

The PROSECUTOR

PART I

Witness Intimidation in the Digital Age

BY MARGARET O'MALLEY

THE GOAL OF THIS SERIES is to provide an overview of the current landscape of witness intimidation crimes, with particular attention to the profound effect that technological advances have had on how these crimes are perpetrated, investigated and prosecuted.

Part I provides an overview of the various types and sources of witness intimidation, who is intimidated, who intimidates, how witnesses are intimidated and when intimidation occurs.

Part II discusses the problem of discovery as a tool for witness intimidation and recent legislation aimed at limiting the distribution of discovery material to third parties.

Part III examines how various components of the pretrial process may present serious challenges for prosecutors in the protection of witnesses and presents strategies to counteract or mitigate intimidation.

Part IV reviews the challenges presented by the use of Internet and cellular technologies to intimidate victims, witnesses, jurors and judicial officials.

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“All criminals are cowards. They are evading problems they do not feel strong enough to solve. We can see their cowardice ... in the way in which they face life... [and] in the crimes they commit.”¹

WITNESS INTIMIDATION is a cowardly crime and one of the oldest and most pernicious threats to the function of criminal justice systems worldwide. Regardless of its form or the seriousness of the case, it “strikes at the heart of the justice system itself.”² The issue has gained particular urgency due to the convergence of readily available digital communications and the rapid expansion across the U.S. of international criminal gangs.

Previous generations wholly endorsed the idea that “[i]t is the duty and the right ... of every citizen, to assist in prosecuting, and in securing the punishment of any breach of the peace...”³ This is no longer true. Although every criminal defendant has the right “to be confronted with the witnesses against him” at trial,⁴ a remarkable number seek to prevent that ultimate confrontation by eliminating essential witnesses, thereby forestalling criminal investigations and thwarting successful prosecutions.

The most visible and widely covered cases of witness intimidation — often the murder of a key witness just days before they are scheduled to testify — involve violent street gangs and organized crime in major urban areas of Baltimore, Philadelphia, Newark, Chicago, Oakland and Los Angeles. However, a more thorough review of state and local press reveals that witness intimidation occurs with surprising frequency in communities such as Portland, Santa Fe, Pottstown, Buffalo, Denver, Charleston and Chattanooga. Although intimidation pervades serious and violent felonies, domestic violence and gang crimes, it also occurs in lesser felony, misdemeanor and even traffic cases before, during and after official investigations and judicial

proceedings. Intimidation takes every possible form, from direct violence against a witness to vague threats directed at the family and friends of a potential witness. It occurs at crime scenes, in police stations and courtrooms as well as in witnesses’ homes, workplaces, schools and neighborhoods. One of the most insidious forms of intimidation arises from the mere existence of a criminal organization with a reputation for violent reprisal.

Regardless of the crime, location or form, the fundamental purpose is the same: to preclude witnesses from testifying freely and instill fear in others by retaliating against those who report crimes and cooperate with law enforcement.

When intimidation is successful, it is rarely, if ever, reported. Persons known to have been present during a crime refuse to speak with investigators, claim to have seen nothing or deny having been present at a crime scene.⁵ If forced to testify, they “forget” everything about the crime, claim a Fifth Amendment privilege or recant and testify for the defendant. Many more simply disappear prior to trial. In the most extreme cases, witnesses and, at times, their families, are executed — publicly and violently.⁶

Unfortunately, the media, legislators, judicial officials and the public most often fail to recognize that every case compromised by witness interference strikes a serious and cumulative blow to our ability to fully and fairly investigate and prosecute the most serious criminal cases.⁷ When witnesses refuse to come forward or are fearful of reprisal, not only do the guilty walk, but often the innocent may be wrongfully convicted. When dozens of witnesses flee a

¹ Adler, Alfred, *Individual Psychology and Crime* in “The Practice and Theory of Individual Psychology” (Routledge & Kegan, London, 1925).

² *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

³ *In Re Quarles*, 158 U.S. 532, 535 (1895).

⁴ U.S. Const., Amndt. 6; *Crawford v. Washington*, 541 U.S. 36 (2004).

⁵ See, e.g., Kocieniewski, D., *A Little Girl Shot, and a Crowd that Didn't See*, New York Times Jul. 9, 2007).

⁶ One of the most dramatic examples of extreme violence was in 2004 when Philadelphia drug “kingpin” Kaboni Savage ordered the firebombing of the home of a federal witness, killing six family members. Press Release, U.S. Attorney, Eastern District of Pennsylvania, *Drug Kingpin Kaboni Savage*

and Sister Kidada Convicted of Arson Murders (May 13, 2013).

⁷ See, e.g., New York Times 2007 *Scared Silent* series by David Kocieniewski (witness intimidation in New Jersey), The Philadelphia Inquirer’s 2009 multi-author *Justice Delayed, Dismissed, Denied* series, the Denver Post’s *Dying to Testify* series by David Olinger, as well as Glen Smith’s *Soliator: Targeting witnesses to kill cases, a huge problem*” (South Carolina) Charleston Post and Courier, Jan. 8, 2014.

crime scene and refuse to provide any information, there is a greater chance that police and prosecutors will rely on false or inaccurate witness statements or eyewitness identifications. Even purported exoneration or wrongful conviction cases can be tainted by witness intimidation and inducements by overzealous project participants.⁸

Without the rule of law, the “law of the street” holds entire communities hostage with fear of violent retaliation against anyone even suspected of being a “snitch.” Television, YouTube, Gangsta Rap, “no-snitching” websites and social media not only reflect, but actively promote this fear-driven, anti-law enforcement attitude. In stark contrast to the post 9/11 “see something say something”⁹ approach to community responsibility for public safety, this culture imposes the self-defeating, if pragmatic, “say nothing, see nothing, do nothing” response to *any and all* cooperation, not only with police, but also with prosecutors and the courts. It is particularly effective in communities where there is a distrust of law enforcement — whether due to patterns of individual or institutional corruption or racial and ethnic conflict.¹⁰

A prosecutor’s duty is to seek justice through a fair and honest search for the truth. Establishing what is true *beyond a reasonable doubt* most often requires both physical evidence and sworn testimony. Notwithstanding remarkable advances in forensic technology, a large number of violent crimes leave no usable forensic or physical evidence. Almost without exception, the sworn testimony of a competent witness is essential; “no witness, no case” is more than just a media catchphrase.¹¹ Prosecutors, unable to guarantee witness safety, forego invoking state material witness statutes, refusing to place vulnerable witnesses and their families in jeopardy. They decline to file charges, dismiss pending cases and settle for pleas to lesser offenses. Some jurisdictions decline to prosecute cases without two or more solid eyewitness, as well as substantial corroborating physical evidence. Essex County, New Jersey prosecutors avoid moving forward on

cases based on a single eyewitness, in large part because witnesses in two-thirds of their homicides receive overt threats not to testify.¹² Others do not pursue a case unless the complaining witness personally appears at the prosecutor’s office within a specific period of time after the reported crime.¹³ Even where intimidation can be proved, the charges may be dismissed in exchange for a plea to the original charge. Even when intimidation charges are upheld, many state laws impose remarkably short and often concurrent sentences — substantially eliminating any deterrent effect.

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Witness intimidation is a pattern crime. Once successful, emboldened perpetrators frequently commit additional, often more serious, crimes.¹⁴ Even when they are — however nominally — held responsible for intimidation crimes, most offenders eventually return to the same community. The “catch and release” pattern seen in many state courts,¹⁵ coupled with an escalation in violence, further reinforces community-wide intimidation and erodes any confidence in law enforcement’s ability or willingness to

⁸ See, Mills, S., *Prosecutors Free inmate in pivotal death penalty case* Chicago Tribune, Oct. 30, 2014; Preib, M., *Crossing Lines: What’s Wrong with the Wrongful Conviction Movement*, www.newcity.com, Feb. 20, 2014; Miner, M., *Anita Alvarez wants to take a third look at Anthony Porter*, www.chicagoreader.com, Oct. 22, 2013; The case is also the topic of the documentary film “A Murder in the Park” (2014).

⁹ Department of Homeland Security, <http://www.dhs.gov/if-you-see-something-say-something>TM

¹⁰ See, e.g., *The Stop Snitching Phenomenon: Breaking the Code of Silence*, Police Executive Research Forum and the U.S. Dept. of Justice, 2009.

¹¹ Attributed to former New Jersey defense attorney Paul Bergrin, convicted of multiple federal charges in connection with his client’s 2004 murder of a key witness in a drug case; Kocieniewski, D., *In Witness Killing, Prosecutors Point to a Lawyer*, New York Times, Dec. 21, 2007; and *Lawyer’s Ways Spelled Murder*, U.S. Is Charging, New York Times, May 20, 2009.

¹² Kocieniewski, D., *Fearful Witness Faces Trial for a Murder Seen, Then Unseen*, New York Times, Jul. 29, 2007 and *Intimidation helps killers remain free — One witness not enough for prosecutors*, New York Times, Apr. 9, 2007.

¹³ Chang, A., *In the Bronx, Victims Get 24 Hours to Talk — Or the DA Lets the Accused Walk*, WNYC News, Aug. 21, 2012.

¹⁴ The escalation from petty crimes to violent homicides which results when community-wide intimidation prevents witness cooperation is documented in the *Speak No Evil* series by Joan Garrett McClain and Todd South, Chattanooga Times Free Press, Dec. 15, 2013. <http://projects.timesfreepress.com/2013/12/15/speaknoevil/index.html>

¹⁵ See, e.g., *String Runs Out for 25-year-old Man with 30 Arrests: Harris Gets 6 Years, 5 Months After Case Taken to Feds*, the chattanooga.com Oct. 11, 2014; Kocieniewski, D., *With Witnesses at Risk, Murder Suspects Go Free*, New York Times Feb. 27, 2007.

protect them.¹⁶

Over the past decade it has become increasingly difficult, and frequently utterly impossible, for state and local jurisdictions to protect witnesses from intimidation and violent reprisals, particularly in gang-related cases.¹⁷ In 2011, gang-related crime and violence accounted for an average of 48 percent of violent crime in most jurisdictions, and at least 90 percent of crime in many others.¹⁸ As gang membership nationwide continues to increase, this trend is likely to escalate. As of 2011, there were approximately 1.4 million street, motorcycle and prison gang members criminally active within the U.S., a 40 percent increase over 2009.¹⁹ Although improved reporting accounts for some of the increase, it also reflects more aggressive recruitment, as well as increased collaboration between rival domestic gangs and between local domestic gangs and more sophisticated transnational drug and human trafficking organizations.

Gangs are employing new and advanced technologies to facilitate and enhance their operations, expand the scope of their criminal operations and create alliances with other gangs and criminal organizations. Electronic distribution of the gangster rap culture, bragging, inter-gang challenges, recruitment and intimidation through the Internet and social media has become firmly entrenched in gang culture and operations.²⁰ Self-promoting videos and websites demonstrate just how easy it is to frighten victims and witnesses into silence, and perhaps more alarming, how easy it is to get away with both the intimidation and the underlying crimes. The expansion of gang crimes and violence will inevitably result in an increase in intimidation crimes — not only directly by gang members, but also by others who are inspired or instructed by the example they set.

Technology, the internet and social media are increasingly employed as effective instruments of individual, as well as gang and community-wide intimidation.²¹ Criminal defendants no longer need to take direct physical action against a witness; wireless technologies make text, image, data and

voice communications available to virtually anyone, anywhere. Over the past five years, similar cases have been reported across the country: defendants, their friends or family use email, text, instant messaging, websites and social media to harass and intimidate victims and witnesses. They post photographs of witnesses, copies of their statements to law enforcement or confidential grand jury testimony on social media, accompanied by derisive commentary, a “snitch” label or similar tagline.²² These are extraordinarily effective methods to frighten witnesses into recanting or refusing to testify in future proceedings. Unlike traditional forms of intimidation (in person, by telephone or in print), social media intimidation exposes witnesses to immediate and widespread harassment, ostracization, and potential violence from virtually anyone within or outside both the defendant’s and the witness’s digital community.²³

These forms of intimidation change as rapidly as smartphone apps and are of particular concern because most state intimidation statutes, as well as local law enforcement and prosecutor training, inevitably lag behind current technology. It is often difficult to obtain the evidence necessary to prosecute digital intimidation and to convince the courts that this conduct is, in fact, criminal. In 2014, a Michigan Circuit Court judge dismissed witness intimidation charges against a friend of one of two men charged in connection with a robbery-homicide at Eastern Michigan University.²⁴ The man posted photographs on Instagram of two witnesses testifying at the defendant’s preliminary hearing — labeling them “snitches.” Defense counsel argued, and the Court agreed, that the speech was protected by the First Amendment, apparently failing to appreciate that, within this context, labeling witnesses “snitches” and distributing it to an unlimited number of the defendant’s social circle in a pending criminal case is tantamount to publishing a wanted poster.

Unfortunately, there is a dramatic disconnect between the manner in which witnesses are currently being intimi-

¹⁶ “Most people charged in local shootings had faced charges before, sometimes for violent crimes like murder and aggravated assault. But time after time, witnesses wouldn’t testify, and charges were dropped.” McClain, J. and South, T., *Speak No Evil (Part 2) The Witness Problem*, Chattanooga Times Free Press, Dec. 15, 2013.

¹⁷ National Gang Intelligence Center, *National Gang Threat Assessment: Emerging Trends* (2011). (<http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends>).

¹⁸ *Id.* at 15. (Arizona, California, Colorado, Illinois, Massachusetts, Oklahoma, and Texas).

¹⁹ *Id.* (There were an estimated one million gang members in the U.S., including all 50 states, the District of Columbia and Puerto Rico).

²⁰ *Id.* at 11.

²¹ Chuck, E., *Witness Intimidation on social media law enforcement growing challenge*, ABC News, Nov. 15, 2013. (<http://www.nbcnews.com/news/other/witness-intimidation-social-media-law-enforcements-growing-challenge-f2d11599928>)

²² Creamer, A., *Seven Grafton teens arrested on felony witness intimidation charges for cyber-bullying crime victim*, The Boston Globe, Jan. 25, 2014.

²³ A message posted on a Facebook user’s page or “timeline” may be accessible by the general public, his or her “friends,” “friends of friends” and so forth, potentially providing an unlimited number of people access to information.

²⁴ Anderson, E., *Witness intimidation charges dropped in case tied to death of EMU Football Player*, Detroit Free Press, May 21, 2014; Counts, J., *EMU student homicide: Man who called witnesses snitches on Instagram has charges dismissed*, mlive.com, May 20, 2014. http://www.mlive.com/news/ann-arbor/index.ssf/2014/05/demarius_reed_homicide_judge_d.html

dated and the conduct prohibited by most state statutes. One important challenge facing prosecutors, the courts, and ultimately, legislators, is to develop new statutory and procedural tools to address the very real threat posed by rapidly evolving forms of digital and internet-based intimidation and obstruction. Prosecutors, following the lead of a number of law enforcement agencies, need to respond both to the threat and to the opportunity posed by increased use of technology by criminal organizations.²⁵ It is more important than ever for prosecutors to know how communications technology, electronic media data, social media tools and resources can be used to investigate and effectively prosecute crimes, particularly intimidation crimes.

HOW SERIOUS A PROBLEM IS WITNESS INTIMIDATION?

One of the greatest obstacles to quantifying the extent of witness interference is the lack of data on the number of incidents reported, arrests made and charges filed and declined to be filed.²⁶ The fact that a specific criminal act is intimidation-related is not reflected in national and state crime databases.²⁷ Most crime statistics reflect only the most serious offense per incident and, as a result, intimidation is not counted when accompanied by, or constituting, a more serious offense (e.g., criminal threats, terrorism, assault or homicide).

Although crime is generally underreported due to factors entirely unrelated to witness intimidation, when successful, victims and witnesses report neither the initial crime nor the intimidation. Many deny that they have been threatened and if they had been cooperating, they recant and claim earlier statements resulted from police or prosecution coercion.

Prosecution offices that track intimidation usually include only cases in which charges are filed. Few routinely incorporate cases in which charges are declined or those resolved by plea-bargains dismissing or reducing intimidation charges. The failure to maintain statistics on all incidents involving witness interference reinforces the misperception that it is not a serious problem and undermines

efforts to obtain funding for witness relocation and protection.

Community-wide intimidation is virtually impossible to quantify precisely because it undermines trust and confidence in the criminal justice system. According to a 2009 field survey, 86 percent of participating law enforcement agencies reported the existence of some form of code of silence in their communities, and 47 percent identified the “stop snitching” phenomenon as key.²⁸ Fear of reprisal has made solving crimes considerably more difficult. Forty-five percent of respondents indicated a decrease in case clearance rates, 24 percent cited a decrease in overall trust in the agency, and 78 percent reported a decreased willingness of witnesses to testify.²⁹ This is consistent with statements by prosecutors, police officers and victim/witness advocates that intimidation is widespread, increasing, and seriously affects the prosecution of violent crimes.³⁰ Ultimately, it is the victims of those crimes and the families who survive them, who pay.

How do we quantify the effect that witness intimidation and non-cooperation has on a community? One method is to compare the number of felony convictions obtained as a percentage of cases filed. In its 2009 *Justice Delayed* series, the Philadelphia Inquirer cited conviction rates for serious and violent crimes as a means to validate anecdotal evidence of rampant witness intimidation. Philadelphia also had the highest violent-crime (murder, rape, robbery, and aggravated assault) rate among the nation’s 10 largest cities, and, other than homicide cases, its conviction rates trailed national percentages. From 2006 through 2008, prosecutors in large U.S. cities averaged a 50 percent win rate in violent-crime cases,³¹ while in Philadelphia prosecutors scored only 20 percent.³² Of 10,000 Philadelphia defendants who walked free in violent-crime cases in 2006 and 2007, 92 percent had their cases dropped or dismissed. Only 788, a mere 8 percent, were found not guilty at trial.³³

The Inquirer series concluded, in agreement with members of the judiciary, law enforcement and prosecutors, that for the most serious of crimes, these “unacceptable” conviction rates³⁴ stem from a series of systemic failings: foremost among them, an unchecked epidemic of witness intimidation pushing the criminal justice system to “...the

²⁵ A number of large metropolitan law enforcement agencies have made great advances in developing investigative programs to track and data mine online criminal activity. See, e.g., Yu, R., *Social Media Role in Police Cases Growing*, USA Today, Mar. 19, 2012.

²⁶ See, e.g., P. Finn and K. M. Healy, *Preventing Gang and Drug-Related Witness Intimidation*, National Institute of Justice, Nov. 1996; Anderson, J., *Gang Related Witness Intimidation*, National Gang Center Bulletin, Feb. 2007; Wilkinson, J., Mallios, C., and Martinson, R., *Evading Justice: The Pervasive Nature of Witness Intimidation*, Aequitas, Mar. 2013.

²⁷ Including the FBI’s Uniform Crime Reporting Program (UCR) and Bureau

of Justice Statistics’ Criminal Victimization reports, U.S. Dept. of Justice.

²⁸ *The Stop Snitching Phenomenon: Breaking the Code of Silence*, Police Executive Research Forum, U.S. Dept. of Justice, Feb. 2009.

²⁹ *Id.* at 16.

³⁰ See, e.g., Finn and Healy, *supra.*; Dedel, K., *Witness Intimidation*, Police Executive Research Forum, U.S. Dept. of Justice, 2006.

³¹ According to unidentified “federal studies.” McCoy, C., Phillips, N. and Purcell, D., *Justice: Delayed, Dismissed, Denied*, (Part I) Philadelphia Inquirer, Dec. 13, 2009.

brink of overall collapse”.³⁵ Camden County New Jersey prosecutors and local law enforcement came to a similar conclusion. In 2013, only 19 of 57 (33 percent) homicide cases in Camden County were solved, largely due to witness intimidation, always a problem in the small community and further exacerbated by social media.³⁶ In 2013, Chattanooga Tennessee police reported 58 percent of open homicide and shooting investigations at dead ends because of witness silence.³⁷

While most of the larger institutional and legislative responses to witness intimidation lie outside the scope of prosecutors’ direct control, there are a number of strategies that can be implemented within a single office and across multiple jurisdictions in order to protect witness information and aggressively prosecute intimidation crimes.

Although substantive and procedural rules vary widely by state, prosecutors share many of the same the obstacles, including:

- Witness intimidation statutes that are narrowly drawn, fail to adequately address intimidation through various electronic means, and carry only minimal sentences, often running concurrent to other charged offenses.

- Bail statutes that fail to consider a defendant’s prior intimidation conduct or dangerousness to the community as grounds for substantially increasing bail or denying bail, and fail to impose specific “no contact” or other terms and conditions to protect victims and witnesses from direct or indirect intimidation.

- Discovery statutes that require automatic or immediate disclosure of witness information, often before prosecutors are made aware of potential intimidation issues, permit copies of witness statements and information to be provided to defendants and other third parties, and fail to address the use of discovery material to intimidate victims and witnesses.

- Discovery protective orders that are unavailable at the earliest stage of a criminal proceedings, are limited to persons officially listed as witnesses, and impose no, or only minimal sanctions for violation.

- Evidentiary statutes or local rules of court that limit the admissibility of hearsay at preliminary hearings or grand

jury proceedings and limit the use of prior witness testimony at trial.

- The lack of in-depth training for prosecutors, law enforcement and judicial officers on constitutionally permissible means to protect witnesses inside court facilities and courtrooms.

Notwithstanding considerable challenges, prosecutors can develop effective policies and procedures to protect victims and witnesses. To the extent that measures can be integrated into case management, file tracking, discovery and other procedures already in use, they are more likely to become effective tools.

Training. Develop training on the basics of witness intimidation — the who, what, when, where and how — in order to be alert to assess the possibility that a victim or witness may be at risk. To the extent possible, initiate and coordinate similar training for law enforcement, judges, judicial staff, probation and members of the defense bar.

Intelligence. Establish procedures to collect, maintain and make readily accessible to other prosecutors (and key law enforcement) background information, criminal histories, social media activity, family relationships, gang or other criminal affiliations of individuals and groups who have engaged in intimidating behavior, been charged with, or convicted of, intimidation crimes in any jurisdiction.

Security. Critically assess the security of the electronic records of prosecutors, law enforcement, probation and the courts and all persons who have access to witness information, discovery, police reports, sealed court records and transcripts of grand jury and other confidential proceedings.

Preparation. Prepare and keep current briefs, bail and discovery protection motions, search warrants, subpoenas, preservation letters, and other material necessary to investigate intimidation crimes and obtain court protection for victims and witnesses.

Advocacy. State and local prosecutors and their professional associations are uniquely qualified to propose changes to intimidation statutes, rules of evidence and rules of court that interfere with the ability to protect witnesses and successfully prosecute violent crimes, as well as intimidation crimes.

³² In forming their analysis, the Inquirer traced the outcomes of 31,000 criminal cases filed between 2006 and 2008, tracking their dispositions through early 2009. *Justice: Delayed, Dismissed, Denied, supra*.

³³ *Id.* (Based on FBI Crime Data)

³⁴ Pennsylvania Supreme Court Justice Seamus P. McCaffery, a former Philadelphia judge and a longtime critic of the courts’ high dismissal rate. *Justice: Delayed, Dismissed, Denied, (Part I) supra*.

³⁵ Based on its interviews with judges, prosecutors, police, defense lawyers, criminologists, victims, and defendants. At least 13 witnesses or their fami-

lies were killed in Philadelphia between 1999 and 2009, and more than 300 people were charged each year with witness intimidation, but less than 25 percent were convicted. *Justice: Delayed, Dismissed, Denied, (Part I) supra*.

³⁶ Boren, M. *In Solving Camden homicides, intimidation a huge hurdle*, Philadelphia Inquirer., May 26, 2014.

³⁷ McClain, J. and South, T., *Speak No Evil (Part 1)*, Chattanooga Times Free Press, Dec. 15, 2013.