

# THE INCREDIBLE ORDINARINESS OF FEDERAL PENALTIES FOR INACTIVITY

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Those arguing that the insurance mandate in the recent health care reform legislation, the Patient Protection and Affordable Care Act (ACA), is unconstitutional have prominently and repeatedly advanced the claim that the mandate’s punishment of personal inactivity is an unprecedented exercise of federal power. That contention is simply false. Federal criminal law contains scores of provisions that facially or in application punish inactivity by individuals. These criminal statutes regulating inaction include not just traditional crimes by omission, where a common law duty is violated, but also offenses related to registration, record keeping, possession, receipt, preventive measures, nondisclosure, organization, misprision, and obstruction. By providing this account of criminal laws punishing and regulating inactivity, this Essay puts the ACA’s insurance mandate in the larger context of federal laws that would be in jeopardy if the mandate were held to be unconstitutional by the Supreme Court. The case of the ACA in regard to the Commerce and Necessary and Proper Clauses is not merely about the enforcement mechanism used for a single health care law as many have contended—it is about the shape and scope of federal criminal law that has been in place for over fifty years.

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## INTRODUCTION

Perhaps the most oft-repeated and salient argument by those questioning the constitutionality of the Patient Protection and Affordable Care Act (ACA) is that, as Randy Barnett stated, the federal government's regulation of "inactivity" by individuals is "literally unprecedented."<sup>1</sup> This contention is being advanced with regularity by scholars, practitioners, judges, and media.<sup>2</sup> The majority in the Eleventh Circuit decision, which held that the ACA's mandate was unconstitutional, saw fit to entitle an entire section of the opinion as the "Unprecedented Nature of the Individual Mandate."<sup>3</sup> Indeed, the word "unprecedented" appeared another twelve times in that opinion.<sup>4</sup> The panel finished its opinion with the claim that "It cannot be denied that the individual mandate is an unprecedented exercise of congressional power."<sup>5</sup> Despite the incredible certainty and conviction of those contending that the ACA insurance mandate is entirely unique, the claim is simply wrong in every way that is constitutionally significant.<sup>6</sup>

Perhaps most prominent among the various areas of federal statutes, federal criminal law is replete with scores of provisions that punish persons who have committed no affirmative act. The federal criminal justice system follows the primary conceptual division of the *actus reus* (act requirements) found throughout American criminal law that there are both crimes of commission and omission.<sup>7</sup> Those federal

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1. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 NYU J.L. & LIBERTY 581, 606 (2010).

2. See *infra* Part II.A.

3. *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1288 (11th Cir. 2011).

4. See *generally id.*

5. *Id.* at 1311.

6. As discussed in Part II.A, the phrase "literally unprecedented," and its like, can be taken in its weakest form to simply state that a law is novel or new. Such an interpretation is not significant in a constitutional or general sense. To make the constitutional challenge to the ACA successful, the litigants involved must show that it is distinguishable from prior case law and statutory schemes (the latter only if the litigants pursue the normal course of not asking the court to overturn those similar codified laws as well). On that measure, those attacking the ACA's constitutionality have failed to show that the law is "literally unprecedented" or some related claim. See *infra* Part II.A.

7. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 102 (5th ed. 2009) ("In essence, the criminal law distinguishes between an act that affirmatively *causes* harm, on the one hand, and the failure of the bystander to take measures to *prevent* harm, on the other hand.").

laws that define crimes by omission are, by their very nature, regulating the inactivity of private citizens by forcing them to act to escape federal prosecution.<sup>8</sup> Many federal statutes are often crafted with these specific omission provisions, but others are applied to inactivity in instances even when omission language is not included in the statutory text.<sup>9</sup>

Ultimately, those offenses that penalize inaction by persons in a manner analogous to that of the insurance mandate can be divided into ten types of provisions: (1) common law duty omission; (2) registration; (3) record keeping; (4) possession; (5) receipt; (6) preventive measures; (7) nondisclosure; (8) organizational; (9) misprision; and (10) obstruction. Each type of criminal statute is discussed in this Essay with examples of “inactive” conduct that is criminal under federal law. Notably, among those criminal laws that punish inactivity, often quite harshly, none have been successfully challenged as unconstitutional exercises of federal power based upon the activity/inactivity distinction advanced in the ACA litigation.

As a brief illustration, consider the cases of persons prosecuted for failure to register (as a sex offender)<sup>10</sup> under the Adam Walsh Child Protection and Safety Act (AWA).<sup>11</sup> A person convicted under the Act for failing to register with government authorities may have pled guilty to or been convicted of a sex crime decades before the AWA was enacted in 2006.<sup>12</sup> Such a person can be convicted for failing to register

8. *Id.* at 105 (“[A] defendant’s omission of a common law duty to act . . . serves as a legal substitute for a voluntary act.”).

9. *See infra* Part I.

10. The crime is defined as:

(a) In General. – Whoever –

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a) (2006).

11. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901-16991 (2006)).

12. *See, e.g., United States v. Gould*, 526 F. Supp. 2d 538, 541-548-49 (D. Md. 2007).

by virtue of doing absolutely nothing.<sup>13</sup> He may simply sit on the couch watching television in the comfort of his home and become a fugitive who could be punished by up to ten years in federal prison.<sup>14</sup> Such persons are being forced by threat of a long-term prison sentence to break out of their inactivity and register in person with the federal government several times a year for at least a decade.<sup>15</sup>

One might think that the AWA is just regulating the conduct of the original sex offense(s) that created the registration obligation and, therefore, the statute punishes activity and not inactivity. However, the federal courts have made abundantly clear that the registration statutes are forward-looking and not punishment for the prior sex offense. Indeed, if the sex offender registration prosecutions were based upon prior sex offenses, they would violate the Ex Post Facto Clause's prohibition on retroactive punishments.<sup>16</sup> As a result, the only *actus reus* punished for failure to register as a sex offender is the failure to act itself. And even though Commerce Clause and Necessary and Proper Clause challenges have been common in such cases, none have been premised upon the distinction between activity and inactivity.<sup>17</sup> Further, challenges against the AWA's crime of failing to register have failed in every federal appellate court that has reviewed such arguments.<sup>18</sup>

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13. See *id.* at 541–43.

14. See 18 U.S.C. § 2250(a) (2006).

15. See 42 U.S.C. § 16913 (2006).

16. See, e.g., *United States v. Kueker*, 352 F. App'x 242, 246 (10th Cir. 2009) (“To the extent Mr. Kueker argues that [the Sex Offender Registration and Notification Act] SORNA also violated the Ex Post Facto Clause by increasing the punishment for his earlier sex offense, this court has already made clear that SORNA does not punish the underlying sex offense . . . .”); *United States v. Young*, 585 F.3d 199, 205 (5th Cir. 2009) (“SORNA’s Title 18 provisions . . . can punish Young only for current conduct—foreclosing any ex post facto claim.”).

17. See, e.g., *United States v. Pendleton*, 636 F.3d 78, 87–88 (3d Cir. 2011) (finding that the federal statute for failure to register as a sex offender is a necessary and proper execution of Congress’s commerce power); *United States v. Yelloweagle*, 643 F.3d 1275, 1288–89 (10th Cir. 2011) (denying arguments that Congress lacks authority to criminalize failure to register as a sex offender based on the Commerce Clause and the Necessary and Proper Clause); *United States v. Guzman*, 591 F.3d 83, 91 (2d Cir. 2010) (rejecting challenges based on the Necessary and Proper Clause and the Commerce Clause to the federal law of failure to register as a sex offender); *United States v. Howell*, 552 F.3d 709, 715 (8th Cir. 2009) (“[A]n analysis of §16913 under the broad authority granted to Congress through both the commerce clause and the enabling necessary and proper clause reveals the statute is constitutionally authorized.”).

18. E.g., *Pendleton*, 636 F.3d 78; *Yelloweagle*, 643 F.3d 1275; *Guzman*, 591 F.3d 83; *Howell*, 552 F.3d 709.

By providing this account of the scope of federal power in criminal laws punishing and regulating inactivity, this Essay serves two purposes. First, it corrects the growing, mistaken belief that the insurance mandate is truly unprecedented in the type of conduct it punishes. Second, and more importantly, it puts the ACA's mandate in the larger context of federal laws at issue if the mandate is held to be unconstitutional by the Supreme Court. The case of the ACA in regard to the Commerce and Necessary and Proper Clauses is not merely about the enforcement mechanism used for a single health care law—it is about the shape and scope of federal criminal law that has been in place for over fifty years.

Part I of this Essay discusses federal crimes by omission and other criminal laws regulating inactivity by persons which serve as precedents for the insurance mandate. Part II analyzes the claims coming from a range of sources that the ACA insurance mandate is an unprecedented exercise of federal power. Part III considers whether there are any persuasive distinctions between the criminal laws discussed and the insurance mandate, as well as other counterarguments available to those challenging the ACA. The Essay then offers concluding thoughts about the stakes involved in the litigation about the constitutionality of the ACA.

#### I. FEDERAL CRIMINALIZATION OF INACTIVITY

The federal criminal code consists of an assortment of crimes that were codified based upon the concerns of Congress and the President at the time. Some crimes, like those related to the War on Drugs, have been driven heavily by political forces.<sup>19</sup> Others, such as authorizing a six-month prison sentence for a person who impersonates a member of a 4-H club,<sup>20</sup> exist for reasons that challenge the imagination. At times, Congress decided to specifically include crimes of omission (which by their nature punish inactivity) in their statutory provisions. However, more often, Congress drafted statutes that, when applied, punished both activity and inactivity by criminals.

Classic crimes of omission are derived from statutes which contemplate a defendant's guilt either by affirmative acts or an

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19. See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 262 (2007) (“The war on drugs offered great political potential to Nixon because it linked the New Left political base to its broader youth culture penumbra and, through that, to classic themes of organized crime and corruption.”).

20. 18 U.S.C. § 916 (2006) (allowing punishment of someone who “falsely and with intent to defraud, holds himself out as or represents or pretends himself to be a member of, associated with, or an agent or representative for the 4-H clubs”).

omission. For example, a mother can murder her daughter by either poisoning (an affirmative act) or starving (an omission). In either case, the mother can be found guilty under the same statute. These types of crimes, sometimes called “commission by omission,” allow for a large number of statutes to cover conduct which is wholly passive.<sup>21</sup>

Of course, omissions, under modern law, are limited in scope by specific duties.<sup>22</sup> So, in the example above, the mother has a duty to feed her child, but her neighbor does not. The duty by parental relationship in that case limits the range of possible defendants. Other recognized common law duties include those by contract, creation of peril, and assumption of care.<sup>23</sup> If a violation of those duties results in a crime, the defendant’s inaction makes her as culpable as a person who had committed affirmative acts resulting in that crime.<sup>24</sup>

The crimes premised upon a common law duty are just a small set of federal statutes punishing inactivity. A larger segment includes crimes which rely upon statutory duties and obligations. In all, crimes that allow for punishment via common law or statutory duties can be divided into ten categories discussed below: common law duty omission, registration, record keeping, possession, receipt, preventive measures, nondisclosure, organizational, misprision, and obstruction.

#### *A. Common Law Duty Omission Crimes*

At the federal level, there are numerous statutes where a defendant might cause a criminal result through inaction based upon a failure to complete a duty recognized under common law. These common law duties are primarily based upon relationship, contract, or assumption of care. As examples, a person under existing federal law can be punished if:

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21. Joshua Dressler, *Some Brief Thoughts (Mostly Negative) about “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 975 (2000) (“In limited circumstances, a person’s failure to act—an omission—constitutes a breach of a common law duty to act.”); see 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 6.2 (2d ed. 2003).

22. LAFAVE, *supra* note 21, § 6.2(a) (including a duty to act based on relationship, statute, contract, assumption of care, creation of peril, controlling the conduct of others, and landowner); see Dressler, *supra* note 21, at 976 (describing instances where one may have a duty to act such as a babysitter with a child).

23. LAFAVE, *supra* note 21, § 6.2(a)(2)-(4). There are other possible duties, such as the duty to act based upon the creation of risk. Dressler, *supra* note 21, at 975-76. However, such duties are linked to prior conduct by a defendant and, thus, do not fit within the category of crimes that punish inactivity.

24. LAFAVE, *supra* note 21, § 6.2(e) (“Thus one’s failure to act to save someone toward whom he owes a duty to act is murder if he knows that failure to act will be certain or substantially certain to result in death or serious bodily injury.”).

- She, through inaction, causes someone not to receive unemployment benefits because of their political affiliation thereby violating a contractual duty to provide such benefits.<sup>25</sup>
- He does not give someone a government benefit on the basis of race thereby violating through inaction a contractual duty to secure the rights and privileges of that person.<sup>26</sup>
- She fails to pay child support through inaction connected to a common law duty of parental relationship.<sup>27</sup>
- He allows a person in custody to escape through inaction or does not execute an arrest warrant issued in violation of a contractual duty.<sup>28</sup>

In each of the above cases, the relevant statute covers both affirmative and passive conduct by defendants. Regardless of the activity or inactivity in the conduct, the statutes attach criminal penalties. There is a potential for numerous federal criminal statutes to implicate passive conduct under the right facts and an abridgement of a common law duty. The list above simply contains some examples.

### *B. Registration Crimes*

As noted in the Introduction to this Essay, the crime of failure to register as sex offender in the AWA severely punishes inactivity by defendants.<sup>29</sup> Title I of the AWA contains the Sex Offender Registration and Notification Act (SORNA) outlining the registration requirements

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25. 18 U.S.C. § 246 (2006) (allowing punishment of someone who “directly or indirectly deprives, attempts to deprive, or threatens to deprive any person of any employment, position, work, compensation, or other benefit provided for or made possible in whole or in part by any Act of Congress appropriating funds for work relief or relief purposes, on account of political affiliation, race, color, sex, religion, or national origin . . .”).

26. § 242 (allowing punishment of someone who “willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens”).

27. § 228(a)(1) (allowing punishment of someone who “willfully fails to pay a support obligation with respect to a child who resides in another State”).

28. § 755 (punishing “[w]hoever, having in his custody any prisoner by virtue of process issued under the laws of the United States by any court, judge, or magistrate judge, voluntarily suffers such prisoner to escape”); *Benjamin v. United States*, 554 F. Supp. 82, 86 (E.D.N.Y. 1982) (“At that stage in the investigation, the warrant compels arrest and, unless it is retracted by the court, the arresting officer who chooses to ignore its command operates at some personal risk.”).

29. 42 U.S.C. § 16913(e) (2006).

for sex offenders in the United States. SORNA requires registration by every individual who was convicted of a sex offense.<sup>30</sup>

SORNA requires that a sex offender register in any jurisdiction where he or she resides, works, or is a student.<sup>31</sup> Within three business days of any change in name, residence, employment, or student status, the sex offender, to avoid prosecution, must appear in person to change the relevant registry information.<sup>32</sup> If an offender ever fails to keep his registry accurate and current, he could be prosecuted under the new crime of failure to register at 18 U.S.C. § 2250(a) with a maximum penalty of ten years imprisonment.<sup>33</sup>

As mentioned previously, one might think that the original sex crime is being punished under SORNA's provisions. However, the statute and case law make abundantly clear that the sex offense that creates the obligation is not being further punished by the prosecution for failure to register. Indeed, it is only by holding that the law does not punish the prior sex offense that a prosecution for failing to register can survive challenges under the Ex Post Facto Clause when the sex crimes occurred before the AWA was enacted.<sup>34</sup> As one court noted, prosecution for failing to register "does not criminalize the fact that the [d]efendant committed a sex offense prior to the statute's enactment."<sup>35</sup> As a result of the holdings in Ex Post Facto Clause challenges, the basis for federal jurisdiction for the crime of failure to register as a sex offender is independent from the prior sex crime. And the only conduct of the defendants being punished in such cases is the failure to act as required by statute.<sup>36</sup>

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30. § 16911(1); § 16913.

31. § 16913(a).

32. § 16913(c).

33. 18 U.S.C. § 2250(a) (2006).

34. See, e.g., *United States v. Gould*, 526 F. Supp. 2d 538, 549 (D. Md. 2007) ("Indeed, only upon an offender's failure to register under SORNA, a new offense, do the enhanced penalties apply. Accordingly, SORNA does not violate the Ex Post Facto Clause." (citation omitted)).

35. *United States v. Cardenas*, No. 07-80108-Cr-Hurley/Vitunac, 2007 U.S. Dist LEXIS 88803, at \*27 (S.D. Fla. Nov. 5, 2007).

36. Notably, the crime of failure to register anticipates two scenarios where an obligation to register might be created: (1) offenders who were originally convicted under federal law, did not travel in interstate commerce, and failed to register, § 2250(a)(2)(A); and (2) offenders who traveled in interstate commerce and failed to register, § 2250(a)(2)(B). Those prosecuted under § 2250(a)(2)(A) have not committed any new act to justify punishment and thus are clear cases of federal punishment of inactivity. In contrast, those punished under § 2250(a)(2)(B) have also traveled in interstate commerce (an affirmative act). The travel between states need not be connected to the failure to register and can occur at any other time. See *United States v. Ambert*, 561 F.3d 1202, 1206–07 (11th Cir. 2009) (allowing prosecution for federal failure to register based upon interstate travel that occurred a year and half after the

*C. Record Keeping Crimes*

Certain persons and entities have an affirmative duty to keep certain records in order to comply with federal criminal law.<sup>37</sup> One recent example of regulations that can punish a failure to keep complete and accurate records pertains to the pornography industry.<sup>38</sup> As part of the Child Protection and Obscenity Enforcement Act of 1988 (CPOEA), persons who create pornographic media of any type are required to get and keep records of every person in such media and proof of their ages.<sup>39</sup> If someone violates the record keeping requirements for the first time, they can face a prison sentence of up to five years.<sup>40</sup>

For example, the Sixth Circuit held that a producer of a magazine which contained personal advertisements with nudity, posted by “swingers” seeking other similarly inclined people, had an affirmative obligation to obtain and keep proof of identity and age from every person posting such ads.<sup>41</sup> The court further held that the statute permissibly required the producers of the magazine to affirmatively produce their kept records at any time revealing the private identities of those who placed the ads.<sup>42</sup>

In a separate CPOEA case, Judge Michael Baylson remarked how the CPOEA regulations were consistent with a long-term trend of the federal government punishing individuals and entities for not keeping accurate records.<sup>43</sup> The Judge wrote:

Such mandatory recordkeeping [as the requirements on pornography producers] has become commonplace in modern times . . . and the drumbeat of mandatory recordkeeping has

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failure to register occurred). Objections that prosecutions under § 2250(a)(2)(B) are actually regulating activity related to inactivity (thus providing no support for the thesis of the Essay) are addressed in Part III.A.

37. See, e.g., 15 U.S.C. §§ 78m(b)(2), (4)-(7), 78ff(a) (2006) (containing the accounting and record keeping provisions of the Foreign Corrupt Practices Act); 18 U.S.C. § 2257 (2006) (requiring record keeping under the Child Protection and Obscenity Enforcement Act); 17 C.F.R. §§ 240.17a-2 to -4 (2011)(containing various record-keeping rules under the Securities and Exchange Commission).

38. 18 U.S.C. § 2257.

39. § 2257(b).

40. § 2257(i).

41. *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 326-30 (6th Cir. 2009).

42. *Id.* at 330 (“[Section] 2257 also makes the information available to the government upon request.”).

43. See *Free Speech Coal. v. Holder*, 729 F. Supp. 2d 691, 696 (E.D. Pa. 2010).

continued unabated. Congress has enacted laws requiring individuals and businesses to keep records concerning taxes as well as regarding immigration and environmental transactions, and has often authorized administrative agencies to detail the records that must be maintained. Courts have routinely upheld the validity of such recordkeeping statutes and regulations.<sup>44</sup>

Notably, in the case before Judge Baylson, the plaintiffs suing to have the law invalidated had committed no wrong, but were fearful that the law placed an unjustified burden upon them to affirmatively act to avoid criminal prosecution.<sup>45</sup>

#### *D. Possession Crimes*

Under federal law, it is illegal for any ordinary person to possess numerous items: illegal drugs,<sup>46</sup> counterfeiting equipment,<sup>47</sup> chemical weapons,<sup>48</sup> biological weapons,<sup>49</sup> forged immigration documents,<sup>50</sup> child pornography,<sup>51</sup> etc.<sup>52</sup> There are also some special possession statutes that restrict a person's ability to possess something based upon their status such as being a felon in possession of a firearm or prisoner with contraband.<sup>53</sup> Possession crimes are of relatively recent origin in America<sup>54</sup> and present a conceptual difficulty for scholars of criminal law.

Although it is normally true that a person took affirmative conduct to acquire something that they then possess, possession crimes do not

44. *Id.*

45. *See id.* at 705, 742.

46. 21 U.S.C. §§ 841-843 (2006).

47. 18 U.S.C. § 477 (2006).

48. § 229.

49. § 175.

50. § 1546.

51. § 2252A.

52. *E.g.*, § 480 (possession of counterfeit foreign obligations or securities); § 489 (possession of counterfeit coins); § 957 (possession of property in aid of a foreign government); § 1460 (possession with intent to distribute obscene material).

53. § 931 (possession of body armor by violent felons); § 1791 (possession of contraband in prison); *Kenner v. Martimer*, No. 7:08-73-KKC, 2008 U.S. Dist LEXIS 44912, at \*7 (E.D. Ky. June 6, 2008) (“[R]egulations do not merely prohibit prisoners from possessing weapons, but they must act affirmatively to ensure that their cells remain free of any contraband.”).

54. *See* MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 32 (2002) (“In general, the offense of possession—whether of drugs, of guns, or of anything else—has emerged as the policing device of choice in the war on crime.”).

actually punish any affirmative conduct.<sup>55</sup> The Second Circuit recently noted, in *United States v. Sabhnani*,<sup>56</sup> how possession statutes do not punish the defendant for acquisition, but are still conceptually different than the traditional omission statutes:

Under this definition of constructive possession, one could violate [the law] by forming the specific intent to possess the [illegal item] of another while having knowing control over them—in theory, without taking any affirmative act. Even accounting for this possibility, however, possessory offenses do not expressly impose affirmative duties to act in the manner of traditional omissions statutes, which, in effect, require affirmative conduct to be taken to avoid commission of the crime.<sup>57</sup>

The Second Circuit's reference to a case of constructive possession of a prohibited item (i.e., drugs or firearms) is particularly helpful in understanding the reach of possession statutes into regulating inactivity. When a person has constructive possession, the only illegal act that government need show is that a person had "the power and ability to exercise dominion and control over" the illegal item.<sup>58</sup> Thus, if three people are riding in a car with cocaine in the backseat armrest, all three persons can be arrested based upon constructive possession of the cocaine.<sup>59</sup> For a conviction, the government must show neither any affirmative act by the defendant acquiring the cocaine nor the defendant exercising actual possession.<sup>60</sup> The criminal act, as defined by statute and the courts, is one with no affirmative conduct at all.<sup>61</sup>

Consider the case of Jerrel Montel King. King was convicted for possession of a firearm in furtherance of a drug-trafficking crime.<sup>62</sup> The firearm, a Hi-Point rifle, and marijuana that served as the physical evidence for the conviction were found in a locked car owned by King's girlfriend.<sup>63</sup> There were no personal effects of King in the car,

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55. LAFAVE, *supra* note 21, § 6.1(e) ("[P]ossession is not, strictly speaking, an act (bodily movement) or an omission to act . . .").

56. 599 F.3d 215 (2d Cir. 2010).

57. *Id.* at 238.

58. *United States v. Culpepper*, 834 F.2d 879, 881 (10th Cir. 1987).

59. *See, e.g., Maryland v. Pringle*, 540 U.S. 366, 372–73 (2003).

60. *See Sabhnani*, 599 F.3d at 238 n.13.

61. *See id.*

62. *United States v. King*, 632 F.3d 646, 647 (2011). There were other guns at issue in the case, but to simplify the discussion, I have only included references to the Hi-Point rifle which was found in King's girlfriend's car.

63. *Id.* at 648.

no indications that he had ever been in the car, and no keys to the car found in King's possession.<sup>64</sup> Nonetheless, in January 2011, the Tenth Circuit upheld King's conviction. As the court stated, a person has possession of something when he or she "knowingly hold[s] the power and ability to exercise dominion and control over it."<sup>65</sup> The only evidence that linked King to the rifle found in the car was a picture of it on his cell phone.<sup>66</sup> As a result, the prosecution did not need to show any activity by King in order to make the case against him.

Although constructive possession cases provide clear examples of how possession statutes punish persons who cannot be shown to have completed an affirmative act, even actual possession cases can focus solely on whether a person was in fact in control of a forbidden item without any proof of acquiring or distributing acts.<sup>67</sup> These federal possession statutes were the very ones at issue in *Gonzales v. Raich*,<sup>68</sup> decided by the Supreme Court on Commerce Clause grounds, but the Court did not address the fact that a defendant could be punished solely for inactivity.<sup>69</sup> Again, one would rightfully contend that defendant Diane Monson had committed an affirmative act of growing marijuana plants, but those actions would not serve as the basis for any criminal prosecution of Monson for "inactive" possession with an intent to distribute marijuana. Similarly, persons may come to acquire marijuana plants on their property simply by natural forces. The *actus reus* is surely met in such cases even though the defendant has committed no act to grow the illegal plants. And if the defendant who happens to have marijuana growing in their backyard does not take action to destroy the illegal plants, he or she can be prosecuted under federal law.

### *E. Receipt Crimes*

Congress has in numerous instances criminalized the mere receipt of certain items or proceeds.<sup>70</sup> Such receipt can be the result of action

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64. *Id.* at 654.

65. *Id.* at 651 (quoting *United States v. Lopez*, 372 F.3d 1207, 1211 (10th Cir. 2004)) (internal quotation marks omitted).

66. *Id.* at 654.

67. *See, e.g.*, 21 U.S.C. §§ 801-971 (2006) (containing the federal law prohibiting possession of illegal drugs).

68. 545 U.S. 1 (2005).

69. *Id.*

70. 18 U.S.C. § 483 (2006) (receipt of counterfeit obligations or securities); § 647 (receipt of loan from a court officer); § 662 (receipt of stolen property); § 880 (receipt of proceeds of extortion); § 1708 (receipt of stolen mail); § 1923 (receipt of payments of missing persons); § 2313 (receipt of stolen vehicle); § 2317 (receipt of stolen livestock).

or inaction by a defendant. Crimes of receipt are similar to, but distinguishable from, crimes of possession. In the case of illegal items such as chemical weapons, the receipt and possession of the contraband stem from the same facts. However, in the cases related to receipt of illegal proceeds, there is sometimes lawful possession, but unlawful receipt.

The Fourth Circuit case of *United States v. Smith*<sup>71</sup> illustrates this point well. The defendant had a joint bank account with his mother where his mother received her Social Security benefits.<sup>72</sup> When his mother passed away, Smith failed to notify the Social Security Administration and his mother's benefits continued to be deposited to the joint account.<sup>73</sup> In that scenario, as the Fourth Circuit noted, Smith's withdrawal and use of the funds was lawful because he had a legal right to access the account, but the receipt of the funds was clearly illegal.<sup>74</sup> Ultimately, the Fourth Circuit upheld Smith's conviction for embezzlement because of his failure to return the Social Security funds to the government.<sup>75</sup> In that case, Smith was subject to imprisonment because he did not fulfill his affirmative obligations to shut down the Social Security payments to the joint account and pay the federal government for all payments after his mother's death. Smith had taken no prior affirmative steps to receive the funds and his only unlawful conduct was inaction.

Similarly, some of the federal firearms restrictions distinguish between acts of receipt and possession.<sup>76</sup> Under the laws regarding transfers of firearms, persons have an affirmative duty to refrain from receiving or possessing unregistered firearms.<sup>77</sup> As a result, defendants who receive firearms that are unregistered must give those weapons to the proper authorities or otherwise dispose of the firearm.<sup>78</sup> If the defendants are inactive and do not give the weapons to the police or

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71. 373 F.3d 561 (4th Cir. 2004).

72. *Id.* at 563.

73. *Id.*

74. *Id.* at 567 ("As a joint owner of the checking account, Smith had legal control over the funds therein, including the ability to withdraw the full amount of such funds. As such, when the government voluntarily placed these funds into the account, they came into his lawful control, *i.e.*, his lawful possession." (citation omitted)).

75. *Id.* ("In the present case, however, the indictment can be fairly construed to aver a charge of embezzlement that could be proven, without surprise to Smith, by evidence showing that Smith, having legal possession of the funds as they were initially deposited into his account, then, after realizing that his continued possession was improper, willfully retained the funds for his own use, and maintained that recurring, automatic scheme of embezzlement during the charged period.").

76. *E.g.*, 26 U.S.C. § 5812(b) (2006).

77. *United States v. Shepardson*, 167 F.3d 120, 124 (2d Cir. 1999).

78. *Id.*

relieve themselves of the gun, they can be punished just as if they had taken affirmative steps to purchase and receive the illegal firearm.<sup>79</sup>

Prosecutions of conspiracies to receive goods further expand the federal reach of regulating individual inactivity by holding persons responsible for the activities of others.<sup>80</sup> Under federal law, the prosecution must show an overt act in furtherance of the conspiracy by at least one member of the conspiracy.<sup>81</sup> This extremely lax requirement is usually met by a multitude of affirmative acts by the various parties in a conspiracy.<sup>82</sup> However, in such instances when the prosecutor only alleges the inactive receipt of proceeds as a potential overt act, that has been held sufficient to meet the prosecutor's burden.<sup>83</sup> And in such cases, the inactive receipt by a single member of a conspiracy fulfills the overt act requirement for all members of the alleged conspiracy who have engaged in no affirmative act to meet the statutory overt act requirement.

There are also instances wherein inactivity is regulated in cases of the receipt of ill-gotten funds from tax evasion. For example, in 2008, Eric Goldschmidt and Darryl Strawberry<sup>84</sup> were charged with "willfully attempt[ing] in any manner to evade or defeat any tax imposed by this title or the payment thereof"<sup>85</sup> because of non-reported income earned by Strawberry.<sup>86</sup> Among other arguments made by the defense was that Strawberry's mere receipt of funds based upon filings made and signed by Goldschmidt were not affirmative acts sufficient to prove an attempt to willfully evade tax obligations.<sup>87</sup> The district court found that the allegation of receiving funds was sufficient to establish a prima facie case against Strawberry and thus establish proper venue in the

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79. *Id.*

80. Further discussion of other conspiracies and the regulation of inactivity appear *infra* Part I.H.

81. 18 U.S.C. § 371 (2006).

82. *See, e.g., Richardson v. United States*, 526 U.S. 813, 817 (1999) (holding the jury "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element"). *United States v. Kozeny* applied this concept to the overt act element. 667 F.3d 122, 131 (2d Cir. 2011).

83. *United States v. Benussi*, 216 F. Supp. 2d 299, 318 (S.D.N.Y. 2002) ("Accordingly, the Court holds that, when a general objective of a conspiracy is economic gain, the knowing receipt of the anticipated economic benefits of the charged conspiracy by a conspirator satisfies the overt act requirement for purposes of the statute of limitations.").

84. Yes, that Darryl Strawberry. *Darryl Strawberry*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/s/strawda01.shtml> (last visited March 27, 2012).

85. 26 U.S.C. § 7201 (2006).

86. *United States v. Strawberry*, 892 F. Supp. 519, 520-21 (S.D.N.Y. 1995).

87. *Id.* at 522.

jurisdiction.<sup>88</sup> Thus, while Goldschmidt committed affirmative acts to justify federal prosecution, the district court saw no problem in allowing the prosecution of Strawberry for the inactive receipt of illegal funds.

#### *F. Preventive Regulation and Punishment*

Perhaps most damaging to the arguments of the health care reform challenges before the Supreme Court is that the facts in the Supreme Court's most recent Necessary and Proper Clause case, *United States v. Comstock*,<sup>89</sup> were based upon the regulation of inactivity. Graydon Earl Comstock, Jr. was designated as "sexually dangerous" by the federal government at the conclusion of his federal prison sentence.<sup>90</sup> His prior crime, which was not the basis for his designation, was possession of child pornography.<sup>91</sup> By labeling Comstock as "sexually dangerous," the federal government, under a quasi-criminal law, was allowed to civilly commit Comstock, potentially for life, after a hearing regarding his sexual dangerousness.<sup>92</sup> The "sexually dangerous" designation was based upon absolutely no affirmative conduct by Comstock.<sup>93</sup> Instead, as in the case of the registration portions of the AWA mentioned above, it was a forward-looking label based upon Comstock's future dangerousness.<sup>94</sup> In other words, Comstock was subject to the civil (or quasi-criminal) commitment statute based upon no actual conduct, but rather his status as a sexually dangerous person.<sup>95</sup>

Notably, the Court upheld the civil commitment statute as a proper exercise of federal power and there was nary a mention of the activity/inactivity distinction proffered by challengers of the ACA. Any

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88. *Id.* at 524.

89. 130 S. Ct. 1949 (2010).

90. *Id.* at 1955.

91. *Id.*

92. *Id.* at 1954.

93. *See id.* The term "sexually dangerous to others" is defined as a prisoner who "would have serious difficulty in refraining from sexually violent conduct or child molestation if released." *Id.* (quoting 18 U.S.C. § 4247(a)(6) (2006)) (internal quotation marks omitted).

94. *See id.* The federal statute states that the Government must prove to a court that the prisoner "has engaged in sexually violent activity or child molestation in the past and that he suffers from a mental illness that makes him correspondingly dangerous to others." *Id.* This confinement will last until the prisoner is no longer a dangerous threat by the abatement of their mental condition. *Id.* at 1955. The condition of the prisoner's mental state will be reevaluated by judicial review in six months intervals. *Id.*

95. *See id.* at 1954.

other preventive detention scheme based upon Commerce Clause jurisdiction would similarly be regulating future conduct (much like the ACA mandate) and not past or present activity by individuals.

### *G. Nondisclosure Crimes*

There are numerous instances when a person is required under federal criminal law to disclose some fact to the government. For example, forced disclosure can also occur by directive of a court for a material witness.<sup>96</sup> Failure to comply with the court's order risks substantial periods of incarceration.<sup>97</sup> Such material witness warrants can be issued with no regard to whether a person committed any act at all—there need only be allegations that the person observed a crime being investigated or prosecuted.

Another example occurs if a person's reason for receiving government benefits change and that person does not disclose that fact, he or she can be convicted of theft of government property<sup>98</sup> for any subsequent benefits received.<sup>99</sup> Similarly, if a person is in the midst of bankruptcy in the federal courts, he or she can be punished<sup>100</sup> for numerous failures to disclose relevant information.<sup>101</sup>

### *H. Organizational Crimes*

With the growth of corporate criminal law, a basic question had to be asked: who in a large company should be responsible for any criminal sentence? This concern could be especially noteworthy if the violation involved allowed for imprisonment of the defendant. In addressing so-called “public welfare laws,” which were one type of

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96. FED. R. CIV. P. 45 (describing the requirements and procedure of obtaining a subpoena of a witness).

97. See 18 U.S.C. § 3144 (2006) (stating the court has the authority to imprison the material witness to secure their presence in court in certain circumstances); see also Adam Liptak, *Terror Witness: A Life Ruined*, INT'L HERALD TRIB. (Fr.), Aug. 20, 2004, at 1 (discussing the long term incarceration of persons involved in terrorism cases under material witness warrants).

98. § 641.

99. See, e.g., *United States v. Bustos*, No. 10-10016, 2011 U.S. App. LEXIS 8335 (9th Cir. Apr. 22, 2011) (defendant failed to disclose condition relevant to receipt of Supplemental Security Income).

100. § 152.

101. See, e.g., *United States v. Hardy*, No. 09-60890, 2011 U.S. App. LEXIS 7390 (5th Cir. Apr. 11, 2011) (defendant failed to disclose ongoing personal injury lawsuit during bankruptcy proceedings).

these newer corporate criminal laws, the Supreme Court assigned responsibility to those atop of the corporate hierarchy.<sup>102</sup>

In *United States v. Park*,<sup>103</sup> the Chief Executive Officer (CEO) of a chain of grocery stores with 874 outlets and over 36,000 employees was found criminally liable for a failure to act to guarantee sanitary conditions in individual stores.<sup>104</sup> The Court in *Park* wrote that the CEO need not have personal “knowledge of, or personal participation in, the act made criminal by statute.”<sup>105</sup> The result is that even though the CEO of a company took no affirmative acts, she can be held criminally responsible under strict liability for the acts taken by others.<sup>106</sup>

Punishments of criminal organizations function in a similar manner. Federal conspiracy law allows for punishment of persons for crimes in which they took no affirmative action.<sup>107</sup> For example, echoing the facts of the famous case *Pinkerton v. United States*,<sup>108</sup> in a recent Second Circuit case, a defendant who was already in prison was convicted for the acts of others in which the defendant took no part.<sup>109</sup> The court held that the defendant could only have escaped criminal liability for acts after he withdrew from the conspiracy and he “must also show that he performed some act that affirmatively established that he disavowed his criminal association with the conspiracy, either the making of a clean breast to the authorities, or communication of the abandonment in a manner reasonably calculated to reach co-conspirators.”<sup>110</sup> There was no doubt that the defendant should be liable for the activities done while he agreed to be part of a conspiracy. However, the Second Circuit made clear that the additional crimes and sentencing that the defendant was held responsible for were the result of his failure to act.<sup>111</sup> The only difference, for purposes of the argument in this Essay, between the inactivities punished for legal and illegal organizations is that the illegal organization can also be prosecuted for the existence of that organization as well as the substantive offenses in which defendants took no affirmative acts.

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102. See, e.g., *United States v. Dotterweich*, 320 U.S. 277, 283–85 (1943).

103. 421 U.S. 658 (1975).

104. *Id.* at 660, 667.

105. *Id.* at 670.

106. *Id.*

107. See 18 U.S.C. § 371 (2006).

108. 328 U.S. 640 (1946).

109. *United States v. Leslie*, 658 F.3d 140, 141 (2d Cir. 2011).

110. *Id.* at 143 (quoting *United States v. Eppolito*, 543 F.3d 25, 49 (2d Cir. 2008)) (internal quotation marks omitted).

111. *Id.*

*I. Mispriison Crimes*

Mispriison concerns the obligation of individual citizens to report a crime. In the federal code, it appears in two places: mispriison of a felony and mispriison of treason.<sup>112</sup> The Supreme Court in *Roberts v. United States*<sup>113</sup> stated how mispriison creates an obligation of citizens to report crimes for which they have knowledge:

[G]ross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.

This deeply rooted social obligation is not diminished when the witness to crime is involved in illicit activities himself. Unless his silence is protected by the privilege against self-incrimination, the criminal defendant no less than any other citizen is obliged to assist the authorities. The petitioner, for example, was asked to expose the purveyors of heroin in his own community in exchange for a favorable disposition of his case. By declining to cooperate, petitioner rejected an “obligatio[n] of community life” that should be recognized before rehabilitation can begin.

Moreover, petitioner’s refusal to cooperate protected his former partners in crime, thereby preserving his ability to resume criminal activities upon release.<sup>114</sup>

However, unlike the other crime types discussed above, the modern interpretation of mispriison requires at least affirmative conduct (concealment) by defendants.<sup>115</sup> Nonetheless, it is worth including in this larger discussion because at the time of America’s founding mispriison solely regulated inactivity, the failure to report a crime.<sup>116</sup> Because those challenging the constitutionality of the ACA have sometimes based their constitutional arguments on an originalist conception of the constitutional text,<sup>117</sup> the fact that mispriison was

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112. §§ 4, 2382.

113. 445 U.S. 552 (1980).

114. *Id.* at 558 (citations omitted).

115. *Branzburg v. Hayes*, 408 U.S. 665, 696 n.36 (1972).

116. Christopher Mark Curenton, *The Past, Present, and Future of 18 U.S.C. § 4: An Exploration of the Federal Mispriison of Felony Statute*, 55 ALA. L. REV. 183, 183–86 (2003).

117. *See, e.g.*, Brief of *Amici Curiae* Center for Constitutional Jurisprudence, et al. in Support of Petitioners at 3, *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (No.11-400) (“Our nation’s Founders never envisioned unfettered spending by the Congress, and when the political branches prove incapable of policing themselves, it is the solemn duty of this Court to check their constitutional excesses.”).

entirely non-controversial at that time is significant. Indeed, misprision has been a federal crime in some form in America since 1790.<sup>118</sup>

Although the crime of misprision has always included the word “concealment,” the original elements of the crime at the time of America’s founding did not necessitate any active concealment by a defendant.<sup>119</sup> Instead, a prosecutor need only show that a person knew a felony had been committed and failed to reveal their knowledge to authorities.<sup>120</sup> Even incomplete disclosures to the police were criminal insofar as they did not include complete details about the felony.<sup>121</sup> Thus, in the founding era, a person was punished for the inactivity of not reporting a felony of which that person had knowledge. For those citing the original public meaning or framer’s intent, the federal crime of misprision presents difficulty in arguing that Article I federal powers did not include the regulation and punishment of inactivity.

### *J. Obstruction Crimes*

There are numerous ways that an individual can impede federal law enforcement. Not surprisingly, Congress has criminalized such obstructive conduct in numerous situations.<sup>122</sup> Notably, obstruction can often occur merely by a person’s failure to act. In addition to general laws pertaining to the obstruction of justice, there are very specific laws that punish persons for failing to act. For example, an individual can be prosecuted if:

- she knowingly has a fugitive in her home without any affirmative act inviting the fugitive to be there;<sup>123</sup>
- he impedes a United States Marshal simply by blocking entry through no affirmative movement;<sup>124</sup> or

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118. Carl Wilson Mullis, III, *Misprision of Felony: A Reappraisal*, 23 EMORY L.J. 1095, 1101 (1974); *see also* Curenton, *supra* note 116, at 185.

119. Curenton, *supra* note 116, at 186 (“Thus, the modern misprision of felony cases differ from their historical counterparts. The historical versions started with the assumption that an ordinary citizen had a duty to control crime, and they questioned whether the citizen failed in that duty. The modern cases assume the duty rests with law enforcement, and they question whether the citizen interfered with that duty.”).

120. Mullis, *supra* note 118, at 1099.

121. *Id.* at 1099 n.23.

122. 18 U.S.C. §1510 (2006) (obstruction of criminal investigation); §1509 (obstruction of court orders); §1511 (obstruction of State or local law enforcement); §1514 (retailing against a witness, victim, or an informant).

123. § 3 (allowing punishment of someone who “receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment”).

124. § 111(a)(1) (allowing punishment of someone who “impedes . . . or interferes with any [designated law enforcement personnel] while engaged in or on

- she, entirely due to inaction, does not comply with an order of a district court following a default judgment.<sup>125</sup>

In each of those scenarios, a person merely fails to comply with some directive by a federal official. That official can be a marshal, federal judge, or other federal investigator. In each instance, an affirmative obligation is placed on an individual and a failure to act accordingly is punished without raising any constitutional concerns.

## II. “UNPRECEDENTED” PUNISHMENT OF “INACTIVITY”?

Those opposing the constitutionality of the ACA have contended that ordinary citizens are being punished for the failure to purchase a qualifying health insurance policy by virtue of the ACA’s insurance “mandate.”<sup>126</sup> For purposes of this Essay, this claim is taken as true. However, for the challenges made against the ACA to succeed, they are further contending that the insurance mandate is wholly unprecedented in American history. That part of the argument which has been at the forefront of legal and scholarly challenges is where this Essay takes issue.

Having discussed the types of criminal laws that provide evidence that the ACA’s mandate is not at all unusual, it is important to explore the concepts of what it means to be “unprecedented” and how the concept of “inactivity” should be understood. Indeed, without some elaboration of those concepts, distinctions could surely be drawn between the crimes described in Part I and the ACA mandate based upon misuses of both concepts.

There are two basic difficulties in evaluating claims that the insurance mandate is unprecedented: what I term the abstraction problem and the action problem. The abstraction problem illustrates why the concept of being “unprecedented” is often misused in the health care debate and what a proper meaning of the term is in this context. The action problem concerns the difficulty in separating action and inaction in a way that provides the constitutional distinction that challengers of the ACA hope it will. Each of these problems is discussed below in a manner that illustrates how those attacking the ACA’s constitutionality have often obfuscated the doctrinal debate by misusing and abusing the concepts of “precedent” and “inactivity.”

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account of the performance of official duties”); *see also* § 231(a)(3) (obstructing firefighters is a civil disorder crime).

125. § 402 (allowing punishment of someone who does not obey “any lawful writ, process, order, rule, decree, or command of any district court of the United States”).

126. *E.g.*, Barnett, *supra* note 1, at 605–06.

*A. The Abstraction Problem*

At a high level of specificity everything is unprecedented. And at a high level of abstraction everything has precedent. If one states that Thomas Edison's invention of the first commercially viable incandescent light bulb was unprecedented, the veracity of that claim is subject to the level of abstraction used by the listener. So, at a high level of specificity (focusing on the specific invention made by Edison), the claim is clearly true—the commercially viable incandescent light bulb was a new device which had never been made before. However, at a high level of abstraction (focusing on inventions in general), the listener could say that inventions were made all the time and therefore, Edison's light bulb had countless precedents. At an even higher level of abstraction (focusing on social change in general), the listener would say that things change all the time and, thus, Edison's contribution to the process of unending societal transformation is entirely unremarkable.

As the Edison example illustrates, at the highest levels of abstraction and specificity, the claims that something is either unprecedented or commonplace are essentially vacuous. The most specific interpretation renders all inventions unprecedented and possibly any other social change as well. Similarly, the most abstract interpretation treats all changes as banal happenings in the grand scheme of history.

In the context of the ACA litigation, those arguing that the insurance mandate has precedent generally prefer the more abstract understanding of the concept. Those seeking to have the mandate struck down would, thus, seemingly prefer as high a level of specificity that is rhetorically defensible. Interestingly, though, those arguing that the insurance mandate in the ACA is unprecedented have engaged in linguistic slippage to make claims at high levels of specificity to the point of constitutional insignificance, some level of abstraction wherein precedents for the mandate exist, and numerous places in between. Consider these claims made roughly in order from most specific to most abstract:

1. "It's never been done, and anything that's never been done before has no precedent for it . . . . It would have to be a new decision by the Supreme Court to uphold this new extension of power."<sup>127</sup>

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127. David Welna, *Opponents Threaten Court Battle on Health Mandate*, NPR (Jan. 18, 2010), <http://www.npr.org/templates/story/story.php?storyId=122693523> (quoting Randy Barnett, Georgetown University Law Professor) (internal quotation marks omitted).

2. “Declaring that Congress lacks the power to impose economic mandates on the people under the Commerce Clause would affect one, and only one, law ever enacted in the history of this country: The Affordable Care Act of 2010. This is because Congress has never done this before, which is conceded even by the federal judges who upheld the mandate’s constitutionality.”<sup>128</sup>
3. “Economic mandates such as the one contained in the Act are so unprecedented, however, that the government has been unable, either in its briefs or at oral argument, to point this Court to Supreme Court precedent that addresses their constitutionality.”<sup>129</sup>
4. “The federal government’s assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented . . . .”<sup>130</sup>
5. “Mandating that all private citizens enter into a contract with a private company to purchase a good or service, or be punished by a fine labeled a ‘tax,’ is unprecedented in American history. For this reason, there are no Supreme Court decisions authorizing this exercise of federal power.”<sup>131</sup>

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128. Randy Barnett, *The New York Times Editorializes on Last Week’s Senate Judiciary Hearings on the Constitutionality of the Individual Mandate*, VOLOKH CONSPIRACY (Feb. 12, 2011, 1:01 AM), <http://volokh.com/2011/02/12/the-new-york-times-editorializes-on-last-weeks-senate-judiciary-hearings-on-the-constitutionality-of-the-individual-mandate/>.

129. *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1288 (11th Cir. 2011).

130. *Id.* at 1312–13.

131. RANDY BARNETT, NATHANIEL STEWART & TODD GAZIANO, HERITAGE FOUND., LEGAL MEMORANDUM NO. 49, WHY THE PERSONAL MANDATE TO BUY HEALTH INSURANCE IS UNPRECEDENTED AND UNCONSTITUTIONAL (2009), available at <http://www.heritage.org/Research/Reports/2009/12/Why-the-Personal-Mandate-to-Buy-Health-Insurance-Is-Unprecedented-and-Unconstitutional>; see also Barnett, *supra* note 1, at 605 (“In sum, all these cases involve *activity*, not *inactivity*. In none of these cases did the government mandate that citizens engage in economic activity by entering into a contract with a private company.”); Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate Is Unconstitutional*, 62 MERCER L. REV. 608, 608 (2011) (“I can prove, however, that an economic mandate like this one is unprecedented. If this mandate had ever happened before, everyone reading this passage would know all the contracts the federal government requires them to make, upon pain of a penalty enforced by the Internal Revenue Service (IRS). No reader, however, can recite any such mandate and neither could any reader’s parents or grandparents because this has never been done before.”).

6. “While the Supreme Court is, of course, free to do this, it is not at all clear that a District Court judge should be devising a new and unprecedented doctrine extending federal power.”<sup>132</sup>

As with Edison’s light bulb, in one sense it is absolutely, without a doubt, correct that the insurance mandate in the ACA is literally unprecedented. Such is the case with any new law. In that regard, saying that the ACA is “unique” or “literally unprecedented” as in the first two quotes above tells us nothing at all of importance. The third quote refers to economic mandates exactly like the ACA. The fourth instance abstracts “unprecedented” to the level of mandating economic contracts with insurance companies. The fifth usage above focuses on economic mandates in general. The final quote concerns the use of “unprecedented doctrine” to support the new law.

Going down the list, each use of the word “unprecedented” takes on a different meaning that determines the universe of precedents. If the range of relevant precedents includes all those statutes mandating economic contracts with insurance companies, then the statement is very likely accurate. However, there is no reason that the clause “economic contracts with insurance companies” is constitutionally significant in a way favorable to those challenging the ACA. Even broadening the possible prior precedents to economic contracts does nothing to advance the constitutional argument.

In the end, the universe of statutory precedents relevant to the ACA’s mandate based upon existing case law contains those that regulate any inactivity which “substantially affect interstate commerce.”<sup>133</sup> Indeed, it is the word “activities” in *United States v. Lopez*<sup>134</sup> that gives rise to the entirety of the activity/inactivity distinction.<sup>135</sup> As a result, the only constitutionally relevant distinction is between the twin concepts of activity and inactivity among statutes that have a nexus to interstate commerce. Nonetheless, further

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132. Randy Barnett, *The Individual Mandate Is Unprecedented? So What??*, VOLOKH CONSPIRACY (Aug. 25, 2010, 8:07 AM), <http://volokh.com/2010/08/25/the-individual-mandate-is-unprecedented-so-what>. *But see* Gerard Magliocca, *The Private Action Requirement*, CONCURRING OPINIONS (Aug. 20, 2010, 5:10 PM), <http://www.concurringopinions.com/archives/2010/08/the-private-action-requirement.html>.

133. *See United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (“Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.” (citations omitted)).

134. 514 U.S. 549 (1995).

135. *See id.* at 558 (“Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power.”).

variations on potential arguments relevant to this distinction are addressed in Part III.

### *B. The Action Problem*

A problem with which criminal law scholars are very familiar concerns the conceptual difference between acts and omissions.<sup>136</sup> While the easy cases far outnumber the difficult ones, there remains some blurriness at the line separating the two types of *actus reus*. Among the essential questions presented in these borderline cases are: Has “conduct” actually taken place? How should “conduct” be defined? Is it merely physical movement? If it includes speech, can “conduct” ever be silence? What if there are legal affirmative acts combined with seemingly illegal omissions?

Those arguing against the insurance mandate’s constitutionality have focused exclusively on “activities” as physical actions. This is problematic for reasons that criminal law theorists have long recognized.<sup>137</sup> For example, consider four different ways that a mob boss might order that someone be killed.

1. The boss says, “kill him.”
2. The boss issues a written order that says, “kill him.”
3. The boss lifts a hand with the intent that the hand signal orders a murder.
4. One of the mob boss’ assassins says, “I’m going to kill him,” looks at the mob boss for any sign of disagreement, and the boss knowingly gives none.

The difference between speech, written note, hand signal, and silence matters for the type of evidentiary proof used by the prosecutor, but the *actus reus* for aiding and abetting a murder (or attempted murder) is established in all four instances. Criminal “conduct” like “activities,” cannot logically be limited to physical acts without creating nonsensical results. It would surely be absurd if the mob boss escaped prosecution in the first, third, and fourth scenarios because of the lack of physical activity. Even allowing for speech to be physical action still would allow the silent boss in the fourth instance to remain free despite ordering a murder.

Yet that is exactly the sort of distinction on which those challenging the ACA have relied. We might imagine interactions

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136. See DRESSLER, *supra* note 7, at 103 (“A ... practical problem is one of line-drawing . . . [between acts and omissions.]”).

137. See, e.g., Michael Gorr, *The Actus Reus Requirement: A Qualified Defense*, 10 CRIM. JUST. ETHICS 11 (1991); see also Jeffrie G. Murphy, *Gorr on Actus Reus*, 10 CRIM. JUST. ETHICS 18 (1991) (responding to Michael Gorr’s article).

between the government and individuals in regard to the insurance mandate that parallel the mob boss and his or her underling:

1. The person says, “I will not comply with the mandate or pay a penalty.”
2. The person writes a letter to the government that essentially says, “I will not comply with the mandate or pay a penalty.”
3. The government orders a person to buy insurance or pay a penalty, but the person shakes her head in opposition.
4. The government orders a person to buy insurance or pay a penalty, but the person simply does not buy insurance or pay a penalty.

In all four scenarios, the person has opposed the mandate, but those challenging the mandate in federal courts have been unclear as to which (if any) of the above constitute “activity.” If the line is between physical action and inaction, then only the second and third choices by the person would be activity. If the distinction includes physical action and speech, then the first, second, and third options all present “activity.” If the challenger to the ACA wants to contend that all four options are “inactivity” (perhaps because they are products of the mandate), then a new definition of the concept beyond anything currently used would need to be advanced. Regardless, such arguments illustrate how ephemeral the difference between “activity” and “inactivity” can be.

While not specifically considering the relevant analogue of omissions and affirmative acts in criminal law, Judge Jeffrey Sutton articulated a similar argument in his opinion finding the ACA’s insurance mandate constitutional:

The unavoidable need for health care coupled with the obligation to provide treatment make it virtually certain that all individuals will require and receive health care at some point. Thus, although there is no firm, constitutional bar that prohibits Congress from placing regulations on what could be described as inactivity, even if there were it would not impact this case due to the unique aspects of health care that make all individuals active in this market.<sup>138</sup>

Judge Sutton’s argument illustrates how the abstraction and action problems intersect. At a high level of specificity or abstraction in restating the same basic facts, an activity can be transformed into an

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138. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 548–49 (6th Cir. 2011).

inactivity and vice versa. Some of those defending the ACA contend that the decision to not buy health insurance is really a decision to self-insure at some later date when health care is needed.<sup>139</sup> In that scenario, the inactivity of not buying insurance is transformed into the activity of self-insuring. Similarly, if a person has health insurance through an employer group plan at the time the ACA goes into effect, he or she can only fail to be in compliance if he or she cancels the insurance or loses his or her job. In that situation, it seems as though inactivity leads to compliance whereas activity creates noncompliance. Yet someone challenging the constitutionality of the mandate would contend that, by focusing on a specific moment in time, the worker is being forced to maintain his or her insurance against his or her will. These scenarios illustrate the vacuous nature of the inactivity/activity distinction in this context, particularly when concepts are abstracted. Every person is inactive at one time or another if we limit our scope to finite moments in time. And yet over the long term, surely some activity could be identified as being regulated by a statute like the insurance mandate.

### III. POSSIBLE DISTINCTIONS AND COUNTERARGUMENTS

Although the abstraction and action problems raise serious doubts about the viability of the arguments challenging the ACA that seek to distinguish existing laws, it is worth considering more specific objections that might be raised to the analogies described in this Essay. Because of the novelty of the arguments against the ACA, there is not a wide, established literature from which to draw counterarguments. Instead, there are a handful of scholarly articles and court filings. Nonetheless, I have attempted to address the likely major responses against my claim that the ACA's insurance mandate has numerous statutory precedents in criminal law in regulating inactivity which are discussed below.

#### *A. Links to Activity*

A potential objection that someone opposed to the ACA's constitutionality might make is that many of the crimes discussed in this Essay involve regulation of inactivity linked to other activities. The argument would be that crimes such as possession of marijuana are connected to some prior activity of acquiring it. Another example would be the CPOEA statute which regulates those who actively produce pornography. However, this argument is not persuasive for three reasons.

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139. See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 47 (2010).

First, there are numerous crimes discussed in Part I that involve no additional activity by the defendant being prosecuted for inactivity or involve activities so far removed from the punished activity as to be irrelevant. For example, the receipt-of-illegal-proceeds crimes described often require no recent or related activity by a defendant. Similarly, duties are attached based upon wholly innocent activities such as having a child (which provide no independent basis for federal jurisdiction) in crimes such as failing to pay child support. Other crimes, such as the failure to register as a sex offender, have been delinked from the prior activity (the original sex offense in the case of the registration statute) to avoid other constitutional problems such as the Ex Post Facto Clause.<sup>140</sup> Also, obstruction crimes can arise merely by being in the wrong place at the wrong time while refusing to act further. Lastly, preventive laws such as the one in *Comstock*, by their very nature are forward looking and unrelated to any actual activities by the persons regulated.<sup>141</sup> Even the example of marijuana possession can occur through inactivity if the person has illegal plants growing in his or her yard or a person places a bag of marijuana in the defendant's backpack.

Second, the scope of federal jurisdiction in criminal cases is determined by the elements of the crime that must be proven by a federal prosecutor. Connections to secondary activities that are not within the statutory elements of a crime are simply irrelevant. For example, in a case of a prosecution for illegal possession of heroin, it is most likely that a defendant took some actions to acquire the heroin. As a result, someone might conclude that the inactivity of possession and connected duty to dispossess the heroin are connected to acquiring the drug in the first instance. However, the prosecutor need not show any evidence related to the heroin's acquisition. Instead, alleging and proving mere possession is enough. As a result, a court examining whether the statute is constitutional under the Commerce and Necessary and Proper Clauses uses the elements of the crime (including any jurisdictional element present) to determine constitutionality. Never does such a court look for connections to other interstate activities by a defendant. Indeed, if the Supreme Court in *Lopez* had inquired as to whether the defendant had any other connections to interstate commerce such as buying gasoline or driving a car on an interstate highway during the possession of the weapon at issue, then the result would have been very different. Instead, the Court limited its analysis to the four corners of the statute and held it facially unconstitutional.<sup>142</sup> Just as the

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140. See *supra* Part I.B.

141. See *supra* Part I.F.

142. *United States v. Lopez*, 514 U.S. 549 (1995).

limitation of the Court's analysis to the elements of the crime ensured the statute punishing activity in *Lopez* unconstitutional, that same limitation means the regulation of inactivities is to be adjudicated based only upon the elements listed (which by themselves do not require activity).

Third, to the degree that this is a noteworthy distinction, it is simply one of form and not of substance. If an alternate version of the ACA would be constitutional if it linked the mandate to some other activity (e.g., interstate travel, self-insuring, use of public resources, being employed, earning income, using a highway, shopping, etc.), then the scope of federal power in the challenger's worldview is identical to that of those defending the ACA. If the mere addition to the statute of an innocuous activity is constitutionally sufficient to establish proper federal jurisdiction, then the constitutional objections are simply a matter of hyper-formalism and the extent of federal power is not contested at all through the legal challenges to the ACA.

### *B. Commercial and Non-commercial Inactivity*

Another possible distinction that those challenging the ACA might make is that the criminal laws mentioned in this Essay are not concerned with "commercial" or "economic" activities and therefore do not provide precedents for the ACA mandate. This argument fails and ultimately undermines the challenger's argument for two reasons.

First, many of the examples above are directly related to economic activities. Indeed, as *United States v. Lopez* and *Gonzales v. Raich* illustrate, criminal laws are overwhelmingly justified under the Commerce Clause even when the connection to economic markets seems limited.<sup>143</sup> Further, the receipt crimes listed herein directly punish illegal commerce inactivity. Also, the organizational, nondisclosure, and record keeping crimes are focused on liability of inactive individuals in companies engaged in interstate commerce. Further, in all instances listed in Part I, the statutes have universally survived Commerce Clause challenges and been held to be proper exercises of federal power.

Second, this argument is counterproductive and counterintuitive. If non-economic, non-commercial mandates are proper exercises of federal power, then surely an economic, commercial mandate of the ACA would be justified as well. The distinction challengers would draw here cuts against their argument. It is nonsensical to contend that non-economic mandates have a tighter nexus with interstate commerce than an economic one that concerns one of the largest sectors of the

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143. *Gonzales v. Raich*, 545 U.S. 1, 5 (2004); *Lopez*, 514 U.S. at 551–52.

United States economy. The existing case law gives the health insurance mandate a far greater nexus to interstate commerce than other laws upheld under the Commerce Clause, such as punishing the failure of sex offenders to register or the inaction of harboring a fugitive in one's home.

### *C. Regulations of Some versus All*

As the Heritage Foundation report authored by Randy Barnett, Nathaniel Stewart, and Todd Gaziano indicates, those attacking the constitutionality of the ACA often choose their words carefully regarding the population targeted.<sup>144</sup> The report contended that: "A mandate to enter into a contract with an insurance company would be the first use of the Commerce Clause to universally mandate an activity *by all citizens of the United States.*"<sup>145</sup> One might contend that the criminal laws outlined here are of limited, and not general, applicability thus providing a distinction for those challenging the ACA to utilize. However, as with the commercial/non-commercial distinction this argument fails and is counterproductive.

First, the possession, receipt, misprision, and obstruction crimes are of general applicability. Every person in the United States cannot illegally possess cocaine or biological weapons. It is also wrong for people to receive Social Security payments that are not properly theirs. Similarly, any person that obstructs a federal criminal investigation is subject to prosecution. Only a small number of the crimes listed in Part I (i.e., record-keeping requirements for pornography producers) are limited in the population regulated.

Second, this distinction works against those attacking the ACA. If a mandate is limited to a smaller population, such as sex offenders or pornography producers, it would be less likely that such laws would have the substantial connection to interstate commerce necessitated under existing case law. In contrast, a law that governs economic inactivity of every citizen in the United States would generally have a tighter nexus with interstate commerce. Because the laws of limited applicability regulating inactivity have been universally upheld, any distinction based upon general applicability undermines claims made by those litigating against the ACA.

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144. See BARNETT, STEWART & GAZIANO, *supra* note 131.

145. *Id.* (emphasis added).

## CONCLUSION

By enacting laws outlining crimes of omission and other crimes without affirmative conduct by defendants, the federal government has firmly established that regulation of inactivity is an entirely normal exercise of federal power. Those attacking the ACA for constitutional reasons might ultimately succeed in having the statute struck down by the Supreme Court. However, such a decision would not be because of the uniqueness of the regulation of inactivity contained in the ACA, but because the Court has decided to revolutionize Commerce Clause and Necessary and Proper Clause doctrine.

There are scores of criminal laws that will be subject to facial and as-applied challenges if the Court strikes down the ACA mandate on the inactivity/activity distinction. Indeed, because of the scope of these statutes, tens of thousands of convictions will be called into question as well. The Court may choose to follow that path, but it is essential that it realizes what is at stake. The ACA mandate litigation is not, as has been contended, about a single enforcement mechanism on one statute; it is about the scope and constitutionality of an immense portion of federal criminal law.