

The PROSECUTOR

PART II

Witness Intimidation in the Digital Age: *The Basics*

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 provided an overview of the various sources and types of witness intimidation, who is intimidated, who intimidates, how witnesses are intimidated and when intimidation occurs. Part I of this series can be found in Volume 48, Number 3, July/August/September 2014 issue of this magazine.

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 will examine 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 will review the challenges presented by the use of Internet and cellular technologies to intimidate victims, witnesses, jurors and judicial officials.

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IN ORDER FOR PROSECUTORS to reduce successful patterns of intimidation they need to understand *who* intimidates and is likely to be intimidated; *what* forms intimidation takes; *when* intimidation occurs; and *how* intimidators convince witnesses¹ to refuse to report a crime, to testify or recant prior statements.

WHO INTIMIDATES?

There is no scientifically valid method for predicting which defendant will, directly or indirectly, target a victim or witness. A defendant's criminal history, particularly history of violent crime, the nature of the charged offense, relationship to the victim or witness, and criminal associations are frequently predictors of witness intimidation. Compared to penalties for violent crime, state sentences for intimidation remain relatively light, particularly when compared to federal sentences.² In addition, sentencing rules may require intimidation sentences run concurrent to those for the underlying crime. Offenders have little to lose and much to gain by avoiding conviction through intimidation. It is merely the cost of doing business.

For others, the motivation is more personal, involving power, reputation and control. Domestic and intimate partner violence and certain sexual abuse offenses arise out of a complex web of relationships. Cooperation with law enforcement and prosecutors challenge the abuser's power and control. Pressuring a victim to "drop charges," recant or refuse to testify is primarily an attempt to regain control. Prosecutors frequently lose their complaining witness due to pressure, coercion or threats from family members acting on behalf of the offender. Identifying the source of intimidation is less of a challenge than ensuring the safety and cooperation of victims and witnesses.³

Defense Attorneys and Investigators. Due to their unlimited access to police reports, witness statements and grand jury transcripts, defense attorneys and their investigators are

able, directly or indirectly, to orchestrate, abet or simply ignore, their clients' interference with victims and witnesses. The 2013 conviction of former New Jersey federal prosecutor Paul Bergrin for conspiring to kill a key government witness in his client's drug-dealing case is exceptional, not only because it was successful, but because it was pursued.⁴ A Rhode Island defense attorney was convicted of paying \$10,000 to, and then instructing, a stabbing victim on how to change his testimony — or, as characterized by the presiding judge, providing "a playbook on how to lie without getting caught."⁵ A defense attorney in Berkeley, California, who admitted to passing handwritten notes from her client to members of his family that turned out to be a hit list of witnesses scheduled to testify at his trial for the murder of an Oakland journalist, was not prosecuted.⁶

The case of San Francisco defense investigator Steve Vender, who was indicted for felony witness intimidation in 2009, attracted press attention. According to shooting victim Ladarius Greer, Vender had been continually calling him asking him not to testify against the gunman, Phil Pitney. He left a message warning Greer that he would be arrested on a felony warrant and advised "It's a good time to visit the Fresno Riviera and stay well."⁷ Greer failed to show up to testify. Vender's 2013 trial ended in a mistrial and he entered a plea to a misdemeanor charge of attempting to dissuade a witness.⁸

Vender was working for Pitney's attorney Eric Safire. It is unclear whether Safire was investigated, notwithstanding his courtroom antics during the 2008 preliminary hearing of Charles "Cheese" Heard for murder. In that case, when the sole eyewitness was asked to identify the shooter, eight gang members stood up in unison, crossed their arms and stared at the witness.⁹ Safire admitted to orchestrating the stunt but claimed that he was only challenging the witness's identification of the defendant.¹⁰ Safire was not charged.

In many more cases, witness statements, grand jury testimony and sealed court documents obtained through discovery have been distributed throughout witnesses' neigh-

¹ The term "witness" is used for brevity, but necessarily includes victims of crime.

² 18 U.S. Code 1512 (a)(3) provides for sentences between 20 and 30 years.

³ A number of excellent publications examine these particular challenges in depth. See, e.g., "Prosecuting Witness Tampering, Bail Jumping and Battering From Behind Bars," Office on Violence Against Women and Vera Institute of Justice, U.S. Dept. of Justice, (2006); Pence, E. and Eng, D., "The Blueprint for Safety: An Interagency Response to Domestic Violence Crimes," Praxis International (2009).

⁴ Bergrin was also convicted of nearly two-dozen counts of conspiracy, racketeering, and cocaine trafficking. "Life Sentences for Lawyer to Celebrities," *New York Times*, September 23, 2013. He was sentenced to six life sentences. Zernike, K., "New Jersey Lawyer Guilty of Murder," *New York Times*, March. 18, 2013.

⁵ Mulvaney, K., R.I. "Defense lawyer gets 6 years in prison for role in scheme to bribe witness," *The Providence Journal*, September 11, 2013.

⁶ Peele, T., "Lawyer faces loss of license for allegedly smuggling hit list from jail for Your Black Muslim Bakery leader," *San Jose Mercury News*, April 22, 2013.

⁷ Ho, V., "Mistrial in S.F. investigator's 'Fresno Riviera' case," *San Francisco Chronicle*, January 27, 2014.

⁸ The jury was hung, 11 to 1 for guilty. Nagle, R., "Defense investigator pleads no contest to misdemeanor charge of witness tampering," *San Francisco Examiner*, March 6, 2014.

⁹ The judge refused a request from the prosecutor to clear the men from the courtroom. Vanderbeken, J., "Attorney accused of 'witness intimidation,'" *San Francisco Chronicle*, October 8, 2009.

¹⁰ Groos, C., Lawyer "Planned Witness Intimidation in SF Murder Trial?," *FindLaw Blotter*, October 8, 2009.

borhoods and posted on social media with the sole intent to frighten witnesses.¹¹ Although the defense bar is largely insulated from responsibility for these crimes by discovery statutes and state bar rules,¹² the illegal and unethical use of this material to intimidate — or eliminate — witnesses is an extremely serious problem.¹³

Religious Organizations. Religious organizations often demonstrate a strong preference for self-regulation of members' conduct, resisting governmental interference. In contrast to associates of gangs and criminal organizations, members of religious groups use positions of trust to perpetrate and to cover up crimes. Adverse publicity, loss of reputation, status, public trust and economic power motivate efforts to derail official investigations.

The pattern of sexual abuse and institutional cover-ups by the Catholic Church over the past 30 years has resulted in more than \$2.5 billion in settlements in the United States alone.¹⁴ Despite 18 years of allegations that Chicago-area Catholic priest Russell Romano plied boys with alcohol and pornography, before abusing them,¹⁵ Church officials refused to inform law enforcement. One stated "We don't want to be snitches."¹⁶ Other religious organizations have demonstrated similar institutional loyalty. In 2010, a Jewish rabbinical court in Brooklyn forbade the Lubavitch Hasidic community from revealing anything that could "lead to an investigation" ... "by any law enforcement agency."¹⁷ The next year, the court adopted a narrow exception to allow community members to report child sex abuse.¹⁸

In 2012, Nechemya Wederman, a prominent member of the Williamsburg (Brooklyn) Satmar Hasidic community, was convicted of 59 counts of sexual misconduct.¹⁹ Before trial, a Wederman supporter offered a witness's husband \$500,000 in exchange for the witness's silence.²⁰ Three men

were charged with threatening and then removing the kosher certification of a restaurant run by a complaining witness's boyfriend.²¹ During trial, four men were arrested after photographing a witness during her testimony and posting them to Twitter.²²

Although the defense bar is largely insulated from responsibility for these crimes by discovery statutes and state bar rules,¹² the illegal and unethical use of this material to intimidate — or eliminate — witnesses is an extremely serious problem.¹³

Members of many groups — social, ethnic and professional — develop similar bonds of loyalty. Police officers, members of the military and others engaged in dangerous professions rely on close bonds to ensure their safety. Many share similar "code of silence" cultures. Although intimidation and coercion by police and prosecutors does occur, unlike intimidation by criminal defendants and criminal organizations, such conduct is not only illegal, but violates the ethical rules and professional standards embraced by the vast majority of practitioners. Unfortunately, substantial press coverage of police intimidation, particularly in corruption or misconduct cases,²³ lends credibility to false claims by recanting witnesses that their statements were

¹¹ Staas, J., "Man convicted of witness intimidation after grand jury testimony is posted on Facebook," *The Buffalo News*, October 30, 2013.

¹² Texas (Tex. Code Crim. Pro. Art. 39.14(a)) and Illinois (Ill. R.Ct. 415) are among the few states that impose clear restrictions on the distribution of copies of discovery to clients in criminal cases.

¹³ The use of discovery material to facilitate witness interference will be addressed in Part III of this series.

¹⁴ Grossman, C., "Clergy sex abuse settlements top \$2.5 billion nationwide," *USA Today*, March 13, 2013.

¹⁵ Janssen, K., "We don't want to be snitches,' church official wrote," *Chicago Sun-Times*, January 21, 2014.

¹⁶ *Id.*

¹⁷ Weichselbaum, S., "Rabbinical court to Lubavitchers: Quit yer snitchin' about cops, crime to outsiders," *New York Daily News*, December 10, 2010.

¹⁸ "Crown Heights Beit Din Says Report Child Sexual Abuse to Police," *Failedmessiah.typepad.com*, July 11, 2011.

¹⁹ Otterman, S., "Abuse Verdict Topples a Hasidic Wall of Secrecy," *New York Times*, December 10, 2012.

²⁰ Yaniv, O., "Man pleads guilty to offering \$500K bribe to silence Weberman

sex abuse victim," *New York Daily News*, August 21, 2013.

²¹ Otterman, S., "Ultra-Orthodox Men Charged with Trying to Silence Accuser," *New York Times*, June 21, 2012.

²² "Nechemya Weberman Trial: Four Men Accused of Photographing Accuser in Court," *Huffington Post*, November 30, 2012.

²³ See, e.g., "Former Baltimore Detective Speaks Out About Intimidation," *CBS Baltimore*, September 4, 2012. <http://www.baltimore.cbslocal.com/2014/09/04/former-baltimore-police-detective-crystal-speaks-out-about-intimidation/>

²⁴ Dedel, *supra*.

²⁵ See, e.g., Rogers, J., "Losey headed to prison for witness intimidation," *Marietta Times*, December 18, 2013. (Georgia man beat unconscious a teenage witness to a vehicle accident); Minch., J., "Police: Hit and Run Suspect tried to intimidate witness," *Lowell Sun*, May 13, 2014 (After a bicycle hit and run, defendant tracked down and warned a witness not to talk to police).

procured through police coercion and intimidation.

WHO IS INTIMIDATED?

Just as anyone can be witness to a crime, anyone can be the target of intimidation. Although prosecutors and law enforcement consistently report the highest rates of intimidation in gang-related crimes, drug and human trafficking, stalking and domestic/intimate partner violence,²⁴ it also occurs frequently in misdemeanors,²⁵ public corruption,²⁶ and white-collar cases.²⁷

Traumatized victims of violent crime, domestic violence, sexual assault and trafficking are particularly easy prey for intimidators.²⁸ Others are particularly vulnerable because of their family ties, residence, age, economic or immigration status.²⁹ Those with close ties to an offender, such as family members and co-workers, are often at a greater risk.³⁰ Because offenders who are incarcerated most often return to the same community, victims and witnesses who live there are at greater risk for retaliation and intimidation than those who do not.³¹ Family and friends of anyone labeled a snitch are ostracized, their physical safety threatened, employment jeopardized and their property subject to vandalism.

Witnesses with criminal records, active warrants, or parole and probation conditions may be particularly hesitant to assist police. Not only is contact with law enforcement likely to trigger disclosure of their own criminal conduct, it may expose their families to additional hardship. Witnesses who are informants or “jailhouse snitches” pose particular problems for prosecutors. In addition to credibility issues, the need to disclose compensation or plea bargains made in exchange for cooperation, keeping incarcerated witnesses safe is challenging, if not impossible.³²

²⁶ See, e.g., Dwyer, J., “An Officer Had Secret Tapes,” *New York Times*, March 13, 2012.

²⁷ “Ex-Chief of WorldCom Convicted of Fraud Charges,” *New York Times*, March 15, 2005.

²⁸ “Ensuring that Federal Prosecutors Meet Discovery Obligations, Hearings on S. 2197 Before the Senate Judiciary Comm.”, 112 Cong. (2012) (Testimony of Stephanos Bibas, Professor of Law and Criminology, Univ. Penn. Law School, June 5, 2012).

²⁹ Connick, E., and R.C. Davis, (1983). “Examining the Problem of Witness Intimidation.” 66 *Judicature* 439; Davis, R., B. Smith, M. Henley, “Victim/Witness Intimidation in the Bronx Courts: How Common Is It, and What Are Its Consequences?,” New York:Victim Services Agency (1990).

³⁰ Finn and Healy, *supra*.

³¹ Elliott, R., “Vulnerable and Intimidated Witnesses: A Review of the Literature.” London: Home Office, 1998.

³² *Id.*

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WHEN WITNESSES ARE INTIMIDATED

Intimidation can occur at any time from the moment a crime is committed until well after conviction and sentencing. Generally, intimidation increases as a case moves through the process from indictment to trial. With previously unknown witnesses, intimidation often commences shortly after discovery is provided. When this occurs, witnesses who initially cooperated will recant or refuse to testify, often resulting in dismissal of charges.³³ Convicted defendants may simply seek retaliation; others seek to force witnesses to change their testimony to support an appeal.³⁴

Witness tampering also extends into the courtroom, where defendants, their families, friends or criminal associates target victims, witnesses, jurors, prosecutors and judges. In gang cases, threats are often communicated by their mere presence; members pack the courtroom, display gang colors, wear shirts bearing “stop snitching” or “not guilty” messages, or stare, direct threatening looks or gestures at witness or jurors.³⁵ Some defendants have gone so far as to physically attack a witness during their testimony.³⁶ More recently, intimidators aim cellphones or take pictures of witnesses before or during their testimony and immediately post them to Instagram, Twitter or social media sites, accompanied by overt or implied threats.³⁷

The problem is exacerbated when court proceedings are delayed or rescheduled and witnesses are subject to repeated abuse. Even when a cooperating witness makes it to trial, overt intimidation and threats while testifying can completely undermine a case. In an all too typical example, the sole witness to an ambush gang killing in Newark reversed his earlier identification of the defendant after “a phalanx of gang members glar[ed] at him in open court.”³⁸ Unfortunately few trial judges are prepared to take immediate action against such actions, unclear as to the constitu-

tional parameters of the right to a public trial and afraid of providing grounds for appeal.³⁹

HOW WITNESSES ARE INTIMIDATED

Most studies distinguish between individual intimidation, related to a single crime or defendant, and communitywide intimidation characterized by a “code of silence” or “stop snitching” culture.

Individual Intimidation. Individual intimidation can take place openly, in plain view of the law enforcement, prosecutors and the courts, conducted in such a way as to make the threat understandable only to the targeted individuals. Most often, however, it is undertaken in private, rendering the conduct difficult to prove. Intimidation takes many forms, including physical violence, direct verbal and non-verbal threats, implied threats and manipulation, shunning and outing via social media. Although some witnesses experience a single threatening incident, intimidation more often involves escalating conduct that becomes more violent over time.⁴⁰ The methods not only tend to escalate, but they are used in tandem.

Initially, a witness may be approached with pleas for mercy or simple persuasion.⁴¹ Others begin with offers of a bribe to change statements to law enforcement or prosecutors, to forget what they saw or heard, or to disappear for a period of time.⁴² When offers of compensation are refused, threats and violence follow. In a typical example, a Charleston, South Carolina man who witnessed a murder was approached by two drug dealers; one urged him not to testify — the other offered cash. Shortly after he refused the money, he was gunned down.⁴³

Threats, whether direct or indirect, are more common than physical violence and are highly effective in deterring

³³ See, e.g., Skutch, J., “Chatham County District Attorney decries unwilling witness’s threat to justice,” *Savannah Morning News*, November 8, 2014.

³⁴ See, e.g., Witherspoon, T., “Convicted killer Cummings’ brother arrested on charges of threatening a witness,” *WacoTrib.com*, November 20, 2012.

³⁵ See, e.g., McGovern P., “Juror dismissed from Jersey City murder trial after reporting intimidation at courthouse,” http://www.blog.nj.com/hudson-countynow_impact/print.html?entry=/2014/06/juror_dismissed_from_jersey_city_murder_trial_after_reporting_intimidation_at_courthouse.html, October 27, 2014.

³⁶ Rombay, D. and Reavy, P., “Man killed in court had tried to prevent witness with ‘personal bias’ from testifying,” *Deseret News*, April 22, 2014.

³⁷ Bernstein, M., “Threats, intimidation of witnesses and victim’s family play out before, during and after Portland trial,” http://www.oregonlive.com/portland/index.ssf/2014/02/post_413.html, February 3, 2014.

³⁸ Kocieniewski, D., “Witness Faces Trial for a Murder Seen, Then Unseen,” *New York Times*, July 29, 2007.

³⁹ See, *infra* note 25.

⁴⁰ Dedel, *supra*.

⁴¹ R. C. Davis, B. E. Smith, M. Henley, “Victim/Witness Intimidation in the Bronx Courts: How Common Is It, and What Are Its Consequences?” New York:Victim Services Agency (1990).

⁴² A Massachusetts witness was offered up to \$25,000 if he agreed to ‘tweak’ his testimony and he was acquitted. Murray, G., “Patsy Santa Maria Jr. indicted on witness intimidation charge,” *Worcester Telegram & Gazette* November 21, 2013.

⁴³ Smith, G., “‘Solicitor: Targeting witnesses to kill cases, ‘a huge problem’” *Charleston Post and Courier*, January 8, 2014.

cooperation. Witnesses, as well as their family and friends, may be followed, watched, receive annoying phone calls or texts; “accidents” may result in property damage or interfere with a business. Threats to expose information about an individual’s personal life, past crimes or misdeeds, sexual orientation, drug or alcohol abuse, criminal history or other information that may affect reputation, family relationships, immigration, child custody or employment are particularly effective.⁴⁴ Internet, social media and technology make the disclosure and dissemination of such information all too easy.

Threats to expose information about an individual’s personal life, past crimes or misdeeds, sexual orientation, drug or alcohol abuse, criminal history or other information that may affect reputation, family relationships, immigration, child custody or employment are particularly effective.⁴⁴

Intimidation from Prison and Jail. Some of the most serious and difficult to prove intimidation occurs within penal institutions.⁴⁵ It is impossible to know how many assaults and homicides in penal institutions are tied to witness interference, but it is clear that incarceration — of perpetrators and potential witnesses — does little to deter violence against victims and witnesses before or after criminal proceedings.⁴⁶ Fearing violent retaliation, a participant in a

2012 Louisiana car-jacking homicide refused to testify against his co-defendants, giving up his bargained-for plea and 23-year sentence, for concurrent sentences of up to 99 years.⁴⁷ In 2014, Sean Echols was sentenced to 20 years for conspiring to kill a 15-year Corrections Department veteran. An unknown inmate with a cellphone ordered the hit. When the target survived, Echols rejected a five-year sentence offered in exchange for the names of his co-conspirators, citing certain retaliation while incarcerated.⁴⁸ Inmates also direct intimidation of witnesses on the outside. Notwithstanding routine monitoring, inmates continue to threaten witnesses through phone calls and letters, concealing threatening material as “legal” mail, exempt from examination. A Ventura County, California, county jail inmate wrote at least 10 letters to skinhead gang members instructing them to “[t]ell all the brothers in the yard...to take (out) that deal-making, wire-wearing punk,” referring to a key grand jury witnesses.⁴⁹ A Maryland defendant facing vehicular manslaughter charges for the death of a police officer sent a letter from jail soliciting a hit against a witness expected to testify.⁵⁰ Others attempt to order intimidation through other inmates. While on Riker’s Island awaiting trial, Joseph Lomardo, a career criminal, attempted to arrange for another inmate to pay \$10,000 for a hit on the child witnesses named to testify against him in an armed home invasion trial.⁵¹

Across the U.S., street and prison gangs control the smuggling of drugs, weapons and cellphones in state and federal correctional institutions. Cellphones are used to run a wide range of criminal enterprises, including witness intimidation.⁵² A 2009 federal indictment identified the proliferation of cellphones as instrumental in enabling the Black Guerilla Family prison gang to coordinate drug trafficking, money laundering and murder from the Baltimore jail.⁵³

⁴⁴ Healey, *supra*; Finn and Healy, *supra*.

⁴⁵ See, e.g., Kocieniewski, D., “Not Scared, or Scalded, into Silence, Ex-Gang Leader Takes Stand in Trenton Murder,” *New York Times*, September 28, 2007; Caleci, J., “Junior Gotti Defense Witness Stabbed to Death in Prison,” *Huffington Post, The Blog*, May 3, 2010. http://www.huffingtonpost.com/jerry-capeci/junior-gotti-defense-witn_b_559860.html.

⁴⁶ Mortality rates by State (<http://www.bjs.gov/content/dcrp/prisonindex.cfm>)

⁴⁷ Simerman, J., “Key witness refuses to testify at Algiers murder trial,” *New Orleans Advocate*, May 9, 2014.

⁴⁸ Kinnard, M., “Man gets 20 years in S.C. prison guard shooting,” *Greenville Online*, August 13, 2014. <http://www.greenvilleonline.com/story/news/crime/2014/08/13/man-gets-years-sc-prison-guard-shooting/14010191/?from=global&sessionKey=&autologin=>

⁴⁹ Wilson, T., “Conspirator in Merriman Case Is Sentenced,” *Los Angeles Times*, September 10, 1999.

⁵⁰ “Kevon Neal adds witness intimidation charge to manslaughter allegations,” *ABC News 7*, January 9, 2014. (<http://www.wjla.com/articles/2014/05/kevon-neal-adds-witness-intimidation-charge-to-manslaughter-allegations-102965.html>)

⁵¹ Lombardo was arrested after prosecutors arranged for an undercover agent to pose as the hit man. Yaniv, O., “Convicted crook accused of trying to hire hit man to kill witnesses,” *New York Daily News*, September 18, 2014.

⁵² In 2013, the California Department of Corrections confiscated 12,151 phones, a striking increase from 1400 in 2007. “Contraband Cell Phones in CDCR Prisons and Conservation Camps,” CA. Dept. of Corr. and Rehab., April 2014. <http://www.cdcr.ca.gov>.

⁵³ Marimow A. and Wagner, J., “13 corrections officers indicted in Md., accused of aiding gang’s drug scheme,” *Washington Post*, April 23, 2013; Smith, V., “Evidence seized in FBI’s BGF prison-corruption raids documented in federal court,” *Baltimore City Paper*, June 4, 2014.

Access to smartphones allows inmates to use email, text, and social networking sites to threaten and harass victims and witnesses and to order murder.⁵⁴ In 2007, Patrick Byers used an illegal cellphone inside a Baltimore jail to order a \$2,500 hit on Carl Lackl one week before he was to testify against him in his murder trial. Lackl was killed outside his home in a drive-by shooting.⁵⁵ A leader of the North Carolina Bloods faces federal kidnapping charges after using a smuggled cellphone to order gang subordinates to kill the father of the prosecutor who handled his 2011 murder case.⁵⁶

Indirect or Communitywide Intimidation. Organized crime and criminal street gangs prevent interference with their narcotics, firearms, human trafficking, loan sharking, and identity theft operations through communitywide intimidation.⁵⁷ Because gangs exist to accumulate power and profit, the conviction of any member, particularly for a serious offense, threatens the livelihood and the reputation of all members. Communal self-interest mandates aggressively deterring and punishing witnesses and informants. Lower level associates are ordered to carry out intimidation and retaliation against witnesses, including execution. The Mexican Mafia, which controls many California street gangs, routinely approves contracts to kill government witnesses after court documents confirm their identity.⁵⁸ Even members of loosely affiliated gangs and local dealers protect their interests through intimidation.⁵⁹

Gangs use the spillover effect from violence directed at specific witnesses to eliminate cooperation throughout entire communities. In Trenton, New Jersey, at least 20 people were present when a stray bullet from a gang fight struck a 7-year-old girl in the face, but the case remains unsolved because “not a single one will testify or even describe what they saw.”⁶⁰ Ten months after the shooting, another person was shot and killed on the same corner during a robbery, but no one would identify the gunman.

Gangs also use their reputation for violence to intimidate potential jurors, who may refuse to serve, much less to convict. The substantial increase in the number of gang members and the geographic spread of domestic and transnational street gangs, human and narcotics trafficking syndicates across the U.S. has increased competition and violence aimed at rivals and witnesses.⁶¹ In inter-gang violence, the same individual may, at different times, be a victim, a witness and an offender; retaliation trumps any contact with law enforcement with few exceptions.

Anyone who testifies to a defendant's gang affiliation — even if they have not witnessed a crime — is targeted for retaliation.

Other public acts are also effective to reinforce the “code of silence” and instill fear in an entire community. Associates canvass neighborhoods displaying “no-snitching” clothing, bumper stickers and signs, wear T-shirts printed with the witnesses’ photographs and distribute witness names, addresses and statements.⁶² Recently, and particularly in states where crimes committed for the benefit of a criminal street gang result in a substantial sentencing enhancement,⁶³ gangs have begun to shed traditional forms of gang identification, including gang colors, tattoos, ethnic and neighborhood affiliations.⁶⁴ Anyone who testifies to a defendant’s gang affiliation — even if they have not witnessed a crime — is targeted for retaliation.

Across the U.S. witness intimidation has become so pervasive that it has destroyed the public’s faith in the ability of the criminal justice system to protect them, particularly against gang crime.⁶⁵ In Newark, dozens of “murder cases have been undone over the past five years after witnesses were killed, disappeared before trial or changed their stories.”⁶⁶ In California, the troubling increase in witness

⁵⁴ See, e.g., Thompson, D. “Inmates Harass Victims Via Facebook,” Yahoo! News, November 21, 2011 <http://www.news.yahoo.com/inmates-harass-victims-via-facebook-081733468.html>; Beiser, V. “Prisoners Run Gangs, Plan Escapes and Even Order Hits With Smuggled Cellphones,” *Wired*, May 22, 2009.

⁵⁵ Bishop, T., “Murder on Call,” *Baltimore Sun*, April 26, 2009.

⁵⁶ Warren, L., “Bloods gang member who is serving life sentence 'masterminded terrifying kidnap of prosecutor's father using a cellphone he'd smuggled in to prison,’” *DailyMail.com*, April 11, 2014. <http://www.dailymail.co.uk/news/article-2602485/Bloods-gang-member-sentenced-life-prison-masterminded-terrifying-kidnap-prosecutors-father-using-cell-phone-he-smuggled-prison.html#ixzz3Infl0jXmV>

⁵⁷ The National Gang Center Website contains a tremendous resource of up to date reports on gang crimes, cases, convictions and related information updated daily. See, <https://www.nationalgangcenter.gov/Gang-Related-News>

⁵⁸ See, e.g., *People v. Valdez* (2012) 55 Cal.4th 82, 106.

⁵⁹ Finn and Healy, *supra*.

⁶⁰ Kocieniewski, D., “A Little Girl Shot, and a Crowd that Didn’t See,” *New York Times*, July 9, 2007.

⁶¹ The National Gang Intelligence Center attributes the surge in gang membership to “the facilitation of communication and recruitment through the Internet and social media.” “National Gang Threat Assessment: Emerging Trends,” *supra*.

intimidation compared to a decade ago is cited as the greatest hurdle facing any successful gang prosecution.⁶⁷ Sen. Charles Schumer of New York recently pointed to the gang intimidation culture as a serious threat to witness safety and responsible for the refusal of credible witnesses to cooperate.⁶⁸

Even in jurisdictions not generally associated with gang violence, intimidation has become pervasive. A 2007 multi-part Denver Post series detailed alarming patterns of gang intimidation. According to Denver officials, “easily in three-fourths of [gang violence] cases we see some kind of ‘intimidation’ and the ‘anti-snitch’ atmosphere is letting killers go free.”⁶⁹ Charleston, South Carolina, police also report the pervasive anti-snitch culture encourages the most violent forms of intimidation. “It’s a huge problem, and it’s a very real issue... ”⁷⁰ “Fifteen to 20 years ago, I could tell witnesses that the chances of something like that happening in this area were really small. I can’t say that anymore.”⁷¹ The Chatham County, Georgia, district attorney decried witness intimidation, responsible for dozens of stalled cases, frustrating prosecutors and victims’ families and making the criminal justice system “grind to a halt.”⁷²

“Snitch” originally referred to members of a criminal organization, a co-defendant or convict who traded information for leniency. “Omerta” and the “code of the streets,” which vilify and punish “snitches,” historically applied only to syndicate members and to those “in the (gang) life.” This is no longer true. Capitalizing on deeply entrenched patterns of mutual mistrust between police and residents of many communities, gangs have deliberately expanded the term, applying it to *anyone* who cooperates with law enforcement. Not merely the expression of disdain for traditional informants, “no snitching” has become a perverted form of community solidarity and a direct threat: anyone who talks will end up hurt or dead, regardless of circumstances. In communities already frustrated by what they perceive to be a systemic lack of response to their safety and

unwarranted police harassment, resistance to gang intimidation is not a viable option.

In part due to technology, the “no snitching” culture has exploded into virtually every community and age group, including law-abiding citizens who have never encountered the criminal justice system. Over the past decade, gangs have distributed anti-snitch rap music and gang-produced videos through YouTube, Myspace, Facebook, gang websites and message boards, and mobile applications to promote the anti-snitching culture and promoting phrases such as “snitches get stitches and then end up in ditches” and “nobody talks, everybody walks.”⁷³ Social media has “made gang activity more prevalent and lethal” by providing an immediately available venue for gang members to intimidate rivals and police, conduct gang business, showcase illegal exploits and facilitate criminal activity.⁷⁴

In response, law enforcement and governmental agencies across the country have begun to partner with community leaders, schools, churches and civic organizations to develop strategies to counter the “no snitching” culture.⁷⁵ Many jurisdictions are implementing community policing, education and other programs aimed at building trust between police and residents in gang-affected communities. A number are testing innovative programs using Internet and digital technologies to enable residents to report criminal activity anonymously. These and other programs seek to lay the foundation for fundamental changes necessary to challenge the overwhelming pressure to “see nothing, say nothing.”

The fact that intimidation crimes occur in so many contexts and in virtually unlimited permutations renders it one of the most difficult crimes to successfully investigate and prosecute. Efforts to protect witnesses and secure reliable testimony are hampered by the very nature of the crime as well as the no-snitching culture, technological advances and gang expansion. Understanding the nature and scope of these factors is the first step toward addressing them.

⁶² Kocieniewski, D., “With Witness at Risk, Murder Suspects Go Free,” *New York Times*, March 1, 2007.

⁶³ See, e.g., Cal. Pen. Code §186.20.

⁶⁴ “National Gang Threat Assessment: Emerging Trends,” *supra*.

⁶⁵ Butterfield, F., “Guns and Jeers Used by Gangs to Buy Silence,” *New York Times*, January 16, 2005.

⁶⁶ Kocieniewski, D., “With Witnesses at Risk, Murder Suspects Go Free,” *New York Times*, March 1, 2007.

⁶⁷ Kamala D. Harris, Testimony before the Committee on the Judiciary U.S. House of Rep., April 2007.

⁶⁸ Siuzdak, C. “Schumer Pushes for Harsher Witness Intimidation Penalty,” *Legislative Gazette*, October 2, 2012.

⁶⁹ Olinger, D., “Anti-snitch” culture lets killers walk,” *Denver Post*, October 2, 2007.

⁷⁰ 9th Circuit Solicitor Scarlett Wilson, Smith, G., “Solicitor: Targeting witnesses to kill cases, ‘a huge problem’” *Charleston Post & Courier*, January 8, 2014.

⁷¹ *Id.*

⁷² Skutch, J., “Chatham County District Attorney decries unwilling witnesses as threat to justice,” *Savannah Morning News*, November 9, 2014.

⁷³ Stass, J., “Man convicted of witness intimidation after grand jury testimony is posted on Facebook,” *Buffalo News*, October 30, 2013.

⁷⁴ “National Gang Threat Assessment: Emerging Trends,” *supra*, p.10.

⁷⁵ A number of these efforts are detailed in “The Stop Snitching Phenomenon: Breaking the Code of Silence,” Police Executive Research Forum, U.S. Dept. of Justice, February 2009.