or "right" to disclose the information rather than seeking payment, and the recipient of the threat has no legal or moral "right" to prevent that disclosure (in the case of disclosure of a crime, quite the contrary). It is equally clear that Fletcher himself views such cases as blackmail.[25] As to the magnitude of the demand, Fletcher

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    21. *See* Fletcher, *supra* note 3, at 1626–29 (proposing a dominance-and-subordination test and applying it to a set of paradigmatic situations).

    22. *Id.* at 1617.

    23. *See id.* at 1623 ("I am skeptical about whether a coherent account is available for these parallel distinctions between threats and offers and between nonproductive and productive exchanges.").

    24. *Id.* at 1627–28.

    25. *See, e.g.*, *id.* at 1617–19 (describing ten paradigmatic hypothetical situations, including, *inter alia*, criminal and noncriminal informational blackmail situations).

asserts only that a "minimal" demand does not reach the level of blackmail, though he acknowledges that "[e]xactly what is required . . . is not clear."[26]

B. Theories of Blackmail as a Crime Against Third Parties

Two other theories of blackmail view it not as a crime against the recipient of the threat but as a crime against whomever would have received the blackmailer's information had the blackmail not taken place. Joel Feinberg conceptualizes this view in terms of the moral duties of the blackmailer to the other party. James Lindgren describes it in terms of the third party's authority to regulate or discipline the threat recipient directly, which the blackmailer is usurping for personal gain.

1. The Breach-of-Duty Theory.—Joel Feinberg's test for blackmail asks whether, even holding aside the existence of the threat, the blackmailer's disclosure or nondisclosure of the information would be wrongful.[27] If the blackmailer has a duty to disclose the information, then it is improper for the blackmailer to violate that duty and keep silent in exchange for money. For example, withholding disclosure of the threatened party's criminal activity would be wrongful because one has a moral duty to report crimes; hence, nondisclosure of criminal activity in return for money would be blackmail.[28] On the other hand, if the blackmailer has a duty *not* to disclose the information, then it is improper to threaten disclosure.[29] (Such threats fall within the category of extortion—the threat to do an act that is itself impermissible—whose prohibition is relatively noncontroversial.) Yet where the person is allowed, but not obliged, to disclose the information, the conditional threat to do so is not blackmail for Feinberg.[30] In short, Feinberg takes seriously the so-called paradox of blackmail—its apparent willingness to punish a threat to perform conduct that would itself be permissible absent

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26. *Id.* at 1627.

27. *See* FEINBERG, *supra* note 3, at 211–13, 238–58 (defining five categories of blackmail-like threats and analyzing their wrongfulness in light of the harm caused to the victim, the harm caused to society, and the unjust gain to the blackmailer).

28. *See id.* at 241–45 (arguing that members of society do not have a right to withhold reports of a crime because nondisclosure causes a public harm).

29. *See id.* at 249–58 (noting that one has a civil duty not to make accusations known to be false and arguing that one has a moral duty to refrain from making truthful accusations of past wrongful conduct or conduct that is innocent but embarrassing).

30. *See id.* at 245–49 (arguing that blackmail should only be criminalized in situations where the threatened disclosure or offered failure to disclose would in itself violate a legal or civic duty); *id.* at 275 ("I don't see how a coherent criminal code based on liberal principles . . . can prohibit people from offering, in exchange for consideration, not to do what they have an independent legal right (but no legal duty) to do.").

the threat—and maintains that law should only sanction the threat where it would also sanction the threatened conduct.[31]

Whether Feinberg's theory depends on the breach of a *legal* duty or a *moral* duty is not always clear. For example, Feinberg posits a duty to report crimes to the police, though he recognizes that "[t]here is admittedly a problem about the precise status"[32]—legal or moral—of that duty and concludes that "our political system . . . clearly imposes a *civic duty* . . . to cooperate with law enforcement, even when that duty is not specifically enforced by the criminal or civil law."[33] Such a "civic duty" is enough for Feinberg to find that its violation in return for pay is blackmail. Feinberg is also willing to allow the criminal law's blackmail prohibition to rest on duties imposed under civil law,[34] such as the tort law governing invasions of privacy.[35] Further, Feinberg makes a normative argument that civil law *should* recognize additional duties, such as a defamation claim for some truthful statements,[36] whose threatened violation would then also support blackmail liability.[37] It seems fair to say, then, that for Feinberg a threat can be considered blackmail if it implicates the violation of a duty that *is* or *could be* legitimately imposed by law. Such a violation could arise from the satisfaction of the blackmailer's demand (preventing disclosure of information he had a duty to disclose), or its nonsatisfaction followed by the carrying out of the threat (leading to disclosure of information he had a duty *not* to disclose).

This category of legitimate (actual or potential) legal duties is similar to but distinct from the notion of a moral duty. Some behavior might be seen as immoral but outside the proper scope of law; as Feinberg says of the case where one knows of another's adultery, even if we think that disclosing the adultery might be the right thing to do, "[n]o *law* requiring or forbidding his disclosure would be justified."[38] Feinberg's general sense of when

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31. *See id.* at 240, 246 (noting that only some types of blackmail are paradoxical but that criminalization of these types cannot be justified on principles of liberalism); *id.* at 258 (stating that criminalization in a liberal penal code should only be allowed if it "would not stumble over the paradox of blackmail"); *id.* at 275 (noting of his argument for decriminalizing certain commonly recognized instances of blackmail, "I came to this radical conclusion only because I take the argument of the 'paradox of blackmail' very seriously").

32. *Id.* at 243.

33. *Id.* at 244.

34. *See id.* at 253 (asserting that "[t]he important point is that 'the law' . . . imposes a duty," not whether the legal duty is criminal or civil).

35. *See id.* at 250–51 (arguing that the duty to not disclose certain damaging information, as imposed by the tort law of privacy invasions, justifies criminalization of blackmail in such cases).

36. *See id.* at 254–56 (supporting recognition of such a legal claim).

37. *See id.* at 254 ("It is open to the liberal, however, to argue that there *ought* to be a civil remedy for such moral wrongs, so that he can argue for criminalization . . . without being thwarted by the paradox of blackmail.").

38. *Id.* at 249.

criminalization is justified is driven by a liberal demand for some demonstration that the law would prevent harm or offense to others.[39] Yet Feinberg's discussion of adultery-blackmail, criminalization of which Feinberg personally opposes, also indicates his willingness to defer to shared community judgements about the proper scope of the law's reach:

> Surely most of those who advocate criminalization of adultery-blackmail would not also advocate legislation making it an independent crime to inform betrayed spouses; nor would they advocate prior legislation making it a legal *duty* to inform betrayed spouses. They cannot have it both ways. *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.[40]

If Feinberg's empirical assertion about public views as to prohibiting disclosure (or nondisclosure) of adultery were shown to be wrong, presumably he would change his position about the propriety of criminalizing adultery-blackmail. Accordingly, for Feinberg, whether the law should prohibit a threat (i.e., treat it as blackmail) depends on whether the law should also prohibit doing the threatened act. If not—if the person making the threat "should have no legal duty one way or the other"[41]—then the threat is not blackmail.

As with the wrongful-intention theory, then, it is possible for subjects to agree with Feinberg about the proper criterion for blackmail but to disagree about how to employ that criterion in particular cases. For the Berman/Katz theory, it is possible to agree with the position that threats should constitute blackmail if and only if they are "wrongful," but to disagree with the theorists' own broader views about what is "wrongful." So too here, it is possible to disagree with Feinberg as to the proper scope of our underlying legal obligations while agreeing that blackmail should apply only to threats that entail violation of those obligations.

Thus, like other theorists, Feinberg makes an appeal to shared intuitions in justifying the criminalization of blackmail as a general matter and his own account of blackmail in particular. He posits the existence of wide consensus as to the wrongfulness of the blackmailer's conduct: "It is a free-floating evil, many people would judge, that *he* [the blackmailer] should make a big gain as a byproduct of someone else's crime or indiscretion, that he should profit

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39. *See id.* at 275 ("I have tried to find a liberal alternative to the legal moralist's account of blackmail . . . .").

40. *Id.* at 249.

41. *Id.*

unproductively from others' wrongdoing. That his gain is unjust seems clear."[42]

Feinberg also maintains that his own account of blackmail would prohibit "precisely those actions that common sense most insistently demands should be criminal."[43] At the same time, what dictates the contours of Feinberg's view is not an appeal to popular moral intuition but an effort to develop an understanding of blackmail consistent with liberal principles. Indeed, Feinberg's desire to embrace such principles and avoid what he considers genuinely "paradoxical" cases of blackmail leads him to develop a theory that excludes cases commonly thought to be paradigmatic examples of blackmail, such as the threat to expose another's adultery.[44]

2. *The Usurping Authority Theory.*—For James Lindgren, the "victim" of blackmail is not the recipient of the threat but some third party whose interests the blackmailer is exploiting or suppressing. In the typical case of a conditional threat to disclose information, the wrong consists of the blackmailer's usurping or "leveraging" the interests of the party entitled to the information: law enforcement authorities, a wronged spouse, etc.[45] In a nutshell, for Lindgren, the wrong of blackmail is that the "blackmailer is negotiating for his own gain with someone else's leverage or bargaining chips."[46] Lindgren offers this account of blackmail in an effort to track common intuitions, describing his project as seeking to "meaningfully distinguish" between "large classes of threats that nearly everyone agrees ought to be illegal and other large classes of threats that nearly everyone agrees ought to be permitted."[47]

Whether the blackmailer is "leveraging" another's position or "using another's chips" can be determined by examining the nature of the blackmailer's demand. If the blackmailer is merely replicating the demand the other party would make if that party had the information, then no blackmail exists.[48] Even if the demand is not exactly what the other party would

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42. *Id.* at 239.

43. *Id.* at 276.

44. *See id.* at 245–49 (concluding that threats to expose adultery should not be criminalized as blackmail because imposing a duty to reveal, or not to reveal, adultery would be inconsistent with liberal principles).

45. *See* James Lindgren, *Blackmail: An Afterword*, 141 U. PA. L. REV. 1975, 1981 (1993) (explaining the theory that "someone who threatens to expose criminality or tortious behavior [is] trading on leverage that properly belongs to others"); Lindgren, *supra* note 2, at 702 ("What makes [the blackmailer's] conduct blackmail is that [the blackmailer] interposes himself parasitically in an actual or potential dispute in which he lacks a sufficiently direct interest.").

46. Lindgren, *supra* note 2, at 702.

47. *Id.* at 680.

48. *See id.* at 714 (asserting there is "no blackmail" if "[t]here is a perfect congruence between the advantage sought . . . and the leverage used").

seek, so long as the maker of the threat is "trying in good faith" to benefit the other party rather than himself, Lindgren expresses "doubt that anyone would consider" the threat to be blackmail.[49] But if the person "requests something in return for suppressing the actual or potential interests of others," the request is blackmail.[50]

C. *Theories of Blackmail as a Societal Harm*

Some theories supporting the criminalization of blackmail are unconcerned with its moral status. For these theories, the prohibition of blackmail is justified not because blackmail is wrongful but because it is harmful (some would say "costly") to society. These theories do not focus on the harm an individual act of blackmail might cause the recipient of the threat but on the overall social costs that would arise from the improper behavioral incentives legalized blackmail would create. Some writers view these costs in terms of the unproductive efforts of would-be blackmailers, some in terms of the excessive privacy investments required of would-be blackmailees, but the shared underlying perspective is that blackmail's legal status should depend on a societal cost–benefit analysis rather than a moral inquiry.

A host of commentators have provided such a law-and-economics analysis of blackmail, according to which it is properly criminalized because it leads to inefficient allocation of resources.[51] These analyses are interested only in contemplating how legalizing or criminalizing blackmail would affect overall societal incentives to ferret out secrets, to overinvest in security, or to engage in fraud.[52] They are uninterested in generating a formulation of

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49. *Id.* at 715.

50. *Id.* at 672.

51. *See, e.g.*, Coase, *supra* note 3, at 674 (opining that blackmailers inefficiently expend resources gathering and transacting for the nondisclosure of information); Epstein, *supra* note 3, at 561, 566 (concluding that blackmail should be criminalized because, while an economic analysis of only the actions comprising the blackmail transaction may seem favorable, a broader analysis would take into account the host of inefficient auxiliary behavior encouraged by blackmail); Ginsburg & Shechtman, *supra* note 3, at 1873 (concluding that blackmail is economically inefficient because it encourages people to expend resources to gain information to protect information); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 26 (1975) (discussing the many ways in which private enforcement of laws through blackmail would incentivize inefficient behavior like fabricating evidence or entrapping victims); Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2292 (1996) (demonstrating that a ban on blackmail combined with social norms will produce the most efficient distribution of information); Posner, *supra* note 3, at 1818 (arguing that, while blackmail is a voluntary transaction, it should be prohibited because it is on average wealth reducing); Shavell, *supra* note 3, at 1902 (explaining that economic analysis supports criminalizing blackmail because of blackmail's tendency to incentivize wasteful gathering and protecting of information).

52. *See, e.g.*, Epstein, *supra* note 3, at 564–65 (pointing out that the opportunity for legalized blackmail will give blackmailers an incentive to help their victims perpetuate fraud); Shavell, *supra* note 3, at 1894–95 (analyzing the effect of blackmail on the incentive to expend effort to obtain information and to take preventative measures to avoid being blackmailed).

blackmail that achieves the "right" or fair result in individual cases. Rather, according to this approach and its underlying concerns, the quality of a given formulation of blackmail would be assessed in terms of its likelihood of achieving the "optimal" or efficient overall societal level of blackmail, i.e., the level at which the marginal costs of preventing blackmail exceeded the marginal costs of the blackmail itself.[53] They are not concerned with the morality *vel non* of blackmail—indeed, some of these accounts raise the suggestion that blackmail might also have some efficiency-related *benefits* as a form of private law enforcement.[54]

Like the law-and-economics theorists, Jeffrie Murphy has offered an account focused on the general incentives that would arise if blackmail were legal.[55] Murphy's account is slightly distinct in its concern with the value of individual privacy.[56] While the economic account is mostly concerned with the prospect of wasted or unproductive efforts to obtain information, Murphy is concerned with the likelihood of privacy invasions and seems to think that such invasions are inherently problematic.[57] At the same time, Murphy would grant an exception allowing the blackmail of public figures, presumably because the information obtained from investigations of public figures would be more socially useful than information about purely private figures.[58] In the end, then, Murphy seems to be addressing a set of cost–benefit tradeoffs involving investments in obtaining or protecting secret information, similar to the typical economic theory.

Theorists of this type typically set themselves the task of merely justifying the blackmail prohibition's existence rather than specifying its proper scope. For economists, voluntary transactions, seemingly undertaken for mutual gain, are generally thought to be desirable, and their prohibition, as in the criminalization of blackmail, therefore stands in need of some explanation.[59] Having given the explanation, however, law-and-economics

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53. *See* Landes & Posner, *supra* note 51, at 42–43 (applying the concept of economically efficient private enforcement of laws to comment on the status of blackmail and concluding that society permits the private enforcement of blackmail-like demands where additional public enforcement would, according to broad social norms, not be worth the expenditure associated with the additional enforcement).

54. *Id.* (suggesting that blackmail by private individuals can substitute for public law enforcement because the amount that the blackmailed person should be willing to pay is equal to the cost of the penalty that law enforcement would impose).

55. *See generally* Murphy, *supra* note 3 (discussing possible incentive-based justifications for a prohibition against blackmail).

56. *See id.* at 159–60, 163–66 (stating that "the protection of privacy does play a role in justifying the criminalization of blackmail" and discussing different privacy issues).

57. *See id.* at 159 (arguing that a blackmailer acts wrongly "not because he is simply proposing an unjust economic transaction, but because he is economizing a part of life which he has no right to economize").

58. *Id.* at 164.

59. *See supra* note 51 and accompanying text.

accounts of blackmail typically do not proceed to elaborate as to the particular shape the blackmail offense should take. The implication is that once the cost or externality that justifies blackmail's prohibition has been identified, the definition of blackmail should be whatever minimizes (or produces the socially optimal level of) that cost. The perspective operates on the level of curtailing social harms rather than responding to individual acts of wrongdoing.

Among theorists of this variety, Joseph Isenbergh stands out in offering an account of blackmail that specifies which particular cases of blackmail should be criminalized and which should not.[60] He attempts to determine "what information is more valuable kept private and what information is more valuable disclosed."[61] Describing the threat recipient, blackmailer, and third party entitled to the information as *A*, *B*, and *C*, respectively, Isenbergh suggests the possibility of limiting the blackmail prohibition to two sets of cases: "1) information, however acquired, held by *B* concerning a prosecutable crime or tort committed by *A* against *C*; and 2) information acquired by *B* outside a prior course of dealing with *A*."[62] Isenbergh later elaborates on the second category, pointing out that the relevant distinction is "between information already held by *B* (or obtained fortuitously) and information generated by *B*'s special efforts for the purpose of blackmail."[63] Isenbergh then posits that situations where *A* and *B* "have a pre-existing relationship" are more likely to involve "information obtained fortuitously" in the course of the relationship, whereas situations where *A* and *B* have "no prior course of dealing" are more likely to involve "information deliberately farmed" and should hence be discouraged via legal sanction.[64] Even for the cases Isenbergh recognizes as undesirable blackmail, however, it is worth noting that he does not advocate direct criminalization as the best legal response. Rather, Isenbergh would favor making the blackmail transaction legally unenforceable and, in the first category of cases, also making *B* legally complicit in *A*'s criminal or tortious wrongdoing.[65]

D. *Theories of Blackmail as Noncrime: The Abolitionist Position*

A final possible response to the blackmail paradox is to conclude that its only proper resolution is to decriminalize blackmail, thereby eliminating the paradox. Some libertarian theorists have defended the position that

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60. *See* Joseph Isenbergh, *Blackmail From A to C*, 141 U. PA. L. REV. 1905, 1907 (1993) (arguing that any justification for blackmail must "lie in the particular nature of information" and that for this reason it makes sense to criminalize certain forms of blackmail and not others).

61. *Id.* at 1927.

62. *Id.* at 1908.

63. *Id.* at 1929.

64. *Id.* at 1930.

65. *Id.* at 1928–29.

criminalizing threats to engage in lawful activity is an impermissible infringement on the freedom to engage in voluntary transactions, hence an unjustifiable exercise of criminal authority.[66]

Russell Christopher has offered a variation on this claim by introducing the concept of "meta-blackmail": the conditional threat to make a blackmail threat.[67] Christopher claims that there is no clear way to determine how meta-blackmail should be treated relative to blackmail itself—whether it should be punished more seriously, less seriously, or the same—and asserts that therefore the only way to avoid logical inconsistency, or at least even thornier puzzles than the paradox of blackmail itself, is to decriminalize blackmail (and hence meta-blackmail also).[68]

Mitchell Berman has argued against the soundness of Christopher's logic.[69] We need not concern ourselves here with the persuasiveness of Christopher's account as an analytical matter because our project is to determine whether that account (or any other) accords with common moral sensibilities. In this case, the abolitionist position is easily testable: if subjects reject the prospect of punishment in all scenarios of putative blackmail, then their moral intuitions would track the conclusion that blackmail should be abolished, and if not, then lay intuitions would contradict the abolitionist proposal. It should also be noted, however, that a disagreement between lay intuitions and these accounts would not necessarily undercut the relevant theorists on their own terms. The libertarian position rests on a broader un-

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66. *See, e.g.*, 1 MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE 443 n.49 (1970) ("[B]*lackmail* 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."); Walter Block, *Berman on Blackmail: Taking Motives Fervently*, 3 FLA. ST. U. BUS. REV. 57, 61–62 (2003) (defining the libertarian view of blackmail as criminalizing something that the blackmailer has the right to do); Walter Block, *The Case for De-criminalizing Blackmail: A Reply to Lindgren and Campbell*, 24 W. ST. U. L. REV. 225, 225–26 (1997) (discussing how a transaction where one refrains from gossip for consideration from another party should be legal); Eric Mack, *In Defense of Blackmail*, 41 PHIL. STUD. 273, 273–74 (1982) (arguing that blackmail should not be prevented by the police power of the state); Ronald Joseph Scalise, Jr., Comment, *Blackmail, Legality, and Liberalism*, 74 TUL. L. REV. 1483, 1506 (2000) ("In a liberal legal system, all voluntary actions between consenting adults are allowable.").

67. *See* Russell L. Christopher, *Meta-Blackmail*, 94 GEO. L.J. 739, 746 (2006) [hereinafter Christopher, *Meta-Blackmail*] (originating the concept of meta-blackmail); 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, 813 (2006) (asking whether meta-blackmail may be more severe than simple blackmail).

68. *See* Christopher, *Meta-Blackmail*, *supra* note 67, at 747–48 ("Resolving the trilemma of meta-blackmail either forces the decriminalization of blackmail or adds considerably to the already difficult puzzles to be surmounted in justifying the criminalization of blackmail.").

69. *See* Berman, *supra* note 6 (manuscript at 41–43) (arguing for the existence of a basis for differentiating meta-blackmail and blackmail); Berman, *Meta-Blackmail*, *supra* note 9, at 788 (arguing that the meta-blackmail "conceit" does not properly address the "widely and deeply held" opinion that some conditional threats to perform legal acts are properly criminalized).

derstanding that the proper scope of criminalization is very narrow and fails to justify a prohibition against blackmail even if blackmail is a moral wrong.[70] Christopher does not purport to offer a moral refutation of the criminalization of blackmail, but what he says is a logical one.[71]

II.   Statutory Approaches

While each U.S. jurisdiction has a criminal provision prohibiting traditional blackmail,[72] there is no single statutory approach used by a majority of states. Even within any given approach, a close comparison of any two blackmail statutes is likely to reveal some differences. However, the range of differences might be summarized as moving along two dimensions: first, the breadth of the range of demands criminalized;[73] second, the breadth of the exceptions (or special defenses) to the crime.

On the first dimension, blackmail statutes can be categorized as either having a broad range of prohibited demands[74] or a narrow range.[75] "Narrow

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70. *See* Berman, *supra* note 6 (manuscript at 36–38) (noting the basis for the libertarian position and asserting that it "rests on a fairly straightforward, easily articulated and understood, major premise that the overwhelming majority of contemporary theorists of the criminal law simply reject").

71. *See* Christopher, *Meta-Blackmail*, *supra* note 67, at 784–85 (arguing that "[c]riminalizing blackmail violates intuitions that are more compelling than the intuition that blackmail is properly criminalized").

72. The standard blackmail case is one in which an actor threatens to disclose a damaging secret if the victim does not pay her some amount of money. Terminology varies from jurisdiction to jurisdiction; most prohibit the blackmail offense via a statute covering "criminal coercion," "extortion," "intimidation," "threats," or a similar term.

73. Interestingly, statutes also vary on the breadth of the range of prohibited *threats*, as opposed to the range of *demands*. All prohibit threats to disclose damaging secrets or expose a committed crime; many also criminalize threats to injure the victim or her property, to impugn the character of the victim or of some third party, to commit a crime, etc. However, these distinctions are irrelevant in the context of this study; it will suffice to note that all jurisdictions criminalize the threat inherent to traditional blackmail.

74. Thirty-three jurisdictions have broad ranges of prohibited demands: Alaska, Arkansas, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Washington, Wisconsin, Wyoming, and the District of Columbia. *See* ALASKA STAT. §§ 11.41.520, .530 (2008); ARK. CODE ANN. §§ 5-13-208, 5-36-101, -103 (2006); COLO. REV. STAT. ANN. § 18-3-207 (West 2009); CONN. GEN. STAT. ANN. §§ 53a-119, -192 (West 2007); FLA. STAT. ANN. § 836.05 (West 2005); HAW. REV. STAT. ANN. § 707-764 (LexisNexis 2007); 720 ILL. COMP. STAT. ANN. 5/12-6 (West 2007); IND. CODE § 35-45-2-1 (2004); IOWA CODE ANN. § 711.4 (West 2009); KAN. STAT. ANN. § 21-3428 (2007); KY. REV. STAT. ANN. §§ 509.080, 514.080 (LexisNexis 2008); LA. REV. STAT. ANN. § 14:66 (2007); MD. CODE ANN., CRIM. LAW §§ 3-701 to 3-708 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 265, § 25 (West 2000); MICH. COMP. LAWS ANN. § 750.213 (West 2009); MINN. STAT. ANN. §§ 609.27–.275 (West 2009); MISS. CODE ANN. § 97-3-82 (West 2006); MO. ANN. STAT. § 570.010 (West 1999); MONT. CODE ANN. §§ 45-2-101, 45-5-305(1)(f), 45-6-301 (2008); N.J. STAT. ANN. §§ 2C:13-5, 2C:20-5 (West 2005); N.M. STAT. ANN. § 30-16-9 (LexisNexis 2000); N.Y. PENAL LAW §§ 135.60, 155.05 (McKinney 2008); N.C. GEN. STAT. §§ 14-118, 118.4 (2007); N.D. CENT. CODE §§ 12.1-17-06,

definition" statutes address only threats made to obtain property or pecuniary value. "Broad definition" blackmail statutes cover those threats and also threats made to coerce action on the part of the victim or some third party.[76]

The second dimension of blackmail is somewhat more complex: statutes can be categorized as having broad exceptions, narrow exceptions, or no exceptions. "Broad exception" statutes generally provide a form of good-faith defense, holding that the blackmailer can escape liability where she is acting with the limited purpose of making the other party correct a wrong, desist from misbehavior, refrain from taking responsibility for which she is not qualified, or other similar situations.[77] These statutes commonly impose

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12.1-23-02, -23-10(12) (1997); OKLA. STAT. ANN. tit. 21, § 1488 (West 2003); 18 PA. CONS. STAT. ANN. §§ 2906, 3923 (West 2009); R.I. GEN. LAWS § 11-42-2 (2002); TENN. CODE ANN. § 39-14-112 (2006); VT. STAT. ANN. tit. 13, § 1701 (2002); WASH. REV. CODE ANN. §§ 9A.04.110(27), 9A.56.110–.130 (West 2003); WIS. STAT. § 943.30–.31 (2009); WYO. STAT. ANN. § 6-2-402 (2009); D.C. CODE §§ 22-3201(4), -3252(a) (2001).

75. Nineteen jurisdictions have narrow ranges of prohibited demands: Alabama, Arizona, California, Delaware, Georgia, Idaho, Maine, Nebraska, Nevada, New Hampshire, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and the federal government. *See* ALA. CODE §§ 13A-8-1(13), 13A-8-13 to -15 (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 13-1804 (2009); CAL. PENAL CODE §§ 518–19 (West 2008); DEL. CODE ANN. tit. 11, §§ 791, 846–47 (2007); GA. CODE ANN. § 16-8-16 (2007); IDAHO CODE ANN. § 18-2403 (2008); ME. REV. STAT. ANN. tit. 17-A, § 355 (2006); NEB. REV. STAT. § 28-513 (2008); NEV. REV. STAT. § 207.190 (2007); N.H. REV. STAT. ANN. § 637:5 (2007); OHIO REV. CODE ANN. § 2905.11–.12 (West 2006); OR. REV. STAT. §§ 163.275, 164.075 (2007); S.C. CODE ANN. § 16-17-640 (2005); S.D. CODIFIED LAWS § 22-30A-4 (2006); TEX. PENAL CODE ANN. §§ 31.01, .03 (West 2009) (note that Texas utilizes a common law duress offense to punish acts equivalent to blackmail); UTAH CODE ANN. § 76-6-406 (LexisNexis 2008); VA. CODE ANN. § 18.2-59 (2009); W. VA. CODE ANN. § 61-2-13 (LexisNexis 2005); 18 U.S.C. § 873 (2006). Note that some of these jurisdictions also have a very limited statute prohibiting the coercion of *illegal* action via threats. *See, e.g.*, ALA. CODE § 13A-6-25; NEV. REV. STAT. § 207.190 (covering mostly classic extortion, i.e., threats of unlawful behavior); *id.* § 205.320 (covering threats to obtain property). While this may technically be approaching our definition of "broad ranges," the illegal-action limitation makes the statute so narrow as to not be comparable with the broad-range statutes.

76. Most statutes recognize threats to harm or otherwise wrong a third party as blackmail. An example would be *B* telling *V* that he will harm *J* (*V*'s brother) if *V* does not pay. *See, e.g.*, ALASKA STAT. § 11.41.520; ARIZ. REV. STAT. ANN. § 13-1804; CONN. GEN. STAT. ANN. § 53a-192; DEL. CODE ANN. tit. 11, § 846.

77. *See, e.g.*, MODEL PENAL CODE § 212.5(1)(d) (1962); *cf.* N.D. CENT. CODE § 12.1-17-06 (defining criminal coercion, including affirmative defenses). Twenty jurisdictions have broad exceptions to the blackmail offense: Alaska, California, Connecticut, Florida, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Vermont, and Washington. ALASKA STAT. §§ 11.41.520, .530; CAL. PENAL CODE §§ 518–19; CONN. GEN. STAT. ANN. §§ 53a-119, 53a-192; HAW. REV. STAT. ANN. § 707-769; KY. REV. STAT. ANN. §§ 509.080, 514.080; N.J. STAT. ANN. §§ 2C:20-5, 2C:13-5; N.Y. PENAL LAW § 135.75; N.C. GEN. STAT. § 14-118; N.D. CENT. CODE §§ 12.1-17-06, 12.1-23-09; 18 PA. CONS. STAT. ANN. §§ 2906, 3923; WASH. REV. CODE ANN. §§ 9A.56.110–.130, 9A.04.110(27).

This group includes jurisdictions that do not explicitly provide a good-faith defense but whose statutory language seemingly incorporates a bad-faith requirement into the offense definition itself. For example, the California extortion statute only criminalizes "the obtaining of property from

additional requirements on the actor and her behavior before she can make use of the exception.[78] "Narrow exception" statutes generally hold that the blackmailer may be excepted only if she is acting to recover restitution for harm done or to recover compensation for property taken or services rendered.[79] Finally, "no exception" statutes provide no explicit provisions recognizing exceptions to the blackmail offense.[80]

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another, with his consent, or the obtaining of an official act of a public officer, induced by a *wrongful* use of force or fear, or under color of official right." CAL. PENAL CODE § 518 (emphasis added). This would permit the obtaining of property from another by a nonwrongful use of force or fear, as where the actor's motivation is to make another person right a previous wrong, stop creating harm, or disgorge stolen or otherwise unlawfully possessed property. Similar provisions exist in various "broad exception" statutes. *See* FLA. STAT. ANN. § 836.05; IND. CODE § 35-45-2-1; MD. CODE ANN., CRIM. LAW §§ 3-701 to -708; MASS. GEN. LAWS ANN. ch. 265, § 25; MICH. COMP. LAWS ANN. § 750.213; MISS. CODE. ANN. § 97-3-82; N.M. STAT. ANN. § 30-16-9; N.C. GEN. STAT. § 14-118; R.I. GEN. LAWS § 11-42-2; VT. STAT. ANN. tit. 13, § 1701.

78. For example, the Model Penal Code requires that an actor limit her purpose to compelling the "good" action, that the action coerced be reasonably related to the circumstances involved, and that the actor believe the accusation or secret revealed to be true. MODEL PENAL CODE § 212.5(1).

79. Twenty-two jurisdictions have narrow exceptions to the blackmail offense: Alabama, Arizona, Arkansas, Colorado, Delaware, Georgia, Idaho, Illinois, Iowa, Maine, Missouri, Montana, Nebraska, New Hampshire, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin, Wyoming, and the District of Columbia. ALA. CODE §§ 13A-6-25, 13A-8-1(13), 13A-8-13 to -15; ARIZ. REV. STAT. ANN. § 13-1804; ARK. CODE ANN. §§ 5-13-208, 5-36-101, 5-36-103; COLO. REV. STAT. ANN. § 18-3-207; DEL. CODE ANN. tit. 11, §§ 792, 847; GA. CODE ANN. § 16-8-16; IDAHO CODE ANN. § 18-2403; 720 ILL. COMP. STAT. ANN. 5/12-6; IOWA CODE ANN. § 711.4; ME. REV. STAT. ANN. tit. 17-A, §§ 355, 361; MO. ANN. STAT. § 570.010; MONT. CODE ANN. §§ 45-2-101, 45-6-301, 45-5-305(1)(f); NEB. REV. STAT. § 28-513; N.H. REV. STAT. ANN. § 637:5; N.M. STAT. ANN. § 30-16-9; S.D. CODIFIED LAWS § 22-30A-4; TENN. CODE ANN. § 39-14-112; TEX. PENAL CODE ANN. §§ 31.01, 31.03; UTAH CODE ANN. § 76-6-406; WIS. STAT. §§ 943.30–.31; D.C. CODE §§ 22-3201(4), 22-3252(a).

This group includes jurisdictions without explicit exception clauses but with statutory language seemingly designed to provide an exception from prosecution for cases in which the actor was attempting to recover property to which he had a legal entitlement. Examples include jurisdictions such as Colorado, where the statute only criminalizes blackmail committed "without legal authority." COLO. REV. STAT. ANN. § 18-3-207(1)(a); *see also* 720 ILL. COMP. STAT. ANN. 5/12-6; MONT. CODE ANN. §§ 45-2-101, 45-6-301, 45-5-305(1)(f); WIS. STAT. §§ 943.30–.31. Presumably, one would have legal authority to recover taken property or recover compensation for past harm. Another example is the District of Columbia, where the offense definition criminalizes blackmailing with intent to obtain "property of another," defined by statute as "any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent . . . ." D.C. CODE §§ 22-3252(a), 22-3201(4). An actor may be privileged to infringe on property owed to him; in such a case it would not be "property of another," and the actor will not be liable. Similar provisions exist in many statutes categorized as having narrow exceptions. *See* IDAHO CODE ANN. § 18-2403; ME. REV. STAT. ANN. tit. 17-A, §§ 355, 361; N.H. REV. STAT. ANN. § 637:5; S.C. CODE ANN. § 16-17-640; S.D. CODIFIED LAWS § 22-30A-4; TEX. PENAL CODE ANN. §§ 31.01, 31.03; UTAH CODE ANN. § 76-6-406; WYO. STAT. ANN. § 6-2-402.

80. Ten jurisdictions have no exceptions to the blackmail offense: Kansas, Louisiana, Minnesota, Nevada, Oklahoma, Ohio, Oregon, Virginia, West Virginia, and the federal government. KAN. STAT. ANN. § 21-3428; LA. REV. STAT. ANN. § 14:66; MINN. STAT. ANN. §§ 609.27–.275; NEV. REV. STAT. §§ 205.320, 207.190; OKLA. STAT. ANN. tit. 21, § 1488; OHIO REV. CODE ANN. § 2905.11–.12 (West 2006); OR. REV. STAT. §§ 163.275, 164.075 (2007); VA. CODE ANN. § 18.2-59; W. VA. CODE ANN. § 61-2-13; 18 U.S.C. § 873.

Relying upon these two dimensions of blackmail formulations creates four major categories into which the fifty-two American blackmail statutes fall:[81] broad–broad, broad–narrow, narrow–narrow, and "other." (There are narrow–broad statutes—a narrow definition of the crime, with broad exceptions—but the narrow definition means that the broad exceptions are never really used, so they are effectively the same in their operation as the narrow–narrow statutes.)

Nineteen jurisdictions follow the Model Penal Code's (MPC) broad–broad approach to blackmail by prohibiting threats made to coerce action or to take property and providing either explicit or implicit exceptions to the crime for actors who commit the offense in the course of an attempt to make the victim behave in a way reasonably related to the circumstances that were the subject of the threat.[82] While these jurisdictions generally follow the MPC's statutory language, there is some variation; Washington, for example, prohibits seeking "property or services" but specifically mentions sexual favors as being included in the definition of "services."[83] Other jurisdictions are not so explicit. Additionally, there is some variation in the defined exceptions to the crime. Most broad–broad jurisdictions employ the MPC's formulation, but some limit the applicability of the exception to certain situations, and others (most significantly North Dakota) dramatically broaden the MPC's exception.

Ten jurisdictions take the broad–narrow approach, criminalizing threats designed to coerce action or to take property but providing an exception only

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81. The fifty-two statutes are the codes of each of the fifty states plus the federal code and the District of Columbia code.

82. Alaska, Connecticut, Florida, Hawaii, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, Vermont, and Washington. *See supra* notes 74, 77 and accompanying text. A typical broad–broad statute would be similar to Pennsylvania's:

 (a) Offense defined.—A person is guilty of criminal coercion, if, with intent unlawfully
 to restrict freedom of action of another to the detriment of the other, he threatens to:
  (1) commit any criminal offense;
  (2) accuse anyone of a criminal offense;
  (3) expose any secret tending to subject any person to hatred, contempt or
  ridicule; or
  (4) take or withhold action as an official, or cause an official to take or withhold
  action.
 (b) Defense.—It is a defense to prosecution based on paragraphs (a)(2), (a)(3) or (a)(4)
 of this section that the actor believed the accusation or secret to be true or the proposed
 official action justified and that his intent was limited to compelling the other to behave
 in a way reasonably related to the circumstances which were the subject of the
 accusation, exposure or proposed official action, as by desisting from further
 misbehavior, making good a wrong done, refraining from taking any action or
 responsibility for which the actor believes the other disqualified.
18 PA. CONS. STAT. ANN. § 2906.

83. WASH. REV. CODE ANN. § 9A.56.110.

to actors who make the threat in order to recover restitution for harm done or to gain compensation for services rendered or property owed.[84] These statutes exhibit significantly more terminological and structural variation than do the broad–broad statutes; some are simply MPC-style provisions with narrower exceptions, some are uniquely drafted but part of a modern code structure, and others are common law-style provisions.[85] Some broad–narrow statutes ban an extensive list of threats,[86] while others are much more limited.[87] Nonetheless, these statutes are appropriately grouped because all prohibit threats seeking action *or* property but only provide an offense exception if the actor is seeking property to which she has some legal right.

Thirteen jurisdictions take the narrow–narrow approach, criminalizing threats made to gain property and providing an offense exception only where the actor makes an otherwise-prohibited threat in order to recover restitution for harm done or to gain compensation for services rendered or property owed.[88] As with the broad–narrow jurisdictions, these statutes exhibit

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84. Arkansas, Colorado, Illinois, Iowa, Missouri, Montana, Tennessee, Wisconsin, Wyoming, and the District of Columbia. *See supra* notes 74, 79 and accompanying text. Broad–narrow statutes can be constructed in a number of ways. One of the simplest is Tennessee's:

(a) A person commits extortion who uses coercion upon another person with the intent to:

(1) Obtain property, services, any advantage or immunity; or

(2) Restrict unlawfully another's freedom of action.

(b) It is an affirmative defense to prosecution for extortion that the person reasonably claimed:

(1) Appropriate restitution or appropriate indemnification for harm done; or

(2) Appropriate compensation for property or lawful services.

TENN. CODE ANN. § 39-14-112; *see also* D.C. CODE §§ 22-3252(a), 22-3201(4); MICH. COMP. LAWS ANN. § 750.213 (requiring the threat to be "malicious" to constitute a violation).

85. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1804 (MPC style); MINN. STAT. ANN. §§ 609.27–609.275 (modern structure code); MASS. GEN. LAWS ANN. ch. 265, § 25 (common law style).

86. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/12-6(a); IOWA CODE ANN. § 711.4.

87. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.213; TENN. CODE ANN. § 39-14-112.

88. Alabama, Arizona, Delaware, Georgia, Idaho, Maine, Nebraska, New Hampshire, South Carolina, South Dakota, Texas, and Utah are "true" narrow–narrow states, while California has a narrow prohibition but seemingly broad exceptions. *See supra* notes 75, 77, 79 and accompanying text. In practice, however, the distinction between narrow–narrow and narrow–broad statutes appears to be irrelevant; if the offense only makes seeking property via blackmail a crime, an exception that goes beyond rightful property recovery (the essence of "narrow exceptions") will never have any effect. Narrow–narrow statutes, like broad–narrow statutes, do not share a general pattern as do most broad–broad statutes. However, Arizona's theft by extortion statute is typical of those jurisdictions with a narrow demand language and a narrow affirmative defense:

A. A person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of a threat to do in the future any of the following:

1. Cause physical injury to anyone by means of a deadly weapon or dangerous instrument.

2. Cause physical injury to anyone except as provided in paragraph 1 of this subsection.

3. Cause damage to property.

4. Engage in other conduct constituting an offense.

5. Accuse anyone of a crime or bring criminal charges against anyone.

considerable variation in statutory language and organization. Many are codified as extortion statutes, but they are intended to cover the traditional blackmail crime also.[89]

In the "other" category are ten jurisdictions that appear to have no exceptions to their blackmail laws.[90] Four have broad prohibitions,[91] and six have narrow prohibitions.[92]

III. Testing Community Views

To test which of the theories and statutory schemes best capture lay intuitions about the conduct that should be criminalized, subjects were given a series of scenarios designed to focus on the differences among the theories. As to each scenario, a test document asked whether such conduct should be criminalized. To be sure that subjects were perceiving the scenarios as intended, a second test document performed a "manipulation check," asking for details about subjects' perception of each scenario—specifically questions testing what the subject perceived with regard to each of the factors that

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> 6. Expose a secret or an asserted fact, whether true or false, tending to subject anyone to hatred, contempt or ridicule or to impair the person's credit or business.
> 7. Take or withhold action as a public servant or cause a public servant to take or withhold action.
> 8. Cause anyone to part with any property.
>
> B. It is an affirmative defense to a prosecution under subsection A, paragraph 5, 6 or 7 that the property obtained by threat of the accusation, exposure, lawsuit or other invocation of official action was lawfully claimed either as:
>
> > 1. Restitution or indemnification for harm done under circumstances to which the accusation, exposure, lawsuit or other official action relates.
> > 2. Compensation for property that was lawfully obtained or for lawful services.

ARIZ. REV. STAT. ANN. § 13-1804. Other statutes achieve the same ends via different means. *See, e.g.*, GA. CODE ANN. § 16-8-16; LA. REV. STAT. ANN. § 14:66.

89. *See, e.g.*, ALA. CODE § 13A-8-15 ("Extortion by means of a threat . . . constitutes extortion in the second degree.").

90. Jurisdictions with "no exception" blackmail statutes have varied approaches. Kansas's blackmail statute is simple: "Blackmail is gaining or attempting to gain anything of value or compelling another to act against such person's will, by threatening to communicate accusations or statements about any person that would subject such person or any other person to public ridicule, contempt or degradation." KAN. STAT. ANN. § 21-3428 (2007). Other "no exception" statutes vary. *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 60-1488 (West 2003) (codifying two exclusive components to Oklahoma's blackmail law—accusing or threatening to accuse a person of a crime or exposing or threatening to expose facts that would "subject such person to the ridicule or contempt of society"— but not recognizing any exceptions to the statute); 18 U.S.C. § 873 (2006) (declaring no statutory exceptions to federal blackmail law if an individual receives some value for the threat of informing or as consideration for not informing of any violation of the law of the United States).

91. KAN. STAT. ANN. § 21-3428; LA. REV. STAT. ANN. § 14:66; MINN. STAT. ANN. §§ 609.27– 609.275; OKLA. STAT. ANN. tit. 21, § 60-1488.

92. NEV. REV. STAT. § 205.320 (2007); OHIO REV. CODE ANN. § 2905.11–.12 (West 2006); OR. REV. STAT. ANN. § 164.075 (2007); 18 U.S.C. § 873 (2006); VA. CODE ANN. § 18.2-59 (2009); W. VA. CODE ANN. § 61-2-13 (LexisNexis 2005).

were being manipulated to test the different theories. The subjects' crimi-
nalization responses were then compared to those predicted by each theory
and each statutory approach to determine which best reflected the subjects'
views.

A. Design and Methodology

The subjects were 129 men and women,[93] recruited through flyers and
an e-mail listserv, who were brought into a quiet laboratory and completed
the study in return for $4. Subjects were run in small groups (usually one to
three per group). Each subject was tested individually, completing the study
at his or her own pace. Subjects ranged in age from eighteen to fifty-eight
and as a group were ethnically, educationally, and economically diverse.[94]

A series of pilot tests revealed that the order in which the two test
documents were given had no effect on results, so all subjects were given the
manipulation-check questionnaire first, then the criminalization
questionnaire. Each questionnaire presented subjects with the same eleven
scenarios (reproduced in Table 1) that were constructed to highlight the
differences among the theories being tested. We administered two versions
of the questionnaire, which varied the order of presentation of the eleven
scenarios. Presentation order did not significantly affect any of the results
we report.

As is apparent, each of the scenarios involves two main characters,
Victor and Brian. In each case, Brian is the potential blackmailer who
threatens Victor, the potential victim, and demands, in return for not carrying
out the threat, some action or other compensation. The threat and the de-
mand in each scenario are different, and each scenario generates a different
pattern with respect to whether it satisfies the criteria of each of the theories.

Table 1. Text of Scenarios

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1. Pay or Report Crime. Brian learns that Victor has killed a man
and tells Victor he will report the crime to the authorities unless Victor
pays him $1,000.

(continued)

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93. Seventy-seven women, fifty-one men, and one subject unspecified.

94. Average age was 25.0, with a standard deviation of 7.9. Ethnicity of the subjects consisted
of 58 white, 41 African-American, 15 Asian, 8 Latino, 4 multi-ethnic, and 3 Native American.
Educationally, the subjects consisted of 7 high school, 69 some college, 46 college degree, 5
masters degree, and 2 professional degree, and their self-reported household incomes ranged from
$10,000 to $175,000 (75th percentile = $65,000; median = $20,000; 25th percentile = $10,000).

Table 1 (cont.). Text of Scenarios

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2. Pay or Face Lawsuit.   Victor, driving negligently, seriously damages Brian's car in an accident. Brian tells Victor that he will sue him in court, where he can collect the cost of repairs, unless Victor pays him the $1,000 that the repairs will cost.

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3. Sober Work or Expose Drinking. Brian and Victor both work in a factory. Brian discovers that Victor has a drinking problem, which not only explains his frequent absences and tardiness but might also create a risk in the workplace. Victor is worried that if management finds out, he will lose his job under the company's "zero tolerance" policy, which mandates dismissal of anyone found to have an existing drinking problem. Brian says he will report Victor's drinking problem to management unless Victor promises to show up sober every day to work, join an alcohol abuse treatment program to avoid recurrence, and make a donation to a charity fighting alcohol abuse.

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4. Pay or Reveal Recipe.   Victor owns a bakery known for its cupcakes, which are very popular despite their high price. Brian discovers that the cupcakes are actually made using a cheap store-bought cake mix and frosting. Though Victor has never made any false claims about how his cupcakes are made, he knows his business will be ruined if the truth is revealed.   Brian threatens to make the cupcake "recipe" public unless Victor pays him $10,000.

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5. Pay or Publish Book.   Brian, a literature professor, has spent considerable time conducting research for a biography of Victor, a famous author. His research has turned up information that would destroy Victor's reputation. Despite what he has learned, Brian admires Victor and does not wish to cause him harm, but he also thinks it would be inappropriate to publish a biography that does not accurately present what he knows. Accordingly, he contacts Victor and says he will discontinue his biography project if Victor pays him the $4,000 that will properly compensate Brian for his expenses and the work he has already done.

Table 1 (cont.). Text of Scenarios

6. Pay or Expose Cheating. Brian and Victor are taking the examination to enter the police academy. All applicants sign a promise not to cheat and to report those who do. Authorities aggressively prosecute cheating but only if there is hard evidence, such as the "cheat sheet" used during the exam. During the exam, Brian sees and picks up Victor's "cheat sheet." He says he will give it to the authorities unless Victor pays him $500. If Victor pays, Brian will give the "cheat sheet" back, and no action of any kind against Victor will be possible.

7. Withdraw or Expose Cheating. Brian and Victor are taking the examination to enter the police academy. All applicants sign a promise not to cheat and to report those who do. Authorities aggressively prosecute cheating but only if there is hard evidence, such as the "cheat sheet" used during the exam. During the exam, Brian sees and picks up Victor's "cheat sheet." Victor is remorseful about the cheating, but does not want to face legal action. Brian says he will expose the cheating unless Victor withdraws his application to the police force, so that he cannot actually benefit from this instance of cheating. If Victor does so, Brian will give back the cheat sheet, and no action of any kind against Victor will be possible.

8. Cut Tree or Publish Photos. Brian, Victor's neighbor, thinks that Victor's expensive and exotic tree is an eyesore. Brian has asked Victor to cut the tree down but Victor has refused to do so. Using a special telephoto lens, Brian takes photos of Victor in his home having sexual intercourse and tells Victor that he will post them on the Internet unless Victor agrees to cut down the offending tree. If Victor does cut it down, Brian will hand over the negatives and the only copy of the photos.

Table 1 (cont.). Text of Scenarios

9. Pay or Report Smoking. Brian and Victor work for a nonprofit anti-smoking organization. Teresa, the current head of the organization, has made clear that she expects all her employees to not smoke, even though this was not an explicit condition for their employment, because she views smokers as insufficiently committed to her organization's mission. However, Teresa is permanently leaving the organization. Her replacement, Tina, does not care whether her employees smoke when they are outside the workplace. A few days before Teresa's departure, Brian runs into Victor at a restaurant. Victor is halfway through a cigar. He asks Brian not to tell Teresa, because he knows that if she finds out, her last act as head of the organization will be to fire him. Victor tells Brian that he loves his job, though he also enjoys smoking on occasion. Brian says he will tell Teresa immediately unless Victor pays him $1,000.

10. Pay or Report Crime. Brian doesn't like Victor. When he learns that Victor has killed a man, he tells Victor that he will report the crime to the authorities unless Victor pays him $1, as a way of forcing an admission of guilt that he might choose to use against Victor in the future.

11. Pay Penalty or Foreclose. Brian is the banker who oversees Victor's home mortgage loan. He is also in love with Victor's wife. Victor has missed several mortgage payments. Brian is authorized by his bosses to either arrange a refinancing of Victor's loan, or to impose a substantial one-time penalty on Victor for missing past payments. Brian tells Victor that unless Victor pays the substantial penalty — which he assumes Victor cannot do — the bank will foreclose on Victor's house. Brian believes if Victor loses his house, Victor's wife will leave him.

The first and second scenarios are designed for quality-control purposes. The first scenario is a classic case of blackmail for which all theorists[95] and all statutory schemes[96] would impose blackmail liability. Scenario 2 provides an example of the reverse case, one in which all theorists and all statutory schemes would agree that no blackmail liability should exist.[97] If a subject were to give an incorrect answer to either or both of these screening questions, that subject would be segregated from the bulk of the subjects and not included in the analysis of survey results. We are committed to putting

95. *See supra* subparts I(A)–(C). *But see supra* subpart I(D).
96. *See supra* notes 73–79 and accompanying text.
97. *See supra* subpart I(C).

the various theories and code-drafting approaches to a fair test, which should not include using subjects who cannot provide proper results for the clear cases presented in the two screening scenarios.[98]

To be sure that the subjects were in fact perceiving the scenarios in the way that each was intended, the manipulation-check questionnaire asked each subject whether he or she perceived certain facts or conclusions about each scenario, specifically those facts or conclusions that served as the criteria for each theory. The standard templates for each manipulation-check question for each of the four theories are set out in Table 2. (Recall that the Isenbergh economic theory made no claim that it was based in any part upon lay intuitions of justice, so there is no manipulation check for it as there is for each of the other theories, although we will later compare its liability prefer-ences to the liability preferences of lay persons.)

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98. As a result of this screening mechanism, thirty-five subjects were excluded from the analysis: twenty-one who varied from the predicted response to Scenario 1, twenty-nine who varied from the predicted response to Scenario 2, and fifteen who varied on both.

For the fifteen who confounded both predictions, it is hard to see how their responses could indicate anything other than confusion, random answering, or malicious mischief, as any principled disagreement to the accepted result in the two cases would arise from different, and indeed opposing, views (abolitionists versus expansionists). In fact, as a group, those fifteen subjects' overall responses were "indifferent" (i.e., not statistically significant relative to a neutral answer) for seven of the remaining nine responses, suggesting randomness. (The other two scenarios were Scenario 5 (Pay or Publish Book), for which the excluded subjects favored liability but the included subjects gave an indeterminate response, and Scenario 10 (Pay or Report Crime), where the excluded subjects favored no liability and the included subjects favored liability.)

Those who "erred" on Scenario 1, rejecting liability where liability was predicted, might have been demonstrating an "abolitionist" position toward blackmail, thinking it should never be punished. Yet these respondents as a group also gave indifferent responses to seven of the other ten scenarios (including scenarios where respondents as a whole consistently rejected liability) and gave pro-liability responses to another two scenarios (Scenarios 4 (Pay or Reveal Recipe) and 8 (Cut Tree or Publish Photos)). In fact, the only other scenario for which this group decisively rejected liability was Scenario 10—the *other* "Pay or Report Crime" scenario. Again, this pattern of responses suggests arbitrariness or outright deception.

Those who erred on Scenario 2 also gave indifferent responses to seven of the other ten scenarios (though not the same seven as for those who erred on Scenario 1). For the other three— Scenarios 5 (Pay or Publish Book), 6 (Pay or Expose Cheating), and 8 (Cut Tree or Publish Photos)—this group favored liability.

The excluded subjects also fared very poorly on the manipulation checks, providing further reason to ignore their responses. Of the forty-four manipulation checks, those who "erred" on Scenario 1 gave indifferent responses to nineteen, and "wrong" (i.e., the opposite of predicted) answers to another six; those who erred on Scenario 2 also gave nineteen indifferent answers and six wrong ones, though they were not for the same sets of manipulation checks as the other group.

Table 2. Manipulation-Check Questions for Criteria for Each Theory

a. Wrongful Intention. If Victor refuses Brian's offer, and Brian carries out the threat, would his primary reason for acting be wrongful? (+ = liability) *[a[1]: Berman] [& finding demand is substantial = a[2]: Katz]*
b. Offer to Violate Legal Duty. If another person knew what Brian knows, should the law require that the person do [or: forbid the person from doing] what Brian threatens to do to Victor, or face legal liability? (+ = liability) *[Feinberg]*
c. Continuing Domination. If Victor agrees to the demand, would Brian retain the power to make additional demands based on the same threat on a future occasion? (+ & finding demand is substantial = liability) *[Fletcher]*
d. Leveraging Another's Influence. If an interested third party learned what Brian knows, would the third party's reaction be to want something different from what Brian demands that Victor do? (+ = liability) *[Lindgren]*

> * Scenario #2 required a special *d* question because the standard *d* question above assumes that there might be an interested third party, but scenario 2 was constructed to not have one. Thus, we needed to confirm that the subjects perceived this to be the case and asked: Is there an interested third party who should more properly be exercising the authority that Brian is exercising when he threatens Victor? (If you think that Brian is threatening to use authority that properly belongs to him alone, select -3, -2, or -1.) (- = no liability)

However, each manipulation-check question was in fact individualized to reflect the facts of each scenario. Thus, for example, the manipulation check for the Wrongful Intention Theory for Scenario 1 was as follows.

a. If Victor does not pay Brian the $1,000 and Brian reports Victor's crime to the authorities, would Brian's primary reason for reporting Victor's crime be wrongful?					
-3 Clearly no	-2 Probably no	-1 Possibly no	+1 Possibly yes	+2 Probably yes	+3 Clearly yes

The same six-point, no–yes scale was used for all forty-four of these questions (one question for each of the four theories' criteria for each of the eleven scenarios).

Following these four manipulation-check questions, three additional questions were asked with regard to each scenario. One asked whether the threat was substantial—an additional element of two of the theories (Katz's and Fletcher's). The two other questions asked about the extent of the harm that would be caused if Brian did as he threatened and about the wrongfulness of the victim's conduct that Brian was threatening to expose. Again, each of these three questions was customized to the facts of the scenario. Thus, the questions for Scenario 1 were as follows, with the response scales shown below.

e. How substantial is a demand that another person pay $1,000?					
0	1	2	3	4	5
No dem-and	Trivial dem-and	Somewhat substantial	Substantial	Very substantial	Extremely substantial
f. What is the extent of the harm that would be caused to Victor if Brian reported Victor's crime to the authorities?					
0	1	2	3	4	5
Not damag-ing	Only trivially damaging	Somewhat damaging	Damaging	Seriously damaging	Extremely damaging
g. How wrongfully did Victor behave by killing a man?					
0	1	2	3	4	5
Not wrongful at all	Trivial	Somewhat wrongful	Wrongful	Seriously wrongful	Extremely wrongful

The last two questions were asked so we could test whether these variables might play a role in the subjects' criminalization decisions. Notice that all three of these questions asked not merely for a binary response (e.g., wrongful or not wrongful) but for a quantitative measure of the factor, which we could then use to see if it correlated with subjects' criminalization decisions.

The "correct answers"—those sought by the researchers to assure subjects were perceiving each scenario as intended—are set out in Table 3 below.

Table 3. Manipulation Check "Correct Answers"

#	Scenario	WI	BD	CD	UA	SD
1	Pay or Report Crime	+	+	+	+	≥2
2	Pay or Face Lawsuit	-	-	-	-*	≥2
3	Sober Work or Expose Drinking	-	-	-	+	≥2
4	Pay or Reveal Recipe	+	-	+	+	≥2
5	Pay or Publish Book	-	-	+	+	≥2
6	Pay or Expose Cheating	+	+	-	+	≥2
7	Withdraw or Expose Cheating	-	+	-	+	≥2
8	Cut Tree or Publish Photos	+	+	-	+	≥2
9	Pay or Report Smoking	+	-	-	+	≥2
10	Pay or Report Crime	+**	+	+**	+	<3**
11	Pay Penalty or Foreclose	+	-	-	-	≥2

Key: *WI* – Wrongful Intention Theory of Berman and Katz
        BD – Breach of Duty Theory of Feinberg
        CD – Continuing Domination Theory of Fletcher
        UA – Usurping Authority Theory of Lindgren
        SD – substantial demand (2 or less suggests subject thought Brian's demand was not substantial)
        + = 'yes' response   – = 'no' response

* Question *d* for scenario 2 asks the preliminary question of whether there is an interested third party, to which we expect the answer to be "no," thereby obviating the need to ask subjects the question that is used in all other scenarios.

** In scenario 10, question *e* we expect to confirm that subjects do not see the threat as substantial, thus barring liability under theories *WI-K* and *CD* even though the liability requirements for those theories are otherwise satisfied.

In the criminalization questionnaire, after each scenario was presented, participants were asked whether or not Brian should be held criminally liable for his threat. Again, each liability question was customized to the facts of the scenario. So the question for Scenario 1 was as follows, with the same scale used for each scenario.

Does Brian deserve any degree of criminal liability for threatening to report Victor's crime if Victor does not pay him $1,000?						
-3 Definitely no liability of any degree	-2 Probably no liability of any degree	-1 Perhaps no liability of any degree	0 Unsure	1 Perhaps liability of some degree	2 Probably liability of some degree	3 Definitely liability of some degree

After responding to the manipulation-check questionnaire and the criminalization questionnaire, participants were given a short demographic questionnaire asking for information such as age, gender, household income, ethnic background, marital status, number of children, political affiliation, and membership in various types of organizations. Participants also were asked about situations in which they may have been coerced or had coerced others in any of the ways similar to those described in the scenarios and were given space to explain further any coercion that they had experienced.

B. Theory Predictions

Each theory predicts a different pattern of criminalization results for the eleven scenarios, as summarized in Table 4 below. By comparing these predictions to the participants' actual preferences, as we do in subpart D below, we can determine which of the theories best reflects the participants' views.

Table 4. Criminalization Predictions for Each Theory

Scenario	*WI-B*	*WI-K*	*BD*	*CD*	*UA*	*EI*
1. Pay or Report Crime	Y	Y	Y	Y	Y	Y
2. Pay or Face Lawsuit	N	N	N	N	N	N

Table 4 (cont.). Criminalization Predictions for Each Theory

3. Sober Work or Expose Drinking	N	N	N	N	Y	N
4. Pay or Reveal Recipe	Y	Y	N	Y	Y	Y
5. Pay or Publish Book	N	N	N	Y	Y	Y
6. Pay or Expose Cheating	Y	Y	Y	N	Y	Y
7. Withdraw or Expose Cheating	N	N	Y	N	Y	Y
8. Cut Tree or Publish Photos	Y	Y	Y	N	Y	N
9. Pay or Report Smoking	Y	Y	N	N	Y	N
10. Pay or Report Crime	Y	N	Y	N	Y	Y
11. Pay Penalty or Foreclose	Y	Y	N	N	N	N

Key:	*WI-B and WI-K* – Wrongful Intention Theory of Berman and Katz, respectively
BD – Breach of Duty Theory of Feinberg
CD – Continuing Domination Theory of Fletcher
UA – Usurping Authority Theory of Lindgren
EI – Efficient Information Allocation Theory of Isenbergh
Y = this theory would impose liability in this scenario
N = this theory would not impose liability in this scenario

Below we explain and document why each of the theories gives the pattern of criminalization set out in this table.

1. Wrongful Intention.—Mitchell Berman and Leo Katz both offer theories of blackmail as the wrongful exploitation of the recipient of the threat by the maker of the threat.[99] Under Berman's view, the threat itself

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99. *See supra* section I(A)(1).

provides evidence of the blackmailer's wrongful motivations or beliefs.[100] Had the blackmailer been interested in disclosing the information (or engaging in whatever other conduct he threatens), he would simply have done so. The willingness to exchange silence (or other nonaction) for personal gain indicates that if the blackmailer's demand is not satisfied and he carries out the threat, he will be doing so in retaliation for not getting what he sought rather than out of a good-faith desire to inform the party receiving the information.[101] Katz similarly thinks that a retaliatory motivation can make an otherwise innocuous disclosure or other threatened act wrongful.[102]

Both Berman and Katz would find five of our scenarios to describe blackmail based on this retaliatory dimension: Scenario 1 ("Pay or Report Crime [$1,000]"), Scenario 4 ("Pay or Reveal Recipe"), Scenario 6 ("Pay or Expose Cheating"), Scenario 8 ("Cut Tree or Publish Photos"), and Scenario 9 ("Pay or Report Smoking"). In each case, Brian will accept money—or, in Scenario 8, the cutting down of the tree—in exchange for keeping secret whatever information he has, indicating that if he later dis-closes what he knows, he will not be doing so for the right reasons, but only because the recipient of the threat did not satisfy his desire to get paid.

Scenario 10 ("Pay or Report Crime [$1]") involves a similar threat but presents the one case where Berman and Katz would disagree about the outcome. For Berman, if the willingness to keep one's silence about a known crime indicates a wrongful motivation, the magnitude of the demand does not change the wrongfulness of the threat.[103] For Katz, on the other hand, even a wrongfully motivated threat ceases to be blackmail if the demand is too trivial, and a demand for $1 does not rise to the level of substantiality Katz would require.[104]

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100. Initially, Berman's discussions of blackmail focused on the blackmailer's motivations; in more recent work, Berman has characterized blackmail in terms of the blackmailer's beliefs. *See supra* notes 12–13 and accompanying text.

101. *See supra* notes 11–13 and accompanying text.

102. *See* Katz, *supra* note 3, at 1598 (assessing a hypothetical act of blackmail as "immoral only because, if it were to be done, it would be done for purely retaliatory reasons").

103. *See* E-mail from Mitchell Berman, Richard Dale Endowed Chair in Law, the Univ. of Texas Sch. of Law, to Paul Robinson, Colin S. Diver Professor of Law, Univ. of Pa. Law Sch. (June 5, 2009) (on file with author) (agreeing that Berman's theory "does not have an exclusion for trivial demands").

104. *See, e.g.*, E-mail from Leo Katz, Frank Carano Professor of Law, Univ. of Pa. Law Sch., to Paul Robinson, Colin S. Diver Professor of Law, Univ. of Pa. Law Sch. (June 8, 2009) (on file with author) (claiming that in this scenario the threat is "too insignificant to count as immoral"); Memorandum from Leo Katz, Frank Carano Professor of Law, Univ. of Pa. Law Sch. (Nov. 21, 2008) (on file with author) ("At some point the threatened misconduct is just too trivial. There is some line to be drawn . . . . Where is that line? We probably have discretion about where to draw it. The only thing we are compelled to do by logical consistency is to have such a line."); *see also* Katz, *supra* note 3, at 1597. In discussing his substantiality requirement for demands, Katz states,

> The blackmailer puts the victim to a choice between a theft (or some other criminal encroachment) and some other, minor wrong. The execution of the theft then carries

Scenario 11 ("Pay Penalty or Foreclose") counts as blackmail for both Berman and Katz. Here Brian has the authority to make Victor pay the bank a penalty (and to foreclose if Victor does not), but he is exercising that authority for wrongful reasons—seeking to cause harm to Victor rather than make his decision on more neutral and fair grounds.

The remaining four cases are not blackmail under this theory as they involve situations where the threat is not driven by any wrongful purpose but by a good-faith desire to achieve a fair outcome for all concerned. In Scenario 2 ("Pay or Face Lawsuit"), Brian simply seeks what he is owed in a way that will avoid litigation costs for both parties. If his request fails, his lawsuit would pursue the same legal entitlement as his earlier request, and Brian would not behave wrongfully in pursuing it. In Scenario 5 ("Pay or Publish Book"), Brian has Victor's best interests at heart but also does not want to bear the financial costs of behaving decently toward Victor. Finally, in both Scenario 3 ("Sober Work or Expose Drinking") and Scenario 7 ("Withdraw or Expose Cheating"), Brian is seeking nothing for himself, but he is trying to help Victor hold on to his job or reputation while also respecting (and seeking to ensure that Victor respects) the legitimate interests of others.

2. Breach of Duty.—Under Feinberg's theory, it is acceptable to prohibit a threat as blackmail if it would also be justifiable for the law to prohibit or mandate the threatened act.[105] Where the law imposes a duty, a person may not threaten to violate that duty (as occurs where the threatened act is prohibited), nor may he offer to violate the duty in exchange for compensation (as occurs where the threatened act is mandated).[106] Further, even if the law does not currently recognize a given duty, where the duty is one the law *should* recognize, then Feinberg argues for both adopting that duty and treating threats (or offers) to violate it as blackmail. For example, Feinberg maintains that revelation of some truthful but damaging information should be treated as defamation and threats to reveal such information should

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with it the level of blameworthiness of a theft. To be sure, the wrong must not be *too* minor. The mere threat to be nasty or unpleasant won't suffice; the immorality has to be more substantial than that. But it need not—and this is the crucial point—be an immorality that comes anywhere close to being criminal.

Id.

    105. *See* FEINBERG, *supra* note 3, at 258, 275 (arguing that blackmail appropriately criminalizes "legally extortive" conduct where the threatened acts violate civil or criminal laws).

    106. *See id.* at 243 ("No citizen can be allowed to barter away his duties for personal advantage, or even offer to do so (the offer in this case being very much like an *attempt* at crime, itself punishable).").

be treated as blackmail.[107] The test, then, can be stated as follows: if it would be proper for the law to impose a duty to act in a certain way, then it would also be proper for the law to treat a threat or offer to violate that duty as blackmail.

Four of our scenarios are blackmail under Feinberg's theory because they involve offers to violate a duty: situations where the blackmailer's failure to do what he proposes to do would be improper. Feinberg explicitly discusses cases such as Scenario 1 ("Pay or Report Crime [$1,000]") and Scenario 10 ("Pay or Report Crime [$1]"), involving offers to breach one's duty to report criminal activity.[108] As to Scenario 10, Feinberg even points out that, in his view, even a modest demand still counts as blackmail if it involves a violation of one's obligations or civic duty to the community, such as nondisclosure of a crime.[109] Scenario 6 ("Pay or Expose Cheating") and Scenario 7 ("Withdraw or Expose Cheating") both contain a promise on the part of would-be police officers, such as Brian, to expose cheating by other applicants, and Brian's offer to Victor would violate that promise in both cases.[110]

One other case would also constitute blackmail under Feinberg's theory. Under the theory, threats to violate a legal duty are blackmail whether the source of a legal duty is civil or criminal. For example, if someone would be entitled to bring a private lawsuit against another for disclosing secret information in violation of his privacy, then the threat to disclose that information can be treated as blackmail.[111] Scenario 8 ("Cut Tree or Publish Photos"), where Brian uses a special device to take compromising photographs of Victor in his own home and threatens to make them public, presents just such a situation, as Victor would almost certainly have a tort claim against Brian for invasion of privacy.

Feinberg's breach-of-duty theory finds that a threat is not blackmail if there is no duty in either direction, but the maker of the threat should be legally free either to engage in the threatened conduct or not.[112] Three of our cases involve situations where the person making the threat is in possession

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107. *See id.* at 254–56 (advocating both civil duties and criminal laws designed to protect personal reputations from such revelations when the public interest in the truth is minimal).

108. *See id.* at 241–45 (describing threats to expose criminal wrongdoing as one form of blackmail).

109. *See id.* at 262 (noting that a minor demand made in exchange for not revealing a crime to the authorities is blackmail not because of the excessive harm to the victim but because it "default[s] on a civic duty to the community").

110. *See id.* at 244–45 (arguing that an offer to violate the civic duty to cooperate with law enforcement should be considered blackmail).

111. *See id.* at 250–51 (asserting that blackmail includes a demand for payment in exchange for revealing information that would constitute a tortious invasion of privacy).

112. *See id.* at 245–49 (arguing that threats to reveal noncriminal conduct by the victim ought not to be criminalized as blackmail).

of certain secret information and neither has, nor plausibly should have, any legal obligation either to disclose or to conceal such information.[113] In Scenario 3 ("Sober Work or Expose Addiction"), Brian might arguably have a moral responsibility to tell his employer of Victor's addiction, but it seems dubious to claim that his failure to do so should subject him to legal liability, either criminally or civilly. In the other cases—Scenario 4 ("Pay or Reveal Recipe"),[114] Scenario 5 ("Pay or Publish Book"),[115] and Scenario 9 ("Pay or Report Smoking")[116]—Brian is clearly free to decide whether or not he should reveal what he knows, as Victor's secret behavior is neither illegal nor dangerous.

Our other two cases—Scenario 2 ("Pay or Face Lawsuit") and Scenario 11 ("Pay Penalty or Foreclose")—involve situations where the maker of the demand is legally entitled to what he is demanding and therefore clearly violates no duty in making the request for it.[117]

3. Continuing Domination.—The criteria for establishing blackmail under George Fletcher's theory are whether the threat involves a demand that is both significant and capable of repetition, thus having the potential to create an ongoing relationship of dominance and subordination between the blackmailer and the victim.[118] Three of our scenarios count as blackmail under this theory. All three involve situations where the blackmailer makes a demand for money that could easily be replicated, even if the recipient of the threat pays the money, because the blackmailer will retain access to the information that grounds the threat: Scenario 1 ("Pay or Report Crime [$1,000]"), Scenario 4 ("Pay or Reveal Recipe"), and Scenario 5 ("Pay or Publish Book").[119]

A fourth case, Scenario 10 ("Pay or Report Crime [$1]"), also involves such a threat but would not count as blackmail for Fletcher because the de-

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113. *Cf. id.* at 248–49 (noting the absence of justifiable duty for those who know about another's adultery either to reveal or to conceal it).

114. *Cf. id.* at 245 (noting the lack of duty to disclose noncriminal "trickery" such as that of "a merchant whose underhandedness falls short of outright fraud . . . but misleads unwary customers into purchasing inferior products for inflated prices").

115. *See id.* at 263–64 (claiming that a publisher who requests fair compensation for not including "damaging" elements in a forthcoming book may be justified and has not committed blackmail).

116. *See id.* at 245–49 (arguing that threats to reveal noncriminal conduct by the victim ought not to be criminalized as blackmail).

117. *See id.* at 264–66 (noting that demands made under a legal claim of right are justifiable and not blackmail).

118. *See supra* section I(A)(2).

119. *See* Fletcher, *supra* note 3, at 1626 ("Blackmail occurs when, by virtue of the demand and the action satisfying the demands, the blackmailer knows that she can repeat the demand in the future.").

mand is not "substantial." A "minimal" demand, such as the request for $1 in this case, is insufficient to create the degree of subordination Fletcher considers to be the gravamen of blackmail.[120]

Our other seven scenarios involve threats that cannot be repeated, so no continuing pattern of domination can be established. Three scenarios are designed to present threats that cannot be repeated because the maker of the threat is offering to relinquish the physical evidence or documentation enabling the threat: Scenario 6 ("Pay or Expose Cheating"), Scenario 7 ("Withdraw or Expose Cheating"), and Scenario 8 ("Cut Tree or Publish Photos").

The four remaining scenarios also involve threats incapable of repetition, each because of more unique circumstances. In Scenario 2 ("Pay or Face Lawsuit"), payment of the cost of repairs will leave Brian with no damages, hence no further ability to bring a lawsuit. In Scenario 3 ("Sober Work or Expose Addiction"), if Victor accedes to Brian's current demand and becomes sober, he will no longer have any problem for Brian to expose. In Scenario 9 ("Pay or Report Smoking"), Brian will lose the opportunity to repeat the demand because the scenario provides that the currently damaging information about Victor's smoking will no longer pose any threat to Victor once the new head of the organization, Tina, takes charge. Scenario 11 ("Pay Penalty or Foreclose") involves a "one-time" penalty that Victor will either pay or not within thirty days. If the penalty is paid, Brian loses his leverage, and if it is not, Brian might make good on the foreclosure threat but would then have no continuing authority to exercise over Victor.

4. Usurping Authority.—Under James Lindgren's theory, "blackmail is a way that one person requests something in return for suppressing the actual or potential interests of others. To get what he wants, the blackmailer uses leverage that is less his than someone else's."[121] Often this involves making a threat "to release damaging information" that some other party might want to know.[122] In our Scenario 1 ("Pay or Report Crime [$1,000]"), Scenario 6 ("Pay or Expose Cheating"), and Scenario 10 ("Pay or Report Crime [$1]"), Brian seeks personal gain by using information in which law enforcement authorities (and the public at large) would have an interest. In Scenario 4 ("Pay or Reveal Recipe"), Brian seeks money to withhold information that would interest the bakery's customers. In Scenario 9 ("Pay or Report Smoking"), Brian seeks money in return for keeping from Teresa information that she would want to know.

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120. *Cf. id.* at 1627 (noting that the case of one who threatens to withhold a kiss in demand of dinner does not pose a threat of dominance and subordination because the "threat and the demand are minimal").

121. Lindgren, *supra* note 2, at 672.

122. *Id.*

Similar, though perhaps less intuitive, results obtain under Lindgren's theory for Scenario 5 ("Pay or Publish Book")[123] and Scenario 8 ("Cut Tree or Publish Photos"). Here also, Lindgren's theory finds the threat to be blackmail on the basis that Brian is somehow selling out the public's interest in obtaining secret, even salacious information about a private citizen.[124]

Finally, Scenario 3 ("Sober Work or Expose Addiction") and Scenario 7 ("Withdraw or Expose Cheating") are also blackmail under Lindgren's theory. In both cases, though Brian does not seem to seek anything for his own benefit, what he asks of Victor departs from what the relevant third party would demand in Brian's stead (and Brian is aware of this). Scenario 3 makes clear that if the employer knew about Victor's substance-abuse problem, it would fire Victor under the "zero-tolerance" policy. Brian is additionally demanding things (such as the donation to charity) that the employer would not be in a position to demand. Accordingly, though Brian might not be advancing his own interests over the employer's, he is pursuing a remedy at odds with what the entitled, but ignorant, third party would pursue. Scenario 7 is similar. Indeed, Scenario 7 presents an even stronger case for blackmail under Lindgren's theory because here not only is Brian making a demand that might be incongruent with what the police force would do, but Brian is also violating his own promise to turn in cheaters to the proper authorities. Accordingly, Brian knows himself to be substituting his own judgment for that of another authorized decision maker.

For two cases, there is no third party whose interests are infringed by Brian's demand to Victor. In Scenario 2 ("Pay or Face Lawsuit"), Brian is not advancing the rights or interests of a third party but his own rights to payment for damage to his car.[125] In Scenario 11 ("Pay Penalty or Foreclose"), Brian's position as an agent of the bank entitles him to impose the penalty, and he is arguably protecting the interests of the bank by doing so. Even if his motivation is not to advance the interests of the bank alone, the bank's position has not been compromised in any way—indeed, the bank is the source of Brian's authority and has delegated to Brian exactly the power he is exercising in this situation.

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123. Lindgren discusses this precise situation. *See id.* at 683 ("Consider also the biographer or memoirist who seeks money to refrain from publishing a book that will damage someone's reputation. Publishing would further the writer's lawful business, but seeking money to refrain from ruining someone's reputation or business is blackmail.").

124. *See id.* at 672 ("[S]elling the right to inform others of embarrassing (but legal) behavior involves suppressing the interests of those other people.").

125. *See id.* at 713–14 ("For example, assume a person believes he has been tortiously and criminally harmed by another person. All authorities agree that it is legitimate for the injured party or his lawyer to threaten to file a civil suit for damages.").

5. *Efficient Information Allocation.*—Four of the scenarios are clearly blackmail of Isenbergh's first variety:[126] both Scenarios 1 and 10 ("Pay or Report Crime") and Scenarios 6 and 7 ("Pay/Withdraw or Expose Cheating") involve situations where the information could form the basis for a criminal prosecution. Two other scenarios are just as clearly *not* blackmail for Isenbergh: in both Scenario 2 ("Pay or Face Lawsuit") and Scenario 11 ("Pay Penalty or Foreclose"), Brian is directly enforcing legal rights that he has the authority to enforce.

For the remaining cases, the issue under Isenbergh's test is whether there has been any "prior course of dealing" between Brian and Victor; if not, the disclosure threat would be blackmail.[127] In Scenario 4 ("Pay or Reveal Recipe"), the case does not specify whether Brian obtained the information about Victor's cupcake recipe fortuitously or through deliberate effort, but there is no indication of any previous relationship, so Isenbergh would treat the case as blackmail. The same seems true for Scenario 5 ("Pay or Publish Book"), where it is clear that Brian was deliberately researching the details of Victor's life for the sake of uncovering what information he could.

This case indicates that Isenbergh's account has a difficult time dealing with cases of journalism or other investigation, where the researcher is, in Isenbergh's terms, engaged in "systematic information-farming" though not "bent only on profit from suppressing what they have uncovered."[128] Are such cases blackmail, because nonprohibition would promote excessive fruitless investigations, or nonblackmail, because the researcher is as or more likely to find (and disclose) useful public information as to find damaging private secrets, and she is not planning at the outset to "bargain" with the target to keep the information secret? Under Isenbergh's test, such cases are blackmail, though it is by no means clear whether such treatment is in keeping with Isenbergh's underlying goals.[129] A basic concern of Isenbergh (as with other law-and-economics thinkers) is to ensure that information ends up where it is most highly valued, and it is not clear in these cases whether the threat recipient values secrecy more than the public would value the

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126. *See* Isenbergh, *supra* note 60, at 1928 (stating the "tentative first rule" in blackmail is that "*B* cannot legally bargain with *A* to suppress information about a prosecutable crime or tortious act committed by *A*").

127. *See id.* at 1908 (noting that an alternative to criminalization would be to treat threats based on information obtained outside a prior course of dealing as legally unenforceable "and to treat *B*'s receipt of compensation for silence as a form of complicity in whatever is kept silent").

128. *See id.* at 1929 (recognizing that one danger of permitted bargaining is that it may "open the door to systematic information-farming by blackmailers bent only on profit from suppressing what they have uncovered").

129. *See id.* at 1930 (suggesting a test where contracts not to disclose private information would be valid only when the parties involved have a preexisting relationship).

information—though often the researcher, with the option of selling the information to either party, might be in the best position to decide.[130]

In the remaining three cases, Brian and Victor do have a preexisting relationship, so Isenbergh's test would not treat any of them as blackmail.[131] In Scenario 9 ("Pay or Report Smoking") and Scenario 3 ("Sober Work or Expose Drinking"), the implication is that Brian obtained the information fortuitously, so the result is consistent with Isenbergh's underlying principle. In such situations it also seems likely that Victor would be the "lowest cost avoider of untoward disclosure, and there is no obvious reason to protect [Victor] from bearing the full cost of preserving his own secrets."[132] The result of nonblackmail in the final case, Scenario 8 ("Cut Tree or Publish Photos"), is somewhat curious because Brian has engaged in deliberate snooping with a specific view to using its fruits as the basis of a threat. Here again, though, perhaps an individual should bear the burden of taking steps to prevent neighbors from spying. Further, it also seems likely that Victor values nondisclosure of the photos more than the public would value access to them; the photos' main, and perhaps only, value lies in Victor's desire to keep them private.

C. Statutory Liability Patterns

We also sought to test which statutory approach in current law best captures the participants' views. Building upon the analysis of current statutes in Part II, which suggested the existence of three common statutory approaches, we analyzed each scenario using the legal criteria summarized in Table 5 below.

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130. *See id.* at 1925 ("The most important concern in framing a regime for bargaining over private information is to enhance the likelihood that it will be controlled by the one who values it most.").

131. *Id.* at 1930.

132. *Id.* at 1931.

Table 5. Legal Criminalization Criteria

> *e. Model Penal Code (broad-broad)*[133] (Broad offense definitions, broad exceptions).
>
> Did Brian, with purpose unlawfully to restrict Victor's freedom of action to his detriment, threaten to commit a criminal offense, accuse anyone of a criminal offense, or expose a secret tending to subject any person to hatred, contempt, or ridicule?
>
> Brian is not liable if he believed the secret to be true and his action was limited to compelling Victor to behave in a way reasonably related to the circumstances which were the subject of the accusation, or exposure. Examples of permissible behaviors for Brian to compel include making Victor desist from further misbehavior, making Victor fix a previous wrong, or making Victor refrain from taking any action or responsibility for which Brian believes that Victor is not qualified.

> *f. Narrow-narrow jurisdictions*[134] (Narrow offense definitions, narrow exceptions).
>
> Did Brian threaten to expose a secret, accuse anyone of a crime, or threaten injury to Victor's property or reputation with intent to obtain Victor's property?
>
> Brian is not liable if he was owed the property as compensation for property or services, or as restitution for harm done to Brian.

> *g. Broad-narrow jurisdictions*[135] (Broad offense definitions, narrow exceptions).
>
> Did Brian threaten to expose a secret, accuse anyone of a crime, or threaten injury to Victor's property or reputation with intent to coerce Victor into taking or refraining from action, or with intent to obtain Victor's property?
>
> Brian is not liable if he was owed the property as compensation for property or services, or as restitution for harm done to Brian.

Using these criteria, the three statutory approaches would generate criminalization for the eleven scenarios in the patterns set out in Table 6 below.

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[133] *See supra* notes 82–83 and accompanying text.

[134] *See supra* notes 88–89 and accompanying text.

[135] *See supra* notes 84–87 and accompanying text.

Table 6. Legal Liability Analysis

Scenario	MPC	N-N	B-N
1. Pay or Report Crime	Y	Y	Y
2. Pay or Face Lawsuit	N	N	N
3. Sober Work or Expose Drinking	N	N	Y
4. Pay or Reveal Recipe	Y	Y	Y
5. Pay or Publish Book	Y	N	N
6. Pay or Expose Cheating	Y	Y	Y
7. Withdraw or Expose Cheating	N	N	Y
8. Cut Tree or Publish Photos	Y	N	Y
9. Pay or Report Smoking	Y	Y	Y
10. Pay or Report Crime	Y	Y	Y
11. Pay Penalty or Foreclose	N	N	N

Key: MPC – MPC (broad-broad) jurisdictions
        N-N – narrow-narrow jurisdictions
        B-N – broad-narrow jurisdictions
        Y – this statutory group typically would impose liability in this case
        N – this statutory group typically would not impose liability in this case

The MPC (broad–broad) jurisdictions would find liability for Brian in Scenarios 1, 4,[136] 5,[137] 6, 8, 9, and 10. However, Brian would get the excep-

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136. Note that in Scenario 4, Brian does not get the MPC affirmative defense because his purpose is not limited to compelling Victor to behave in a way reasonably related to the circumstances. However, North Dakota's formulation of the exception is significantly different: rather than having a limited-purpose requirement, the statute only requires that Brian believe "[t]hat a purpose of the threat was to cause the other to . . . refrain from taking any action or responsibility for which he was disqualified." N.D. CENT. CODE § 12.1-17-06(2)(b) (1997). While preventing Victor from taking a job for which he was unqualified is clearly not Brian's primary purpose, it could arguably be one of his secondary motives. As such, Brian would receive an exception for Scenario 4 in North Dakota.

137. The outcome for this scenario is slightly curious, as it presents one of the few situations that might fit into the "narrow" exception but does not fit within the "broad" one. Brian's request for money to cover his work expenses has no direct connection to Victor's underlying wrongdoing,

tion offered by the MPC in Scenarios 2 and 7, as his purpose in those situations was to make Victor act in a way reasonably related to the circumstances surrounding Brian's threat. In Scenario 3, Brian will get the exception, but he does not satisfy the MPC's offense requirements in any case because he does not have purpose to restrict Victor's freedom of action "to his detriment."[138]

It is difficult to formulate a "model" broad–narrow statute because of their different drafting styles, but we conclude that statutes in this group would find liability for Brian in every scenario except 2, 5, and 11. The critical difference between this category and the broad–broad category relates to the nature of the exception: in every scenario in which the broad-exception statutes, such as the MPC, would give an exception, the narrow-exception statutes would not (in Scenario 5, however, the narrow exception would apply even though the MPC's would not).[139] Brian does not have a right to any of the property demanded in Scenarios 1, 6, 9, and 10; thus he will not get an exception. If he did have a right to the money, however, he could get an exception under a broad–narrow statute.

For the narrow–narrow statutes, it is again difficult to formulate a model, but these statutes will find liability for Brian in Scenarios 1, 4, 6, 9, and 10. Predictably, these statutes differ from the broad–broad statutes with respect to Scenario 8, where Brian demands action from Victor rather than compensation; a narrow–narrow statute will not criminalize the actor who makes this type of demand. These statutes also find no liability where the actor demands only compensation for property or "lawful services," as in Scenario 5.[140]

Of the jurisdictions in the "other" category, the four "broad prohibition" statutes would impose liability for Brian in all scenarios, and the five "narrow prohibition" statutes would impose liability in Scenarios 1, 5, 6, 9, and 10, tracking the narrow–narrow jurisdictions' results.

A more complete legal analysis explaining and documenting each of these liability judgments for each statutory approach is set out in Appendix A. In subpart D below, we will compare these statutory criminalization patterns to the participants' liability patterns.

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thus it is not "reasonably related to the circumstances which were the subject of the accusation," as the MPC exception requires. MODEL PENAL CODE § 212.5(1) (1962). At the same time, Brian is at least arguably requesting "restitution" or "compensation" from Victor, as required by the narrow exception; even though Victor did not commission the biography and so does not legally owe Brian for his work, Brian would complete the work and obtain due compensation from other sources were he not forbearing from disclosing what he knows about Victor.

138. *Id.* § 212.5(1)(d).

139. *See supra* note 137.

140. *See supra* note 137.

D. Results and Discussion

1. Manipulation-Check Results.—The results of the manipulation-check questionnaire are set out in Table 7, which can be compared to the desired subject perceptions described in Table 3. Average responses greater than zero are a "yes" response; those below zero are a "no" response.

Table 7. Manipulation Check Results

#	Scenario Q:	*WI*	*BD*	*CD*	*UA*	*SD*
1	Pay or Report Crime	1.1	2.2	2.2	2.3	2.6
2	Pay or Face Lawsuit	-2.4	-0.7	-1.2	-0.6	2.7
3	Sober Work or Expose Drinking	-2.2	*0.3*	-0.4	0.5	2.9
4	Pay or Reveal Recipe	2.3	-1.9	2.0	1.5	4.1
5	Pay or Publish Book	-0.4	-1.4	1.4	1.2	3.2
6	Pay or Expose Cheating	1.3	0.8	**0.6**	2.1	3.0
7	Withdraw or Expose Cheating	-1.5	1.0	-0.5	*0.4*	3.3
8	Cut Tree or Publish Photos	2.7	2.5	-0.5	1.5	2.8
9	Pay or Report Smoking	2.2	-1.7	-0.7	2.0	3.0
10	Pay or Report Crime	0.9	2.2	2.1	2.2	1.0
11	Pay Penalty or Foreclose	1.5	-0.6	*-0.1*	*-0.1*	3.1

Key: *WI* – Wrongful Intention Theory of Berman and Katz
        BD – Breach of Duty Theory of Feinberg
        CD – Continuing Domination Theory of Fletcher
        UA – Usurping Authority Theory of Lindgren
        SD – substantial demand (2 or less suggests subject thought Brian's demand was not substantial)
        + = 'yes' response   – = 'no' response

Although the concepts being manipulated here are quite complex and abstract, a comparison to Table 3 suggests that these results are quite good. The one response of the sixty-six that is not the desired perception described in Table 3 is set out in bold. The four responses that indicate indifference— those that do not statistically significantly differ from zero, meaning a neutral

response—are in italics. (Later in our analysis, we will introduce specific analyses that attempt to compensate for these subject misperceptions.)[141]

A special note may be appropriate here. Part of the goal of this project is to encourage criminal law theorists to undertake or to participate in such empirical research. By themselves, the excellent results above may create a false impression that it is easy for researchers to write scenarios that subjects will perceive as the researcher intends. In fact, the opposite is true. No matter how clear or obvious a researcher may think the picture painted by a scenario, one can be almost guaranteed that some minority of subjects, or even a majority, will read the scenario in unanticipated ways. Ambiguity is rarely obvious when a scenario is first drafted.

This creates a serious problem, of course, because when subjects perceive a scenario in a way different than that intended—which means that different subjects are probably perceiving the scenario differently from one another—it is difficult, if not impossible, to draw reliable conclusions from the liability results reported. Without knowing what the subjects are re-sponding to, a researcher cannot know what conclusions to draw from their responses.

The good manipulation-check results reported in this study are not the result of either good luck or a special talent in drafting scenarios but rather the result of dozens of manipulation-check mini field tests together with three formal manipulation-check pilot tests. After each test, adjustments were made to the scenarios' texts, which were then retested. As may be apparent to the reader, one may spend months making scenarios unambiguous for a data collection of the main point of interest that may be done once and done quickly. The vast bulk of the work is in the preparation, not in the data collection or analysis.

The larger point here is that criminal law theorists who undertake such studies can benefit significantly from partnering with a well-trained experi-mental psychologist and from having a good deal of patience for the unexpected trials that reliable experimental work inevitably brings.

2. Liability Results.—The subjects' criminalization judgments are set out in Table 8. The theory predictions from Table 4 and the statutory liability patterns from Table 6 are reproduced for comparison purposes. The points at which a theory or a statutory approach disagree with the subjects' views, on average, are marked in bold.

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141. *See infra* Table 10 (showing the correlation between the predictions and the subjects' liability responses, conditioned on the subjects' manipulation-check responses).

Table 8. Criminalization Results (and Comparisons)

Scenario	Mean	Y/N	*WI-B*	*WI-K*	*BD*	*CD*	*UA*	*EI*	*MPC*	*N-N*	*B-N*
1. Pay or Report Crime	2.5	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
2. Pay or Face Lawsuit	-2.5	N	N	N	N	N	N	N	N	N	N
3. Sober Work or Expose Drinking	-1.6	N	N	N	N	N	**Y**	N	N	N	**Y**
4. Pay or Reveal Recipe	1.3	Y	Y	Y	**N**	Y	Y	Y	Y	Y	Y
5. Pay or Publish Book	*0.2*	–	*N*	*N*	*N*	*Y*	*Y*	*Y*	*Y*	*N*	*N*
6. Pay or Expose Cheating	1.6	Y	Y	Y	Y	**N**	Y	Y	Y	Y	Y
7. Withdraw or Expose Cheating	-1.1	N	N	N	**Y**	N	**Y**	**Y**	N	N	**Y**
8. Cut Tree or Publish Photos	2.3	Y	Y	Y	Y	**N**	Y	**N**	Y	**N**	Y

(continued)

Table 8 (cont.). Criminalization Results (and Comparisons)

9. Pay or Report Smoking	0.7	Y	Y	Y	**N**	**N**	Y	**N**	Y	Y	Y
10. Pay or Report Crime	1.5	Y	Y	**N**	Y	**N**	Y	Y	Y	Y	Y
11. Pay Penalty or Foreclose	-0.5	N	**Y**	**Y**	N	N	N	N	N	N	N

Key: *WI-B and WI-K* – Wrongful Intention Theory of Berman and Katz, respectively
BD – Breach of Duty Theory of Feinberg
CD – Continuing Domination Theory of Fletcher
UA – Usurping Authority Theory of Lindgren
EI – Efficient Information Allocation Theory of Isenbergh
MPC – MPC (broad-broad) jurisdictions
N-N – narrow-narrow jurisdictions
B-N – broad-narrow jurisdictions
Y = this theory would impose liability in this scenario
N = this theory would not impose liability in this scenario

All of the liability averages are statistically significantly different from zero, except those for Scenario 5, set in italics. That scenario was the one in which the author of a biography gave the subject of the biography an opportunity to compensate him for his work to date in return for not publishing damaging information that the author had found during his research work. The problem was not one of different subjects perceiving the scenario differently and, therefore, coming to different liability conclusions. As is apparent from Table 7 above, the Scenario 5 manipulations for all four types of theories tested worked. The subjects simply disagreed with one another about whether there should be criminal liability in such a case. The resulting average of 0.2 was not statistically significantly different from zero, which was "unsure."[142] In our analyses below, we will for the most part exclude consideration of Scenario 5.

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142. 48.8% of the subjects would impose liability and 34.9% would not, while 16.3% were undecided (the highest number of undecided responses of any scenario). More subjects (twenty-one) answered "unsure" for this scenario than for any other, and the overall distribution of responses for this scenario was uniquely "flat," with all possible responses from –3 ("definitely no liability") to +3 ("definitely liability") chosen by at least thirteen subjects but no more than twenty-five subjects.

At least one of the six theories disagreed with the subjects on every scenario (except the two screening scenarios, Scenarios 1 and 2, of course). This is as planned. The scenarios were constructed to test the differences between the theories. The more theories the subjects' responses for a given scenario contradicted, the more support those responses would tend to provide for the theory or theories supporting the result. The maximum support for any given theory would be a scenario where only that theory, and no others, predicted a given result, and the subjects' responses generated that result. On the other hand, the clearest evidence of disagreement with a given theory would be if only that theory predicted a given result and the subjects chose the opposite result.

Two scenarios generated liability results that disagreed with the predictions of three theories: Scenario 7 (*BD*, *UA*, *EI*) and Scenario 9 (*BD*, *CD*, *EI*). Another three scenarios had results that disagreed with two theories: Scenario 8 (*CD*, *EI*), Scenario 10 (*WI-K*, *CD*), and Scenario 11 (both versions of *WI*). Three scenarios gave results that conflicted with the prediction of only one theory: Scenario 3 (*UA*), Scenario 4 (*BD*), and Scenario 6 (*CD*). As discussed earlier, the results of Scenario 5 were inconclusive.

A simple way to test the relative descriptive adequacy of the various positions is to simply count to see how many of their predictions bear out when looking at the mean liability judgments for the ten scenarios with significant liability results presented in Table 8.[143] Here's the scorecard:

>
> 10 (out of a possible 10): MPC (Broad–Broad)
>
> 9: Wrongful Intention (Berman); Narrow–Narrow
>
> 8: Wrongful Intention (Katz); Usurping Authority (Lindgren); Broad–Narrow
>
> 7: Breach of Duty (Feinberg); Efficient Allocation (Isenbergh)
>
> 6: Continuing Domination (Fletcher)[144]

Below we give a more detailed look.

 3. *The Theories.*—As is apparent from Table 8, no liability theory exactly matches the subjects' liability judgments, although the Wrongful

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 143. Scenario 5 is excluded from the analysis. *See supra* text accompanying note 142.

 144. As noted above, one of the manipulation checks for Fletcher (Scenario 6) gave the opposite of the predicted result. *Compare supra* Table 3, *with supra* Table 7. The subjects' pro-liability result for that scenario does not conflict with Fletcher's theory, however, given the subjects' perception of the scenario. *See infra* Table 10. Accordingly, Fletcher could as easily fit into the "7" scorecard category above.

Intention Theory, especially the Berman version, comes quite close. Apart from Scenario 5 (the scenario on which the subjects themselves substantially disagreed about the proper result), the only scenario the theory got wrong was Scenario 11, in which Brian, a bank official, does what the bank has authorized him to do but with a wrongful intention. The subjects on average said no liability, while the Wrongful Intention Theory would impose liability. All four of the other theories got this liability prediction correct. On the other hand, this was the scenario on which there was the most disagreement among the subjects (apart from Scenario 5): a majority of 51.2% versus a minority of 39.5% (with 9.3% undecided).[145] Thus, the Wrongful Intention Theory does accurately capture the views of a substantial minority of the subjects.

Each other theory had more points of disagreement with the subjects. The Katz version of the Wrongful Intention Theory had the same disagreements with subjects as did the Berman version but, in addition, turned out wrong about the one aspect on which the Katz and the Berman versions disagreed: Scenario 10. The subjects were happy to impose criminal liability even though the demand itself was not substantial (only for $1), while Katz would have taken the trivial demand as barring liability.

Lindgren's Usurping Authority Theory did slightly less well, with two points of disagreement: Scenarios 3 and 7. In both cases, Lindgren's theory would impose liability, but the subjects did not, even though they recognized that Lindgren's relevant factor was present, i.e., the manipulation checks were positive (though modestly so). More generally, Lindgren's theory was only weakly predictive where it indicated liability but was the second most strongly predictive theory (after Berman's) where it predicted no liability,[146] including an accurate prediction of no liability for Scenario 11, the only one Berman's theory predicted incorrectly.[147]

Feinberg's Breach of Duty Theory had three points of disagreement with subjects (beyond Scenario 5): Scenarios 4, 7, and 9—and the disagreements were in both directions. The disagreement on Scenarios 4 ("Pay or

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145. Five of the nine test scenarios—3, 4, 6, 8, and 10—had a trivial amount of dissent (ranging from 3.0% to 19.2%). Two other scenarios had a larger group of dissenters: 7 and 9 (25.3% and 26.3%, respectively).

146. *See infra* Tables 9, 10.

147. This might suggest Lindgren's test provides a useful factor that might supplement Berman's as a "negative" predictor: where Lindgren's factor is not present, subjects might reject liability even though Berman's test is satisfied. In other words, perhaps subjects are inclined to impose liability where the person making the threat has wrongful motivations and is seeking an entitlement that is properly someone else's. This effect, however, might also be attributable to the fact that Lindgren's theory predicted no liability for only two scenarios, one of which (Scenario 2) was a screening case for the no-liability result. Further, subjects were strongly willing to impose liability in Scenario 8, for which the relevant entitlement under Lindgren's theory—the public's putative interest in seeing compromising photos of a private citizen—seems relatively weak.

Reveal Recipe") and 9 ("Pay or Report Smoking") is hardly surprising, as both bear some similarity to the classic adultery-disclosure blackmail scenario that Feinberg's theory excludes from liability.[148] In both situations, the person making the threat has access to potentially reputation-harming information that he has no obligation to share with anyone, and he offers to reveal that information unless paid. Subjects would treat such situations as blackmail, though Feinberg would not.[149] Yet Feinberg would impose liability in Scenario 7 ("Withdraw or Expose Cheating"), though subjects would not.[150]

As with Feinberg's theory, Isenbergh's Efficient Information Allocation Theory had three points of disagreement with subjects: Scenarios 7, 8, and 9. And, again, the disagreements were in both directions: for Scenario 7, Isenbergh would favor liability, but the subjects rejected it, whereas for Scenario 8, Isenbergh would oppose liability, but the subjects favored it (quite strongly).[151] In Scenario 9, subjects were willing to impose liability though Brian clearly obtained the information fortuitously rather than by "information farming." It seems unlikely that the subjects' intuitions were driven by the considerations Isenbergh finds relevant—which is not a direct critique of Isenbergh, of course, because his account of blackmail made no claim to reflect public moral sentiment.

The Continuing Domination Theory of Fletcher had four points of disagreement with subjects: Scenarios 6, 8, 9, and 10. Like Katz, Fletcher takes the position that threats should only constitute blackmail if the blackmailer's demand is above some threshold level of significance.[152] As with Katz, the subjects' willingness to impose liability in Scenario 10, involving a demand of $1, indicates that this aspect of Fletcher's theory does not accord with popular intuitions.[153] The other three scenarios for which Fletcher's predictions depart from actual responses also err in the same direction: subjects imposing liability where Fletcher's theory would not.[154] Scenario 6, however, does not truly count against Fletcher, for the subjects' manipulation-check responses for that scenario were positive for Fletcher's theory, indicating that they believed its criterion was satisfied, so their will-ingness to impose liability for that scenario actually aligns with what Fletcher would predict given the subjects' own understanding of the case.[155] For

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148. *See supra* section III(B)(2).
149. *See supra* Table 8.
150. *See supra* section III(B)(2).
151. *See supra* section III(B)(5).
152. *See supra* sections III(B)(1), (3).
153. *See infra* Table 9 and accompanying text.
154. *See supra* section III(B)(3).
155. *See supra* Table 7.

Scenarios 8 and 9, however, the manipulation-check test for Fletcher's theory is negative, yet the subjects' liability response is positive, indicating that they are not following Fletcher's ongoing-subordination account of blackmail. Both cases are constructed so that Brian could not repeat his demand of Victor, and the subjects perceived this feature of both scenarios but were willing to impose liability nonetheless.

Finally, it is worth noting the lack of support for the abolitionist position. Subjects supported liability in six of the eleven scenarios tested. Only one subject who completed the survey imposed no liability for any of the eleven scenarios. Moreover, this person responded in a manner consistent with our predictions for the manipulation checks for only seventeen of the possible fifty-five theory items, raising doubts about how seriously the subject took the survey.[156] The empirical data suggests that the abolitionist position is inconsistent with community views.

4. The Statutory Schemes.—It turns out that the statutory schemes did better overall than the theorists in predicting the subjects' liability views. Indeed, setting aside Scenario 5 (on which the subjects were essentially split among themselves), the Model Penal Code's broad–broad approach matched the subjects' views exactly, the only one to do so! The consonance between the statutory approach and the subjects' intuitions is all the more remarkable given the Model Penal Code's overtly utilitarian focus and disavowal of any effort to track public moral sentiment—though it is possible the Code's drafters were more influenced by considerations of moral blameworthiness than they let on.[157]

The other two statutory options seemed to fall short insofar as they departed from the Model Penal Code's approach. The broad–narrow approach, which defines the offense expansively (like the Model Penal Code) but recognizes fewer exceptions, erred in the direction of imposing liability in two cases where the subjects would not: Scenarios 3 and 7. On the other hand, the narrow–narrow approach, which defines the offense itself less broadly, failed to impose liability in one scenario where the subjects would, Scenario 8—which was also the scenario which had the second strongest pro-liability result, nearly as strong as the result for Scenario 1, the archetypal

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156. As noted earlier, because this subject did not give the predicted response to Scenario 1, his or her survey was not used in calculating the results of the study. *See supra* note 98 and accompanying text.

157. *See, e.g.*, Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1839 (2000) (asserting that the Model Penal Code "defers to laypersons' shared intuitions of justice on issues touching essentially all criminal cases"). For a similar example of the Model Code drafters taking account of community intuitions without admitting it, see their treatment of resulting harm, discussed in Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. CONTEMP. LEGAL ISSUES 299, 317 (1994).

blackmail case. It seems, then, that so far as community sentiment is concerned, the "narrow offense" approach is too exclusive, and the "narrow exception" approach too inclusive, in determining which threats count as blackmail.

5. More Sophisticated Measures of Best Fit with Subjects' Criminalization Views.—Comparisons of relative accuracy also can be made using more sophisticated statistical analyses. Tables 9 and 10 use η_p^2, or "partial eta squared," which is a measure of effect size that approximates the proportion of variance in liability judgments due to the distinction made by the theory. (For both logical and statistical reasons, the screening scenarios—Scenarios 1 and 2—are excluded from these analyses.[158]) Under the standard interpretive scheme for such measurements, η_p^2s of .02, .13, and .26 conservatively are seen as small, medium, and large effects, respectively, for behavioral research.[159] By this measure, most of the study's measured effects are large.

Table 9 below compares the average responses given by each subject for the nine test scenarios as distinguished by the frameworks' predictions. For example, to calculate the statistics in the first row, for each participant, we calculated the average liability response she gave to the six scenarios for which Berman predicts liability (4, 6, 8, 9, 10, and 11). Then, we calculated the average response given for the three scenarios for which Berman predicts no liability (3, 5, and 7). A negative number in the "no" column indicates that the theory had some accuracy when it predicted no liability (the larger the negative number, the better the predictive power); a positive number in the "yes" column indicates the theory had some accuracy when it predicted liability (again, the larger the positive number, the better the predictive power). The *t*-value indicates whether, across our participants, the average difference score (liability for "yes" minus liability for "no") significantly differs from zero. The larger the *t*-value (or η_p^2 in the following column), the

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158. Logically, the *t*-tests intend to contrast the descriptive adequacy of the various positions, and thus it makes sense to include only the scenarios that were intended to distinguish the positions. Statistically, for Scenarios 1 and 2 we cut the distributions of liability judgments before zero, making the mean liability judgments quite extreme. Because some of the theories make relatively few predictions of one kind (e.g., Fletcher makes only three "yes" predictions for our eleven; Katz makes six), the effects of mixing in these extreme responses will be more pronounced for some of the theories than others. That is, the inclusion of responses to Scenario 1 will bias the "yes" bin for Fletcher upwards more than it will for Lindgren, who makes nine "yes" predictions. Katz, Feinberg, MPC, and narrow–narrow will be less biased, as their predictions are closer to fifty–fifty (six of one type, five of the other).

159. *See* JAMES P. STEVENS, APPLIED MULTIVARIATE STATISTICS FOR THE SOCIAL SCIENCES 197 (4th ed. 2002) (citing reference using .01 as a small effect size, .06 as a medium effect size, and .13 as a large effect size using eta squared or partial eta squared); *see also* SCHUYLER W. HUCK, STATISTICAL MISCONCEPTIONS 238 (2009).

higher the overall predictive power of the theory (or statutory scheme) in question.

Table 9. Liability Judgments By Theories' Predictions

Theory	Predicts Liability		t-value	η_p^2
	"No" Scenarios	"Yes" Scenarios		
MPC Broad-Broad	-0.73	1.50	21.09	0.78
Wrongful Intention (Berman)	-0.82	1.17	18.61	0.73
Narrow-Narrow	-0.12	1.29	13.84	0.60
Wrongful Intention (Katz)	-0.23	1.10	12.36	0.54
Breach of Duty (Feinberg)	0.03	1.09	10.93	0.48
Usurping Authority (Lindgren)	-0.46	0.63	6.46	0.25
Broad-Narrow	-0.11	0.68	6.23	0.23
Efficient Allocation (Isenbergh)	0.24	0.72	5.51	0.19
Continuing Domination (Fletcher)	0.43	0.78	2.97	0.06

Each of these t-values is highly significant ($p < .001$), except for Continuing Domination, where $p < .01$

In keeping with the earlier, less sophisticated analyses, the MPC formulation and the Berman theory perform best under this analysis. Feinberg, Isenbergh, and Fletcher perform considerably less well, particularly in their "no" predictions, which do not correspond to subjects' actual liability judgements—on average, when these theories oppose liability, subjects favored it. As noted above, Lindgren's theory is relatively highly predictive of "no" responses (the second best theory, after Berman's), but does the worst job of predicting "yes" responses. The narrow–narrow statutory formulation does very well at predicting liability—where it would impose liability, so would the subjects—but, because it defines the offense narrowly, it does a poor job with its no-liability predictions (i.e., the narrow–narrow test sometimes denies liability where the subjects are willing to impose liability).

Table 10 below presents a similar analysis by using not the theories' predictions of liability for each scenario directly but rather their predictions based upon how the subjects perceived each scenario. Recall from Table 7 that not every manipulation worked as exactly hoped: for example, there was

one manipulation check, the Fletcher check for Scenario 6, where the subjects' manipulation-check responses were marginally contrary to the sought-after response. To compensate for this, we can look at the same issue for the five theories for which there were manipulation checks and use the subjects' *actual* perceptions, rather than what we had hoped the subjects would perceive. In other words, how well did each subject's liability responses track any given theory given that subject's responses to the manipulation checks? Using this corrective measure, the relative effects of the five theories are as set out in Table 10.

Table 10. Liability Judgments by Theory Predictions

Theory	Predicts Liability		t-value	η_p^2
	"No" Scenarios	"Yes" Scenarios		
Wrongful Intention (Berman)	-0.80	1.17	15.39	0.65
Wrongful Intention (Katz)	-0.20	1.07	9.47	0.42
Usurping Authority (Lindgren)	-0.49	0.77	7.03	0.31
Breach of Duty (Feinberg)	0.13	0.84	4.76	0.16
Continuing Domination (Fletcher)	0.44	0.60	1.08	0.01

Each of these t-values is highly significant (p < .001), except for Continuing Domination, which fails to reach significance (p = .284)

As is apparent from Table 10, this alternative analysis generally confirms the predictive value of the five theories (on which manipulation-check data was collected). The Berman and Katz theories still work the best and the Fletcher theory the worst, although the corrective measure in Table 10 makes it clearer that the Lindgren theory does better overall than the Feinberg theory.

Taken together, these analyses confirm the earlier discussion with the MPC statutory approach having the most predictive power of any blackmail scheme and Berman's theory having the most predictive power of any of the theoretical accounts. After Berman's theory, Lindgren's theory is most highly predictive as to "no" results but relatively weakly predictive of "yes" results. Fletcher's theory is most weakly predictive even after adjusting for

subjects' perceptions—an adjustment that should correct for the fact that subjects' manipulation-check responses for one scenario were contrary to the expected response for Fletcher's theory.

6. Effect of Seriousness of Threat and Wrongfulness of Victim's Undisclosed Conduct.—Set out in Table 11 below are the results of the last three questions in the manipulation-check questionnaire (*e*, *f*, and *g*). Recall that these three questions asked subjects for a quantitative assessment of the extent of the seriousness of the demand, the threat, and the victim's secret, rather than just the binary choice of agree–disagree or yes–no asked in the manipulation-check and the criminalization questions, respectively.

Table 11. Subject Evaluations of Extent of Demand, Disclosure, and Secret

Scenario	e. Demand	f. Disclosure	g. Secret
1. Pay or Report Crime	2.6	4.7	4.8
2. Pay or Face Lawsuit	2.7	2.3	3.2
3. Sober Work or Expose Drinking	2.9	3.8	2.8
4. Pay or Reveal Recipe	4.1	3.9	1.5
5. Pay or Publish Book	3.2	3.7	2.6
6. Pay or Expose Cheating	3.0	4.1	4.1
7. Withdraw or Expose Cheating	3.3	3.9	4.1
8. Cut Tree or Publish Photos	2.8	4.1	0.3
9. Pay or Report Smoking	3.0	3.7	1.3
10. Pay or Report Crime	1.0	4.8	4.8
11. Pay Penalty or Foreclose	3.1	4.5	2.5
Correlation with subject liability judgment	.01	.41	.06

Key: *e* – How substantial was the demand?
        f – How harmful would disclosure have been?
        g – How wrongful was the victim's conduct to be revealed?

We computed for each subject the correlation between the liability judgments she supplied for each of the eleven scenarios with the eleven ratings she gave across the scenarios for demand, for disclosure, and for secret. The median correlations observed between liability and each of these factors were .01, .41, and .06, respectively. Of these, only disclosure was significantly different from zero (by signed rank test, $W = 3760$, $p < .001$). In other words, the more harmful a subject viewed Brian's threat of disclosure to be, the more likely she was to assess criminal liability for the action, but the relationship between the other factors and liability was not significant.

The absence of correlation between the magnitude of the demand and the subjects' liability judgments across the battery of eleven scenarios suggests that Katz's and Fletcher's adherence to a "trivial-demand exception" for blackmail does not accord with lay intuitions.[160] The correlation between subjects' liability judgments and their estimates of the harmfulness of disclosure offers some indirect support for the perspective (shared by Berman, Katz, and Fletcher) that the recipient of the threat is the true victim of the blackmail offense.[161] As the potential harm to the recipient increases, so does the subjects' support for liability. Finally, the absence of correlation between subjects' liability judgments and their moral assessment of the victim's behavior offers some reassurance that their views about blackmail are not driven purely by their sympathy (or lack of sympathy) for the victim.

IV. Conclusion

Our study reveals that the Model Penal Code's legal formulation and Mitchell Berman's theoretical account are better than their existing rivals at capturing shared intuitions regarding blackmail. One important shared trait of these two versions of blackmail is that both see blackmail as a form of extortion—a category traditionally limited to conditional threats to engage in criminal acts, such as a threat to injure someone unless paid. The Model Penal Code's coverage of blackmail falls within its broader extortion offense (entitled "Criminal Coercion"[162]), and Berman's theory seeks to justify the criminalization of blackmail on the ground that it constitutes a variety of extortion.[163] Our study indicates that lay understandings of blackmail share the position that its gravamen involves harm to the recipient of the threat,

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160. *See supra* note 104 and accompanying text; *supra* note 26 and accompanying text.

161. *See supra* note 11 and accompanying text; *supra* note 17 and accompanying text; *supra* note 21 and accompanying text.

162. MODEL PENAL CODE § 212.5(1) (1962). Section (1)(a) is traditional extortion; sections (1)(b) and (1)(c) are common situations of blackmail.

163. *See supra* note 11 and accompanying text.

rather than some third party or generalized social interest. (Further, and significantly, our study indicates that some other factors that might be considered relevant to the blackmail inquiry are not seen that way: general lay intuitions regarding blackmail do not seem to attach any significance to the magnitude of the blackmailer's demand or to the nature of the information the blackmailer threatens to disclose.)

More specifically, as Berman's theory claims,[164] lay intuitions seem to accord with the position that blackmail amounts to extortion because of the blackmailer's bad faith or improper motivations. The blackmailer's central interest is to benefit himself, and his means of pursuing that interest displays his willingness to wrong the other person, either by forcing that person to sacrifice money (or something else) or by subjecting that person to the harm the blackmailer knows the threatened act will cause.

At the same time, however, and unlike Berman's theory,[165] lay intuitions seem to view some demands as objectively legitimate even if their subjective motivation in a given case is improper. Thus a person whose demand seeks to vindicate a valid legal or societal interest, as in our Scenario 11, is not seen as engaging in blackmail even if his underlying motivation is to harm the recipient rather than to advance the legitimate interest. This sentiment accords with the Model Penal Code's exception where the putative blackmail threat is made for the sake of compelling the other "to behave in a way reasonably related to the circumstances which were the subject of the [threat], . . . as by desisting from further misbehavior, [or] making good a wrong done."[166]

Taken together, the theoretical basis Berman excavates for blackmail and the more practical objective constraints the Model Penal Code imposes might suggest a formulation of criminal coercion that embraces, but also limits, the scope of blackmail, perhaps along the lines of the following:

Criminal Coercion

(1) A person commits criminal coercion if he demands money or other valuable consideration as a condition of refraining from any act he intends or knows would cause harm to another person.

(2) For purposes of subsection (1), "harm" may include physical injury, financial deprivation, or substantial psychological stress.

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164. *See supra* note 14 and accompanying text.

165. *See, e.g.*, Berman, *supra* note 3, at 848 (describing how even threats of legitimate action constitute appropriately criminal blackmail if made with bad motives).

166. MODEL PENAL CODE § 212.5(1).

(3) Exception. It is not an offense under subsection (1) if the actor believed his demand to be justified as a means of advancing a legitimate legal or societal interest.[167]

Such a formulation illuminates and makes explicit the general normative intuitions that seem to underlie popular sentiment while also drawing lines that prevent blackmail from being a purely subjectivized offense concerned only with culpability and not with objectively unjustified harm.

Our study also suggests some more general conclusions about criminal law and theory. First, whether discussing blackmail, other offenses, or more general normative issues of punishment, nearly all theorists rely on what they take to be popular moral intuitions—but they cannot all be right. Further, which (if any) of them are right is testable. Accordingly, empirical work regarding lay intuitions can provide meaningful critique or illumination of theory. Our study put the blackmail tests to the test, and the results provide strong support for one theory and much weaker support for others.

Finally, though some may not find the contention novel or surprising, this study may lend further credence to the claim that some aspects of criminal law are, if anything, overtheorized. The intellectual paradox of blackmail has given rise to a host of explanatory theories, most rooted in an effort to reflect and justify shared moral intuitions, yet many of those theories miss their mark rather widely, and none accord with popular intuitions as well as the Model Penal Code, a document purporting to advance a purely pragmatic agenda rather than to embody any deep or wide moral commitments. Many of the theorists who have gone to great lengths to advance and defend a principled justification of the blackmail offense might have done better by simply asking people what they think.

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167. The exact text of the statutory provision, we would suggest, depends in part on the features of other provisions in the code of which the provision would be part, especially its General Part and Special Part provisions, such as the extent to which the code prefers objective example lists over general criterion definitions. For an example of specific prohibited threat descriptions, see *id.* § 212.5(1)(a)–(d).

Appendix A: Scenario Legal Liability Analyses
(explanations of conclusions in Table 6 in subpart III(C))

Model Penal Code (broad–broad)[168]

1. Liability under 212.5(1)(b). No exception because although the accusation would be true, Brian's purpose is not "limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation."[169]

2. No liability per the exception; Brian is compelling Victor to act in a way rationally related to the circumstances surrounding the crash and is only demanding that Victor fix a past wrong.

3. No liability. Brian's threat was not made "with purpose unlawfully to restrict [Victor's] freedom of action *to his detriment*."[170] He would get the exception in any case because the threatened action is reasonably related to workplace safety.

4. Liability. Brian is threatening to reveal a secret that will subject Victor to contempt. He will not get the exception because a $10,000 payment is not related to cupcake ingredients.

5. Liability. Brian's action satisfies § 212.5(1)(c), and he will not get the exception because a $4,000 payment to Brian is not "reasonably related" to the circumstances of Victor's wrongful behavior.

6. Liability. There is some question, however, as to whether Brian's threatened action (giving the sheet to the authorities) falls into one of the four prohibited threats in the MPC. Brian will not get the exception because the $500 payment is not reasonably related to cheating on an exam.

7. No liability. Brian will get an exception—his purpose is limited to compelling Victor to obey the promise.

8. Liability. The action satisfies § 212.5(1)(c), and publishing the photos is not related to cutting down the tree.

9. Liability. The $500 payment is not rationally related to smoking or to workplace dedication.

10. Liability. There is no minimum-threat language in the MPC's criminal coercion statute; analysis is the same as for Scenario 1.

11. No liability. Brian is not threatening to reveal a secret, accuse anyone of a crime, or commit a crime, nor is he acting as an official. (The

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168. Note that while these analyses cite specific MPC provisions, all broad–broad statutes will have the same outcomes. Statute numbering and structure will vary by jurisdiction.

169. MODEL PENAL CODE § 212.5(1).

170. *Id.* (emphasis added).

MPC does not define "official," but it is valid to assume that this means "government official.")

Narrow–Narrow Jurisdictions

1. Liability. Brian is threatening to expose a secret and demanding property (the $1,000). The exception does not apply because Brian is not owed the money, and it is not compensation for a past wrong.

2. No liability. Brian is owed the property (that is, the money needed to fix the car) as compensation for the damage caused by Victor's negligent driving. As such, Brian will get the exception.

3. No liability. No transfer of property to Brian is involved.

4. Liability. Brian is demanding property and threatening to expose a secret.

5. No liability. Brian is trying to get Victor's property by threatening to expose a secret, but he gets an exception because he is claiming that money as compensation for the time and effort that was necessary to write the biography.

6. Liability. Brian is threatening to reveal a secret in order to gain Victor's property.

7. No liability. Brian is not demanding property.

8. No liability. Same as above; Brian is demanding action, not property.

9. Liability. Brian is demanding money and threatening to reveal a secret if the property is not turned over.

10. Liability. Same analysis as Scenario 1.

11. No liability. Brian, an agent of the bank, is threatening harm to Victor's property, but Brian is claiming the property as compensation for services rendered (that is, the mortgage). Brian's other motivations are probably not relevant to the analysis.

Broad–Narrow Jurisdictions

1. Liability. Brian attempted to obtain Victor's property (the $1,000) by threatening to accuse him of a crime. Brian will get no exception because the narrow exception only operates if Brian is trying to recover compensation or restitution for services rendered or harm caused to Brian by Victor.

2. No liability. Brian will get the exception because he is only demanding property as compensation for harm done by Victor.

3. Liability. Brian threatened to expose a secret with intent to coerce Victor into taking action (showing up to work sober, etc.). No exception applies.

4. Liability. Brian is trying to make Victor take action against his will by threatening to expose a secret and does not have an exception.

5. No liability. Brian is threatening to expose a secret in order to take Victor's property, but the payment is compensation for Brian's effort and thus will justify an exception.

6. Liability. Victor is being coerced to pay Brian $500 via a threat to expose a secret. The money is not compensation or restitution, and as such there is no exception.

7. Liability. Brian is attempting to get Victor to take action against his will by threatening to expose a secret. No exception.

8. Liability. Brian is trying to coerce action by threatening injury to Victor's reputation.

9. Liability. Brian is attempting to take Victor's property (the money) by threatening to expose a secret. No exception applies.

10. Liability. Same analysis as Scenario 1.

11. No liability. Brian is threatening harm, but he is claiming the property as compensation for the mortgage. Because Victor agreed to the conditions of the mortgage, Brian will get the exception.