Manufacturing Crime: Process, Pretext, and Criminal Justice

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What do Bill Clinton, Roger Clemens, Martha Stewart, and Lil’ Kim have in common? How about adding Marion Jones, Barry Bonds, Kwame Kilpatrick, Frank Quattrone, Donald Siegelman, and Lewis Libby? The list of notable names could go on, each sharing a particular characteristic. All have been accused of a “process crime”—an offense not against a particular person or property, but against the machinery of justice itself.

Process crimes have a long and storied history in the American criminal justice system. Familiar variations of such offenses include perjury, obstruction of justice, and contempt; more recent iterations materialize as violations of court orders or failures to appear. Yet despite the laundry list of politicians, business icons, and sports and entertainment celebrities that have lately found themselves ensnarled in charges related to process crimes, legal scholarship on the topic remains scarce. Moreover, the extant discussion centers entirely on process crimes in federal courts and typically focuses on issues related to prosecutions undertaken for pretextual reasons, like that of Al Capone.

This Article is the first to take a comprehensive look at process crime prosecutions. This survey reveals two critical insights. First, it uncovers a vibrant yet essentially undocumented practice of process charging in state courts. Second, it identifies a new motivation underlying process crime prosecutions. Specifically, this Article argues that process prosecutions are brought not only to remedy core violations of rights or to target otherwise elusive defendants with pretextual charges, but also to punish defendants for nothing more than their obstinate or anti-authoritarian behaviors. This Article closes by probing the normative desirability of process charging in light of these observa-

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tions, and sounds a note of caution to encourage closer monitoring of such offenses on both a categorical and individual level.

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INTRODUCTION

I write . . . to call attention to the extraordinary authority Congress, perhaps unwittingly, has conferred upon prosecutors to manufacture crimes.  

What do Bill Clinton, Roger Clemens, Martha Stewart, and Lil' Kim have in common? How about adding Marion Jones, Barry Bonds, Tammy Thomas, Kwame Kilpatrick, Frank Quattrone, Donald Siegelman, and Lewis Libby? The list of notable names could go on, each sharing a particular experience in common. All have been accused of a "process crime"—an offense not against a particular person or property, but against the machinery of justice itself.

"Process crimes" have a long and storied history in the American criminal justice system. Familiar variations of such offenses include perjury, obstruction of justice, and contempt; more recent iterations materialize as dissuading witness testimony or failing to appear. Yet despite the laundry list of politicians, business icons, and sports and entertainment celebrities that have lately found themselves ensnared in charges related to "process crimes," legal scholarship on the topic remains relatively scarce.

The conventional account of process crimes depicts them as either protections against the perversion of governmental functions (what I call "core prosecutions") or as pretextual means to a substantive end ("pretextual prosecutions"). The existing scholarly attention likewise falls into two separate but related camps. The first focuses on emerging prosecutorial strategies used to police the practices of large corporations, primarily in the wake of national

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2. Stuart P. Green, Why It's a Crime To Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 EMORY L.J. 1533, 1612 (1997) (enumerating list as including "crimes such as perjury, false statements, obstruction of justice, bribery of public officials, prison escape, tax and customs duty evasion, illegal immigration, and draft dodging").
scandals like Enron and WorldCom. The second and less popular area of inquiry centers on “pretextual prosecution” and contemplates the legitimacy of using one form of criminal liability as a means of apprehending a defendant sought for another reason. Although any offense can serve as a “pretext” (the government may as well use assault charges to nab a perjurer as the reverse), for reasons explored later process offenses as a practical matter are particularly well-disposed to pretextual use.

Most strikingly, virtually all of the scholarly attention to “process crimes” and pretextual prosecutions has considered them largely, if not exclusively, a federal phenomenon. The poster child of pretextual (although not process) prosecution is Al Capone, whom Eliot Ness apprehended for tax evasion rather than the myriad other crimes of violence and extortion of which he was suspected. Attorney General Robert F. Kennedy later famously threatened to lock away similarly notorious mobsters for “spitting on the sidewalk”; Attorney General John Ashcroft echoed the sentiment with regard to terrorists in the aftermath of September 11.

Thus, on the sparse landscape of literature addressing process prosecutions, several vistas are altogether missing. Absent is any story about process crimes in state court—whether they exist, what they are, and how they function. Lacking also is any “ground truth” about process crimes in the criminal justice system, including an overarching perspective on the evolution and deployment of these offenses. Are such charges common? Who are they used against? What practical purpose do they serve? Finally, conspicuously omitted is any robust theoretical inquiry into the relationship between process offenses and the power of the state.

This Article aims to shine a comprehensive light on the phenomenon of

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5. See, e.g., Richman & Stuntz, supra note 3, at 583. A variation of this line of inquiry includes the approach exemplified by the work of Stuart Green, who probes the moral content of many white collar offenses. See STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME 24 (2006).

6. See, e.g., Litman, supra note 3, at 1137; Richman & Stuntz, supra note 3, at 583 (“Pretexutal charging is primarily a phenomenon of the federal criminal justice system . . . .”).

7. Richman & Stuntz, supra note 3, at 583–84.


9. Webster’s defines “ground truth” as derived from the earth sciences, and as referring to “the facts that are confirmed [when] an actual field check is done at a location, specif. the determination of facts by examining the ground for patterns revealed by remote sensing or aerial photography.” Webster’s New Millennium Dictionary of English, Preview Edition, “ground truth,” http://dictionary.reference.com/browse/ground_truth (last visited March 8, 2009).
process charging. Part I begins by establishing the vocabulary that describes the basic characteristics of process offenses. Part II then explains the relationship between process and pretext and particularly focuses on why process offenses serve as such attractive vehicles for pretextual prosecutions. Part III then offers two new critical insights about process prosecutions. First, it calls attention to a vibrant practice of pretextual process charging in state courts. Second, it describes the emergence of a third kind of process prosecution—beyond remedying core violations or achieving pretextual ends—that it terms the “obstinacy” offense. Rather than redress an injury to the integrity of the system or provide the means through which to address an otherwise difficult to remediate harm, obstinacy offenses simply vindicate the state’s interest in formalistic respect. Illustrating these observations, Part IV paints a comprehensive portrait of the operation of process offenses within the criminal justice system, drawing upon legislative, doctrinal, anecdotal, and empirical studies to examine five process crimes more concretely. Specifically, this Part considers: failure to appear, false statements, obstruction of justice, contempt, and perjury. Finally, Part V highlights concerns raised by the practice of obstinacy charging and questions its normative desirability.

I. THE “CORE” OF PROCESS CRIMES

The label “process crime” virtually defines itself, which may explain why the literature so rarely makes an effort to articulate its definition. The adjective “process” naturally refers to the procedures of criminal justice. Accordingly, “process crimes” comprise those criminal offenses with content addressing acts that interfere with the procedures and administration of justice. Thus, for example, Professor Chris Sanchirico, in his two influential articles on what he terms “detection avoidance,” refers to “process crimes like perjury or obstruction of justice.” He also equates “process crimes” to “evidence tampering,” intending to refer to a secondary form of liability that is derivative of a primary offense. Without a primary referent, there is no “witness” or “evidence” with which to tamper—there are simply people and things.

Used in this way, the category alone—“process crimes”—carries no normative valence. It solely serves to segregate one category of crime from another, much the same way that loose notions of “white collar crimes” or “property

10. Sanchirico, supra note 4; Sanchirico, supra note 3.
12. Sanchirico, supra note 4, at 1336 (referring to “shifts in the law’s posture toward process crimes—and detection avoidance generally”).
13. Sanchirico, supra note 3, at 1244 (comparing “process crimes with primary activity crimes” and effectively equating process crimes with “evidence tampering” offenses including “perjury and obstruction”).
14. Indeed, Professor Sanchirico focuses on attaining optimal enforcement and deterrence of certain behaviors, not upon any inquiry into the exercise of discretion per se.
crimes" constitute recognizable groupings of offenses with shared traits. What behavior the category rightly regulates, of course, is a source of contest. Reasonable people may disagree whether a robber who says "no" when asked by police if she stole the money ought to receive criminal punishment for that response, but few would argue that it should not be a crime to threaten to kill the eyewitnesses to the theft because they made a report. The "process crime" label, then, simply classifies offenses that interfere with the administration of justice, the core of which most people recognize as rightly punishable.

As regards this "core," the philosophical underpinnings for criminalizing process offenses withstand even strict applications of the harm principle. The "harm" might be described in several ways. In the narrowest construction, process offenses may directly penalize the doing of harm by one person to another: killing the witness constitutes both murder and obstruction of justice. But justifying the separate penalty for murder of a witness—that is, as a result of the circumstances of the victim's identity or relationship to state processes—requires a conception of harm that addresses that distinguishing feature. This more generous idea of harm might nonetheless be fairly tightly conceived as an injury to a particular interest. That is, even if the ultimate outcome of the primary case was not compromised, the act manifests a concrete result: killing the witness prevents the government from presenting that witness's testimony and thereby harms the victim's own interest in appearing.

But this notion of harm starts to unravel when the interest becomes untethered from any particular victim; say, for example, the executed witness was to testify to some neutral fact in a narcotics case. And it likewise meets difficulty the less correspondence there is between the act and any adverse outcome; suppose the executed witness intended to recant prior incriminating testimony—surely that does not eliminate the added liability. Without some broader notion of a harm principle, the theoretical basis for such offenses founders.

Thus, the conventional justification for punishing process crimes derives from a "collective interest" that the people together hold in the integrity of the system overall, without regard to the effects on any particular victim or outcome of any single case. Public institutions that permit lying, obstruction, and

15. JOEL FEINBERG, 4 THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING, at ix (1990) [hereinafter FEINBERG, HARMLESS WRONGDOING] (defining the harm principle and contrasting it to other justifications for penal law); JOEL FEINBERG, 1 The MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 63 (1984) [hereinafter FEINBERG, HARM TO OTHERS] (describing "governmental interests" violated by certain process offenses as "in the last analysis belong[ing] to individual citizens"); id. at 221–23 (exploring legitimacy of harms to public interest).

16. See FEINBERG, HARMLESS WRONGDOING, supra note 15, at 33 ("It would be absurd to deny the legitimacy of criminal statutes forbidding these harms [such as tax fraud, perjury, or contempt of court], yet the liberal is committed to just that if he restricts legitimate criminalization to the prevention of grievance evils and cannot show the personal grievance in merely public harms.").

17. See FEINBERG, HARM TO OTHERS, supra note 15, at 223 (defining "common interests" as "interests that all or most persons in a community have in one and precisely the same thing," such as "maintenance of public services" like "police protection").
intimidation to go unchecked cannot maintain the confidence of the citizenry they superintend. All members of society therefore share an interest in preserving functional, healthy processes of criminal justice.\textsuperscript{18}

Professor Stuart Green, in his assessment of the moral underpinnings of process and regulatory offenses, presents the harm prevented as a “combination” of the familiar notions of \textit{malum in se} and \textit{malum prohibitum} offenses.\textsuperscript{19} Specifically, Green wrote:

The \textit{malum in se} harm is that which the particular statute is intended to prevent—whether it be untrue court testimony and statements to the government, threatened jurors . . . . The \textit{malum prohibitum} harm is distinguishable, and potentially significant. It is the harm that comes from the defendant’s disobedience of the law—damage to the authority of the government; a lessening of the public’s confidence in our institutions; public cynicism, fear, and uncertainty; and a social climate that is likely to lead to even greater disobedience. These harms occur precisely because the underlying conduct is prohibited.\textsuperscript{20}

In this respect, conventional understandings of the legitimacy of punishing process offenses derive from their connection to this collective interest in the integrity of the system of governance.

We can therefore imagine a “core” value served by enforcement of process offenses. Granted, it is an imperfect, hazy center—but the purest instantiation of process prosecution lies in the protection of the collective interest in uncorrupted governmental functions. In terms of actual prosecution of process crimes—that is, their procedural deployment—it may very well be that this “core” value animates the majority of cases.

But what makes process prosecutions difficult and interesting as a practical and moral matter is not their applicability to the core, but their capacity to drift. The further a prosecution moves from redressing the core prohibitions of process offenses—such as acts that directly pervert a function of justice or compromise a collective interest in a healthy system—the less firm the moral justification for punishment.\textsuperscript{21} In simplistic terms, killing a witness launches a direct assault on the machinery of justice and thus stands on firm footing for prosecution; but discouraging a witness from volunteering information to investigators perhaps just places a pebble in the wheel, and therefore the legitimacy of prosecution becomes more contestable. The more attenuated the connection

\textsuperscript{18} See Feinberg, \textit{Harmless Wrongdoing}, supra note 15, at 34–38 (describing “public harms”—and distinguishing them from “collective harms”—but defining both as cases in which “there can be genuine personal interests that would be protected by legislation forbidding what might otherwise seem to be non-grievance, even free-floating evils”).

\textsuperscript{19} Green, supra note 2, at 1612.

\textsuperscript{20} Id.

\textsuperscript{21} Cf. Richman & Stuntz, supra note 3, at 608–09 (describing federal fraud statutes as “cover[ing] a great deal more than core fraud”).
between the process offense and its pernicious effect, the more troubling its application. Outside the realm of violations that incontrovertibly merit punishment lies a no man's land where the lines between legitimate and illegitimate are far less clear. It is in this ambiguous space that the second well-established use of process charges—pretextual prosecution—thrives.

II. THE "PRETEXTUAL" PROCESS CRIME: PROCESS AS PERFECT PRETEXT

Enter, then, pretextual prosecution. Whereas “process crimes” refers to a category of offenses, “pretextual prosecution” refers to a prosecutorial tactic. It reflects the mechanics of procedure rather than the content of a substantive offense. As described succinctly by Professors Dan Richman and William Stuntz, “pretextual prosecution” occurs when “prosecutors target defendants based on suspicion of one crime but prosecute them for another.”

The duality of pretextual prosecution is reminiscent of, but distinguishable from, the duality of process offenses. Recall that process offenses are typically derivative of a primary violation (for instance, the secondary offense of obstruction or perjury is committed to cover up a primary offense such as theft). Similarly, pretextual prosecutions consist of a primary basis for suspecting or targeting a defendant and a secondary basis for imposing liability. Thus, for instance, a person suspected of murder (primary basis) may in fact be prosecuted and convicted for tax evasion (secondary basis). In this respect, pretextual prosecution is a direct outgrowth of prosecutorial discretion—in terms of a prosecutor’s ability to choose which suspects among many to target and to choose which charges among many to file. Prosecutors may target a suspect for one offense but prosecute and secure conviction for another.

What, then, explains the pervasive association between pretextual prosecution and process crime? After all, pretextual prosecution need not be for process crimes—in theory, the pretextual offense could be as serious as homicide or as trivial as speeding; what makes it pretextual is that the charge does not represent the actual reason the government pursued the defendant. To answer that question, it is important first to clarify a distinction between a pretextual prosecution and a baseless prosecution. In a pretextual prosecution, a suspect targeted for crime A is prosecuted instead for crime B. But crime B cannot be any random provision of the code: a pretextual prosecution relies upon founded charges. Rather, it is simply that the motivation for pursuing those charges is something other than an effort to control the behavior that such charges regulate. Tax evasion is a crime. Al Capone did in fact commit it. What makes the prosecu-

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22. See Litman, supra note 3, at 1137; Richman & Stuntz, supra note 3, at 584.
23. Richman & Stuntz, supra note 3, at 583; see also Litman, supra note 3 (discussing generally the pretextual use of federal prosecutorial discretion). The most sustained body of work in this area is attributable to Professor Stuart Green. See, e.g., Green, supra note 5; Stuart P. Green, Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements, 53 Hastings L.J. 157 (2001); Green, supra note 2; Stuart P. Green, Uncovering Cover-Up Crimes, 42 Am. Crim. L. Rev. 9 (2005) [hereinafter Green, Cover-Up].
tion pretextual is that the authorities did not prosecute Capone on that charge because they wanted to stop him from flouting the tax code, they prosecuted him because he was a notorious mobster.

In short, "pretext" refers only to the selection of charges, not their provability. In contrast, "baseless prosecution" describes situations in which wholly unfounded charges are trumped up against a particular defendant; for example, if charges were brought against Al Capone for purse-snatching. Of course, just where pretext ends and baseless begins can itself be a source of significant contention. Some might contend that any legitimately broken provision of the criminal code, no matter how trivial or typically unenforced, makes fair game for pretext. In this view, the only truly baseless, illegitimate prosecution is for a charge that does not exist or for conduct that never occurred. This perspective has some adherents—for instance, the earlier references to pinioning undesirables for "spitting on the sidewalk." But more commonly it is "pretextual prosecutions" for legitimate offenses that have garnered both scholarly proponents and judicial approval. Nevertheless, as Part IV will explore with regard to obstinacy offenses, judicial acceptance of pretextual charging practices affects the substantive content of process offenses, in that approving pretextual prosecutions based on marginal or technical violations results in an inevitable expansion in the substantive content of the crime such that it eventually may apply in non-pretextual cases.

Process offenses prove undeniably appealing as a basis for pretextual prosecution for a number of reasons. Chief among them is that process offenses carry a strong veneer of legitimacy. The criminal law is infamously broad. Even in the days of then-Attorney General Robert Jackson, it was possible to say that "[w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the

24. See Litman, supra note 3, at 1148 ("A prosecutor who files trumped-up charges against a defendant whom the prosecutor believes (or knows) to be a menace in the community has committed malfeasance, regardless of the pretextual element, because it is clearly and independently wrong to manufacture criminal charges.").

25. Fixing that line is not necessary for my purposes. This Article stakes no position on the legitimacy of pretextual prosecution generally.

26. See, e.g., id. at 1135.

27. Id. at 1152.

28. See infra section IV.B.2.

29. For instance, Professor Stuart Green implicitly acknowledges the close relationship between process crimes and pretext prosecutions in his articles weighing the moral content of process offenses, which he calls "cover-up crimes." This term appears to have been coined by Kathleen Brickey. Kathleen F. Brickey, Andersen's Fall from Grace, 81 WASH. U. L.Q. 917, 958 (2003). Green defines a "cover-up crime" as an act by "a person . . . under investigation for some putative course of illegal conduct [who] has allegedly lied to government agents about her involvement in such illegality, destroyed or altered evidence, intimidated a witness, violated a court order, or in some other way hindered the government's case." Green, Cover-Up, supra note 23, at 9; see also id. at 36-37; Griffin, supra note 4, at 333-34 (considering extent to which "'cover-ups' displace underlying crimes"); Strader, supra note 4, at 57 (referencing defendants "charged with cover-up crimes").
part of almost anyone." But mere "technical violations" raise suspicion. People might genuinely debate whether jaywalking or mattress tag tearing or other substantive "technical" offenses deserve sanction at all.

In contrast, process offenses penalize a core of harmful activity that most agree ought to be outlawed. Lying to courts, knocking off witnesses—these are the kinds of crimes that almost every person reflexively believes deserves punishment, at least in the abstract. This categorical legitimacy bolsters the legitimacy of the pretextual pursuit, even if its application in a specific case is suspect.

Relatedly, process violations generally carry significant penalties. Despite the aforementioned reach of the criminal code, trivial offenses often authorize only trivial sentences. But the substantive core of a process offense justifies a meaty sanction—a law that specifies a ten-year sentence for perjury strikes many people as fair and appropriate. An obstruction statute that authorizes a life sentence may seem reasonable, especially if the obstruction involved harm to a person. A crime that carries the stigma and the sentencing range of a serious felony conviction therefore offers an attractive vehicle for achieving a significant ultimate sanction in a pretextual context. And to the extent that the process offense authorizes a lesser sentence, it might be stacked with other process charges to achieve a lengthy term.

Third, process crimes make appealing candidates for pretextual prosecutions in part because the government is able to help produce them. Gathering evidence against a particular defendant or within a particular time frame for an offense that hinges upon harms to persons or property may be difficult. Even vice crimes, such as solicitation or drug possession, require the targets to engage in illegal activity possibly unrelated to the primary conduct that caught the pretextual prosecutor's attention. But investigators need not rely on the materialization of either victim or vice to find a process violation—they can instead seek to generate proof on their own. As Professors Richman and Stuntz describe, investigating complex federal crimes

will require the expenditure of considerable investigative resources and often sustained cooperation between agents and prosecutors. Along the way, all sorts of statutory violations may turn up—offenses that fall far short of the suspicions that first triggered the inquiry. Indeed, a new crime occurs each time an interviewee lies to investigators. Needless to say, such easy-to-prove crimes can often be generated with only modest effort from the investigating agents.

In the name of the pursuit of crime A, then, law enforcement creates

31. See Richman & Stuntz, supra note 3, at 584 (noting that pretextual prosecution "has generated a standard debate, and the debate has a standard resolution").
32. Id. at 615.
environments (such as grand jury hearings or discovery requests) in which crime B—of the process variety—is apt to flourish. The same is true in the street crime context. The process itself creates and optimizes conditions in which an offense can occur: release a defendant saddled with a host of oppressive or unrealistic conditions and soon enough he is bound to violate one. Hold enough hearings over a long enough period of time and eventually the defendant will be late or miss one. This self-generating quality, which the final Part highlights as a source of serious concern, makes process offenses natural vehicles for pretextual cases.

Fourth, because process crimes take secondary status to a primary investigation or offense, they make intuitively sensible candidates for pretextual prosecutions. Al Capone's case may sit badly with critics of pretext precisely because tax evasion was so wholly unrelated to murder, extortion, or the other primary conduct for which he was targeted. But process crimes, by their very nature, derive from some primary transgression—however unprovable it may be. The tighter the nexus, the less nakedly pretextual the prosecution may seem. If, in the course of investigating allegations of improper stock trading, investigators had uncovered that Martha Stewart had lied in a divorce hearing about having plastic surgery, then the fact that the false statements were about personal issues—rather than insider trading—would undoubtedly have raised even greater public opprobrium toward her prosecution and conviction. The clear relationship between stock trading and lying about stock trading, however, makes the pretextual charge more palatable.

Lastly, and perhaps most importantly, process violations make excellent pretextual prosecutions because they are so easy to prove and hard to defend. Ironically, some treatments of process crimes view convictions for such offenses as exceptionally difficult to obtain because they often turned on hard-to-prove mental states. But changes in law and practice have perhaps lightened that burden. Compared to primary violations, process crimes can be far easier to prove. They rarely rely upon civilian witnesses or complex evidentiary structures and often present a series of straightforward elements that afford few

33. That is not to say that a process charge cannot ever be viewed as illegitimate: think of Ken Starr and Bill Clinton. What raised great ire—especially the less certain it is that the defendant is guilty of the primary conduct—is that what began as a financial investigation turned into a sex scandal; the ultimate charges seemed so remote from the kind of behavior alleged in the primary offense.

34. Martha Stewart spoke with officials investigating a possible insider trading charge related to one of her stock sales, but she ultimately was convicted not of insider trading but of making false statements, conspiracy, and obstruction of justice; some people felt she was unfairly targeted. See, e.g., Scott Turow, Cry No Tears for Martha Stewart, N.Y. Times, May 27, 2004, at A29 (arguing that Stewart was rightly prosecuted, but recounting the views of those—including a Wall Street Journal editorial—who viewed the prosecution with skepticism).

35. Green, Cover-Up, supra note 23, at 36–37 (describing cover-up crimes as “easier,” . . . cheaper to prosecute, more comprehensible to the jury, and less subject to subtle nuances in proof”).

36. See, e.g., Raskolnikov, supra note 11, at 618 (“Well-known difficulties with obtaining convictions for any of these offenses suggest that proving intent to mislead or evade detection is not easy.”).
defenses.\textsuperscript{37}

In fact, the process crime may encompass a subset of the elements of the primary offense: rather than prove that defendant was on the corner on Friday selling narcotics, the prosecutor just has to prove that defendant was on the corner Friday but told the investigator it was Thursday. Statute of limitations may also pose less of an obstacle because the offense can arise during an investigation opened at any time. And as technology improves methods of documentation and information transmission—whether in the form of email and voicemail records, urinalysis results, or electronic location trackers—capturing a suspect’s slightest transgressions may be as simple as pressing a button.

III. TWO NEW OBSERVATIONS ABOUT PROCESS CRIMES: A VIBRANT STATE PRACTICE AND THE “OBSTINACY” OFFENSE

The two preceding Parts explore two common animators of process prosecutions: protection of systemic integrity, or what I term preservation of “core” process values, and pretextual charging. Both are conventionally held to occur almost exclusively in federal court. Those two approaches encapsulate the current thinking about process offenses and their place in the criminal justice system. But do they capture the reality of process charging?

This Part takes a broad look at process charging to gain greater clarity on the complexity surrounding this category of offenses. This examination affords two critical insights. First, close scrutiny reveals the robustness of state court process charging for core and pretextual violations. Second, and perhaps more importantly, it also uncovers a third motivation for process charging that has emerged in the state and federal systems. That motivation, which I call “obstinacy” charging or the “obstinacy” offense, reflects a strain of process crime prosecutions aimed at securing convictions against simply defiant or insubordinate individuals—not because their actions actually threaten the integrity of judicial processes or because they are otherwise difficult to convict, but solely because their acts constitute an affront to the formal dignity or authority of the state. This Part explores each of these ideas in turn.

A. PRETEXT PROCESS CRIMES IN STATE COURTS

As noted, the little academic light that has fallen on process crimes has tended to shine only on offenses prosecuted in the federal system. Of course no one has seriously disputed (although it seems that no one has seriously discussed it, either) that state courts prosecute significant numbers of “core” process violations. State courts routinely enforce obstruction statutes against individuals that threaten witnesses, for example. But few academic treatments consider the possibility of pretextual process prosecutions in state court, much

\textsuperscript{37} See Green, Cover-Up, supra note 23, at 36–37 (“[C]over-up cases are typically cheaper to prosecute, more comprehensible to the jury, and less subject to subtle nuances in proof.”); Richman & Stuntz, supra note 3, at 617–19.
less consider the likelihood that they share characteristics in common to their federal counterparts.

The conventional wisdom is that "[p]retexxual charging is primarily a phenomenon of the federal criminal justice system."

Nearly all of the high-profile cases cited at the start of this article occurred in federal courts. Even in popular imagination, the idea of pretextual process charging conjoins up offenses like perjury and obstruction of justice that many associate with large federal investigations or with high-profile celebrity defendants getting hauled into federal courts.

Yet, a similar story ought to be—but is not—told about state courts. It may be true that "[l]ocal criminal law enforcement is primarily a 'what' enterprise; the goal is to go after particular classes of conduct" whereas "federal law enforcement is more a 'who' enterprise: [t]he goal is to nail given (always shifting) classes of offenders." But this observation does not preclude pretextual process prosecution from flourishing in local courts.

As with federal pretextual process prosecutions, an offense has been committed, but it is not necessarily the reason that the state pursues the defendant. Instead, some other goal animates the prosecution. For example, localities have adopted express policies for pursuing failure to appear or "dissuading a witness" charges as a means of punishing alleged domestic abusers. Orders to stay away from particular areas or persons serve as vehicles through which to obtain contempt convictions of drug dealers or suspected gang members. The prosecu-
tion is not about the substance of the process offense; rather, the process offense serves as a pretextual vehicle through which to convict a defendant sought for other reasons.

This is not to suggest that process prosecutions in state court are identical to those in federal court. They are not. Process offenses in state court tend to originate in the individual's relationship to the judicial, rather than to the executive, branch. That is, rather than arise as a result of grand jury investigations or prosecutorial debriefings, state process offenses typically emerge after an individual has first made contact with the system in some case.46

The initial interaction with the court may identify the defendant as a member of a particular targeted class—for instance, alleged abuser, drug dealer, or gang member. It could be through formal criminal charges or even civil proceedings such as gang injunctions or restraining orders. That then sets the stage for the later process violation much the same way that the instigation of a prolonged federal investigation does. At presentment or arraignment, the majority of defendants in state courts, unlike their federal counterparts, are released back into the community.47 And they are released with a host of conditions, ranging from instructions as simple as to appear in future proceedings to complicated conditions for drug testing, self-improvement, or to stay away from certain places or persons.48 This tends to be true regardless of the kind of case—whether the offense stems from person, property, or vice, the network of requirements remains the same.

Inevitably, numerous appearances and informal monitoring structures follow. From this matrix of orders the state equivalent of the archetypal federal process crime is easily generated. Federal executive officers ensnare defendants in an impossibly demanding investigative web that only the most scrupulously honest or even self-sacrificing defendant could survive without misstep. State judicial officers do the same. Whereas the federal system uses the investigative process as the web in which to catch a process offender, the state system uses the judicial process.49

In sum, process charging occurs—both on a "core" and "pretextual" basis—as commonly in state courts as it does in federal courts. Although some of

46. See Richman & Stuntz, supra note 3, at 587 (observing that defendants in local prosecutions frequently come to court after police officers' arrests, not after extended prosecutorial investigations).
47. Compare, e.g., THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (Nov. 2007) ("Between 1990 and 2004, 62% of felony defendants in State courts in the 75 largest counties were released prior to the disposition of their case"), with MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL JUSTICE TRENDS, 2003, at vii (Aug. 2006) (noting that 76% of all federal defendants were detained in 2003 and 58% were in 1994).
49. See COHEN & REAVES, supra note 47; MOTIVANS, supra note 47.
the particular characteristics and motivations may vary, as Part IV explores in greater depth, the practice is alive and well in both systems.

B. PROCESS CHARGING BEYOND CORE AND PRETEXT: THE OBSTINACY OFFENSE

Having suggested that process charging has a vibrant existence in both state and federal court, it remains to ask what those prosecutions look like. Are the "core" and "pretext" theories a full account of current process charging practices?

This section argues that they are not, and that there exists in both systems a species of process prosecution that cannot be explained by either the core or pretext theories alone. In some cases—not a majority, but a sizeable number—such charges neither safeguard the judicial processes nor enable the apprehension of slippery defendants. In these cases, the processes of investigation and adjudication are no longer simply the machinery for achieving justice but instead become themselves the subjects or sites of victimization. The substantive offense is nothing other than the insult to the efficiency and authority of the state itself. I term this the "obstinacy" offense.

To recap: the essential nature of process charges is to address a "core" of activity that few would dispute should be penalized. Preservation of the orderly operation of justice and public policy requires that the state punish genuine threats to harm witnesses, or contumacious failures to appear, or extravagant false statements. When Dana Defendant threatens to break Willie Witness's kneecaps if Willie testifies at Dana's trial, then surely the state ought to intervene. The relationship between Willie's status as a witness and Dana's motivation to cause harm takes the private offense of assault and adds to it the public offense of witness tampering or obstruction of justice. Whether framed as the state's obligation to prevent harm to the person or to public institutions and welfare generally, few could contest that the state has an obligation to intervene in some way.

But as Part II explains, prosecutors also pursue process charges to reach behavior outside the "core" of the offense. The most familiar account of such efforts is the "pretextual" prosecution, in which offenses conceived to guard the integrity of governmental functions instead serve to secure convictions against otherwise difficult-to-convict individuals. As also further noted, pretextual prosecutions often rely on process charges. Sometimes pretextual process charges happen to remediate "core" violations. But all too often, pretext cases pursue charges for what would otherwise be considered fringe or marginal conduct precisely because the true purpose is not to penalize the defendant for the process crime, but rather for some other behavior. Even still, in both incarnations (core and pretext), the purpose of the prosecution remains to protect either the public or public institutions. The ultimate "victim" is something other than the state itself.

But review of current practices suggests a third theory of prosecution for process crimes. Prosecutions in this vein do not redress core integrity violations
because the offenses do not represent any meaningful threat to the integrity of the process or any attempt to pervert government function. Indeed, they might be trivial, insubstantial violations. Nor do such prosecutions represent pretextual efforts because the defendants are not targeted to compensate for their elusiveness on some other ground. It is not an end to the defendant’s evasion that the process prosecution seeks, it is to her insubordination. The obstinacy theory pursues process violations as the main event; the offense is not secondary either to a primary offense or any pretextual goal.

By way of illustration, take a failure to appear charge. Failure to appear might initially be viewed as an offense aimed at a pervasive or deliberately intentional refusal to show up in court and be held accountable (core violation). It might morph into a strategy by which prosecutors frustrated by the difficulties of prosecuting domestic violence cases successfully obtain jail sentences for otherwise elusive defendants (pretextual violation). But it might also constitute an expression of frustration and irritation at a defendant’s inability to prioritize court attendance, or even at the defendant’s perceived disinterest in or disdain for the court’s authority. It is this last iteration that I term the “obstinacy” offense.

Kneecap-smashing obstruction is a core prosecution. Martha Stewart-style obstruction arguably constitutes pretext prosecution. But refusal to cooperate with investigators and waive one’s Fifth Amendment privilege or answering an investigator with nothing more than an “exculpatory no” that misleads no one—these constitute obstinacy offenses. Similarly, hounding a frightened victim despite the victim’s grant of a requested stay away order is core contempt. Using a violated order to wrangle a plea to assault from a recalcitrant defendant and avoid reliance on a victim’s testimony is pretextual contempt. But charging a violation for a defendant’s acceptance of a jail visit from a girlfriend who never wanted the order in place at all is simple obstinacy charging.

Obstinacy charging rationalizes the imposition of punishment on a defendant who timely appears for fourteen hearings in a simple possession case but oversleeps on the morning of the fifteenth one. Or it labels it obstruction to feed expired parking meters in full view of a traffic officer. Or it justifies contempt charges for a defendant who raises a middle finger to his ex while under a protective order. The government’s pursuit of the offense is neither about rectifying the perversion of a governmental function nor about using a pretext to achieve a particular end—it is instead about the insult to the performance of the state’s authoritarian role.

In this respect, obstinacy prosecutions might be viewed as a hybrid of pretextual and core process prosecutions. From one view, the obstinacy offense is simply an effort to redefine what constitutes a substantive process violation—a widening of the “core.” Whereas once the substantive content of “false statements” meant something like “a falsehood that perverts the pursuit of justice,” the substantive content now could be recited as “any false statement, no matter how trivial or inconsequential.” This view of obstinacy offenses sees
them as simply broadening the scope of the substantive offense.

In another view, obstinacy offenses are procedural, rather than substantive, in nature. The substantive content of process crimes (the "core") remains unchanged, but obstinacy offenses reflect a prosecutorial strategy—a pretextual means of winning convictions against targeted defendants. In contrast to typical pretextual prosecution, however, the process offense is not a substitute or even a means of exerting leverage for some primary offense. Rather, the obstinacy offense is untethered to any other charge. It is either purely net-widening (in that it punishes a defendant otherwise unpunishable) or additive (in that it punishes a defendant in addition, but not related to or because of, a different crime). In either case, the obstinacy charge exists solely to penalize the defendant for daring to oppose the state's authority.

In both views, however, the theoretical thrust of the crime is the same. Whether substantively tacked on to the "core" of perversion of government function or procedurally used as a means of penalizing defendants solely for their contumacy, the obstinacy offense renders illicit more than actual frustration of government efforts—it sweeps in simple noncooperation and non-acquiescence. Obstinacy offenses condemn behaviors just because they make it more difficult for police to police, or prosecutors to prosecute, or judges to judge (and, I could add, corrections to correct). Simple noncooperation, not active contravention, constitutes deviance. Obstinacy offenses represent a notion of primacy in the interests of the state—not just in preventing harms or mediating disputes—but in the use of coercion to preserve formal respect. This paramount interest trumps the interests of the individual, whether victim, defendant, or disinterested person.

This is evident in that the obstinacy approach persists even when the individual's behavior embodies an act of self-preservation. That is, the obstinacy offense materializes even though to comply with the state is to act against one's own interest—say, by volunteering the location of incriminating evidence or

50. In this way, the idea is akin to the familiar offense of "contempt of cop," in which officers charge resisting arrest or failure to obey or other minimal procedural offenses simply to punish or exact retribution on disrespectful or non-submissive individuals. As one scholar recounts, the "experience conducting intake and interviewing potential clients at the American Civil Liberties Union of Maryland confirms that the act of questioning authority is a common element of many encounters that end in legally dubious arrests." Reed Collins, Note, Strolling While Poor: How Broken Windows Policing Created a New Crime in Baltimore, 14 Geo. J. On POVERTY L. & POL'y 419, 435 (2007); see also Diana Roberto Donahoe, "Could Have, "Would Have:" What the Supreme Court Should Have Decided in Whren v. United States, 34 Am. Cium. L. Rev. 1193, 1208 (1997) (noting that "an individual often is jailed for a minor offense because he fails the 'contempt of cop' test by refusing to show the officer proper respect"); Eric Nalder et al., "Obstructing" Justice: Blacks are Arrested on "Contempt of Cop" Charge at Higher Rate, SEATtLE POST-INTELLIGENCER, Feb. 28, 2008, at A1 (finding that "African-Americans are arrested for the sole crime of obstructing eight times as often as whites when population is taken into account").

admitting guilt of a crime. The obligation of the obedient subject is to facilitate the exercise of police power, even if the engines of that power are at the time trained on running that same individual down. Whereas it might once be said that officials of the state are “expected to tolerate a certain level of uncooperativeness, especially in a free society in which the citizenry is not obliged to be either blindly or silently obeisant to law enforcement,” the obstinacy vision of law abidingness obliterates any zone of noncooperation, relabeling it as deviant or asocial.

To flesh out these two theses more fully and to obtain a comprehensive picture of process crimes, it is necessary to look to the courts (both federal and state) to see how such prosecutions are pursued. The next Part does just that.

IV. PROCESS PROSECUTIONS IN ACTION: KEY OFFENSES

Part III proffered two new assertions about process charging: first, that it occurs regularly in state courts, and second, the “obstinacy” thesis, which describes a form of prosecution evident in both systems. This Part examines the history and evolution of five archetypal process charges—failure to appear, false statements, obstruction of justice, contempt, and perjury—in light of both claims.

Before turning to the survey, it is necessary to offer a disclaimer about my approach. As every close observer of the American criminal justice system knows, the collection and analysis of data has generally not ranked high on law enforcement’s list of institutional priorities. Although great strides have been made in the direction of increased empirical study, particular aspects of the system as a whole—especially with regard to low-level and state-level offenses—remain frustratingly mysterious.

Such hurdles stand particularly high with regard to process crimes. First, such offenses rarely rank among those for which data is collected in a granulated manner. The information collected by the federal government, of both state and federal practices, lumps offenses like obstruction of justice, perjury, or failure to appear in catch-all “other public order” categories rather than separate them for individual measurement. And even if separate categories were created, a comprehensive picture might nonetheless prove elusive because each jurisdic-

52. State v. Davis, 749 N.E.2d 322, 324 (Ohio Ct. App. 2000) (Gorman, J., dissenting); see also Feinberg, Harms to Others, supra note 15, at 244–45; Green, Cover-Up, supra note 23, at 41 (referring to crimes as hindering the government’s case).


tion has its own name for offenses penalizing identical substantive conduct.\textsuperscript{56} To complicate matters further, many process offenses may be charged as either misdemeanors or felonies. Because most data collection in state and federal courts focuses on felonies, information about process offenses can be quite difficult to obtain on a national scale.

Second, process offenses rarely rank as the “most serious offense” charged—the criterion by which much data is collected. Due to their inherent nature as secondary to a primary offense, they are often not the lead charge in an information or indictment.\textsuperscript{57} This particularly undermines efforts to glimpse state court practices\textsuperscript{58} because the use of a process offense as a leverage tool may result in the process charge simply getting stacked behind primary charges. Moreover, because such charges tend to be secondary, they are all the more likely either to disappear altogether or hide behind a greater offense in a plea bargain, thus leaving little by way of a record of conviction. For example, it could be that fifty percent of loitering cases also allege failure to appear, but if the failure to appear is not classified as the lead charge, or is dismissed after functioning as leverage to secure a plea to loitering, then little trace of those process charges (and the fifty-percent statistic) will remain.

Third, even were it possible to obtain an accurate measure of the frequency with which process offenses are successfully prosecuted in state and federal courts, the notable absence of any base rate information would diminish the utility of such data. Are there more perjury prosecutions because the American witness has become a soulless non-believer in the oath or simply because prosecutors are bringing them more frequently? Are there fewer obstruction charges because strict enforcement has deterred all but the most hardened obstructionists or because a pervasive culture of looking the other way has led to little evidence of enforcement?\textsuperscript{59} And even if there were some indication of the frequency with which the actual offenses occurred in the population over time, the data concerning prosecution rates would not distinguish between motives for prosecutions. Without a case-by-case examination, it would be impossible to tell whether an increase in contempt prosecutions reflects a

\textsuperscript{56} See Zimring, supra note 53, at 4 (“The local nature of crime data means that different places will often use different criteria of crime classification . . . ”).

\textsuperscript{57} See, e.g., Sanchirico, supra note 3, at 1242−43 (observing the difficulty in obtaining precise data for perjury given the familial limitation of coding done only for the “most serious offense' charged”).

\textsuperscript{58} Additionally, it may also seriously impair attempts to collect federal data. Federal prosecutors have specifically been instructed to charge “the most serious readily provable charge” in the Principles of Prosecution. This instruction was a change from the earliest, 1980s version of the Manual, which instructed prosecutors to “ordinarily” charge the most serious offense but to exercise caution with regard to mandatory life imprisonment charges. David A. Sklansky, Starr, Singleton, and the Prosecutor’s Role, 26 Fordham Urb. L.J. 509, 533−34 (1999). As a result, in any case in which the process offense is not the one that carries the most time, it will be all the more unlikely that the process offense will be recorded in national reports.

\textsuperscript{59} For instance, “[a] small number of arrests, prosecutions, and convictions for perjury is consistent with both rampant perjury due to lax enforcement and tight enforcement leading to very little perjury.” Sanchirico, supra note 3, at 1244.
commitment to stamping out "core" violations that happen to be on the rise, or whether it is indicative of the rampant use of pretextual contempt charges.

Despite these limitations, and no doubt many more, this Part strives to tell a story about process prosecutions in contemporary courts. Admittedly, this attempt to make broad observations about "what's happening out there" invites its fair share of legitimate skepticism. But in part, it is my hope that by calling attention to this increasingly common classification of crime, more fine-grained data about process charges and convictions might be accrued. Relying upon a composite of extant empirical studies, doctrinal and legislative evolution, scholarly legal analyses, and sheer anecdotal observation, it is perhaps possible to "consider the possibility that impressionistic evidence—though unreliable in general—may be conveying at least some real information in this case."60 And given the choice between an imperfect appraisal and the inscrutability of no appraisal at all, many a conscientious scholar has chosen the former.61

Thus, mindful of the tale of the blind men and the elephant,62 this Part attempts to cull from the available resources a broader story about the development and direction of an array of offenses. Although I occasionally cut or tabulate existing data in a different manner, the summaries below do not contain original field work.63 Rather, this effort draws upon a wide range and variety of sources. Given the length of this data, some readers may prefer to read the first paragraphs of each section, which sums up the findings, or simply to skim this Part.

A. FAILURE TO APPEAR

The imposition of criminal punishment for failure to appear in court is hardly a twentieth century invention,64 although its popularity may be.65 It was not

60. Id. at 1246.

61. Cf. 4 William Blackstone, Commentaries *127 (describing crimes against public justice as a "species of crimes . . . subdivided into such a number of inferior and insubordinate classes, that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy").

62. The well known tale involves six blind men, each of whom feels a part of an elephant and reaches a different conclusion about what they have encountered (a wall, a spear, a snake, a tree, a fan, and a rope). It was made famous in many sources, including the nineteenth century poem by John Godfrey Saxe of the same name, that ends: "So oft in theologic wars/ The disputants, I ween,/ Rail on in utter ignorance/ Of what each other mean,/ And prate about an Elephant/ Not one of them has seen!" John Godfrey Saxe, The Poetical Works of John Godfrey Saxe 111 (2007).

63. Of course, such study would be immensely beneficial.

64. See, e.g., Giles v. State, 52 Ala. 29 (1875) (upholding conviction for willful failure to appear pursuant to 1873 enactment by Alabama assembly).

until the mid-twentieth century that statutes punishing failure to appear began to proliferate and not until recently that they were used to punish tardiness and inadvertent absence rather than truly contumacious refusals to appear. Pretexual uses of failure to appear statutes are evident in state courts—for instance, to obtain convictions in domestic violence cases. The hazy outline of obstinacy charging practices is also evident, both in the marked increase in failure to appear convictions as well as anecdotal reports about punishing defendants for marginal or trivial violations. This section traces the federal and state story together, in accordance with the arc of the story about the emergence of the offense.

The provision for bail in federal courts first found expression in the Judiciary Act of 1789, which also permitted punishment for “all contempts of authority.”66 That contempt power served as the basis for imposing sanctions for failure to appear—in the form of money penalties or criminal contempt67—until Congress enacted the first federal bail statute in 1954 and then made landmark revisions in 1966.68

In the years immediately following, independent punishment for “bail-jumping" appears to have been relatively uncommon. Professor Caleb Foote, the eminent scholar of the American bail system, wrote in 1954 that only “a few jurisdictions punish bail-jumping directly” and noted that “[o]ne federal court has done this by using its contempt power.”69 He further commented that “the availability of this method is severely limited because it can be applied only if the defendant had actual knowledge of the order to report,” which appears a less likely condition then.70 Foote captured a small empirical snapshot of bail-jumping by reporting that in New York county “eight or nine cases a month” were sent to grand jury for bail jumping and that “[t]hirteen bail-jumping indictments during the last six years [were] reported in Brooklyn,” where the District Attorney nonetheless called the statute a “valuable deterrent.”71

Just over ten years later, the Federal Bail Reform Act of 1966 expressly

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66. The Judiciary Act of 1789, section 17 provides that courts shall have the authority "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority." Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73 (1789).

67. See James M. Grippando, Fear of Flying—The Fugitive's Fleeting Right to a Federal Appeal, 54 FORDHAM L. REV. 661, 678 (1986); Metzmeier, supra note 65, at 400-05; Tobolowsky & Quinn, supra note 48, at 269-85 (discussing the evolution of pretrial release practices).

68. Grippando, supra note 67, at 678.

69. Caleb Foote et al., Compelling Appearance in Court: Administration of Bail in Philadelphia, in STUDIES ON BAIL, supra note 65, at 1, 40; see also id. at 261 n.323 (providing a 1958 federal statute and a 1966 Minnesota statute that punished bail jumping).

70. Id. at 40.

71. Id. at 41.
outlined penalties for failure to appear, although it also preserved the court's contempt powers.\textsuperscript{72} The statute punished felons who "willfully fail[] to appear" with a maximum five-year sentence and $5000 fine, while misdemeanants faced a maximum one-year sentence and fine equivalent to the underlying substantive offense.\textsuperscript{73} However, the progressive provisions of the 1966 Act, which were designed to encourage greater numbers of pretrial releases, eventually gave way to increasing concerns about dangerousness.\textsuperscript{74} After a brief experiment with preventive detention in the District of Columbia,\textsuperscript{75} Congress enacted the Bail Reform Act of 1984, which set out to rationalize bail-making decisions and provided for the first express form of preventive pretrial detention.\textsuperscript{76} Failure to appear there emerged as a distinct basis of criminal liability, and Congress changed the mental state to "knowingly" and upped the penalties to ten years for the most serious offenses.\textsuperscript{77} It also mandated that the term of imprisonment "imposed pursuant to this section shall be consecutive to the sentence of imprisonment for any other offense."\textsuperscript{78}

Prior to the 1966 act, only seven states had statutes that expressly punished failure to appear.\textsuperscript{79} In the time between that act and the 1984 Federal Bail Act, however, at least thirty-three states enacted similar provisions.\textsuperscript{80} After 1984, an


\textsuperscript{73} 1966 Bail Reform Act § 3(a).


\textsuperscript{76} Scott, supra note 74, at 4-5.


\textsuperscript{78} Id. (setting out additional affirmative defense of "uncontrollable circumstances," which survives today as 18 U.S.C. § 3146(c)).

\textsuperscript{79} CAL. PENAL CODE § 1320 (West 1996); 720 ILL. COMP. STAT. 5/32-10 (2000); LA. REV. STAT. ANN. § 14:110.1 (1993); MASS. GEN. LAWS ANN. ch. 276 § 82A (West 2004); MINN. STAT. ANN. § 609.49 (West 1999); OHIO REV. CODE ANN. § 2937.99 (West 2002); OKLA. STAT. ANN. tit. 22, § 1110 (West 1999).
additional nine states passed statutes.\(^8\) Today, only four states do not separately penalize failure to appear: South Carolina, Pennsylvania, Michigan, and Indiana.\(^2\) Moreover, almost every jurisdiction has actively tinkered with their bail jumping provisions—thirty-five statutes were substantively amended within the past fifteen years, many multiple times.\(^3\)

Information about the enforcement of these statutes proves difficult to obtain for the reasons given in the introduction to this Part. For instance, even though failure to appear constitutes a separate substantive provision of the U.S. Code, it nevertheless may occasionally be prosecuted as a form of contempt.\(^4\) However, one way of making broad observations about its popularity is by examining records related to the characteristics of defendants in the pretrial monitoring system. Since 1992, the Bureau of Justice Statistics has collected information on the court appearance history of federal defendants.\(^5\) This data differentiates between defendants with and without a prior arrest history, thus making it possible to cull from the group those defendants unlikely ever to have had


82. Michigan and South Carolina do not seem to penalize failure to appear at all. Pennsylvania has a provision for "default in required appearance," 18 PA. STAT. ANN. § 5124 (West 2001), but it appears to be not commonly used. Indiana provides only for forfeiture of bond. IND. CODE § 27-10-2-12 (2003).


84. See, e.g., United States v. Bernardine, 237 F.3d 1279, 1281, 1283–84 (11th Cir. 2001) (upholding conviction of defendant indicted and tried for contempt under 18 U.S.C. § 401(3) for failing to appear at a court-ordered hearing, by holding that a court may delegate the duty to issue a summons to a probation officer).

85. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1992–2004. The very fact that data was not even collected between 1984, when the Bail Reform Act was passed, and 1992 underscores the likelihood that prior records for failure to appear were not considered either significant or measurable enough as considerations for bail determinations.
significant prior court experience. 6

An examination of these data indicate that failure to appear convictions have risen dramatically even in the ten to twenty years since their enactment. The data depict a steady increase in the percentage of defendants with a history of failure to appear, such that each year reflects a 1%-2% rise over the prior year. For instance, in 1992, 15% of all defendants with a prior arrest had a record of failure to appear; by 2004, that number had risen to 22.5%. 87 When calculated with respect to the total number of defendants in pretrial release, roughly 8% had a prior failure to appear, which doubled to 16% by 2004. 88 Such information is consistent with other available reports that defendants with records of "prior failures to appear increased 6 percent" from 1989 to 1999. 89

Significantly, all available evidence suggests that the actual rate of failure to appear has remained relatively constant, at least in the federal system, during the same time. 90 Although a measure of convictions for failing to appear is a little studied event, the great interest in pretrial detention and release practices has generated a sizeable body of data about defendants' actual failure to appear. 91 One comprehensive survey of failure to appear rates from 1985 to

86. Id. Unfortunately, the data still suffer from numerous shortcomings. For starters, in measuring rates for prior "failures to appear," there exists little uniformity among pretrial services agencies as to how they define that term. It seems likely that, for reasons of convenience, the vast majority determine "prior failures to appear" from records of convictions for the same. However, some agencies may rely on internal data about whether a bench warrant has ever been issued in that jurisdiction for the defendant, regardless of whether a charge or conviction resulted, and others may look to arrest data, as opposed to prosecution or conviction. See Emails between author and David Levin, Pretrial Justice Institute (Mar. 27, 2008) (on file with author). For example, among federal pretrial services agencies, "sixty percent define an FTA as occurring only when a bench warrant is issued, whereas 35 percent define FTA as whenever any court appearance is missed, regardless of whether a warrant was issued." Bureau of Justice Assistance, U.S. Dep't of Justice, Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs, at viii (2003). This is a longstanding issue in such calculations. See Wayne H. Thomas, Jr., Bail Reform in America 88, 92 (1976) ("Computing the nonappearance rate of defendants on pretrial release is not an easy task and is subject to manipulation.").


88. This arguably suggests that the rise in failure to appear did not correspond to an increase in defendants acting in flagrant defiance of court orders to appear, as such defendants would be more likely to be detained in later cases. See id.


90. Because the records of prior failures to appear would include convictions from state court as well as federal court, it is possible that the actual failure to appear rate in state courts could skyrocket while the federal rate remained constant. However, it seems equally plausible that the notion of what constitutes a "failure to appear" has changed over time, rather than that the rate at which defendants themselves appear has dramatically altered in one system but not the other.

91. See, e.g., Timothy P. Cadigan, Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982, Fed. Probation, Sept. 2007, at 10 (observing that "the failure to appear rates and rearrest rates in all four districts were very low under both the former and current bail laws"); Rodney Kingsnorth et al., Preventive Detention: The Impact of the 1984 Bail Reform Act in the Eastern Federal District of California, 2 Crime Just. Pol'y Rev. 150 (1987) (comparing detention and failure to appear rates from period fifteen months before and twenty-one months after implementation of Bail Reform Act and finding both unaffected by the legislation); see also id. at 164–65 (noting that "the Eastern
2006 reveals relatively low overall rates that spiked slightly from 1987 through 1995, and that since then have, if anything, declined. Another report observes that in 1994, the national failure to appear rate was around 3%; seven years later in 2001, that rate still hovered just under that mark. When contrasted to the consistently rising rate at which defendants coming into the system show prior records of failure to appear, then, it seems fairly likely that prosecution and conviction rates—not behavior rates—are changing.

In addition, these data also appear consistent with the available historical information, which shows, for instance, that of the federal defendants "released on bail in 10 judicial districts between July 1975 through June 1983," roughly 2.7% failed to make at least one court appearance. In a study comparing the 1966 and 1984 bail regimes, researchers examined four federal judicial districts chosen in part because the "rates of . . . failure to appear for judicial proceedings were high compared to other judicial districts." They reported a failure to appear rate of 2.1% under the 1966 bail law and 1.8% under the new bail law. Most interestingly, they followed up on fifty-five defendants who had failed to appear, roughly thirty of whom had since been returned to federal custody. Of those thirty, only four were charged with failure to appear, and only two of those were ultimately found guilty. Although no information is given as to why prosecutors deemed it unnecessary to charge the remaining twenty-six fugitives as well, their failure to do so perhaps provides some corroboration for a conclusion that it is not the rate of appearance that has changed dramatically over time, but rather the consequence for failing to do so. After all, in the contemporary practice of many jurisdictions, a failure to appear that resulted in the issuance and return on a warrant would constitute an easy "core" violation of the offense, yet in 1966 it apparently did not even give rise to a charge in most cases.

Of course, federal defendants make up only a small fraction of criminal

92. Cadigan, supra note 91, at 13 & tbl.5 (calculating percentage of cases in which released defendant failed to appear, using denominator of all cases—released and detained—closed); accord James Byrne & Jacob Stowell, The Impact of the Federal Pretrial Services Act of 1982 on the Release, Supervision, and Detention of Pretrial Defendants, FED. PROBATION, Sept. 2007, at 31, 32 (commenting that "there were no changes in . . . the percentage of defendants who failed to appear in court (2.3 percent vs. 2.2 percent)" from 1994 to 2003).
94. Id. at 17.
96. Id. at 11–13 (explaining methodology, which entailed two random samples of felony defendants in northern Indiana, Arizona, southern Florida, and eastern New York, drawn from the period of January to June in 1984 and again in 1986).
97. Id. at 37.
98. Id. at 38.
99. Id. (noting that thirty-one defendants were returned to custody, but disposition data were missing for one).
defendants overall, and the prior history of federal defendants will also include any records acquired in state courts. But where the window into the federal system was cloudy, the general view onto the states’ systems is effectively opaque. The best and only broad gauge of state court practices over time emerges from the State Court Processing Statistics (SCPS) project conducted by the Bureau of Justice Statistics. The SCPS project, administered by the Pretrial Justice Institute, has collected data on felony cases from a representative sample of forty of the seventy-five most populous counties in the United States every even-numbered year since 1988.00

These statistics, although impressive as an achievement overall, are nonetheless subject to a range of limitations with regard to recording failure to appear crimes.101 What data exist, however, suggest that the rate of defendant’s failure to appear has remained relatively constant since 1988. One multi-city study sets the range as from 21 to 24% of released defendants.102 Another study of Lake County, Illinois reported that roughly 16% of released defendants under supervision failed to report for a court date, although that number fluctuated wildly—from as low as 5% in 1987 to a peak of 23% in 1995 and then back down to 14% in 2000.103

Perhaps a better perspective on the changing nature of state practice can be gleaned by reviewing isolated reports about individual localities. For instance, one study of a Milwaukee demonstration project for domestic violence prosecution reported on a deliberate strategy to prosecute accused offenders for failing to appear in court—in other words, the use of failure to appear for pretextual purposes. As the report explained, "[f]ailure to appear in court for scheduled court appearances was a violation of the court’s order and, therefore, a crime."104 Because so many cases faltered due to reluctant witnesses, pursuing failure to appear proved an effective pretextual means of convicting alleged abusers without relying upon civilian testimony. Indeed, "[t]he increase in bail jumping charges helped increase case conviction rates as evidence of bail jumping was generally unambiguous."105 In the four years under review, the "issuance of bail jumping charges increased from 8.1% in 1999 to its peak of 13% in 2003, an

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101. Most significantly, these data look only at felony defendants, and not misdemeanants. Because misdemeanants make up such a large percentage of the total number of defendants prosecuted in state courts, their absence is notable. Moreover, it is likely that misdemeanants such as drug users or homeless and mentally ill persons are among those most likely to incur failures to appear. Cf. Foote, supra note 65, at 8 (reporting on Philadelphia study from 1950s that “found that most bail jumping was for minor crimes and that there was none for the most serious offenses”).

102. COHEN & REAVES, supra note 47, at 8.


105. Id. at 35.
increase of 39% overall. Ultimately, convictions for failure to appear showed up among the conviction charges in 11% of the domestic violence cases closed in 2002. Notably, because bail jumping in that jurisdiction could be charged either as a felony or a misdemeanor, without such a report it seems unlikely that bail jumping would constitute the most serious offense charged or that the misdemeanors would ever be visible otherwise.

Another snapshot of state use of bail-jumping statutes reveals their use in the obstinacy context. One example emerges from the rare circumstance of a reported appellate court decision overturning a conviction for failure to appear. Failure to appear does not usually raise complicated legal issues or even trial proceedings from which appeal can be taken. But in this case the defendant, Ayanna Khadijah, was initially arrested and charged with various drug-related counts. Roughly eighteen months later, after over thirty appearances in the case for which she had arrived on time, Ms. Khadijah overslept and arrived to court one hour and fifteen minutes late. At her trial for failure to appear, the defendant testified that she had worked from 1:00 a.m. to 8:00 a.m. the evening before her scheduled 10:45 a.m. appearance and had stopped home and collapsed on the couch, instructing her boyfriend not to let her fall asleep. He did not abide her wishes; she awoke when her attorney called her cell phone and immediately rushed to court.

Although the appellate court overturned the conviction on the grounds that her failure was not "willful," the fact of prosecution and conviction in such circumstances provides some insight into the changing nature of what it means to "fail to appear." To be sure, Khadijah is an extreme, and perhaps idiosyncratic, example of such a prosecution. Yet as a reporter who later investigated the case uncovered, "nearly 1 in 10" criminal cases in Connecticut "not involving motor vehicles that ended in convictions over the past five years included a conviction for failure to appear." Such a high rate of conviction—which likely represents only the tip of a larger iceberg of bargained-away or dismissed charges of failure to appear—marks a clear historical shift in the frequency with which these offenses are pursued.

Indeed, both the numbers and the anecdotal reports paint a picture that contrasts starkly with perspectives on "bail-jumping" in the mid-century. For instance, in 1963, a four-district Attorney General study that addressed bail-
jumping in part reported a low failure to appear rate, but added that "[m]any such instances presumably involved minor technical defaults. It is thought that comparatively few of them were cases of 'bail jumping' in which the defendant disappeared to avoid trial or punishment." The very notion that a distinction could be made between deliberate evasion and technical default—between fleeing the state and simply being too high to show up at court, for instance—is one lost in many jurisdictions today. The same attitude is evident in another study that attempted to quantify the rate of failure to appear in major cities in 1962 and 1971. The author observed that "while in some courts we could be quite confident that every time the defendant was not in court this fact would be noted, in other courts this was not the case." A non-appearance that did not result in prolonged absence simply did not count as much: "such failures to appear, regardless of the reason they occurred, represent only a minor inconvenience to the court when compared to the longer more serious [failures to appear]."

Of course, this shift, in both the federal and state systems, may be expected given that the idea of separately criminalizing "failure to appear" is of fairly recent vintage, as are the institutions necessary to monitor vigorously the activity of released defendants. The wave of bail reform statutes, at both a state and federal level, brought with them marked changes in the delivery of pretrial services in general. Naturally, just as the idea of pretrial release began to take on a more defined character, so too developed more regimented structures for monitoring releasees. The first pretrial services program was New York's Manhattan Bail Project—the instigator of all federal and state bail reform—in 1961. Then, in 1982, President Ronald Reagan signed into law the Pretrial Services Act, which formalized an experimental program authorized under the Speedy Trial Act of 1974 to create pretrial services agencies in ten federal judicial districts. The 1982 act mandated the establishment of pretrial service agencies in all federal districts, although implementation was spotty.

115. Foote, supra note 65, at 260.
116. See id. at 92 n.92.
117. See Wayne H. Thomas, Jr., Bail Reform in America 88 (1976).
118. Id. at 88.
119. Id. at 93.
120. The implementation of automated case tracking systems likely also had an effect, both in the federal and state systems. Byrne & Stowell, supra note 92, at 35-37 (discussing effect of PACTS in pretrial monitoring); Cooprider, supra note 103, at 38 (reporting changes as a result of implementation of automated system).
122. Byrne & Stowell, supra note 92, at 31.
124. Wagner, supra note 123, at 329.
125. Id. at 330-31.
Indeed, it was not until 1998 that federal pretrial services finally “achieved the ability to complete an investigation and report in virtually all cases,” thus fulfilling one of the original goals of the legislation.\(^{126}\) Similarly, although more than 300 counties now operate pretrial services agencies,\(^ {127}\) pretrial services in the states remain imperfectly executed. To the extent that an increase in charging or convicting failure to appear might be evident in the past twenty years, it may very well be attributable to the simple fact that, for the first time in history, someone really has been watching.\(^ {128}\)

**B. FALSE STATEMENTS**

False statements to investigators, like failure to appear, are an ancient pedigree of recent distinction. The federal statutes—typified by 18 U.S.C. § 1001—are fairly well known to anyone who reads the Sunday paper. The state analogues, however—typified by “stop and identify” laws—are of lesser notoriety. Both have become common pretextual vehicles for investigators seeking to ensnare otherwise elusive targets, and increasing sanction has been given to the obstinacy iteration of each offense (for instance, prosecutions involving mere “exculpatory no” statements or suspicionless street stops). This section examines the federal and state archetypes in turn.


Perhaps one of the most high-profile process crimes of late, at least in the federal system, is that of lying to a federal investigator. News accounts claim a significant uptick in prosecutions under 18 U.S.C. § 1001,\(^ {129}\) and certainly any regular reader of a national newspaper has grown well accustomed to watching the parade of civic, political, business, and entertainment stars indicted under its provisions. In addition to anecdotal reports about the popularity of prosecutions for false statements, recent legislative and doctrinal developments paint a picture of renewed interest in and substantial widening of their applicability. The archetypal provision under which such cases are prosecuted is § 1001, but that is simply the trunk of a tree on which grow many additional branches. In Title 18 alone, there are separate criminal provisions for false statements made specifically with regard to postal losses,\(^ {130}\) the death of armed forces,\(^ {131}\) obtaining an Indian trademark,\(^ {132}\) and roughly fifteen odd other offenses.\(^ {133}\)

\(^{126}\) Cadigan, *supra* note 91, at 11.

\(^{127}\) Mahoney et al., *supra* note 121, at 8.

\(^{128}\) See Byrne & Stowell, *supra* note 92, at 37; Kingsnorth, *supra* note 91, at 164


\(^{131}\) *Id.* § 1038.

\(^{132}\) *Id.* § 1158.

The federal false statements statute claims ancestry in an act of 1863, in which Congress first penalized the filing of fraudulent government claims. As the Supreme Court observed in 1995, that act “also proscribed false statements, but the scope of that provision was far narrower than that of modern-day § 1001; the Act prohibited only those false statements made ‘for the purpose of obtaining . . . payment.’”

The next major amendment occurred over fifty years later, in 1918, when Congress slightly broadened the statute to prohibit statements made with the “intent of cheating or swindling or defrauding the Government of the United States.” Although the new provision widened liability, “the statute remained relatively narrow: It was limited to false statements intended to bilk the Government out of money or property.” However, the new provision proved inadequate to protect the swell of federal programs created in the New Deal, and so in 1934 Congress created what became 18 U.S.C. § 1001. That statute proscribed the making of “any false or fraudulent statements or representations . . . in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder.”

The substantive terms of the statute stood virtually untouched for over sixty years after the 1934 enactment. Starting in the 1990s, however, three impor-
tant changes occurred in quick succession. First, in 1996, Congress expressly broadened the statute to include liability for statements regarding "any matter within the jurisdiction of the executive, legislative, or judicial branch" in response to a decision by the Supreme Court that held that false statements made to the judicial branch fell outside the ambit of liability. Second, in 2004, Congress amended the penalty provision to explicitly provide greater punishment for statements made in connection with offenses of terrorism. Lastly, in 2006, Congress again changed the penalty provision to increase the sentence for false statements related to sex offenses.

This flurry of activity after a long period of relative dormancy, coupled with the character of the amendments themselves, attest to a recent and renewed interest in § 1001. The broadening of liability to include statements made in connection with all three branches of government and with regard to terrorism and sex crimes reveals a statute with a purpose dramatically different than its origins—which were to protect the government from the perpetration of tangible, even specifically monetary, fraud. Indeed, the adoption of tailored—and heightened—penalties for terrorists and sex offenders suggests that the statute has morphed into more of an all-purpose tool of prosecution, rather than the specifically white collar or agency-based practice with which it is historically associated.

Similarly, the doctrinal development of § 1001 evinces a steady, if not singular, expansion in its scope of liability in recent years. After fifteen years of silence, the Supreme Court issued major rulings on the substantive scope of § 1001 twice in 1984, and once each in 1985, 1995, and 1998. Four decisions expanded liability. The fifth, which narrowed liability, was overturned by...
Specifically, in *United States v. Rodgers*, the Supreme Court held that a false report of crime to the FBI was covered by the terms of the statute, thus expressly repudiating any notion that § 1001 only covered statements to agencies that doled out benefits or adjudicated rights.\(^{148}\) Then in *United States v. Yermian*, the Court ruled that § 1001 does not require proof that the defendant made a false statement with actual knowledge that the matter fell within federal agency jurisdiction.\(^{149}\) Foreshadowing the arguments later raised in *Brogan*, the Court firmly dismissed any concerns that its ruling would create a "trap for the unwary."\(^{150}\) A year later, the Court decided *United States v. Woodward*.\(^{151}\) Although essentially a procedural case, *Woodward* is significant in that it held that § 1001's provisions did not raise double jeopardy problems with a similar false statements provision of the financial code, thereby permitting consecutive sentencing under the broad provisions of § 1001 along with any contextually tailored provision.\(^{152}\)

Lastly, in 1998, the Court decided the *Brogan* case, which definitively eliminated the common law "exculpatory no" defense and held that even one-word denials of guilt could give rise to liability under § 1001.\(^{153}\) In reaching its conclusion, the Court announced that it found "no basis for the major premise that only those falsehoods that pervert governmental functions are covered by § 1001."\(^{154}\) Thus, the Court wholly rejected any notion that circumscribed the ambit of liability to the statute's original purpose cited—namely, the prevention of financial or other resource-related harms wrought by false statements.\(^{155}\)

In sum, the legislative and doctrinal history of § 1001 paints a consistent picture of significant expansions of liability that increased in speed and fervor within the past twenty years.\(^{156}\) In fact, the only case in recent history to limit

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148. *United States v. Rodgers*, 466 U.S. 475, 479 (1984). The defendant in Rodgers had called the FBI to report that his estranged wife had been kidnapped and that she was part of the plot to assassinate the president in an effort to have them locate her whereabouts. *Id.* at 477.


150. *Id.* at 74. In *Yermian*, the defendant misrepresented several aspects of his history on a Department of Defense Security Clearance form, including false statements about employment with prior companies and the failure to disclose a prior conviction. The defendant claimed that he filled out the form in a manner consistent with misrepresentations he had made to his employer, a private company that contracted with the Department of Defense. *Id.* at 65–66.


152. *Id.* at 108.


154. *Id.* at 402.


156. Since the modern incarnation of § 1001 came into existence in 1934, there have been roughly ten Supreme Court cases addressing substantive aspects of the statute. Five of those were decided after 1984, one was decided in the immediate aftermath of the 1934 passage of the statute, and the remaining cases cluster around the anti-communism period of the 1950s and 1960s.
the application of § 1001 was *Hubbard v. United States*,\(^{157}\) which held that statements made in a judicial proceeding were not covered by § 1001.\(^{158}\) Notably, such statements remain covered by the perjury and obstruction of justice doctrines, and so it is not as though such offenses were left wholly unpunished.\(^{159}\) In any event, Congress quickly responded to the decision by amending the statute to include statements made in all three branches.\(^{160}\)

Unfortunately, as with all process crimes, quantitative evidence about the frequency of charges or conviction is difficult to obtain. For starters, the Uniform Crime Reporting System does not report separate data for false statement offenses. The closest fit is to “perjury, contempt, and intimidation,” a catch-all category that is not defined with any greater specificity.\(^{161}\) In addition to the typical difficulties with collecting data about process crimes,\(^{162}\) false statements are particularly problematic because, as noted above, § 1001 is one of many specialized federal statutes penalizing falsehoods.\(^{163}\) Thus, even if reliable data existed for § 1001, it would be difficult to gauge the full impact of false statement prosecution without also looking at all related provisions.

Anecdotal evidence, however, suggests at the very least that § 1001 prosecutions have achieved greater public salience in recent years and perhaps have significantly increased in frequency. Scholars have commented on an apparent uptick in such charges,\(^{164}\) pursuant to all three models—core, pretextual, and obstinacy. One author writes that “[d]uring the last decade, the government has used § 1001 to prosecute a wide variety of crimes”\(^{165}\) and that, despite a spate of criticism about potential abuses, “§ 1001 continues to be used frequently.”\(^{166}\) Another report claimed that false statement filings went down from 1996 to 1997 but then “shot up, more than doubling from 2001 to 2002.”\(^{167}\)

As reported by a colorful journalist in 1998, the false statements statute is “[a]n obscure 1930s law, not to be confused with perjury, . . . [that] has quietly become the tool that independent counsels love to use when all else fails.”\(^{168}\) According to that author, “[f]or [fifty] years, [§ 1001] was used mainly to enforce government rules and to nail white-collar criminals.”\(^{169}\) The article then

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158. *Id.* at 715.
159. *Id.* at 714.
160. See *supra* note 142.
162. See *infra* Part III (introductory portion).
163. See *supra* text accompanying notes 130–33.
166. *Id.* at 494.
168. Glastris, *supra* note 129, at 25 (describing the statute as “elastic, all-purpose, and fearsome”).
169. *Id.* at 26
reports:

[C]ritics say independent counsels are increasingly using the statute to prosecute government officials who have allegedly committed very modest crimes, or no crimes at all. "You're seeing more and more prosecutions now of lies in which there is no underlying criminal conduct," observes former Independent Counsel Michael Zelden, "and that's a disturbing trend." 170

And, indeed, a number of prominent individuals have been threatened with or actually indicted for violations of § 1001. The list includes: Henry Cisneros, Bernard Ebbers, John Rigas (Adelphia), Martha Stewart, Oliver North, John Poindexter, Jeffrey Skilling, Tammy Thomas (cyclist), Melvyn Weiss (of Milberg Weiss), Acevedo Vila (Governor of Puerto Rico), Mike Espy, Brian McNamee, and Lewis Libby, just to name a few.

In sum, anecdotal reports seem to suggest that federal prosecutors have brought greater numbers of prosecutions for false statement offenses in recent years. Of course, there may be many explanations for any such increase. It could be a reaction to congressional and judicial broadening in the substantive basis of liability. It may be attributed in part to the enactment of the independent counsel statute 171 in the 1980s 172 or to changes in the frequency and nature of the background checks conducted by federal agencies. 173 Whatever the reason, however, the perception certainly seems to be that § 1001 is a bedrock of the federal process crimes charging practices, and—that there is at the very least a perception that some of those charges are pretextual and that some are retributive, in the sense that the government pursues persons who have not broken any laws but who are somehow otherwise disdaining the authority or values of the state.

2. State Archetype: Failure to Identify

Prosecutions for false statements to government officials appear far more common in federal than in state courts. The reasons for this may be myriad: most local policing is reactive rather than proactive; much local attention is occupied by "politically mandatory" prosecutions like violent crime; and many localities lack the resources to undertake long, complex investigations. 174 It might also be that many localities simply do not have laws on the books to

170. Id. at 25–26.
172. See Glastris, supra note 129, at 26. Interestingly Glastris claims that "until the Cisneros case no one had ever been prosecuted for lying on a background check." Id. at 25. But of course, Cisneros was indicted in 1997 and at the very least Yermian, the defendant who was prosecuted for lying on his Department of Defense background check documents, had his conviction affirmed in 1984. United States v. Yermian, 468 U.S. 63, 65 (1984).
173. See Glastris, supra note 129, at 25.
174. Oesterle, supra note 164, at 447–48 (describing difficulties with these kinds of investigations); Richman & Stuntz, supra note 3, at 600–04.
address such offenses. In the commentaries to the revised Model Penal Code, published in 1980, the authors observed that “[n]o state law of equal breadth [to § 1001] was discovered during the drafting process.” And, indeed, of the at least thirteen states that have unsworn false statements statutes—all of which were enacted in the 1970s—almost all apply only to written statements.

However, some contrary evidence indicates that states have not altogether ignored false statement style process prosecutions. A series of high profile prosecutions by then-Attorney General Eliot Spitzer prompted a wave of state-level investigations of major corporations and financial institutions around the millennium. If state attorneys general assert greater authority to prosecute such offenses, it seems likely that they might increasingly use the process crimes already on the books in most jurisdictions, seek to strengthen the penalties on provisions that have fallen into desuetude, or move to enact new catch-all provisions as have several states in recent years. But although it is virtually impossible to ascertain the general frequency with which prosecutions are brought under these provisions, it seems safe to conclude that even as they increase in popularity they will remain less prevalent in the state system than in the federal system.

Instead, the proper state-level, street-crime analogue to the federal approach

175. Model Penal Code and Commentaries § 241.3 cmt. at 150 (Official Draft and Revised Comments 1980). However, both Georgia and North Dakota enacted statutes shortly after the drafting of the Model Penal Code section that were similarly broad in scope. See id. at 150 n.2.


178. See, e.g., Henri E. Cauvin, Deal Made in District Election Scandal; 2 Admit Their Guilt, Will Aid Prosecutor, WASH. POST, Feb. 24, 2006, at B1 (reporting on guilty plea to false statements in local prosecution for election fraud).

179. Ohio Rev. Code Ann. § 2921.31 (West 2006) (proscribing "any act" done with a purpose to "prevent, obstruct, or delay the performance by a public official of any act within the public official's official capacity," which had formerly been a misdemeanor but in 1999 became a felony); Armond D. Budish, Even Little White Lies Could Land You in Jail, CLEVELAND PLAIN DEALER, Jan. 24, 2004, at E9 ("False oral statements also can result in legal trouble.").

is not false statements per se, but rather the kind of "failure to identify" statutes that are increasingly used by local law enforcement. In the federal system, formal investigations serve as a ready context in which agents can elicit statements that later ease the path of prosecution against targeted suspects for whom other substantive proof may be lacking. Similarly, in the state system, street encounters provide a ready context in which beat officers can engage suspects with the goal of eliciting statements (or physical evidence) that later ease the path of prosecution against targets for whom substantive proof of the suspected crime may be lacking. The "targeting" decision may be more spur of the moment in the street-level scenario, but the purpose is essentially the same: secure grounds for prosecution and conviction in a case in which it might otherwise be difficult to obtain.

As of April 2008, at least twenty-four states had specific "stop and identify" statutes. These statutes generally take one of two forms: either they mandate disclosure of basic identifying information whenever an officer has reasonable suspicion of criminal activity or else they list "failure to identify" as a basis upon which an officer may suspect a person of criminal loitering. Roughly half were passed before the 1970s, whereas four were enacted in the 1980s and nine were passed in the 1990s.

Measuring the actual implementation or frequency with which charges are brought under such provisions, much less whether they represent core, pretextual, or obstinacy approaches, is all but impossible. Such charges are "traffic" offenses in many jurisdictions, which may not even merit appointment of counsel, much less result in a trial or reported appellate case. However, the Supreme Court recently upheld one such statute against constitutional challenge in Hiibel v. Sixth Judicial District Court of Nevada. That opinion in many respects represented a retreat from the Court's holdings in the 1970s invalidating traditional vagrancy laws. Although these new statutes tend to activate


182. See, e.g., Ala. Code § 15-5-30 (2003); 725 Ill. Comp. Stat. § 5/107-14 (2004); Kan. Stat. Ann. § 22-2402(1) (2003); see also Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 183 (2004) ("In some States, a suspect's refusal to identify himself is a misdemeanor offense or civil violation; in others, it is a factor to be considered in whether the suspect has violated loitering laws.").


only on the basis of "reasonableness"—the same standard required for temporary investigative detention under the Fourth Amendment\textsuperscript{186}—that standard is itself so low that very little is required to trigger its provisions. It therefore creates the perfect cooperation trap for obstinacy or pretextual charging: flight in certain neighborhoods, or trivial public order offenses, or perhaps even acting insubordinate, may supply the reasonable suspicion\textsuperscript{187} under which officers demand identification. Failure to identify, in some respects the most naked of obstinacies, then constitutes an arrestable—and thus searchable—offense.\textsuperscript{188} From there, greater substantive charges may evolve.

In this way, uncovering records of stop-and-identify charges prove even more elusive. The stop-and-identify arrest will often serve as an entry point to search or interrogate a suspicious person in the hopes of obtaining more information. If incriminating information does not materialize, then the stop-and-identify charge may also dissipate; if it does, then the charge is apt to get lost in the bargaining process.

Of course, isolated exceptions may surface, revealing pretextual or obstinacy usages. In one recent and rare reported opinion, a court upheld a conviction under a general state obstruction statute in a case involving a man who failed to identify himself to a police officer investigating a complaint.\textsuperscript{189} When the man responded, "this isn't Russia. I'm not showing you any [identification]," he was arrested for interfering with a police officer.\textsuperscript{190} Finding that this generally worded obstruction statute covered "failure to identify,"\textsuperscript{191} the court parroted the Supreme Court's finding that "[a]sking questions is an essential part of police investigations."\textsuperscript{192} Apart from legal challenges to the constitutionality or breadth of such statutes, however, a strong trail of appellate cases about such charges does not seem likely.

C. OBSTRUCTION OF JUSTICE

Like false statements, obstruction of justice proves difficult to quantify. The state and federal codes both contain numerous iterations of obstruction offenses, each of which hones in on a particular strain of conduct.\textsuperscript{193} As one commentator

\textsuperscript{186} Terry v. Ohio, 392 U.S. 1, 20 (1968).
\textsuperscript{188} Chimel v. California, 395 U.S. 752, 762–63 (1969) ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested . . . .").
\textsuperscript{189} State v. Aloi, 911 A.2d 1086, 1087–89 (Conn. 2007).
\textsuperscript{190} Id. at 1089.
\textsuperscript{191} Id. at 1092.
\textsuperscript{192} Id. at 1095 (quoting Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 183 (2004)).
\textsuperscript{193} Decker, supra note 177, at 129 ("An examination of obstruction of justice laws in the United States reveals significant differences in their definition and scope.").}
has observed with regard to the federal code, many "obstruction provisions . . .
demonstrate quite graphically how incompletely defined, redundant, and intern-
ally inconsistent the obstruction portion of the ‘code’ is. They provide clear
examples of the irrationalities in organization and grading that plague the code
as a whole."194 And as regards the complex web of both state and federal
obstruction provisions, Professor John Decker has commented that “[n]ot surpris-
ingly, . . . many academicians, practitioners, and students of criminal law have
little understanding of the potential reach, both good and bad, of obstruction
prohibitions in their jurisdictions.”195

In both federal and state courts, obstruction of justice proves readily ame-
nable to both pretextual and obstinacy prosecutions. Moreover, a version of
obstruction has emerged in state courts that punishes “dissuading a witness,”
which has become a popular tool in domestic violence prosecutions and is
easily wielded for pretextual or obstinacy purposes.

1. Federal Archetype: Chapter 73 of Title 18

The origins of the twenty statutes that constitute Chapter 73 of the federal
code196 and form the core of obstruction of justice in the federal system can be
 traced, as with the federal bail statute, to the Judiciary Act of 1789.197 That
statute bestowed upon the newly formed federal courts the power to punish “all
contempts of authority.”198 However, complaints about improper extensions of
the contempt power quickly emerged as judges summarily punished perceived
malfeasant for out-of-court behavior.199 This frustration peaked in a conflict
between a federal judge and a rogue Irish land speculator in “pioneer Mis-
souri.”200 After Judge James H. Peck issued a politically divisive opinion
adverse to the aptly named claimant Luke Lawless, Lawless issued a complaint
in the form of a rebuttal published in a local newspaper.201 Judge Peck found
Lawless guilty of contempt in summary proceedings, and Lawless responded by
successfully petitioning the House of Representatives to initiate impeachment

195. Decker, supra note 177, at 130.
196. Sanchirico, supra note 3, at 1249.
general notion that obstructing justice constitutes an offense goes back “over four centuries.” Daniel A.
Shtob, Note, Corruption of a Term: The Problematic Nature of 18 U.S.C. § 1512(c), the New Federal
Obstruction of Justice Provision, 57 Vand. L. Rev. 1429, 1434 (2004); see also Federal Crimes Act of
1790, 1 Stat. 112.
198. The Judiciary Act of 1789, section 17 provides that courts shall have the authority “to punish
by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or
hearing before same.” Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73.
199. See United States v. Reed, 773 F.2d 477, 485-86 (2d Cir. 1985) (recounting the history of and
response to the impeachment of Judge James H. Peck).
200. See Walter Nelles & Carol Weiss King, Contempt by Publication in the United States: To the
201. Id. at 428.
Judge Peck averted impeachment by a one-vote margin, but concerns mounted about the use of summary contempt proceedings to reach conduct occurring outside the courtroom walls. Within twenty-four hours, the House asked the Judiciary Committee to look into “the expediency of defining, by statute, all offences which may be punishable as contempts of courts of the United States.” The result was the passage, just over a month later, of the Act of 1831, which bifurcated the contempt power.

The first section of the new statute authorized the use of summary proceedings only for “misbehavior of any person in their presence, or so near thereto” the court. The second, which was to lay the foundation for the modern statutory incarnation of the offense of obstruction of justice, provided a maximum three-month punishment “if any person ... shall, corruptly, or by threats or force, endeavor to influence, intimidate or impede any juror, witness, or officer, in any court of the United States ... or shall corruptly, by threats or by force, obstruct or impede ... the due administration of justice therein.” The act thereby created a distinction between the processes for summary contempt and those for general obstruction of justice, which required full procedural safeguards.

In 1909, Congress enacted the provision that became the modern precursor to 18 U.S.C. § 1503, the catch-all statute and foundation of the federal proscription on obstruction of justice. In 1940, Congress passed a separate provision—the part now embodied in § 1505—to cover proceedings before other branches of government. In 1948, when Congress undertook to revise the Federal Code, it added a number of additional obstruction provisions.

The next major set of revisions to the obstruction statutes did not occur until

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202. Id. at 429.
203. Id. at 430.
204. Id. at 430.
206. Id.
207. Id.
208. See Cooke v. United States, 267 U.S. 517, 537 (1925) (“Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation.”).
211. See, e.g., 18 U.S.C. § 1501 (assault on process server, 1948); id. § 1502 (resistance to extradition agents, 1948); id. § 1503 (catch-all, 1909); id. § 1504 (influencing juror by writing, 1948); id. § 1505 (obstructing agencies or committees, 1948); id. § 1506 (false bail, 1948). See generally O’Sullivan, supra note 194, at 643 (noting that the “closest Congress has come to enacting a code was its creation of Title 18 of the United States Code in 1948”).
1982 when Congress passed the Victim Witness and Protection Act. At that time, Congress added sections with penalties for non-coercive forms of witness intimidation and tampering and retaliation. Just twenty years later, in 2002, Congress passed the landmark Sarbanes-Oxley Act, which again substantially altered the obstruction provisions. In between the two, Congress had amended Chapter 73 several times and added three new provisions. Most recently, Congress added a provision penalizing the filing of a false lien against a federal judge.

However, more informative than the messy breadth of Chapter 73 is the degree to which it has received mounting congressional attention in recent years. From its inception through the early 1980s, Congress occasionally tinkered with its provisions, undertaking a major revision in 1948 and then adding provisions in 1950, 1956, 1960, 1967, and 1970. But it was not until the passage of the 1967 provision, § 1510, that the obstruction statutes even reached acts interfering with FBI investigations. And recent history reflects a maelstrom of activity. Congress has added sweeping new provisions on two occasions—1982 and 2002—and either substantively revised or seriously enhanced penalties on existing statutes no fewer than eight additional times.

Obviously not every enactment or interpretation has broadened the scope of liability, but most have. The principal source of prosecution for obst-
tion, § 1503, 223 remains a broad omnibus provision 224 that several circuits have held to "proscribe[] an expansive category of conduct that interferes with the judicial process." 225 Indeed, the conduct itself might not even otherwise be illicit. In the words of one scholar, "non-coercive obstruction offenses are so broadly defined that they can encompass almost anything—even entirely legal acts—that prosecutors or juries might find troubling." 226 Of course, such breadth provides ample grounds from which to cultivate pretextual and obstinacy prosecutions.

Some of this breadth is due to the vague language in the drafting of the statute, but some of it also can be attributed to the gloss that courts have put on statutory terms. For instance, although early Supreme Court precedent interpreted the omnibus provision as requiring a fairly strict standard of specific intent, 227 courts more recently have permitted a negligence—or "reasonably foreseeable" mental state—to satisfy the intent requirement. 228

If measuring increased legislative and judicial attention to obstruction statutes is a difficult enterprise, then measuring increased executive applications of those statutes is an all but impossible one. The Bureau of Justice Statistics lumps together intimidation, perjury, and contempt in its statistical calculations. 229 An examination of the data from 1984 to 2004 suggests relative stability during that time, with notable increases in the years 1992 to 2001. For instance, from 1984 to 1990, the most serious offense charged for roughly 0.3%-0.4% of all suspects received for investigation was perjury, contempt, or intimidation. 230 In 1992, that number doubled to 0.6%, and it hovered in that range through 2001, reaching a peak of 0.8% in 1996. In 2002 through 2004, the rate returned to 0.4%. The data for the number of suspects prosecuted (as a percentage of total number of suspects prosecuted for any offense) and then convicted (as a

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222. See Sanchirico, supra note 3, at 1251-52 & n.142 (charting "convoluted" legislative history). Although it remains to be seen how prosecutors will wield it and courts will interpret it, the statute unquestionably broadens the scope of liability. See Jeffrey R. Kallstrom & Suzanne E. Roe, Obstruction of Justice, 38 Am. Crim. L. Rev. 1081, 1107 (2001); Sanchirico, supra note 3, at 1255. But see Kallstrom & Roe, supra, at 1108-09 (noting that courts have read certain acts from the list narrowly).

223. Decker, supra note 177, at 53-54 (noting that § 1503 is the basis of the "majority of federal prosecutions").

224. 18 U.S.C. 1503(a) (2006) ("Whoever corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice ... ").


226. Id. at 679.


229. See, e.g., BUREAU OF JUSTICE STATISTICS, supra note 161, at 17, 31.

230. All calculations are drawn from the Compendia of Federal Justice Statistics issued by the Bureau of Justice Statistics on an annual basis, although data for 1987 and 1991 are excluded. See supra note 85.
percentage of all cases resulting in conviction) reflect the same basic curve. The only respect in which this category shows a steady rate of increase is with regard to the percent of perjury, obstruction, and intimidation cases brought that terminated in conviction: there, the numbers hovered around 67%-69% in the 1980s, leapt to 75% in 1992, reached an all time peak of 86% in 1999, and have since remained in the 80% range. At most, the data suggest that conviction rates for these kinds of offenses have climbed, although complaints and filings have stayed relatively steady. At least, it may be said that “[i]n the past few years, obstruction of justice has earned a prominent place in our public discourse.”

What also emerges from anecdotal and empirical study, however, is that obstruction statutes often apply in ways that confound ordinary expectation. As Professor Decker observes, “[w]hen many people consider the offense ‘obstruction of justice,’ they probably think of conduct such as evidence destruction and tampering with witnesses, jurors, and others involved in the judicial process.” But “[w]hile such beliefs would be correct, these conceptions would be incomplete,” because “obstruction statutes have been interpreted to prohibit a broad range of activities.”

For example, in Professor Lisa Kern Griffin’s insightful article identifying the “new corporate criminal procedure,” she relates a number of creative prosecutorial theories bolstering obstruction charges. She describes recent prosecutions that have rested on “a novel theory of obstruction” that labels it obstructive to make statements to individuals not even employed by the government. She cites, for instance, obstruction charges that stemmed in one case from statements by an employee to lawyers in a firm representing his employer and in another from an executive’s representations to “auditors and attorneys [he] himself had hired,” resting liability on the premise that those statements later wound their way into part of the investigation. In the latter case, the prosecutor even pursued an obstruction charge on the basis of the executive’s lack of disclosure to the third party—a perspective that exemplifies obstinacy charging in that, in her words, it characterizes “incomplete cooperation [as] itself obstruc-

231. Kallstrom & Roe, supra note 222, at 1082 (“[I]t appears to me that white-collar prosecutors are increasingly electing to rely on obstruction charges in high-profile cases . . . .”); see also Decker, supra note 177, at 129 (cautioning “participants and observers of our criminal justice system . . . not [to] overlook the growing importance of the crime of obstruction of justice”); O’Sullivan, supra note 194, at 677.

232. Decker, supra note 177, at 51.

233. Id.

234. Griffin, supra note 4, at 311–12. In relating these theories, Professor Griffin warns against such prosecutorial power because “[a]n employee may have a reasonable fear of prosecution that leads to evasive behavior later charged as obstructive, even though that employee may have been innocent of any wrongdoing prior to questioning.” Id. at 334; see also id. at 361.

235. Id. at 371; see also Sanchirico, supra note 3, at 1244 n.111 (“The new section 1503 [obstruction of justice] charge provides another round of ammunition for the prosecutor in the plea bargaining process.” (alteration in original)).

236. Griffin, supra note 4, at 371–72.
In this respect, it should also be noted that efforts to extract a harsher penalty upon conviction after trial by referencing the obstruction enhancements of the sentencing guidelines have also become quite common. In short, whatever the frequency of obstruction prosecution, novelty and innovation in its breadth of application seem beyond dispute.

2. State Archetypes: Obstruction of Justice and Dissuading a Witness

a. Obstruction of Justice. At first glance, the pursuit of obstruction charges seems far less prevalent in the states than in the federal system. But closer inspection uncovers two challenges to that assumption: first, state statutes tend to penalize a far broader range of conduct than even their federal counterparts and therefore can be wielded against a wider range of offenses and second, states have made use of specialized obstruction statutes, like proscriptions against “dissuading a witness,” in creative ways that significantly broaden their reach.

The District of Columbia and twenty-four states have sweeping obstruction of justice statutes in effect. Five additional states have narrower obstruction statutes that criminalize only particular conduct. In Professor John Decker’s impressive and comprehensive survey of state and federal obstruction statutes and cases, he too laments that state uses of obstruction statutes are difficult to document. For instance, “among the twenty-five states with general obstruction statutes containing broad language, only a few states demonstrate an active use of the statutes.”

However, two caveats clarify that this does not necessarily mean that obstruction is not actively employed as a charge in the states. First, he observes that in only two of those twenty-five states—Ohio and New York—are many trial level cases reported. Without reported trial court cases, charging decisions may be entirely obscured by plea bargaining practices. As if to underscore this point, it is revealing that in both of the states with reported cases, a colorful and creative tapestry of obstruction charging emerges. Second, recall that roughly half of the states have generally worded obstruction provisions, while the remainder rely on a patchwork of laws targeted to specific acts. In the latter

237. Id. at 372-73.
238. See id.
239. Decker, supra note 177, at 79-81.
240. Id. at 77.
241. See id. at 81. Every state has statutes that target specific conduct. Id. at 76. Confusingly, a handful of states have statutes with titles that reflect variations on “obstructing justice,” but which instead refer to conduct more popularly referred to as accomplice liability or accessorial liability after-the-fact. Id. at 83.
242. Id. at 121 (citing statutes from Ohio, New York, and Pennsylvania).
243. Id. at 121 n.569.
244. See id. Of course, it may be that jurisdictions less inclined to report trial cases nonetheless have few obstruction cases, or it may simply be that those cases tend not to see the light of appellate review and written report.
category of states, appraising the popularity of obstruction charges becomes more difficult. Indeed, Professor Decker observes that even those states with general statutes use them to "fill the gaps" and prefer to proceed under the narrower statutes if possible. Thus, "most states charge obstructions under a variety of individual statutes that target specific forms of conduct."  

What little the survey does uncover, however, demonstrates fairly creative deployment of obstruction statutes within the states. In one Ohio case, a woman observed an officer preparing to write a parking ticket, and the woman put money in the parking meter. The officer warned her to stop, but instead she put money in the next meter as well. Upholding her arrest and conviction for obstruction, the court disregarded the argument that her actions did not prevent the officer from continuing to write tickets. Professor Decker, in a review of Ohio obstruction cases, notes that cases such as this one, "which appear to be no more than basic disorderly conduct, appear frequently throughout Ohio's caselaw." In addition to this kind of general disorderly conduct or, it might be argued, obstinacy use of obstruction laws, Professor Decker identifies categories relating to interference with law enforcement, obstruction by omission, and speech. He cites cases in which defendants blocked officers' paths or made provocative comments; refused to be helpful during search warrant executions; annoyed or irritated officers performing their duties; and warned others (by shouting "five-oh" or broadcasting a CB "smokey" report) of officers' nearby presence.

Professor Decker's review further revealed that, "[a]t the state level, obstruction laws have been used increasingly against drug offenders who, in some fashion, attempt to destroy or conceal their drugs when being pursued by police." A typical scenario involves a defendant observing an approaching officer and throwing away or swallowing drugs or drug paraphernalia. These creative deployments of obstruction statutes represent a marked expansion from the historical understanding of the purpose of the offense and indicate that both pretextual and obstinacy prosecutions under such statutes do in fact take place.

b. Dissuading a Witness. Although not captured in Professor Decker's survey, some jurisdictions have also increasingly relied upon novel applications of

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245. Id. at 121.
246. Id. at 51 (giving examples of obstruction cases that include a "child [who] shouts obscenities at his public school teacher, shoves her, and leaves the classroom" and "[t]wo middle-aged women [who] privately state that they believe a recent arson was committed by the local police").
249. Id. at 110.
250. Id. at 110-11 (giving examples, including a jaywalker who "quickened his pace" when asked by an officer to stop).
251. Id. at 105-13.
252. Id.
253. Id. at 51.
254. Id. at 117 (citing cases).
"dissuading a witness" obstruction statutes. Of course, Anglo-American law has long proscribed witness tampering. Presently, thirty-six states outlaw witness tampering as a "distinct offense," and the federal government introduced new witness tampering sections as part of the Victim and Witness Protection Act of 1982. Conventionally, such statutes are aimed at preventing efforts to intimidate witnesses and keep them from offering evidence or testifying.

But a broader theory of liability has recently also achieved prominence. Specifically, prosecutors have increasingly interpreted witness intimidation provisions to apply to conduct undertaken even at the time of the original unlawful acts. That is, the government has charged witness tampering in situations in which a defendant, at the time of the commission of the underlying offenses, also makes threats or statements to the victim or witnesses to discourage report of the crime.

In California, for example, such prosecutions are common. Prosecutions are brought under Penal Code section 136.1, which is located within the "Crimes Against Public Justice" title in the chapter labeled "falsifying evidence, and bribing, influencing, intimidating or threatening witnesses." Specifically, the state statute provides at least a one-year penalty for anyone who "[k]nowingly or maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry"; in addition, the penalty is provided for anyone who dissuades a witness from "[m]aking any report of that victimization" or "[c]ausing a complaint" or "seeking the arrest." There are also additional penalties for doing so with force.

California's provision was initially enacted in 1872, at which time it stated that "[e]very person who willfully prevents or dissuades any person who is or may become a witness, from attending upon any trial, proceeding, or inquiry, authorized by law, is guilty of a misdemeanor." That statute remained virtually unchanged until a series of enactments beginning in 1967. From 1967 through the present, the California legislature amended its provisions no fewer than six times, including several penalty increases and a major revision in 1980 that substantially widened its scope.

On its face, the statute appears to apply to acts and threats against persons

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255. See BLACKSTONE, supra note 61, at *324; see also id. at *126 (describing the offense of "dissuad[ing] a witness from giving evidence").
256. Decker, supra note 177, at 90; Green, Cover-Up, supra note 23, at 19 & n.39 (referring to § 1512).
259. Id. at § 136.1(f).
260. Id. at § 136 (1872) (amended and updated at CAL. PENAL CODE §137 (West 2009)).
who are affiliated with or in a position to initiate official proceedings. In this respect, there would seem to be an implicit requirement of a break in time between the act that rendered the individual a witness or victim and the act that constitutes tampering or dissuasion of that witness. Indeed, the legislature even briefly included a provision requiring courts at arraignment to “admonish [a] person who there is cause to believe may violate this section” and warn her as to the penalties; this suggests a two-part time series: first an offense occurs that creates the possibility of a victim or witness, and later that victim or witness is dissuaded or intimidated. Threats contiguous to the original criminal act, therefore, would be covered by separate statutory provisions generally proscribing threats.

Yet this provision frequently is used in circumstances in which the obstructive act occurs at the time of the criminal act. This occurs even when the “obstruction” seems inextricable from the illicit motive of the act, rather than indicating a separate or subsequent intent to thwart the judicial processes. For example, in People v. McElroy, the defendant and his female companion fought over the course of two days, during which he physically grabbed or shoved her on several occasions. At one point she attempted to call her brother, but he took the phone from her hands and hung it up. Later she tried again, and he unplugged the telephone base; she then grabbed his cellular telephone and called to request a “civil standby”—that is, police presence to prevent any violence. Upholding his conviction for dissuading a witness on the basis of his interruptions of her attempts to use the phone, the court even held that the fact that she requested a civil standby, rather than report victimization, was immaterial because “any police response to an ongoing domestic dispute ... will likely result in the officer’s taking a report.” The 1980 amendments smoothed the path to this interpretation of witness dissuasion, in that they added a section that penalized dissuading “any report of ... victimization.” This language perhaps enables the argument that acts of victimization and witness dissuasion may be concomitant.

As this anecdote suggests, strategic use of obstruction and dissuading witnesses charges has achieved particular currency in domestic violence prosecutions. Of course, few would dispute that threats that occur in the course of victimization merit punishment, and naturally the California code has provisions applicable to such threats. What makes this use of dissuasion unique is

263. CAL. PENAL CODE § 136(c) (West 1979) That provision now is lodged in the section of the code that deals with influencing testimony. CAL. PENAL CODE § 137 (West 2009).
265. Id. at 444–45.
266. Id. at 444.
267. Id. at 445.
270. See CAL. PENAL CODE § 422 (West 1999).
that it essentially remakes all victims into simultaneous witnesses. In this respect, the act of victimizing a person itself constitutes a form of obstruction, folding the ultimate trial and conviction of the accused into the initial allegation. What remains is recursive victimization: the man accused of murdering his wife in a rage also obstructs justice in that he eliminates the only witness against him, notwithstanding that no "witness" or proceedings yet exist at the time of the "obstructive" act. Indeed, the defense to the charge of obstruction may in such a case depend entirely on innocence of the underlying offense, rather than any mental state or nexus to the judicial proceedings.

Although charges of this kind seem most popular in California, they are by no means limited to that jurisdiction. Nor is this expansive interpretation restricted to the domestic violence context. For example, in Commonwealth v. King, the defendant robbed a convenience store that he frequented as a patron. On his way out, he asked about videotapes of the store interior and then stated that if he saw himself on the news that night, he would come back and kill the store clerk and others. When later apprehended, the defendant was charged with counts related to the robbery; he was also charged not for general threats, but under a witness intimidation statute that penalized "willful interference 'with any person furnishing information to a criminal investigator relating to a violation of a criminal statute of the commonwealth.'" The court, in upholding the conviction, held it irrelevant both that the threat concerned reporting to the media, rather than to the police, and that the victim had not been presently engaged in furnishing information to authorities. Instead, the court found it sufficient that the jury could infer that "the victim, once assured that the defendant had left, would report the robbery."

In another case, this one arising within the military, a staff sergeant disobeyed general regulations by engaging in forbidden sexual relationships with four separate junior service members. When an investigation began, she advised the junior members not to cooperate, to invoke the right against self-

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271. However, not every jurisdiction has authorized this novel theory of obstruction. See, e.g., People v. Hollenquest, 570 N.Y.S.2d 155 (App. Div. 1991) (rejecting witness tampering theory where defendant threatened individual who observed him commit robbery, but did so at time prior to being arrested or charged with robbery).


276. Id. at 945.

incrimination, and to contact defense counsel.\textsuperscript{278} Upholding her conviction for obstruction of justice, the court differentiated between advice that is "honest, uncorrupt, and disinterested" and that given by a party with an interest in the outcome.\textsuperscript{279}

To be clear, in many instances, the conduct complained of might (and ought) reasonably be charged under an ordinary threats or assault statute. What makes dissuading prosecutions relevant to this discussion, and interesting as an example of the expanding sweep of process crimes, is that they extend the idea of "witness tampering" to include conduct done before formal proceedings are instituted or any "witness" formally comes into being. In essence, they convert what might logically be viewed as private unlawful conduct (ordinary threats) or even prior immoral conduct (statements expressing the desire to avoid apprehension) into offenses against the public justice. This transformation is effectuated simply by labeling the desire to evade punishment or to commit crime undetected, both archetypical obstinate behaviors, a form of "witness dissuasion" or intimidation. And although not every jurisdiction has endorsed such an expansive view of witness intimidation,\textsuperscript{280} this theory of liability has become increasingly popular.

D. CONTEMPT OF COURT ORDERS

The U.S. Code authorizes a court to punish "such contempt of its authority . . . as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command."\textsuperscript{281} This provision has been held to require either the commission of an offensive act in the presence of the court, or a "willful violation of a standing court order."\textsuperscript{282} Although there is some evidence of current use of the contempt charge in federal court,\textsuperscript{283} an overarching appraisal suggests that the practice is not particularly common.

The charge of contempt in the state courts, in contrast, appears to be flourishing. The underlying basis for contempt can take many forms, but two particular variations are relevant here: violation of an order to stay away from a person or place (often issued as a bail condition or as a civil protective order) and violation of an order to fulfill general conditions of release such as urine testing or attendance at educational programs. This broader notion of what constitutes contempt—in essence, any violation of a court order, regardless of the intent behind the violation or the complexity or legitimacy of the order itself, represents a significant expansion in the understanding of this process offense and offers ample opportunity for pretextual and obstinacy prosecutions.

\textsuperscript{278} Id.
\textsuperscript{279} Id. at 110.
\textsuperscript{280} See, e.g., State v. D.A., 923 A.2d 217, 221–22 (N.J. 2007) (rejecting government argument that "every defendant who commits a crime and attempts to silence a witness" is tampering).
\textsuperscript{282} Sanchirico, supra note 3, at 1258 (quoting 18 U.S.C. § 401).
\textsuperscript{283} See, e.g., Green, Cover-Up, supra note 23, at 21 (citing cases).
As the Supreme Court declared in 1993 in *United States v. Dixon*, prosecutions for violations of release conditions constitute "a historically anomalous use of the contempt power."\(^{284}\) *Dixon* involved consolidated cases in which defendants convicted for contempt were then tried on the substantive charges underlying their contemptuous conduct. In one case, the defendant had been released pretrial and ordered not to "commit any criminal offense"; he was later arrested and charged with possession of cocaine with intent to distribute.\(^ {285}\) In the other case, a civil protection order had issued ordering the defendant not to assault his wife; he later was arrested for numerous attacks on her.\(^ {286}\) In both cases, the defendants were convicted of contempt for violating the orders and then charged for the substantive offenses underlying those contempts. Finding that "the 'crime' of violating a condition of release cannot be abstracted from the 'element' of the violated condition," the Court held that pursuit of charges identical to those upon which the defendants were convicted for contempt constituted double jeopardy.\(^ {287}\)

Tracing the history of contempt, the *Dixon* Court observed that "criminal contempt power was confined to sanctions for conduct that interfered with the orderly administration of judicial proceedings."\(^ {288}\) As originally conceived, "criminal contempt involve[d] a dispute between the contemnor and the state—a harm to something larger than simply the opposing party in the underlying litigation."\(^ {289}\) On its face, to permit otherwise would mean that the "power of courts to impose sanctions for insult or disobedience is not meaningfully constrained."\(^ {290}\) The Court also noted, in reference to the breached release condition that commanded that the defendant refrain from committing an additional offense, that "there was a long common-law tradition against judicial orders prohibiting violation of the law."\(^ {291}\) General release conditions such as "stay away from the 1200 block of Jones Street" or "report weekly to pretrial services" or even "refrain from committing any future crimes" simply have only proliferated in very recent history.\(^ {292}\)

\[^{285}\] Id. at 691.
\[^{286}\] Id. at 692.
\[^{287}\] Id. at 698. Accordingly, some of the counts could proceed because they had not served as the basis for the contempt convictions even though arising from the same transaction. Id. at 700-02.
\[^{288}\] Id. at 694.
\[^{289}\] Green, *supra* note 2, at 1613.
\[^{290}\] Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 Va. L. Rev. 1025, 1026 (1993). Indeed, the early struggle to define the contours of contempt consisted largely of distinguishing between those acts punishable summarily and those that required ordinary criminal processes. It was not until 1941 that the Supreme Court definitively circumscribed courts' power by limiting summary contempt to acts occurring "near to" the court geographically, rather than metaphysically. Nye v. United States, 313 U.S. 33, 48-49 (1941) (interpreting 18 U.S.C. § 241 language of "near to" as "physical proximity not relevancy").
\[^{291}\] Dixon, 509 U.S. at 694-95.
\[^{292}\] PRETRIAL JUSTICE INST., *supra* note 100 (remarking on "growing practice" of imposing "non-financial conditions [of release] in combination with a money bail").
Although *Dixon* might have stalled the use of contempt charges in state courts, that does not seem to be the case. In ruling that double jeopardy precluded only charges based on identical elements, the Court left open a fairly wide swath of terrain. One of the defendants discussed in *Dixon*, for instance, could not be tried for simple assault after having been convicted for contempt on that basis, but he could still be tried for the more serious offenses of assault with intent to kill and several counts of threats. Moreover, in many cases, bringing contempt charges may be appealing as a means of inducing plea bargaining with regard to other substantive counts.

For instance, domestic violence prosecutors have increasingly used contempt charges in order to secure convictions in otherwise difficult to prosecute cases. In Professor Jeannie Suk’s pathbreaking article, *Criminal Law Comes Home*, she supplies a vivid account of the use of protective orders (both from civil courts and as release conditions) to provide a vehicle through which to bring later criminal charges based on violations. Protective orders frequently issue—even against the express wishes of the victim—and require that the defendant not contact the victim or even return to what may be their shared home. She explains the advantages of such orders as “evidentiary and preventive”: victim cooperation can be difficult to secure in domestic violence prosecutions and “[a] violation of a protection order is far easier to prove than the target crime.” Moreover, the displacement is intentional: it is the state that seeks the “de facto divorce,” not the victim. In this respect, “the reason the order exists is to be violated, so as to set in motion criminal prosecution for proxy conduct.” Accordingly, she labels such efforts a form of “proxy” prosecution.

Professor Suk provides an empirical snapshot of this prosecutorial approach at work, looking specifically at New York County. She notes that in the third quarter of 1998, 65% of domestic violence cases were charged as assault and 15% as criminal contempt. The year 2001 reflects similar numbers. The fact that the underlying offenses were largely misdemeanors enhanced the

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293. Id. at 700.
296. Id. at 48. Several jurisdictions have expressly held that consent of the victim is not a defense to violation of a stay away order. State v. Branson, 167 P.3d 370, 373 (Kan. 2007); cf. Ba v. United States, 809 A.2d 1178, 1183 (D.C. 2002) (dodging consent question by noting that victim revoked any alleged consent).
297. Suk, supra note 295, at 18.
298. Id. at 19.
299. Id. at 10.
300. Id. at 21.
301. Id.
302. Id. at 43 n.172. The remaining charges included other forms of harassment or property offenses. Id. (citing Richard R. Peterson, N.Y. CRIMINAL JUSTICE AGENCY, COMPARING THE PROCESSING OF DOMESTIC VIOLENCE CASES TO NON-DOMESTIC VIOLENCE CASES IN NEW YORK CITY CRIMINAL COURTS 30 (2001), http://www.cjareports.org/reports/dv01.pdf).
303. Id.
prosecutorial appeal of the strategy because the sentence for the target offense is likely to approximate that for contempt.304

This approach is in practice across the nation.305 Considering that one-third of felony defendants in a 2002 survey of fifteen large urban counties were charged with domestic violence offenses,306 and that presumably an even larger percentage of state court misdemeanor defendants are so charged,307 it is apparent that such prosecutions may be occurring on a wide scale.

But contempt prosecutions are not confined only to the realm of domestic violence. Perhaps in response to the widespread formation of pretrial services agencies across the nation, conditions of release such as drug testing, job or educational training, and rehabilitative programs have become standard parts of release.308 In some jurisdictions, imposition of a “stay away” from a block or area has become a regular bail term.309

And, of course, as release conditions have proliferated, so too have reported violations of those conditions.310 In 2000, for instance, 32% of released felony defendants in the seventy-five most populous counties committed some misconduct while in a release status, including failure to appear, arrest for a new offense, or “some other violation of release conditions.”311 And, in general, the use of contempt as a means of enforcing such release conditions has become quite common. Courts have upheld prosecutions for violations under contempt laws as well as statutes that expressly penalize violations of release conditions. For instance, in Grant v. United States, the District of Columbia Court of Appeals held that the defendant could be convicted for criminal contempt for

304. *Id.* at 54 & nn.226–27 (describing sentencing provisions).


308. Byrne & Stowell, supra note 92, at 32.


310. Byrne & Stowell, supra note 92, at 32, 37; Kingsnorth, supra note 91, at 164. Notably, the number of detained defendants also increased during that time, so the rise in imposition of release conditions and violations might arguably appear incongruous. Byrne & Stowell, supra note 92, at 32, 36; *see also id.* at 36–37 (noting that increase in imposition of release conditions is surprising, given that a greater percentage of all defendants are detained, and dismissing argument that profile of offenders has changed).

311. Rainville & Reaves, supra note 55, at 21. Only 16% of all released defendants committed new offenses, and roughly 22% of all released defendants failed to appear, so even assuming no overlap, a not insignificant number of defendants committed a less substantial violation. *Id.* at 21–22.
using drugs and failing to submit to urinalysis as ordered by the court.\textsuperscript{312}

It may be contested whether an addict arrested for drug possession, who then is charged with violating release conditions for testing positive, has committed a "core" or "obstinacy" offense. But whatever the categorization, such charges mark an expansion from traditional notions of the contempt power. Other anecdotal cases suggest a sensitivity to otherwise minor transgressions that bolsters the obstinacy account. For example, in one recent case in Maine, a man was charged with a felony violation of an order after "displaying his middle finger to someone who had a protection order against him."\textsuperscript{313} Although by no means commendable behavior, such actions surely fall afield of the core of the offense. Thus, it seems that the practice of charging contempt for violation of court orders—typically release conditions or stay away orders—creates fairly fertile ground from which obstinacy crimes may sprout.

Finally, although arguably distinct from the strategies enumerated in this section, one additional emerging prosecutorial practice merits mention. Increasingly, "municipalities... across the United States have adopted a range of novel social control techniques, including civil injunctions, loitering-with-intent laws, new applications of trespass law, [and] off-limits orders."\textsuperscript{314} For example, some jurisdictions have "convey[ed] public streets and sidewalks to local property owners" to facilitate the removal of undesirables from public spaces through use of trespass or contempt charges.\textsuperscript{315} The practice was recently upheld by the Supreme Court in \textit{Virginia v. Hicks}.\textsuperscript{316}

These vary slightly from the other regimes discussed here in that they may require collaboration from those outside of the judicial system.\textsuperscript{317} Yet, they resemble process offenses in that they are readily generated from within the system. Indeed, in some respects such tactics sweep even more broadly, because they impose a condition without first requiring the initiation of criminal prosecu-

\begin{itemize}
\item \textsuperscript{312} Grant v. United States, 734 A.2d 174, 178 (D.C. 1999); see also Lee v. Municipality of Anchorage, 70 P.3d 1110, 1113 (Alaska Ct. App. 2003).


\item \textsuperscript{315} Herbert & Beckett, \textit{supra} note 314, at 8.

\item \textsuperscript{316} Virginia v. Hicks, 539 U.S. 113, 124 (2003) (upholding housing authority policy to issue barring notices to individuals, without any procedural safeguards, and then secure arrests when the individual violates the notice). In \textit{Hicks}, the city of Richmond conveyed several public streets around a public housing project to the local housing authority, a political subdivision of the state. \textit{Id.} at 115–16. Thereafter, a police officer showed Hicks a "barring notice" informing him that he could not return, and he was arrested for trespass when he did. \textit{Id.} at 117. The court upheld the policy. \textit{Id.} at 124. At the time of these events, Hicks' mother, children, and his children's mother all lived at the housing authority, and after he received his barring notice, he twice requested permission to enter the area and was twice denied. Brief for Respondent at 8–9, \textit{Hicks}, 539 U.S. 113 (No. 02-371).

\item \textsuperscript{317} However, those outsiders are nonetheless often state or local employees such as housing authority administrators.
\end{itemize}
tion (say, via a gang injunction or no trespass order). One study of Seattle’s practices estimated that the “Seattle Police Department issues between 9,000–10,000 criminal trespass admonishments a year,” and that such offenses now constitute 10% of the municipal cases filed in Seattle. The same report notes that a similar program in New York City resulted in a “jump in trespass arrests” there.

In sum, prosecutors and courts have breathed new life into contempt and similarly styled release-condition statutes. This invigoration may be the result of the expansion in pretrial release conditions, or a reaction to urban unrest, or a simple reflection of issue-specific prosecutorial strategies such as domestic violence intervention or community protection. Regardless of the reason, however, it is evident that a vibrant practice of process charging of this variety is currently taking place in state courts.

E. PERJURY

The last of the process offenses discussed here is perhaps the most venerable: perjury. Like false statements, perjury proves readily amenable to pretextual and obstinacy charging, even if it requires the additional hurdle of the prior statement having been made under oath. With the rising popularity and breadth of grand jury hearings—both as an investigatory matter in federal courts and in their screening roles in state courts—perjury supplies a powerful tool to discourage witness deviation from earlier testimony or penalize statements made to the government even in the absence of court or counsel.

In Professor Richard Underwood’s anthology of perjury, he notes references in Roman law to punishment for perjury and characterizes it as a potent charge to levy against an enemy throughout history. Professor Stuart Green likewise notes that “[a]t common law, perjury was considered one of the most odious of criminal offenses.” Indeed, according to Professor Green, “[u]nder the Code of Hammurabi, the Roman law, and the medieval law of France, the punishment for bearing false witness was death; in the colony of New York, punishment included branding the letter ‘P’ on the offender’s forehead.”

Perjury charges typically present a slightly higher hurdle for prosecutors, in that perjury—unlike, for instance, false statements—requires evidence of falsehoods made under oath. The historical interest protected by the offense of perjury “is for the wrong done to the courts and the administration of justice,” in terms of both the damage done by the falsehood itself as well as that done to the

319. Id. at 25 n.12.
320. Id. at 12.
323. Id. at 174–75.
public institution. But perjury then is very different from perjury now. In the words of Professor Stuntz: "In Blackstone's day, as now, perjury was defined as telling material lies under oath in a legal proceeding. But while the nominal definition was the same, perjury's actual coverage was much narrower one or two centuries ago than it is today." There were simply fewer occasions to take an oath and not tell the truth—no depositions, no grand juries, no regular legislative and administrative hearings. Accordingly, "[p]erjury was thus limited to a narrow, and almost always very bad, category of lies: material falsehoods told by non-party witnesses in court cases."

Today the breadth and scope of perjury offenses sweep much more generously. All fifty states punish perjury according to a range of different rules and regulations. In the federal system, three statutes expressly cover false statements made under oath; prosecutions may also be brought under the omnibus obstruction and false statements clauses. The original federal provisions were enacted in the federal codification of 1948 and essentially mirrored the 1909 provisions of the same names. Section 1621 proscribes false statements made under oath in a range of contexts, while § 1622 prohibits subornation of perjury.

Those statutes served as the basis of federal perjury liability until 1970, when Congress sought to "facilitate federal perjury prosecutions" by providing for a new basis of liability. Congress thus enacted § 1623, which, like § 1621, punished false statements under oath in a variety of contexts. The two provisions contain three important points of distinction. First, and most importantly, Congress expressly eliminated a "two witness" requirement for conviction like the one that courts had imposed on § 1621 and allowed convictions to stand on "irreconcilably inconsistent declarations under oath" alone.

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324. United States v. Manfredonia, 414 F.2d 760, 764 (2d Cir. 1969); see also Green, supra note 2, at 1612 (noting that harm is both the "untrue court testimony" and the "damage to the authority of the government").
326. Id. at 1880–81.
327. Id. at 1881.
333. 18 U.S.C. § 1621 (2006); see also Davis, supra note 330, at 833. Section 1622 penalizes subornation of perjury.
336. See Davis, supra note 330, at 844 (noting that one witness and corroborating evidence had been held to suffice).
ond, § 1623 penalized not just those who utter or subscribe to falsehoods under oath but also those who “make or use” any false statements. Third, by allowing for conviction on the basis of two irreconcilable statements under oath, § 1623 no longer required the government to prove which of the two statements was false.

However, this history should not be read to suggest that perjury liability has only expanded in the past thirty years. The new enactment was narrower in two respects: it applied to a smaller range of proceedings than § 1621 and it expressly provided for a defense of recantation (whereas § 1621 had a narrower common law recantation defense). In addition, the Supreme Court dramatically circumscribed the scope of perjury liability in 1973 in Bronston v. United States, which held that § 1621 required a literal falsehood under oath and not just a deliberately misleading answer.

The range and rates of perjury prosecution prove as difficult to capture as are all process offenses. Yet again, many prominent examples stand out. Alger Hiss is the Al Capone of pretextual perjury prosecutions: because the statute of limitations had expired on espionage, the government instead successfully pursued perjury charges. More familiar may be the long list of prominent persons charged with or convicted of perjury, including Barry Bonds, Tammy Thomas, Lil’ Kim, Scooter Libby, Mark Fuhrman, James Zimmerman, Larry Stewart, Kwame Kilpatrick, and others. Perhaps the most notorious is former President Bill Clinton, who was accused of lying under oath in a deposition about his now-infamous “sexual relations with that woman, Miss Lewinsky.”

Hard findings about perjury filings can be a subject of contention. Professor

338. Davis, supra note 330, at 846.
339. Id.
340. Id. at 845; Sanchirico, supra note 3, at 1259–60.
341. Davis, supra note 330, at 847.
342. Bronston v. United States, 409 U.S. 352, 353 (1973). In Bronston, the defendant was asked whether he ever had a Swiss bank account, and he answered that his company had one. Id. at 354. The Court found this answer, although evasive and nonresponsive, not to constitute perjury. Id. at 357.
346. Constance L. Hayes, Ex-Chief of Federated Stores Is Indicted on Charges of Perjury, N.Y. TIMES, Jan. 5, 2005, at C2 (reporting on retired chairman of department store chain indicted for statements made about conversations he had regarding product sales to competitor store).
Chris Sanchirico has recounted how, in the midst of the Lewinsky scandal, news outlets variously characterized the President's prosecution as either wholly anomalous or common.\textsuperscript{350} A \textit{USA Today} article claimed that perjury prosecutions were rare and concluded that "[t]he more serious crime of suborning perjury—encouraging someone to lie under oath—is more likely to be prosecuted."\textsuperscript{351} The \textit{New York Times} similarly reported that federal perjury prosecutions were uncommon and constituted roughly 0.2% of all federally filed felonies in 1997.\textsuperscript{352}

But then, in Professor Sanchirico's words, "the news pendulum swung the other way."\textsuperscript{353} One headline declared: "Indictments for Perjury Commonplace."\textsuperscript{354} The \textit{New York Times} amplified its earlier appraisal with an article suggesting that "people are prosecuted for what might be called small lies" quite commonly in state courts.\textsuperscript{355} Specifically, the article cited an Ohio youth arrested for underage drinking who claimed under oath that he was never read his rights; the youth was then prosecuted and convicted for perjury and received a sixty-day sentence.\textsuperscript{356} The article referred to 395 "perjury cases" in New York in 1997 and 4,318 such cases in California.\textsuperscript{357} Close review of a hundred cases in state and federal court, the author wrote, revealed that "[p]erjury charges are brought in civil cases far less frequently than in criminal cases."\textsuperscript{358}

Professor Sanchirico, attempting to validate the California statistics, agreed that there were 4,318 felony arrests for perjury in the state that year, but noted that the rate of conviction appeared lower.\textsuperscript{359} In fact, "though it may be true that the proportion of perjury arrests in California (1.3%) is six times larger than in the federal system, the percentage of all perjury convictions is about the same across the two systems (.2%)."\textsuperscript{360} However, as Professor Sanchirico himself acknowledges, "the precise meaning of these kinds of arrest, prosecution, and conviction numbers is far from clear" because numerous hurdles prevent an

\textsuperscript{350} Sanchirico, supra note 3, at 1241–42. The same type of coverage has repeatedly flared up in the wake of more recent scandals. \textit{See}, e.g., Adam Liptak, \textit{Threats and Responses: The Law: Prosecutions for Perjury in Legislative Settings Are Unusual}, \textit{N.Y. Times}, March 31, 2004, at A21 (claiming "perjury prosecutions for testimony given in legislative settings are not common").

\textsuperscript{351} Dennis Cauchon, \textit{Perjury Charges Rare in Civil Cases}, \textit{USA Today}, Jan. 29, 1988, at 5A.

\textsuperscript{352} Sanchirico, supra note 3, at 1241.

\textsuperscript{353} Id. at 1242.

\textsuperscript{354} Gil Klein & Mark Johnson, \textit{Indictments for Perjury Commonplace}, \textit{TAMPA TRIB.}, Sept. 18, 1998, at 8 (stating that "[f]ederal prosecutors . . . have indicted plenty of people, including politicians, for perjury").


\textsuperscript{356} Id.; \textit{see also} State v. Abrams, 178 P.3d 1021, 1025 (Wash. 2008) (requiring jury to determine materiality of falsehood in case where defendant testified that he was not read his Fifth Amendment rights).

\textsuperscript{357} Glaberson, supra note 355.

\textsuperscript{358} Id.

\textsuperscript{359} Sanchirico, supra note 3, at 1243.

\textsuperscript{360} Id.
One interesting consequence of Professor Sanchirico's efforts to verify the perjury rates, however, was his observation that the lion's share of California's perjury arrests "derived from a single county's idiosyncratic practice of adding perjury charges to welfare fraud charges." Because perjury carried a higher penalty, it both showed up as the "most serious offense" charged and also served as effective leverage to secure conviction on the lesser, substantive fraud count. Plea-inducing practices such as this, which may be fairly categorized as pretextual uses of the perjury charge, likely exist in enough isolated jurisdictions to make their numbers worth closer scrutiny.

Without more precise information, it is impossible to ascertain circumstances under which perjury charges are most often brought. In the federal system, in which perjury has received a great deal of recent attention from both the legislative and executive branches, such insights have proven instructive. Perjury is the kind of offense that lends itself—as do all process offenses—to easy exploitation for political purposes, which in turns ripens it for obstinacy and pretextual charging. As Professor Underwood observed, "[o]ne gets the impression that, more often, the law [of perjury] has been invoked for revenge, or for the purpose of realizing some political end . . . , or for the purpose of nabbing a criminal who might otherwise be difficult to nab, or dare I say it, for the purpose of gaining some tactical advantage." If such conclusions can be drawn about practices that take place in the bright lights of federal prosecutions of celebrities, then one can only wonder what occurs in the shadowy corners of low-level state courts.

V. PROCESS PROSECUTIONS RECONSIDERED

Although the frequency and increasing popularity of process charges may be the subject of some dispute, it is clear that process charging occurs—whether in the form of core, pretext, or obstinacy prosecutions—with some regularity. Overall, the narrative is one of expanding criminalization as evidenced by the enactment of pertinent statutes, their interpretation by the courts, and their implementation by actors within the system. This alone, perhaps, is hardly remarkable. Most of the stories about the past one hundred years of criminal justice read the same, and categorically speaking there may be myriad reasons why a particular offense gained greater currency.

What is noteworthy, however, is the lack of concerted academic attention devoted to these types of offenses and the overall lack of empirical information

361. Id. (observing problem of "most serious offense" charged coding standard obscuring data, for instance).

362. Id. (noting further that, because perjury carried a longer sentence, it showed up as the "most serious offense" charged even though "[t]ypically, prosecutors in this county would then drop the perjury charges and conviction would follow only on welfare fraud").

363. Id.

about process prosecutions. This is particularly true given that the institutions that enforce process crimes are vindicating their own interests, which creates the potential for self-dealing and abuse.

The handful of legal scholars that have wrestled with the normative implications of a robust practice of process charging have focused almost exclusively on one or two questions: the philosophical justifications for punishing "core" process crimes at all and the philosophical justification for pursuing "pretextual" cases (usually in the form of process violations). Given that this article is the first to identify the "obstinacy" offense, it goes without saying that no discussion of obstinacy charging—either explaining its emergence or analyzing its legitimacy—exists. In light of the constraints of space, and building from the literature surrounding "core" and "pretextual" charging, the remainder of this Part focuses on obstinacy charging as a means of instigating a more comprehensive conversation about process offenses generally.

A. THREE THEORIES ON EMERGENCE OF THE OBSTINACY OFFENSE

A thorough examination of obstinacy offenses requires some explanation of how and why they have emerged. Of course, such understandings cannot be scientifically established, and several possibilities present themselves. In exploring the alternatives, this section directly embraces Professor Garland's injunction to "move the sociology of punishment from a series of more or less singular interpretations towards a more multidimensional framework in the belief that this will improve analysis and deepen understanding."

Thus, in advancing multiple theories, I do not mean to privilege any particular account.

1. Increased Commission or Detection

The easiest explanation for the proliferation of obstinacy charging is that such offenses are now more commonly committed or detected. This thesis assumes that change has not so much occurred in the substantive scope of process crimes or the readiness with which prosecutors punish. Rather, defendants either increasingly commit marginally contumacious conduct or such conduct is more commonly detected than it was in the past.

There may be some truth to this theory. Investigations, grand jury hearings, and court proceedings have all become much more costly, frequent, and time-consuming. Court-imposed conditions of release have become more common and comprehensive. Certainly an increase in the opportunity to commit process offenses generates a greater likelihood not only of raising the raw number of core violations, but also inviting new forms of underlying behavior that encompass peripheral, obstinacy-type conduct.

Moreover, as the illustrations given in the preceding Part suggest, the state's detection apparatuses have unquestionably improved. Computers alone have

augmented the state's ability to track compliance with court orders and appearances, generating easier fodder for charges like contempt or failure to appear. Technology has likewise arguably, in light of the prevalence of electronic and recorded means of communication, delivered far easier tools for uncovering and proving false statements or obstruction offenses.

But although the increase in opportunities to commit process offenses, and the likelihood that such offenses would be detected, offers one piece of the puzzle, it nonetheless does not solve the entire thing. After all, the evidence in the preceding Part suggests—although by no means conclusively establishes—that it is not simply that a greater number of core process offenses are committed today than in the past. More importantly, attributing the change to an increase in commission or detection seems woefully incomplete as a theory, in that it does not also explain prosecutorial and judicial willingness to permit marginal or technical process violations to serve as the basis for conviction.

2. Slippage from the Approval of Pretext Cases

Perhaps the emergence of obstinacy offenses could instead be viewed as a direct lineal descendant of pretextual charging, and even as a consequence of habit rather than conscious choice. The acceptance of conventional pretextual prosecutions—in which a defendant deemed guilty of a substantive offense is pursued for a process crime—might have eased acceptance of obstinacy charging generally because prosecutors and judges in ordinary cases were willing to push the substantive envelope in service of the pretextual goal. That is, as the substantive content of process offenses widened to sweep in marginally offensive activity committed by very offensive perpetrators (for example, calling it “contempt” to have a single positive urine test in order to convict a hard-to-get drug dealer), there followed a natural drift from limiting such cases on the basis of the target’s actual underlying culpability (drug dealing) to also approving prosecutions without a pretextual motive (pursuing all defendants with single positive urines, without reference to added culpability).

By means of example, take the program that encourages failure to appear charges in domestic violence cases. It originates to secure convictions in otherwise difficult cases, say because the witness recants or refuses to participate even though the government firmly believes in the defendants’ guilt. To further the underlying goals of the program, prosecutors might pursue, and courts allow, charges in every possible situation, including for trivial conduct like appearing an hour late. Over time, however, the pretextual aspect begins to drop out. Charges are brought for failure to appear, no matter how marginal the conduct, regardless of whether sufficient evidence supports the guilt of the defendant for the original substantive offense.

Then the habit spreads. Other defendants—say ordinary misdemeanants—routinely are charged for trivial violations as well. The initial animating principle—to find a pretextual avenue to obtain convictions in otherwise problematic cases—gets lost in the routine of day-to-day charging. No one pauses to ask
whether an obstinacy charge is appropriate in the particular case. Moreover, even if some doubt were expressed, curtailing the practice from the bench would prove difficult: judges rightly fear that rejecting obstinacy charges in non-pretextual cases would foreclose endorsement of obstinacy charging in the pretextual cases of which they approve.

The emergence of obstinacy charging according to this account therefore reflects the legacy of both the habit and the success of charging fringe process violations in pretextual cases. They are the foreseeable side effect of the generally overwhelming breadth of discretion granted to the executive by the legislative and judicial branches. That discretion is enabled by the copious number of substantive criminal offenses and their dwindling definitional constraints. Wholesale prosecutorial dominance may have become such a familiar habit, in a sense, that efforts aimed at restricting its expression have become a lost art.

Perhaps less perniciously, it may also be that the existence of pretextual charging muddles the distinction between pretext and obstinacy for criminal justice actors. For example, a program might pretextually use process offenses to incarcerate domestic abusers against the wishes of their partners. But the same charge may start to look more like an obstinacy offense if the program ceases to use the process crime as a means through which to attain its goal but instead treats the process offense as independent evidence of intractable deviance or incorrigibility. Consider a defendant alleged to have beaten his spouse, whom nonetheless refuses to cooperate with the prosecution. A contempt charge—say for continuing to see the victim—might look like a sensible pretextual strategy if the government desires to separate the parties via conviction and incarceration. But the prosecution creeps perilously towards sheer obstinacy if the spouse credibly recants, perhaps by admitting to making a false accusation out of vindictiveness, and yet the government still pursues contempt charges out of its own outrage that the defendant (and the complicitous victim) defied its separation command. Is the contempt charge evidence of the defendant’s deviance, or is it evidence of the state’s frustration at encountering opposition to its wishes? Of course, the difficulty of separating those two possibilities in the actual day-to-day practice of prosecutorial charging reinforces the credibility of this account.

3. Resource Constraints + Systemic Disrepute = Bully

Both the preceding explanations no doubt play some role in understanding the nature and trajectory of emerging obstinacy charging practices. But this Article proposes a third, perhaps more controversial theory. Namely, that the emergence of the obstinacy offense is most plausibly the natural offspring of the two defining traits of contemporary criminal justice: that it is intensively resource constrained and largely disrespected. Notably, however, although these two characteristics describe both the federal and state systems, the dynamics that manifest obstinacy charge practices differ in each context.
Specifically, in federal courts, obstinacy charges fortify the financially strapped government against the power and influence wielded by monied defendants. In financial fraud or other white collar cases, many defendants can mount a defense that outspends the government. Such cases are also often complicated and difficult to prove: they entail voluminous documents, attenuated evidentiary chains, and perhaps technical sophistication or expertise. Conducting a full-scale investigation can be extraordinarily costly, and persuasively presenting the case to a jury may be extraordinarily difficult. During investigation and at trial, the defense counsel can bog down the government with motions and complex details as the bottomless pockets of resourced clients enable the filing of every conceivable motion and the pursuit of every possible line of defense.

Obstinacy offenses offer the government a cheap and easy ticket out of this problem. Either the prosecutor can layer process charges upon substantive offenses in an effort to coax a plea from a defendant leery of the probability of acquittal on a laundry list of charges, or the government can simply drop the substantive offense altogether and take to the jury a cleaner, easier, more readily presentable process case. After all, why pursue a complicated financial fraud case when a clear-cut false statements charge is available?

Obstinacy charges also vindicate the state’s own interest in showing these defendants who is boss. The ability to outmaneuver the government—the very idea that the outcome of a case can be bought rather than determined by the rule of law—is itself a signal of a defendant’s disrespect. Obstinacy charges allow the state to debunk any notion that resourced defendants are “above the law.” Did the defendant tell the grand jury a self-serving white lie? Or call the corporate lawyer instead of talking to the investigating agents? The obstinacy offense serves not only as the primary means of convicting certain otherwise litigious defendants, but it also signals the state’s superior and omnipresent authority. The process offense is the substitute for the substantive offense—a reminder that, whether the underlying behavior was lawful or lawless, to dare to oppose the government’s investigation will itself be treated as an offense.

In state courts, obstinacy charging serves the needs of a slightly different master. Here, as in federal courts, obstinacy charges help to compensate for the state’s lack of both resources and respect. But the difficulty in state courts is not so much the well-resourced, arrogant defendant as it is the overworked, beleaguered agents of law enforcement. Police officers and prosecutors cannot thoroughly investigate and fully adjudicate all of their cases and would encounter numerous obstacles and hostilities if they tried. State actors need shortcuts to circumvent not the threat of one overwhelming defense, but a million tiny ones.

For instance, obstinacy charges legitimate street searches that in turn generate the evidence necessary to ease the path of prosecution. They encourage quick plea bargains or lengthier sentences for substantive violators—not just because those violations are hard to prove as in the federal courts, but also because prosecutors can ill-afford any additional trials. As one attorney put it, “[t]here are a lot of bail jumping charges issued in order to get an easy plea or
secure a conviction in a case where [the prosecution is] less likely to get it.”

It is a means of winnowing cases by coercing plea bargains or ensuring punishments in otherwise questionable cases.

Some might argue that obstinacy charges are simply the natural consequence of a modern, diverse, heterogeneous society in which the bonds between citizen and state become readily attenuated—where finding witnesses or adjudicating defendants proves more difficult than just ambling down the street. But it is also symptomatic of a system that stands on tenuous footing, and that cannot absorb the slightest insults to its authority. The problems of resources and respect converge in obstinacy offenses: a crowded docket can little accommodate a late defendant just as an overworked cop or prosecutor can little tolerate an evasive or recalcitrant witness. Indeed, the frequency with which the individual encounters the formal apparatus of the state not only provides greater opportunity for a violation (hold enough hearings or ask enough questions and the defendant is bound to trip up eventually), but it also tends to generate greater ire when the individual does not submit. The system is simply stretched too thin for error, even of the most trivial kind: one slight can bring the wheels of justice screeching to a halt and transform a small insult into one of epic proportions.

The fact that state court defendants tend to be disproportionately poor and members of minority groups may exacerbate this inclination. Demographically speaking, such defendants may be less likely to feel or show respect to traditional figures of authority such as police, prosecutors, or judges, whether due to different beliefs in the legitimacy of law enforcement or other cultural values. Poor and minority defendants may also be more likely, whether deliberately or incidentally, to overtly flout the norms of the majority in dress, speech, and cultural and personal habits. Their words and their actions may read to the establishment as a refutation of the values that the criminal justice system valorizes and aims to instill (such as timeliness, cooperation with authority, or the honor and integrity of serving law enforcement’s interests).

The obstinacy charge, then, functions for these indigent state defendants as it does for their richer federal counterparts: it represents an assertion of the state’s superior and ultimate authority. The state’s inability to bring defendants to heel outside of court through the informal means of social norms prods the machinery of justice into action to coerce submission and compliance.367 In this


367. It is worth noting, although beyond the scope of this Article, that the use of process crimes against jurors and attorneys also in some instances is properly classified as obstinacy prosecutions and arguably is a product of the same pressures enumerated above. See, e.g., People v. Kriho, 996 P.2d 158,
respect, it is perhaps no coincidence that so many process charges evolved historically from the core offense of contempt: the ultimate snubbing of the nose of the authority of the court.

In sum, in both the state and federal systems, the emergence of obstinacy charging can be viewed as the product of an overleveraged system that must resort to coercion and bullying in order to continue to function. The state-individual relationship no longer represents a mutually beneficial contract, but rather the condition of chronic deprivation in resources and respect convert the state into a coercive tyrant. In this configuration, the individual is either "with us or against us"; there is no longer room for law-abidingness that is not wholly submissive to the wishes of the government. To defiantly feed a parking meter or to let a job interfere with a court hearing is to affront—criminaly—the primacy of the state's interests. But a state that can do its work only by relying on forcible compliance does not garner voluntary, stable respect and obedience from its people, and instead threatens to unravel from the core. That eventuality is the subject of the final section.

B. NORMATIVE IMPLICATIONS

Few could argue with process prosecutions aimed at rectifying core violations. To be sure, several philosophers of punishment have attempted to tackle the theoretical underpinnings of the precise harm redressed by such offenses. But if all process prosecutions concentrated on core violations, then it seems reasonable to suggest that few objections could be raised.\textsuperscript{368} It is because process prosecutions tend to spill outside of this "core" that efforts to attend to the moral legitimacy of process prosecutions tend to focus elsewhere. Specifically, the extant scholarship has focused mainly on the concerns raised by pretextual prosecutions, particularly those in federal court.\textsuperscript{369}

The remainder of this section amplifies the extant conversation about the concerns raised by process charging by focusing on the two central insights of this paper: the vibrancy of state court process charging and the existence of the obstinacy offense. I argue that the familiar concerns about transparency, state legitimacy, and self-dealing that arise with regard to pretextual charging are intolerably heightened with respect to obstinacy offenses.

\textsuperscript{368} FEINBERG, HARMLESS WRONGDOING, supra note 15, at 37 (warning that "by enlarging our conception of what can count as 'harm' and what can count as 'wrong,' the acknowledgement of collective harms may render respectable some versions of 'impure legal moralism in the broad sense' that the liberal, given his respect for autonomy, has every motive to exclude").

\textsuperscript{369} See, e.g., Litman, supra note 3; Richman & Stuntz, supra note 3.
1. Accountability

Concerns about transparency and accountability mark the crux of the process-as-pretext complaint and serve as the locus of most scholarly debate. Critics of pretextual prosecution worry about prosecutorial abuse, procedural injustice, and "horizontal equity, that is, the principle of like treatment of similarly situated persons." They cite the dangers of unconstrained exercises of prosecutorial discretion and government power, along with due process concerns of lack of notice. Moreover, some critics worry about the expressive function of criminal adjudication—both for society as a whole and for the deterreable criminal element. Stated succinctly, "[c]harging criminals with their 'true' crimes makes criminal law enforcement more transparent, and hence more politically accountable. It probably also facilitates deterrence." In contrast, pretextual prosecutions "can create serious credibility problems" for law enforcement, in that they "mudd[y] signals" to would-be criminals who internalize a lesson about crossing Ts and dotting Is, rather than about desisting from committing substantive offenses.

In contrast, proponents of pretextual prosecutions argue that although the potential for abuse always exists, prosecutorial discretion can be wielded responsibly. Because it is "a waste of time and resources" to pursue pretextual prosecutions "based on poorly grounded suppositions about the defendant," they argue that the selection process is likely to be reliable. As a safeguard, advocates note that pretextual cases still receive full procedural justice and are limited at sentencing to the statutory maximum attached to the pretextual offense. Moreover, they argue, prosecutors (especially federal prosecutors) frequently apply selection criteria to determine which of many possible cases to pursue, and reliable information about a particular defendant's criminal activity ought to inform that decision. Such background information already serves to distinguish between suspects—whether in charging or sentencing or other phases of the process, thereby ameliorating particularized concerns about eq-

370. Compare Richman & Stuntz, supra note 3 (arguing against pretextual prosecution), with Litman, supra note 3, at 1159–61 (arguing in favor).
371. Litman, supra note 3, at 1148 (endorsing pretextual prosecutions but listing critics' complaints).
372. Richman & Stuntz, supra note 3, at 585–86 (citing "strong social interest in non-pretextual prosecution").
373. Id. at 583.
374. Id. at 583, 586; see also Green, supra note 2, at 1536 ("[A]pplying criminal sanctions to morally neutral conduct is both unjust and counterproductive. It unfairly brands defendants as criminals, weakens the moral authority of the sanction, and ultimately renders the penalty ineffective. It also squanders scarce enforcement resources and invites selective, and potentially discriminatory, prosecution.").
375. See, e.g., Litman, supra note 3, at 1178–79.
376. Id. at 1175.
377. Id. at 1174–77.
378. Id. at 1160–61; see also id. at 1167 (adding that in "the great majority of federal cases that employ the Al Capone approach," the determination to charge "rest[s] on differences between putative defendants whose moral relevance is relatively uncontroversial").
uity.379 Indeed, to the extent that the concern is that like defendants are not treated alike, such inequities so deeply pervade the criminal justice system that they are hardly endemic only to pretextual practices.380

But because critics have focused exclusively on federal courts, they have failed to consider the ways in which state- and local-level prosecutions (whether for pretextual or obstinacy reasons) magnify these concerns. In particular, although the conventional wisdom holds that state prosecutions are subject to greater accountability and local control, there is ample evidence that this is not the case.

As has previously been noted, process charging practices already lack true transparency in either federal or state courts. They are not documented by conventional statistical instruments, and they rarely receive categorical public attention. But state and local prosecutions are particularly opaque. It might be expected that a local prosecutor who relentlessly pursues obstinacy offenses would readily raise the ire of the local community, whereas an appointed federal prosecutor can hide behind national policy. Yet there are many reasons why the opposite may in fact be the case.

First, although local, often elected prosecutors tend to be more directly accountable to their constituents than their appointed counterparts, in practice this accountability is largely symbolic. In general, the public has little interest in monitoring the workaday actions of the prosecutor. What generates public attention is typically the loss of a high-profile case or the implementation of a broadly applicable, unfavorable policy, not the vigorous pursuit of trivial process charges against a largely indigent population. In contrast, federal prosecutors often pursue high-profile, newsworthy targets, and too much trifling over perceived obstinacy matters may result in the loss of public confidence. The lower visibility of state pretextual charging practices may make them particularly amenable to abuse by the government: there may actually be greater checks against abuse in the well-watched prosecution of one public figure than the obscure prosecutions of thousands of poor minority-group members.

Second, even if such prosecutions are visible, the affected constituency often wields far less political and socio-economic power than its federal counterpart. The vast majority of defendants in state and local courts are poor, politically powerless individuals who may even be formally disenfranchised as a result of prior convictions. For this group, it may be unrealistic to expect a critical mass of hands on the voting booth lever, much less imagine that they could operate as reins. Large numbers of indigent minority-group members simply make less politically salient parties than even small numbers of well-resourced federal defendants.

Third, because pretextual state process prosecutions tend to target group-based classes versus individuals, they may be prone to greater degrees of error.

379. Id. at 1162–63.
380. Id. at 1163–64.
Recall the discussion in the preceding Part about using contempt or failure to appear to secure convictions against alleged domestic abusers or false statements for cases of welfare fraud. Both examples illustrate how state process charging tends to be less about targeting individual defendants than about targeting classes of defendants. Rather than the federal court model of catching a specific bad gangster (Al Capone), the model is to get all the bad gangsters (any Latin Kings member). Yet to the extent that we trust prosecutors' abilities to accurately recognize the leaders of the mafia, we may trust them less to accurately identify the members of the Mafioso rank and file.

Fourth, it might be assumed that the “mandatory” nature of the state and local docket—in that prosecutors simply cannot ignore murder, rapes, and robberies for instance—as opposed to the entirely discretionary character of the federal docket, would result in less opportunity and fewer resources to engage in frivolous obstinacy charging. But in fact, the “mandatory” docket comprises only one small fraction of most state and local dockets. The vast majority of jurisdictions fill their courtrooms not with sensational felonies, but with low-level misdemeanor and traffic violations. And it is in these very cases—large numbers of all but invisible petty transgressions that are charged and pleaded out in court in a single day—that obstinacy charges become a valuable weapon to expedite the judicial process. Even the huge numbers of drug defendants are in large part “discretionary,” in that prosecutors can widely vary in the vigor with which they pursue such offenders. State dockets thus start to seem as “discretionary,” if not more so, than their federal counterparts; the major difference is that no one would dream of charging and convicting a federal defendant in a single day, much less scores of them.

Fifth, state and local charging practices are more amenable to abuse in obstinacy charging because they are diffuse, dispersed, and locally idiosyncratic. The most complete data on criminal justice systems are those collected from federal agencies and courts for obvious reasons: their centralization makes reporting and analyzing such information possible. But capturing the practice in a single state—or all fifty states—proves a daunting and difficult task. Even if such data could be easily collected, the local variation (what constitutes “failure to appear,” for instance—just failing to show up for court, or also for a probation meeting?) would make comparing such data difficult. Whereas a significant uptick in federal process prosecutions would register on a national level, the same effect in state courts might be all but invisible even to a dedicated researcher. It is simply, as the previous Part laments, hard to figure out exactly what is going on in state courts, especially for process offenses with little public profile.

2. Diminishing State Legitimacy

Another significant danger posed by obstinacy charging practices is the risk that such prosecutions undermine the perceived legitimacy of the criminal justice system. Process crimes are inherently problematic. For instance, in
searching for the substantive content of offenses like “obstruction of justice, perjury, [and] false statements.”

Professor Green describes the “strikingly broad range of moral judgments that colors cases like these” and the deep “moral ambivalence” that criminalization of such conduct engenders. That is because “obstruction” is all too often in the eye of the beholder. Providing a workable definition of conduct that harms some nebulous collective interest is difficult enough: toeing the line between harm to a community interest in the integrity of the system and harm to the system period, regardless of whether integrity is on the line, can prove quite flimsy even with regard to “core” violations.

But the substantive defensibility of process crimes becomes further attenuated when deployed as a pretextual basis for prosecuting a defendant targeted for other reasons. Critics of pretextual charging note that there is something unsettling about a defendant’s conviction not fairly reflecting the reason the prosecution was pursued. As Professor Green notes, quoting a blog posting that reacted to two high-profile convictions for cover-up offenses:

I find something vaguely Star Chamber-ish about the Quattrone conviction, just as I did with respect to the earlier Martha Stewart conviction. In neither case did the government indict the defendant with respect to the alleged underlying violations. Instead, both were indicted for subsequent acts that allegedly obstructed the investigation.

As this statement attests, process offenses awkwardly occupy a gray zone in which the moral legitimacy of the offense may track the legitimacy of its pretextual use. The more confident we are in the offender’s guilt, the stronger the case for the legitimacy of even broad definitions of process crimes; the weaker the basis for targeting the defendant, the less legitimate all but the truest core of process offenses may seem.

But to the extent that some notion of injustice lingers, at least pretextual practices can cite some underlying motive for targeting the defendant that in turn may be appraised as either legitimate or illegitimate. In contrast, naked obstinacy charging promotes only its own end. That is not to say that one could not envision a legitimate justification for the obstinacy approach. Most obviously, we might say that penalizing such conduct is justified because it checks a defiant attitude that is a proxy for or harbinger of greater lawlessness.

Notwithstanding the attractiveness of such an argument, it still provokes

381. Green, Cover-Up, supra note 23, at 9.
382. Id. at 11.
383. Id. at 12 (quoting Stephen Bainbridge).
384. See id. at 10 (“One of the things that is so intriguing about such cases is how dramatically people’s moral and legal judgments of them vary.”); id. at 11 (“[T]he strikingly broad range of moral judgments that colors cases like these has less to do with the identity of individual defendants than with a deeper form of moral ambivalence that pervades our understanding of the cover-up offenses and of white collar crime more generally.”).
considerable alarm. Obstinacy charges at best explicitly redress only the wounded pride or interest of the state. Accordingly, their common use may suggest a state that is either so weak or so discredited that it cannot garner respect conventionally. Stated another way, why do so many people fail to comply with court orders or to cooperate with investigators, if not because the state lacks authority? At minimum, obstinacy charging dramatically reimagines the citizen as a servant to, rather than participant in, the body politic. It exposes a state so fragile that it bullies its disaffected citizenry, forcing obedience through threat of sanction rather than the promise of the rewards of the social contract.

3. Self-dealing

Finally, process charges should immediately sound some notes of caution in that they can be self-generated by the state. Robust process charging may be attributable directly to the state's own dysfunction and mismanagement of the criminal justice system. For example, one recent newspaper account reports that financially strapped courts have stepped up criminal enforcement of court orders for fines and fees. The report further noted that "[s]tates facing lower revenue from income and property taxes are taking action that includes ... fee increases." In this way, an angry, ineffective, or dysfunctional state can feed its own monsters. Is the docket too unwieldy? Is it too difficult to adduce evidence in this complex case? Are jurors too disaffected to return guilty verdicts in certain cases? The process charge can sweep in—either in its pretext or obstinacy iteration—and save the day. The cycle of disaffection and entrapment can be endless: the state sets fifteen court dates in a trivial case because it mismanages its resources and then charges failure to appear because the clogged docket cannot countenance a defendant who is twenty minutes late.

This risk of self-dealing particularly arises with regard to obstinacy offenses, which hew neither to an individual or collective harm principle. The only name in which an obstinacy offense is pursued is in that of the government itself. Being late for court, refusing to cooperate with the police, or reconciling with an estranged lover only contravenes the needs and wishes of the state. When criminal prosecution results, it is exclusively the authority of the government

385. Of course, "empire-building government has been a central premise of constitutional discourse since the Founding," especially as regards the striking of a balance of powers between the federal government and the states. Daryl Levinson, Empire-Building Government in Constitutional Law, 118 Harv. L. Rev. 915, 918 (2005). Professor Levinson expresses skepticism at this account, id. at 937, stating that democratic accountability of both elected officials and institutional bureaucrats tempers any systematic attempts at self-aggrandizement. Id. at 927–30, 932–33. But it is important to note that, as regards criminal justice, such political safeguards may be less dependable, because the interested constituencies may lack both organization and public sympathy. Id. at 967–68 (imagining various political outcomes of the use of money damages to compensate for political constitutional violations in the criminal context).


387. Id.
that the prosecution vindicates—a sort of "how dare you put something else before us?"

Underlying this story is the growth of the institutions of criminal justice both as a structure and an ideology.\textsuperscript{388} The criminal justice system is after all, a \textit{system}. It has a panoply of component parts, and all of those parts must be implemented. Implementation takes investment—emotional investment, sure—but also capital investment in people (pretrial officers, judges, clerks, prosecutors, defense lawyers, marshals, probation, parole, and corrections officials), in buildings (precincts, laboratories, courthouses, jails, officers, monitoring units), and in equipment (copy machines, testing devices, computers, tracking systems, uniforms).

A narrative of excess already dominates the scholarly discourse surrounding the contemporary practice of criminal justice in America. Scholars document the unremitting expansion of the criminal law, both in the addition of new substantive offenses and in the relaxation in the elements of proof. Critics decry the seemingly harsh and disproportionate penalties that attend a range of crimes, whether non-violent drug offenses, white collar offenses, or even serious felonies. Headlines declare that one in a hundred Americans reside in our jails and prisons,\textsuperscript{389} and the popular media's display of a defendant \textit{du jour} has become de rigueur.

At the same time, sociologists report that the incidence of both unreported and reported offenses—for everything from property to violent crimes—has experienced a steady decline.\textsuperscript{390} Indeed, many first-year criminal law teachers revel in showing the diagram of declining rates of property and violent crime compared to rising rates of incarceration, which form a near-perfect "X" when superimposed. In a system beset by docket crunches, a lack of public confidence, and exorbitant expenses—in a time of falling crime rates and actual incidence of violence—the state's resort to process crime may represent nothing more than the system's own efforts at self-preservation and justification.

Indeed, the most revealing portrait of the criminal justice system is that a fairly continuous decline in crime has brought with it a systemic rise in the practice of and participants in criminal justice. As the Bureau of Justice Statistics (BJS) reported:

\begin{quote}
Between 1982 and 2003, per capita expenditure, including Federal, State and local governments across justice functions, increased from $158 to $638, over
\end{quote}

\textsuperscript{388} See generally Jonathan Simon, Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear 109 (2007) (probing politics of public discourse of crime control and noting that "[f]or more than three decades, the making of crime laws has offered itself rather explicitly as the most important subject for expressing the common interest of the American people").


\textsuperscript{390} See, e.g., Zimring, supra note 53, at 3.
300%. During that same time period:
- Correction expenditures increased 423%, from $40 to $209 per U.S. resident.
- Judicial and legal expenditures increased 321%, from $34 to $143.
- Police protection expenditures increased 241%, from $84 to $286.

Since 1982, total direct expenditures increased more than five-fold from nearly $36 billion to over $185 billion, a 418% increase. The average annual increase between 1982 and 2003 was nearly 8%.391

Moreover, "[f]ederal intergovernmental spending on justice activities rose from $189 million in 1982 to more than $5.1 billion in 2003," which BJS attributes "primarily to the creation of several large law enforcement related grant programs in the 1980s and 1990s.392"

Of course, those expenditures reflect concrete expansions in the size and scope of the criminal justice system.393 In 1982, the criminal justice system "employed approximately 1.27 million persons; in 2003 it reached over 2.3 million," representing an 86% increase.394 Federal employees grew most dramatically, by 168%, while states logged an impressive 115% growth and localities 65%.395

Workloads reflect this increase. Case filings in state courts rose from 86 to 100 million from 1987 to 2003,396 and the "total [number] of judicial and legal

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391. KRISTEN HUGHES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003, at 2 (2006) (internal citations omitted) (noting also that the federal government expanded roughly 10% annually whereas states and localities grew 8% and 7%, respectively). The report notes that, between 1982 and 2003, the federal government increased expenditures as follows: 708% on police protection, 573% on judicial and legal services, and 925% on corrections. Id. at 2. The parallel state and locality rates were respectively: 293.4% and 305.8%, 474.3% and 368.2%, and 550.9% and 519.6%. Id. at 2–3.
392. Id. at 2.
393. The report does not adjust for inflation; however, it does note that spending far outpaced inflation. Id. at 3 (calculating that if total expenditures were limited to the rate of inflation, in 2003 they would amount to $65.7 billion—using the consumer price index—rather than the documented $185.5 billion). In addition, a report that did adjust for inflation found that "operating costs per officer rose 38% for State agencies, 30% for sheriff’s offices, 27% for county police, and 21% for municipal police" from 1990 to 2000. BRIAN A. REEVES & MATTHEW J. HICKMAN, U.S. DEP’T OF JUSTICE: LAW ENFORCEMENT MANAGEMENT AND ADMINISTRATIVE STATISTICS, 2000: DATA FOR INDIVIDUAL STATE AND LOCAL AGENCIES WITH 100 OR MORE OFFICERS, at v (2004).
394. HUGHES, supra note 391, at 7.
395. Id. at 1.
396. Id. at 7. In the state courts, caseloads nationwide grew dramatically from 1987 to 2004. LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE COURT ORGANIZATION, 1987–2004, at 2 (2007). The Bureau of Justice Statistics (BJS) reports that trial court filings increased roughly 45% in limited jurisdiction courts and 43% in general jurisdiction courts during that time. Id. Appellate courts experienced a 32% increase, id., and an increasing number of states added intermediate specialized jurisdiction courts to buffer the caseload between the trial courts and courts of last resort. Id. at 3. Not surprisingly, the staff of state courts—including judges, support staff, and law clerks—increased accordingly. Trial courts raised judicial staffing roughly 11%, and intermediate courts increased by roughly 25%. Id. Law clerks increased 55% in intermediate courts and 27% in courts of
employees grew about 101% to over 494,000 persons in 2003. From 1982 to 2003, employees in policing grew from 724,000 to over 1.1 million, and those in corrections nearly doubled from 1982 to 2003, rising from 300,000 to 748,000.

Notably, during this same period of time, 1982 to 2003, crime victimization rates steadily lowered. From 1973 to 2003, the rate of violent crime generally declined. In 1973 the rate was just under 50 per 1,000 persons; apart from sharp peaks between 1977 through 1981 and 1986 through 1993, violent crime continued a steady decline to 25.1 in 2001. Property crimes witnessed an even steadier fall: from 1974 to 2001 rates fell from just over 500 per 1000 households to 166.9 per 1000 households. This change in rate reflects a decline in raw numbers as well—in 1995 the number of violent victimizations and property victimization was 10,022,000 and 29,490,000 respectively; in 2003 it was 5,401,720 and 18,626,380. As Professor Franklin Zimring observes in his comprehensive study of The Great American Crime Decline, "[t]he 1990s witnessed the longest and deepest decline in crime by far in the United States since World War II."

Indeed, data from the federal government’s Uniform Crime Reporting program reveal that the vast majority of categories of offenses have experienced a precipitous drop in arrests from the 1990s to the present. For example, from 1995 to 2003, homicide arrests dropped 29.2%, robbery 24%, motor vehicle theft 24.2%, and weapons possession 27.5%. Telling, however, are the nature of

last resort. Id. The federal courts’ caseload appears to have increased less dramatically. MOTIVANS, supra note 47, at vii.
397. HUGHES, supra note 391, at 7 (2006).
398. Id. As of September 2004, state and local law enforcement agencies had 1,076,897 full-time personnel, 5.6% more than the 1,019,496 employed in 2000. From 2000 to 2004 the number of full-time sworn personnel increased from 708,022 to 731,903. In 2003, local police departments cost about $93,300 per sworn officer and $200 per resident to operate for the year. Sheriffs’ offices cost about $124,400 per officer and $82 per resident for the year. Id.
399. Id.
401. Id.
402. Id. at 2-3.
403. Id. at 2–3. Property crimes fell from roughly 400 per household in 1983 to half that in 2003.
405. Id. at 4.
the few categories that have grown in that time. For the same period, for instance, only five of twenty-nine arrest offense categories has steadily, and markedly, increased: drugs (21.7%), liquor law violations (10.2%), vagrancy (27.5%), embezzlement (16.5%), and “[a]ll other offenses (except traffic)” (11.6%). The “all other offenses” category includes any violation of state or local laws, except those specified in the other categories and traffic offenses—some portion of these, then, include process crimes.

In sum, in the face of roughly twenty years of relative decline in reports of victimization, the criminal justice system has continued a precipitous growth in infrastructure and expense. Of course, one lesson is that all that money has been worth it. Crime is down because more potential offenders have been locked away, which naturally means costs are up. But another lesson might be that, since at least the early 1990s, the criminal justice system has been all dressed up (in a very expensive gown) with increasingly fewer partners to take to the dance. And unlike many institutions that succumb to market forces or external pressures to downsize or scale back, the criminal justice system has built within it a strong mechanism for survival. It can simply change what it means to commit a crime and raise the price of committing one.

By this logic, the behemoth of the system itself assumes a stake in its own existence. A system that has trouble managing its docket can penalize those who make that task more difficult—say, by showing up a few hours (or weeks) late. A bureaucracy of pretrial supervisors can construct a labyrinth of conditions and oversight that results in failure to appear and contempt charges. Officers accused of isolating themselves in police cars and underserving crime-ridden communities can counter witness distrust and noncooperation with threats of obstruction or perjury charges. Prosecutors tired of victims who change their stories, or who lack resources or energy to pursue complex, time-intensive cases or surmount procedural burdens and hurdles, or who fail to pursue certain charges, can conjure prêt-a-porter process convictions. Judges irritated with revolving door defendants can strategically deploy contempt in order to secure a long sought break.

One plausible view of process prosecution, in short, remakes the system as both victim and victimizer. Rather than self-correct or scale back, it can self-aggrandize and self-promote. Rather than streamline and serve its citizenry,
it can stay bloated and serve itself.

CONCLUSION

Although the final section intentionally excites and provokes, the crux of the arguments advanced by this Article promote far less controversial positions. My main goals have been fairly straightforward: to document the vibrant practice of process prosecutions in state and local courts and to argue that a new theory underlying such prosecutions—the obstinacy thesis—is evident in both the federal and state systems.

By focusing on specific process offenses, I by no means intend to suggest that I have catalogued such crimes exhaustively. Indeed, persuasive cases could be made that a range of additional offenses themselves function as a species of process crime—for instance, narcotics, general fraud, and other white collar "evasion" offenses like "structuring." Numerous sentencing enhancements, such as for acceptance of responsibility or cooperation, also may reveal obstinacy practices. I have also neglected the growing number of cases in which obstinacy offenses are brought against other actors in the criminal justice system, such as jurors or attorneys. Finally, in focusing on prosecutions in criminal courts, I have altogether overlooked the manner in which parallel systems of enforcement operate in tandem with process prosecutions to achieve similar ends: for example, immigration control or post-conviction proceedings that use parole conditions to populate jails with technical violators.

In acknowledging all that this Article could not address, it is my hope that I can foster greater dialogue about the purpose and occurrence of process crime prosecutions in both the federal and state systems. In light of the real concerns of accountability, legitimacy, and self-dealing that process charging practices raise, such offenses merit treatment as a distinct category of crimes worthy of close monitoring and continued examination.

409. See generally Markus Dirk Dubber, Policing Possession: The War on Crime and the End of Criminal Law, 91 J. CRIM. L. & CRIMINOLOGY 829, 908 (2001) (cataloging ills associated with criminalizing drug possession, and describing such statutes as "the new vagrancy" laws). In addition, possession charges often serve as a form of pretextual liability for alleged, but unconvictable, sellers. See id. at 936.
410. Strader, supra note 4, at 85–87 (discussing mail and wire fraud).
412. See, e.g., Federal Sentencing Guidelines, 18 U.S.C. § 5K1.1 (2006) (substantial assistance to authorities); id. § 3E1.1 (acceptance of responsibility). But see id. § 5K1.2 (noting that a refusal to assist authorities should not constitute an aggravating factor).
413. See supra note 367.