
California Law Review

VOL. 97

DECEMBER 2009

No. 6

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Criminal Lying, Prosecutorial Power, and Social Meaning

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This Article concerns the prosecution of defensive dishonesty in the course of federal investigations. It sketches a conceptual framework for violations of 18 U.S.C. § 1001 and related false statement charges, distinguishes between harmful deception and the typical investigative interaction, and describes the range of lies that fall within the wide margins of the offense. It then places these cases in a socio-legal context, suggesting that some false statement charges function as penalties for defendants' refusal to expedite investigations into their own wrongdoing. In those instances, the government positions itself as the victim of the lying offense and reasserts its authority through prosecution. Efficiency rather than accuracy goals drive enforcement decisions in marginal criminal lying cases, which may produce unintended consequences. Using false statement charges as pretexts for other harms can diminish transparency and mute signals to comply. Accountability also suffers when prosecutors can effectively create offenses, and when it is the interaction with the government itself rather than conduct with freestanding illegality that forms the core violation. The disjunction between prosecutions and social norms about defensive dishonesty may also result in significant

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credibility costs and cause some erosion of voluntary compliance. Animating the materiality requirement in the statute with attention to the harm caused or risked by particular false statements could mitigate these distortions. An inquiry into the objective impact of a false statement might account for the nature of the underlying conduct under investigation, whether the questioning at issue is pretextual, whether the lie is induced, and whether the deception succeeds or could succeed in harming the investigation. By taking materiality seriously, courts could curtail prosecutorial discretion and narrow application of the statute to cases where prosecution harmonizes with social norms.

INTRODUCTION

Process offenses that arise during white collar investigations rather than from the commission of the crime itself have increasingly been the focus of federal prosecution. In several recent cases, high-profile targets in the worlds of business, politics, and sports have started out implicated in scandals and ended up guilty of crimes because they attempted to minimize their misconduct when questioned by government officials. This Article concerns the prosecution of particular process crimes—defensive deception in response to questioning by government agents—and the effect those cases may have on enforcement goals and the public's cooperation with evidence gathering in other investigations.

Part I describes everyday lies, compares them to typical investigative interactions, and then considers the broad range of conduct within the scope of 18 U.S.C. § 1001 and related false statement offenses. Current enforcement strategies authorize the pursuit of organic falsehood: reactive misrepresentations that arise solely as a result of the defendant's engagement with government agents. The statute also permits charges for proxy deception, including statements made to state officials and nongovernmental parties who then relay them to the federal government. Although in some cases organic and proxy false statement charges merely supplement the underlying crimes, in others, there is no stand-alone offense, and false statements supply the only prosecutable crime.

Part II examines the potential for prosecutorial misuse of the statute, including the possibility of crime creation and overcharging for plea-bargaining purposes. Prosecutors may use false statement charges to constructively amend white collar statutes that do not reach a defendant's conduct. Although § 1001 ostensibly protects the accuracy of information, the nature of the offense does more to increase efficiency than to enhance truth-seeking. Prosecutions proceed as well to penalize defendants' recalcitrance and to assert governmental authority, or to force apologies. But those justifications may ultimately be undermined by what false statement prosecutions signify.

Part III discusses the unintended consequences of the current enforcement strategy, including the signals sent by prosecuting the full spectrum of false statements. Because such charges are often pretexts for punishing unprovable

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offenses, and because plea-bargaining resolutions are likely, they reduce transparency. Prosecutorial accountability further decreases when the interaction with law enforcement itself forms the core violation, rather than independent criminal conduct that predates the investigation. Credibility costs are substantial as well. Many theorists have argued that calibrating law to reflect social norms is essential to the perceived legitimacy of law enforcement, and several factors indicate discord here: the lack of consensus among moral philosophers about defensive falsehoods that merely mislead, social psychology concerning deception success rates, countervailing norms about self-protective perjury, and the response to recent, high-profile cases. Deep deterrence of harmless lies may lead to diminished compliance and other backfire effects, so that an offense that ostensibly protects the government's access to information in practice produces less of it.

Part IV suggests that one approach to mitigating these expressive distortions and safeguarding against abuse would be to animate the materiality requirement in the statute with independent content derived from the "harm principle."¹ Structural deficiencies hinder many proposals to check prosecutorial discretion, but the existing language in § 1001 provides a point of entry for judicial line-drawing. Courts might raise the costs of prosecution by scrutinizing the objective implications of false statements or omissions, including the significance of the underlying conduct, whether the defendant initiated the statement, what information government agents already possessed, and any resulting harm or risk to the investigation.

I

DEFINING FALSE STATEMENTS IN INVESTIGATIONS

Section 1001 is an expansive provision with terms that have been interpreted to punish not only conduct that impedes an investigation but also evasions or understatements that merely fail to expedite it.² The statute prohibits making a "materially false, fictitious, or fraudulent statement or representation" or falsifying, concealing, or covering up "by any trick, scheme,

1. In general terms, the "harm principle" holds that "harmless immoralities should not be officially prohibited or punished." John Gardner, *Justifications and Reasons*, in HARM AND CULPABILITY 103, 127 (A.P. Simester & A.T.H. Smith eds., 1996); see also JOHN STUART MILL, ON LIBERTY 22 (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

2. The statute provides for a fine and a maximum sentence of five years for:
 [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
 (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 (2) makes any materially false, fictitious, or fraudulent statement or representation; or
 (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry

18 U.S.C. § 1001(a) (2006); see also *Brogan v. United States*, 522 U.S. 398, 416 (1998) (Ginsburg, J., concurring).

or device a material fact” in any matter within the jurisdiction of the federal government.³ Liability requires a knowing and willful falsehood (which could take the form of misleading, misrepresenting, or concealing) that is material to a matter within federal jurisdiction.

In its current form, the statute has drifted from its core purpose of protecting governmental interests and preventing the loss of information and has instead become a tool for penalizing otherwise unreachable defendants or forcing cooperation with an inquiry.⁴ The potential for abuse arises from the fact that lying may be the most ordinary human activity to be regulated through the criminal law. It is not unusual for prosecutors to charge readily provable offenses, such as tax evasion, as pretexts for more serious crimes that raise strategic difficulties. Nor is it uncommon for law enforcement to use devices such as traffic stops to further the course of investigations into broader wrongdoing. But false statements are not actionable, in the way that either pretext crimes or infractions that create investigative opportunity would be, absent interaction with law enforcement. Because dishonesty is pervasive and derives its entire criminal content under § 1001 from contact with the government, the government exercises some control over when and whether an offense is committed.

A. *Everyday Lies*

Deception is part of our everyday interactions; it surrounds us in the form of social niceties, misleading statements, wishful thinking, exaggerations, concealment, and flat untruths.⁵ Lying is difficult to recreate clinically or study empirically, but recent research provides some evidence of its frequency. Studies have revealed that as many as one out of three job applicants lies to potential employers; that nine out of ten college students have lied to sexual partners; and that study participants lied to about a third of the people with

3. Section 1001 is the center of my analysis and the most widely used of the false statement offenses, but there are companion provisions that criminalize particular kinds of false statements, including: claims against the United States government, 18 U.S.C. § 287 (2006); statements to FDIC-insured banks, 18 U.S.C. § 1014 (2006); and statements related to ERISA filings, 18 U.S.C. § 1017 (2006). Approximately 100 additional federal false statement statutes were catalogued in the dissenting opinion in *United States v. Gaudin*, 28 F.3d 943, 959–60 nn.3 & 4 (9th Cir. 1994) (Kozinski, J., dissenting).

4. See, e.g., William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881–82 (2000) (“A century ago, lying raised moral and reputational questions but only rarely legal ones. Today, lying by any government official or lying in the course of any business transaction is usually a felony.”).

5. See DAVID LIVINGSTONE SMITH, *WHY WE LIE* 2 (2004) (“From the fairy tales our parents told us to the propaganda our governments feed us, human beings spend their lives surrounded by pretense.”); *id.* at 9 (“Lying is universal—we all do it; we all *must* do it.”) (quoting Mark Twain); EVELIN SULLIVAN, *THE CONCISE BOOK OF LYING* 61 (2001) (“Deception is widespread, and it appears in so many different ways, and has so many effects—ranging from miniscule to fatal—that it can safely be said to be more complicated than anything else we do that carries a moral cargo.”).

whom they spoke in a given week.⁶ Any statement on the frequency of lying depends on how deception is characterized. Some diary studies suggest that the average person tells one or two lies a day, but one set of subjects recording daily interactions identified as many as three fibs or fabrications for every ten minutes of conversation.⁷ Of course, many of these statistics concern “false positives” in the form of relatively innocuous social lies,⁸ and flattery or puffery occurs with much greater frequency than the denials of culpability that give rise to criminal liability. The very prevalence and predictability of human deception, however, underscores some potential for manipulation by prosecutors. And lies may be even more unexceptional in the interactions between the government and witnesses or suspects. Deception often arises from fear, an emotion felt acutely in criminal inquiries, and it typically aims at control,⁹ a desire central to the power struggle in an investigative interview. Like the other commonplace deceptions mentioned here, investigative lies are often anticipated and insignificant, but they can give rise to liability nonetheless. Given the high incidence of dishonesty and the simple yet sweeping elements of the statute, prosecutors can precipitate offenses to refresh stale investigations or to force plea bargaining.

Because of the broad scope of the language of § 1001, there is both this potential for overreaching and a great deal of underenforcement. While better sorting is necessary, decriminalizing lies altogether seems ill advised. Investigators are rightly concerned that dishonesty with and hostility toward the government are increasing, even as there is a growing need for voluntary compliance to address complex enforcement problems like corporate crime. The issue is not whether the prosecutors should pursue false statements at all but whether the plus factor that they apply when selecting cases is too often the defendant’s identity and too rarely the egregiousness of the offense.¹⁰

6. See LIVINGSTONE SMITH, *supra* note 5, at 18–19; Bella M. DePaulo et al., *Lying in Everyday Life*, 70 J. Personality & Soc. Psychol. 979, 991 (1996).

7. Compare DePaulo, *supra* note 6, at 991 with LIVINGSTONE SMITH, *supra* note 5, at 15.

8. Cf. DAVID NYBERG, *THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE* 53 (1993) (intentional deceit can be a creative and compassionate alternative to truth-telling).

9. As Evelin Sullivan observes:

[T]he answer to why the liar wants the truth kept from being known or a falsehood believed [is obvious]. The fear of losing something—money, a job, a marriage, power, respect, reputation, love, life, freedom, comfort, enjoyment, cooperation, etc., etc.—is one reason; the desire to gain something—a better job, admission to a desired school . . . money, revenge, love, cooperation, respect and admiration, control and power, comfort and convenience, and so forth—is another.

SULLIVAN, *supra* note 5, at 57.

10. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940–1941) (“If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”).

In some important respects, defensive false statements to government agents fall outside traditional understandings about serious deception. Lying is often defined as “telling or otherwise communicating a falsehood with the intention to deceive,”¹¹ and at least some philosophical definitions require, as well, an expectation of success at deception.¹² For some suspects being interviewed, however, there may be little expectation of success and an intention primarily to change the subject. Many courts have held that whether or not the agent believes the false statement to be true has no bearing on the applicability of the statute,¹³ but on one theory, “falsehood ceases to be falsehood when it is understood on all sides that the truth is not expected to be spoken.”¹⁴ Agents and prosecutors are sufficiently acclimated to the likelihood of deception that they know that a witness, even one who is not a suspect, will frame events to protect herself and minimize any exposure. This is unsurprising given society’s distrust of government agents. The natural reaction of most subjects confronted by investigators is to respond in a way that deflects scrutiny and forestalls liability—a reaction that agents generally anticipate.¹⁵

Nor do concerns about lying from the realm of applied ethics seem particularly applicable to the context of a criminal investigation. Lying classically involves “the creation, and simultaneous breach, of a relationship of trust between a speaker and listener,”¹⁶ but the relationship between agents and

11. See, e.g., SULLIVAN, *supra* note 5, at 57.

12. See Roderick M. Chisholm & Thomas D. Feehan, *The Intent to Deceive*, 74 J. PHIL. 143, 159 (1977); James Edwin Mahon, *The Definition of Lying and Deception*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Feb. 21, 2008, <http://plato.stanford.edu/entries/lying-definition/> (noting one definition of lying as making “a believed-false statement to another person, with the intention that that other person believe that statement to be true, violating that person’s right of liberty of judgment, with the intention to harm that other person”).

13. See *United States v. Sarihifard*, 155 F.3d 301, 305 (4th Cir. 1998) (statement was material even though the agents called defendant a liar immediately after he made it); *United States v. Johnson*, 139 F.3d 1359 (11th Cir. 1998); *United States v. Ross*, 77 F.3d 1525 (7th Cir. 1996); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979) (“[T]he test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances.”).

14. Albert Z. Carr, *Is Business Bluffing Ethical?*, in *ETHICAL ISSUES IN BUSINESS* 46, 46 (Thomas Donaldson & Patricia Werhane eds., 1979) (quoting British statesman Henry Taylor).

15. See SULLIVAN, *supra* note 5, at 75 (“[O]nly a perpetrator who is repentant or out to be punished is honest.”); see also *Ashcraft v. Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting) (“It probably is the normal instinct to deny and conceal any shameful or guilty act.”); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 648 (1991). Friedman stated:

How dire the consequences of the truth must be before a person is willing to tell a lie may differ from person to person, but it would be hard to deny that virtually everybody has a tipping point. . . . [A]nd probably for most, the threat of serious criminal punishment is sufficient.

Id.

16. 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, 166 (2001); see also CHARLES FRIED, *RIGHT AND WRONG* 67 (1978) (“Every lie is a broken promise . . . made and broken at the same moment. Every lie necessarily implies—as does every assertion—an

suspects is not an association founded on trust. To some philosophers, the damage lying causes comes not from the falsehood itself but from its tendency to “compromise and corrupt our relationships.”¹⁷ But the government and criminal suspects already are in an adversarial relationship. While lying can undermine cooperative behavior and exacerbate imbalances of power,¹⁸ agents prepare extensively for interviews in white collar cases, and are neither trusting nor vulnerable in these scenarios. The interviews that give rise to false statement charges often involve surprising suspects at odd hours and in uncomfortable places; those conversations do not resemble ordinary social interactions within a complex of reciprocal obligations.¹⁹ To the extent these conversations produce exculpatory lies, agents rarely intend to rely on what is said, and the lies generally cause little harm.²⁰

By way of example, in May 2008, Olympic track coach Trevor Graham was convicted of one count of lying to federal agents in a steroids probe. Investigators confronted Graham in 2004 and questioned him about his contacts with a steroids dealer. At the time, Graham asserted that he had not spoken to the dealer since 1997, but prosecutors had already obtained phone records showing nearly 100 calls Graham placed to him between 1998 and 2000. Although jurors convicted Graham on that false statement, they acquitted him of two additional counts, including his false claim that he had never met the dealer in person. After the verdict, the jury foreperson expressed general skepticism about the government’s case, including the lack of any contemporaneous interview notes, and the reasons for withholding the phone records instead of confronting Graham directly. “It was like they wanted to catch him,” the juror remarked, and “[i]t got me to questioning the government themselves.”²¹

Although deception may be integral to criminal activity, many view it as less reprehensible than the underlying crimes themselves. Yet the spare require-

assurance, a warranty of its truth.”).

17. Robert C. Solomon, *Is It Ever Right to Lie? The Philosophy of Deception*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 27, 1998, at A60; see also Robert C. Solomon, *What a Tangled Web: Deception and Self-Deception in Philosophy*, in LYING AND DECEPTION IN EVERYDAY LIFE 30, 40 (Michael Lewis & Carolyn Saarni eds., 1993) (“Lying is wrong because it constitutes a breach of *trust*, which is not a principle but a very particular and personal relationship between people.” (citation omitted)).

18. See SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 20, 28–30 (1978) (noting that deception increases imbalances of power and that lying undermines trust relationships); Robert N. Van Wyk, *When is Lying Morally Permissible?: Casuistical Reflections on the Game Analogy, Self-Defense, Social Contract Ethics, and Ideals*, 24 J. VALUE INQUIRY 155, 155 (1990).

19. See, e.g., Christopher Slobogin, *Lying and Confessing*, 39 TEX. L. REV. 1275, 1291–92 (2007) (discussing potential moral limitations on the use of deception by law enforcement during interrogations).

20. Cf. 4 WILLIAM BLACKSTONE, COMMENTARIES *137 (referring to perjury and stating that “if it only be in some trifling collateral circumstance, to which no regard is paid, it is not penal”).

21. See Amy Shipley, *Graham Is Convicted of Lying to Investigators*, WASH. POST, May 30, 2008, at E3.

ments for liability mean that “anything more than a casual social conversation with a Government employee [c]ould, without warning, subject the speaker to the possibility of severe criminal punishment.”²² And the wide and irregular margins of the offense allow for the possibility that “an overzealous prosecutor or investigator—aware that a person has committed some suspicious acts, but unable to make a criminal case—will create a crime by surprising the suspect, asking about those acts, and receiving a false denial.”²³

B. The Wide Margins of the False Statement Offense

There are almost 4,000 federal offenses, and approximately 300 of them criminalize deception in its various forms.²⁴ The primary concern of this Article is accounting for the expansion of charges for unsworn statements to the government.²⁵ In some notable respects—including the situations in which cases arise, what motivates prosecutors to pursue them, and the costs of an aggressive enforcement strategy—false statement offenses differ from other forms of criminal lying. The perjury statute, which punishes knowingly making false, material statements under oath, protects the integrity of the court system.²⁶ The many obstruction provisions prohibit interference with court or agency proceedings, destruction of evidence, or the disruption of pending investigations.²⁷ In some cases, obstruction and false statements are interchangeable, but § 1001 has a more rapid trigger and allows prosecutors to impose sanctions for dishonesty from the moment a suspect or witness encounters the government. It makes almost any falsehood actionable, without regard to the stage of the investigation or the relevance of the statement to underlying wrongdoing. The statute is sufficiently broad to reach

22. *Friedman v. United States*, 374 F.2d 363, 366 (8th Cir. 1967), *abrogated by* *United States v. Rodgers*, 466 U.S. 475, 484 (1984), *as recognized in* *United States v. Rodriguez-Rios*, 14 F.3d 1040, 1050 (5th Cir. 1994).

23. *Brogan v. United States*, 522 U.S. 398, 416 (1998) (Ginsburg, J., concurring).

24. *See, e.g.*, Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 *BUFF. CRIM. L. REV.* 249, 289 (1998).

25. As a general matter, it is difficult to gather accurate data on the prevalence of false statement prosecutions, as they often are not the lead charge in an indictment, and they tend to be aggregated with false claims, perjury, and obstruction of justice charges in federal statistics. Taken together, however, statistics on federal prosecutions indicate a steady increase in false statement cases, which appeared to double between 1997 and 2007, from approximately 600 to approximately 1200 filed annually. *See, e.g.*, TRAC, SYRACUSE UNIVERSITY, WHITE COLLAR CRIME PROSECUTIONS FOR JANUARY 2007 (2007), http://trac.syr.edu/tracreports/bulletins/white_collar_crime/monthlyjan07/fil/ (greatest increase in number of white collar prosecutions between 2006 and 2007 was a 31.9 percent increase in § 1001 charges); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 *GEO. L.J.* 1435, 1468 (2009) (“[A]necdotal reports seem to suggest that federal prosecutors have brought greater numbers of prosecutions for false statement offenses in recent years.”).

26. 18 U.S.C. §§ 1621, 1623 (2006).

27. *See, e.g.*, 18 U.S.C. § 1503 (2006) (obstruction before federal courts and grand jury); 18 U.S.C. § 1505 (2006) (obstruction before agencies); 18 U.S.C. § 1512 (2006) (witness tampering).

nondisclosure, and the Supreme Court has noted that its terms encompass “unadorned” false denials that mislead no one.²⁸

To be clear, both perjury and obstruction are serious crimes that can undermine the integrity of the courts and the criminal justice system as a whole. And false statements can cause similar institutional harms and obscure information necessary to enforce the law. The statutory language is so open-textured, however, that prosecutions can stray from the statute’s core objective.²⁹ The obstruction statute, although rather broad itself,³⁰ contains some constraints absent from § 1001. The Supreme Court has held, for example, that the deception must have some nexus to official proceedings, and therefore that a false statement to an investigating agent who was not acting as an arm of the grand jury did not constitute obstruction.³¹ The standards for proving perjury are significantly more stringent,³² perjurious statements can be recanted, and superfluous testimony, even though false, does not give rise to liability for perjury. A perjury conviction also requires the formalities of a sworn statement given during an official proceeding, whereas § 1001 imposes “no requirement of an oath, no strict rule of materiality, and no guarantee that the proceeding will be transcribed or reduced to memorandum.”³³

The circumstances of the typical interview, moreover, “do not sufficiently alert the person interviewed to the danger that false statements may lead to a felony conviction.”³⁴ The courtroom itself puts a defendant on notice of potential liability for falsehood, and the playing field there is more level—in terms of both available information and legal representation—than the imbalanced investigative interactions during which many § 1001 violations occur.³⁵ Actionable false statements can transpire in informal settings like the defendant’s driveway, and conversations with agents are very rarely framed

28. *Brogan*, 522 U.S. at 410.

29. This evolution parallels the drift in the “honest services” theory of fraud, which has transformed fairly workaday conduct into a crime by defining disloyalty itself as the harm rather than requiring a tangible loss of property. *See* 18 U.S.C. §§ 1341, 1346 (2006) (fraud includes depriving another of “the intangible right of honest services”). *See also generally* John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

30. *See* Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes As Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 677 (2006) (“[W]hite-collar prosecutors are increasingly electing to rely on obstruction charges in high-profile cases such as the criminal prosecutions of Frank Quattrone (former star banker for Credit Suisse First Boston), Andrew Fastow (former CFO of Enron), Martha Stewart, Sam Waksal (founder of ImClone Systems), Arthur Andersen LLP, and ‘Scooter’ Libby . . .”).

31. *See* *United States v. Aguilar*, 515 U.S. 593, 600 (1995).

32. *See, e.g.*, *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962), *abrogated by* *Brogan*, 522 U.S. at 401, 408, *and* *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994).

33. *See* *United States v. Ehrlichman*, 379 F. Supp. 291, 292 (D.D.C. 1974).

34. *Id.*

35. *See* *United States v. Chevoor*, 526 F.2d 178, 183 (1st Cir. 1975), *abrogated by* *Brogan*, 522 U.S. at 401, 408.

with any warning about potential liability.³⁶

Nor is the ease with which false statements can be pursued and sanctioned proportionate to the relative impact these statements have on the institution of criminal justice. Perjury can harm the justice system itself by threatening the function of the courts. Some forms of obstruction cut off the flow of information to both prosecutors and jurors and hinder the “fine judgments”³⁷ they are called upon to make. Enforcing these offenses, the theory goes, “further[s] the interest of truth-finding and allow[s] the prosecution’s case to be put to the test.”³⁸ Conversely, false statement charges too often insulate the prosecution’s case from scrutiny. Rather than increasing the flow of information, false statement charges can truncate investigations and lead to coarse charging decisions. They may result in more plea bargains and thereby mitigate trial risk, avert any challenge to the underlying case, and preclude meaningful judicial oversight.

This is true, to some extent, of lesser offenses likely to induce pleas in any investigation, including such strategic charges as the failure to pay taxes on ill-gotten gains or the use of a communications device in a drug transaction. But those violations generally occur before the government gets involved, while false statement charges result from investigators’ ex post opportunism. As Justice Ginsburg wrote in *Brogan v. United States*, the statute “arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt.”³⁹

36. See Robert P. Mosteller, *Softening the Formality and Formalism of the “Testimonial” Statement Concept*, 19 REGENT U. L. REV. 429, 439 n.45 (2007) (noting that the “function of the publicly administered oath”—“calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to [testify truthfully]”—“would appear qualitatively quite different in terms of its effect on solemnity” from the unannounced sanctions for false statements to investigators) (quoting FED. R. EVID. 603 advisory committee’s note) (alteration in original); see also *Brogan*, 522 U.S. at 410–11 (Ginsburg, J., concurring) (expressing concern about the “extremely informal circumstances” of agent interviews) (quoting *United States v. Ehrlichman*, 379 F. Supp. 291, 292 (D.D.C. 1974)).

37. See Patrick Fitzgerald, Special Counsel, Announcing Indictment of Lewis Libby, Oct. 28, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/28/AR2005102801340.html> (the harm of the obstruction charged in the Libby case is that it prevented prosecutors from “making the fine judgments we want to make”); see also *United States v. Brown*, 459 F.3d 509, 530 (5th Cir. 2006) (perjurious testimony before a grand jury “clos[es] off entirely the avenues of inquiry being pursued”) (quoting *United States v. Williams*, 874 F.2d 968, 981 (5th Cir. 1989)).

38. STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME 181 (2006).

39. 522 U.S. at 409 (Ginsburg, J., concurring); see also *id.* at 409 n.1 (citing William J. Schwartz, Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316, 325–26 (1977)). Justice Ginsburg stated:

Since agents may often expect a suspect to respond falsely to their questions, the statute is a powerful instrument with which to trap a potential defendant. Investigators need only informally approach the suspect and elicit a false reply and they are assured of a conviction with a harsh penalty even if they are unable to prove the underlying

There has been little critical examination, however, of the primary statute that criminalizes lying to the government, and no sustained effort to unpack what sorts of statements constitute “lies” and what audience is the equivalent of the “government.” Despite occasional expressions of judicial and scholarly concern,⁴⁰ § 1001 is an undertheorized offense that has received scant attention since the Supreme Court’s 1998 rejection of a distinction between deliberate, affirmative statements and mere denials in response to questioning.⁴¹ Ten years after the *Brogan* decision, which also highlighted the dangers of the statute and sounded a cautionary note for prosecutors and Congress, § 1001 continues to provide federal agents with “a potent combination of an investigatory and prosecutorial tool.”⁴² Using that tool on defensive false statements or on deception to proxies for the government may further procedural expediency, but without necessarily increasing accuracy or protecting institutional values.

1. Organic Falsehood: The Meaning of Lying

Perhaps the most problematic feature of § 1001 liability is that its broad scope invites prosecutions for statements initiated by law enforcement. “Organic false statements” are those that arise naturally from the interaction between agents and suspects or witnesses in an investigation. They are inherent in those interactions—spontaneous and unrefined. They can involve defendants who enter a conversation technically innocent but end up exposed to criminal liability because they lie reflexively to protect themselves from embarrassing revelations rather than to obstruct legitimate prosecutions.⁴³ Law enforcement might, for example, question a suspect who has no involvement in the offense under investigation but offers a false alibi to disguise a noncriminal indiscretion. The expansive nature of the offense and minimal requirement of

substantive crime.

Id.

40. See *United States v. Lambert*, 470 F.2d 354, 358 (5th Cir. 1972) (“Were [§ 1001] to be applied in every situation consonant with its literal wording any individual who passed on to a governmental agency the most trivial bit of misinformation would be criminally liable for his statement.”), *vacated en banc*, 501 F.2d 943 (5th Cir. 1974); *United States v. Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972) (“[V]irtually any false statement, sworn or unsworn, written or oral, made to a government employee could be penalized as a felony.”); Green, *supra* note 16, at 191 (describing the false statement statutes as “a complex, chameleon-like body of law with few clear governing principles”).

41. *Brogan v. United States*, 522 U.S. 398, 404 (1998). See, e.g., Giles A. Birch, Comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990); John Poggioli, Note, *Judicial Reluctance to Enforce the Federal False Statement Statute in Investigatory Situations*, 51 FORDHAM L. REV. 515 (1982). Stuart Green’s scholarship integrating moral theory with the doctrines governing various white collar crimes is a notable recent exception. See GREEN, *supra* note 38.

42. NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 717 (4th ed. 2006).

43. See, e.g., *United States v. Cisneros*, 26 F. Supp. 2d 24, 42 (D.D.C. 1998) (dishonesty concerned amount and quantity rather than existence of bank checks during a background check). See also generally O’Sullivan, *supra* note 30 (analyzing overbroad obstruction statutes).

materiality make offering the untrue (but technically irrelevant) alibi a felony. The statute allows investigators to refresh stale crimes as well. If investigators confront a defendant with wrongdoing on which the statute of limitations has long since run, and the defendant denies it, she has committed a new, actionable crime.⁴⁴

It is not necessary to stage a parade of horrors to make this point; on-the-ground enforcement offers ample illustrations of crime creation.⁴⁵ Assume that FBI agents approach you about a corruption investigation after tape-recording a transaction between you and an informant. They ask you whether you engaged in the transaction, and you say, simply, “no.” According to the court, by foreclosing the line of inquiry into possible innocent explanations for the transaction, you made a material false statement actionable under § 1001.⁴⁶ Or suppose you are a notary, and an IRS agent appears at your door and tells you she is investigating a man named “John Doe” and needs to ask you some questions about how you perform your function as a notary. You state that you require documents to be signed in person, but it turns out that the agents possess some documents that you notarized without the presence of the signatories.⁴⁷ Because the initial inquiry elicited a false denial, even though agents already knew the answer, the interview created a federal felony.⁴⁸ Or imagine that you are confronted with copies of checks indicating that you have been involved in an extortion scheme. You do not deny that you received and cashed the checks, but you do minimize your involvement by saying that one of them was for your winnings in a Super Bowl pool. When an investigator notices that the check predated the Super Bowl game, you say that maybe the payor “knew I was going to win.”⁴⁹ Although an obviously futile attempt to avoid detection, the statement is a separate felony.

In some cases, organic obstruction supplants rather than supplements other suspected criminal activity. This occurs most frequently in prosecutions involving high-profile liars but very personal lies. One example is the prosecution of Martha Stewart, who was accused of acting on insider information when

44. In *Brogan*, for example, the statute of limitations had run on 4 of the 5 underlying substantive offenses. See 522 U.S. at 411 (Ginsburg, J., concurring).

45. The voluminous federal criminal code invites academics to invent potential problems around statutes that “politically accountable prosecutors” rarely charge. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225 (2007) (arguing that many of the crimes scholars complain about are effectively nullified). Section 1001, however, is frequently utilized and has yielded enough published cases with questionable fact patterns to raise concern about the even larger array of convictions by plea agreement for trivial untruths.

46. Cf. *United States v. LeMaster*, 54 F.3d 1224, 1230 (6th Cir. 1995).

47. Cf. *United States v. Tabor*, 788 F.2d 714 (11th Cir. 1986), *abrogated by Brogan*, 522 U.S. at 401, 408.

48. See *id.* at 719 (the conviction was later reversed according to the now defunct “exculpatory no” doctrine); see also *United States v. Goldfine*, 538 F.2d 815, 820 (9th Cir. 1976) (liability for false statements even where agents asked questions with known answers).

49. See *United States v. Capo*, 791 F.2d 1054, 1060 (2d Cir. 1986).

she sold her ImClone stock and then giving federal agents a false explanation for the transaction. Stewart was ultimately convicted only of lying about the sale, and the prosecution thus constructively amended the insider trading provisions to reach her conduct.⁵⁰ In related examples, former Secretary of Housing and Urban Development Henry Cisneros and former President Bill Clinton both lied to protect themselves from embarrassing revelations rather than to obstruct potential prosecutions, but their lies then exposed them to criminal liability.⁵¹ And many of the athletes implicated in prosecutions arising from the steroids scandals were also technically innocent of any federal crime until the investigation began.

For example, Roger Clemens may have cheated, but he did not necessarily violate the law when he used (as opposed to distributed) performance-enhancing drugs. Nonetheless, when he professed his innocence during interviews with members of Congress, even before his sworn testimony, he came within the ambit of § 1001, which extends to investigations conducted by congressional committees. Congress has since asked the Justice Department to investigate not just whether Clemens perjured himself in the hearing, but whether he made statements in violation of § 1001 in the course of the congressional investigation. One of the few players to be prosecuted as a result of the investigation into steroids in baseball has not been accused of using performance-enhancing drugs and instead stands convicted of misleading statements about whether he knew other players were doing so. Miguel Tejada—with regard to whom prosecutors acknowledge they have no evidence of steroid use—was questioned by congressional investigators in an unsworn interview in a Baltimore hotel. During the interview, Tejada responded “no” when asked in various ways whether he was aware of other players using

50. See *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006); Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 *CARDOZO L. REV.* 2023, 2024–25 (2005) (“[Government] was reduced, in effect, to arguing that it was illegal for her to lie about something that was not illegal and that her protestations of innocence constituted the fraud upon which she should be considered guilty.”); Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should be Charged with Criminal Conduct?*, 109 *PENN ST. L. REV.* 1059, 1070 (2005) (“[Stewart] went, and she talked, but they did not like what was said. Therefore, they proceeded to charge her with crimes related to lying instead of proceeding exclusively in the civil sphere or charging the substantive crimes for which they were initially investigating her.”).

51. Cisneros admitted to the FBI that he made payments to a woman with whom he once had an affair but was then indicted for false statements about the timing and amount of the payments. Some commentators have connected the increase in false statement prosecutions to the institutionalization of the independent counsel law in the 1980s and the subsequent prosecutions (later overturned on appeal) of Oliver North and John Poindexter. See, e.g., Paul Glastris, “*False Statements*”: *The Flubber of All Laws*, *U.S. NEWS & WORLD REP.*, Mar. 30, 1998, at 25. Ronald Blakely, for example, chief of staff to Mike Espy, was convicted of false statements in the investigation of Mr. Espy for taking favors from companies who did business with the Department of Agriculture. Special prosecutor Donald Smaltz pursued Blakely for \$22,000 in outside income that he failed to report on financial disclosure forms. See David Stout, *Prosecution That Spared Espy Leaves a Top Aide in Ruins*, *N.Y. TIMES*, June 6, 1999, at A30.

steroids.⁵² The congressional referral states that the veracity of Tejada's assertion that "he had no knowledge of other players using or even talking about steroids or other banned substances" materially influenced the House Oversight Committee's investigation.⁵³ Tejada did not provide false information; he merely denied discussing steroids with two other players (neither of whom has been charged with any offense) and thereby may have failed to expedite the congressional investigation. Congressional prerogative to pursue investigations and hold hearings on matters of public concern is important, and some leverage over witnesses is appropriate. It is rather attenuated, however, to charge a baseball player with lying about whether *other* players were truthful when they testified in an investigation that has produced no legislation and no prosecutions for the use of the drugs themselves.

At the far reaches of the statute lies the defensive deception referred to as an "exculpatory no": a false response to an investigator's accusation in a form such as "no" or "wasn't me." These reflexive reactions were treated in the majority of circuit courts as constructive "not guilty" pleas,⁵⁴ and an "exculpatory no" defense to § 1001 charges was valid until the 1998 decision in *Brogan v. United States*.⁵⁵ Consider the facts of the *Brogan* case itself. Federal agents knocked on James Brogan's door one evening, unannounced. Well before they went to his home, they had obtained records verifying that Brogan had received funds from a company that employed members of the union for which he served as an officer. The agents told Brogan that they were investigating the company and various individuals and asked him whether he had received any money or gifts from the company. Brogan responded: "No." Agents then told him that they had the records of payments to him and that he had just committed a crime by lying to them. As Justice Ginsburg concluded, "when the interview ended, a[nother] federal offense had been completed—even though, for all we can tell, Brogan's unadorned denial misled no one."⁵⁶ The Supreme Court rejected the defense on statutory interpretation grounds, but the concerns that led courts to judicially construct the "exculpatory 'no'" doctrine precluding

52. Information at 4, *United States v. Tejada*, No. 09-MJ-077 (D.D.C. Feb. 10, 2009).

53. *See id.* at 4–5; Letter from Henry A. Waxman, Chairman, Comm. on Oversight & Gov't Reform, H. Rep. & Tom Davis, Ranking Minority Member, to Michael B. Mukasey, Attorney General, U.S. (Jan. 15, 2008), available at <http://graphics8.nytimes.com/packages/pdf/sports/housecommittee.2008.1.15.pdf>.

54. *See, e.g., Moser v. United States*, 18 F.3d 469, 473–74 (7th Cir. 1994), *abrogated by Brogan v. United States*, 522 U.S. 398, 401, 408 (1998); *United States v. Taylor*, 907 F.2d 801, 804 (8th Cir. 1990), *abrogated by Brogan*, 522 U.S. at 401, 408; *United States v. Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988), *abrogated by Brogan*, 522 U.S. at 401, 408; *United States v. Tabor*, 788 F.2d 714, 719 (11th Cir. 1986), *abrogated by Brogan*, 522 U.S. at 401, 408; *United States v. Fitzgibbon*, 619 F.2d 874, 880 (10th Cir. 1980), *abrogated by Brogan*, 522 U.S. at 401, 408; *United States v. Chevoor*, 526 F.2d 178, 183–84 (1st Cir. 1975), *abrogated by Brogan*, 522 U.S. at 401, 408.

55. 522 U.S. at 410 (Ginsburg, J., concurring).

56. *Id.*

prosecution for simple denials of guilt remain.⁵⁷

Nor have defendants prevailed on the theory that organic falsehoods result from sprung perjury traps, despite the risk that the government can use criminal lying charges to “escalate completely innocent conduct into a felony.”⁵⁸ The subjective test for entrapment is “whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.”⁵⁹ As a general matter, federal criminal provisions do not apply where agents “instigate” a person to commit an offense,⁶⁰ but demonstrating entrapment requires proof of both inducement and lack of predisposition. Proving a negative—that one did not have a predisposition to lie—may be impossible and at the very least presents evidentiary challenges that the defendant lured into an uncharacteristic narcotics deal would not face.

Nothing prevents the government from initiating questioning without any reasonable expectation that it will produce probative evidence. Because investigations are dynamic and prosecutors’ motives are often mixed, to demonstrate that the sole and exclusive purpose of questioning is to extract perjury presents a virtually insurmountable hurdle.⁶¹ Particularly in the corporate realm, where the truth about complicated transactions involves some interpretation, defendants who might be clear of any wrongdoing can nonetheless be “ensnared by ambiguous circumstances.”⁶² Some false statements occur, not because of consciousness of guilt, but because of consciousness of risk, or even indignation about innocence.⁶³

Parsing language or relying on technicalities provides no defense either; the government can bring charges even in the absence of outright lies because implied falsity suffices for a conviction.⁶⁴ Once a citizen responds to questioning, she “has an obligation to refrain from telling half-truths or from excluding information necessary to make [her] statements accurate.”⁶⁵ Section 1001 can

57. *See id.* at 411; *see also* *United States v. Yermian* 468 U.S. 63, 81 (1984) (Rehnquist, J., dissenting) (arguing that § 1001 is “intended to deter the perpetration of deliberate deceit on the Federal Government” not to “criminalize the making of even the most casual false statements so long as they turned out, unbeknownst to their maker, to be material to some federal agency function”).

58. *See Brogan*, 522 U.S. at 410–11 (noting the solicitor general’s acknowledgment at oral argument that §1001 could be used to create a felony charge).

59. *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

60. *Id.* at 435.

61. Bennett L. Gershman, *The “Perjury Trap,”* 129 U. PA. L. REV. 624, 684 (1981) (explaining that the “sole and exclusive purpose” test for perjury traps is “so restrictive that it affords virtually no protection at all from prosecutorial abuse”).

62. *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 558 (1956).

63. *See Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 317 (1850) (“[A]n innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs.”).

64. *See United States v. Brown*, 151 F.3d 476, 485 (6th Cir. 1998).

65. *United States v. Cisneros*, 26 F. Supp.2d 24, 42 (D.D.C. 1998). *See also* Susan R.

also target sins of omission: incomplete statements that “merely mislead.” “Caveat auditor” principles, according to which “a listener is responsible, or partly responsible, for ascertaining that a statement is true before believing it,”⁶⁶ do not apply. And unlike the perjury statute, under which “[p]recise questioning is imperative as a predicate for the offense,”⁶⁷ § 1001 offers little opportunity to debate the “meaning of is”; it covers false statements “of whatever kind.”⁶⁸

While it is certainly true that suspects have the option to stay silent, rarely do agents advise them of that option in the informal context of investigative interviews.⁶⁹ Moreover, “in our normal social dealings, one who remains silent

Klein, *Lies, Omissions, and Concealment: The Golden Rule in Law Enforcement and the Federal Criminal Code*, 39 TEX. TECH. L. REV. 1321, 1338 (2007) (“[M]ost courts hold that when a government official inquires about a fact, the target of the inquiry has a duty to disclose enough information so that the government is not misled regarding the subject of the inquiry.”); *id.* at 1339 (once Peter Bacanovic, Martha Stewart’s stock broker, “agreed to discuss the matter . . . he could not offer only part of the story, nor omit any relevant facts”); *United States v. Stewart*, 433 F.3d 273, 318–19 (2d Cir. 2006). The court concluded:

Defendant’s legal duty to be truthful under section 1001 included a duty to disclose the information he had regarding the circumstances of Stewart’s December 27th trade, even though he voluntarily agreed to speak with investigators. . . . Trial testimony indicated that the SEC had specifically inquired about Bacanovic’s knowledge of Stewart’s trades. As a result, it was plausible for the jury to conclude that the SEC’s questioning had triggered Bacanovic’s duty to disclose and that ample evidence existed that his concealment was material to the investigation.

Id. In another example, Bristol-Myers recently pled guilty to making false statements in violation of § 1001 after statements made during settlement negotiations in a civil case came to the government’s attention because they included disclosures that had not been made to the FTC. *See United States v. Bristol-Myers Squibb Co.*, No. 07-CR-140 (D.D.C. May 30, 2007).

66. GREEN, *supra* note 38, at 78–79.

67. *Bronston v. United States*, 409 U.S. 352, 360–62 (1973) (statements must be literally false to sustain perjury charges, not merely evasive and nonresponsive).

68. *Brogan v. United States*, 522 U.S. 398, 400 (1998). *But cf.* JEREMY CAMPBELL, *THE LIAR’S TALE* 11 (2001) (“Many categories of responses which are misleading, evasive, nonresponsive or frustrating are nevertheless not legally ‘false’ [including] literally truthful answers that imply facts that are not true.”) (quoting President Clinton’s legal brief to the Arkansas Supreme Court committee considering his disbarment) (alteration in original).

69. In Continental criminal practice, by way of contrast, parties are exempt from perjury prosecutions because they have no duty to harm their own interests, even though they have a separate right to refuse to testify. *See MIRJAN R. DAMASKA, THE FACTS OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 130 (1986) (“To impose on [civil parties] the duty to tell the truth and thereby to harm their own interests was proclaimed to be inhumane, akin to a form of moral torture, even though civil parties had also acquired the right to refuse to testify.”), *cited in* GREEN, *supra* note 38, at 85 n.36. Suspects are generally warned of their right to silence at an earlier point in the investigation as well. In both Germany and England, warnings must be given at the point a suspect is being investigated, even if not in custody, and in Italy, any suspect who begins to make an inculpatory statement to a magistrate or police officer must be interrupted and informed of the rights to silence and counsel. Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 808–09 (1998).

in the face of an accusation often *is* presumed to be guilty.⁷⁰ Few suspects understand that taking steps in between silence and cooperation can expose them to criminal liability.⁷¹ Section 1001 is not a statute with which agents often seek compliance *ex ante*; they typically reveal its reach only after the false statement is made.⁷² And saying some version of “not me” is a speech act that often proves more fateful than “I confess” would have been.

2. Proxy Deception: The Meaning of Government

The jurisdictional requirement in the statute—the necessary link between the falsehood and agency action—also supplies fairly anemic protection.⁷³ Even if the false statement pertains to a matter outside of the agency’s regulatory jurisdiction, if the general subject matter of the investigation bears some relationship to the agency’s authority, that will suffice.⁷⁴ As things presently stand, the agency need not even receive or read the statement.⁷⁵ The Supreme Court has held, moreover, that a defendant need not know that a statement concerns a matter “within the jurisdiction of any department or agency of the United States.”⁷⁶ As a result, defendants theoretically could be prosecuted for lying to undercover agents, and for providing false statements to counsel or media that subsequently reach the government. Even if government agents ask unlawful questions, false responses remain punishable.⁷⁷ To add yet

70. GREEN, *supra* note 38, at 85 n.34.

71. See *Brogan*, 522 U.S. at 404 (1998) (“Whether or not the predicament of the wrongdoer run to ground tugs at the heartstrings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie.”); see also *Bryson v. United States*, 396 U.S. 64, 72 (1969) (Fifth Amendment does not protect falsehoods); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (“[T]he knowingly false statement . . . do[es] not enjoy constitutional protection.”).

72. See *Brogan*, 522 U.S. at 410 (Ginsburg, J., concurring).

73. See *United States v. Rodgers*, 466 U.S. 475, 480 (1984) (“[T]he term ‘jurisdiction’ should not be given a narrow or technical meaning for purposes of § 1001.”) (quoting *Bryson*, 396 U.S. at 70).

74. See *United States v. DiFonzo*, 603 F.2d 1260, 1265 (7th Cir. 1979).

75. *United States v. Calhoon*, 97 F.3d 518, 532 (11th Cir. 1996) (concealment of material facts while seeking Medicare reimbursement for royalty fees).

76. *United States v. Yermian*, 468 U.S. 63, 68–70 (1984) (government need not prove that defendant knew of federal agency jurisdiction when making the false statement); see also *United States v. Hildebrandt*, 961 F.2d 116, 118–19 (8th Cir. 1992) (defendant need not have actual knowledge that the statement was within a federal agency’s jurisdiction); *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984) (the federal element is strict liability); cf. *United States v. Montemayor*, 712 F.2d 104, 108–109 (5th Cir. 1983). The *Montemayor* court stated:

[W]hen a statement is not submitted directly to a federal agency, knowledge of federal involvement may be one circumstance to be considered in assessing the potential threat the statement may be to the proper functioning of the federal agency involved. This knowledge may be decisive when the involvement of the United States in the matter to which the statement relates is peripheral. In other instances, a showing that the defendant had actual knowledge of federal involvement might lessen the need for a detailed examination of the federal government’s relationship to the statements.”

Id. (quoting *United States v. Stanford*, 589 F.2d 285, 297 (5th Cir. 1978)) (citations omitted).

77. See *Bryson*, 396 U.S. at 72 (upholding a § 1001 conviction for falsely denying affiliation with the Communist Party in affidavit filed with the NLRB).

another layer, the false statement charge itself can involve a scheme to deceive, rather than the specification of particular lies.⁷⁸ And broad potential liability arises from statements made to third parties and merely relayed to officials. Defendants may be prosecuted, for example, for aiding and abetting false statements. If the treasurer of a campaign files a false Federal Election Commission report, a donor who exceeded the legal contribution limits or donated in someone else's name could be found guilty of aiding and abetting the concealment of material facts or conspiring to conceal them in violation of § 1001, even if prosecutors cannot charge a violation of the campaign finance provisions themselves.⁷⁹

Charges for proxy deception—statements, whether offensive or defensive, made only in a derivative way to the government—are most common in the corporate context and the parallel realm of obstruction prosecutions.⁸⁰ Kevin Ring, a defendant in one of the cases arising from the corruption investigation of lobbyist Jack Abramoff, was recently charged with obstruction for allegedly lying to private counsel retained to conduct an internal investigation.⁸¹ Defendants involved in the securities fraud case against software company Computer Associates were prosecuted on the related theory that they knew the statements they made to their own counsel would be passed on to the government.⁸² Computer Associates General Counsel Stephen Woghin was indicted for obstruction in part as a result of professing innocence in a press release. The Woghin indictment also cites false justifications made to inside auditors and a “failure to expedite” the investigation.⁸³ Along the same lines, the government added obstruction charges to an indictment against El Paso Merchant Energy gas trader Greg Singleton because of statements he made to counsel retained by

78. See *United States v. Hubbell*, 177 F.3d 11, 13 (D.C. Cir. 1999).

79. See *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994).

80. See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 371–72 (2007) (describing prosecutors' use of a novel theory of obstruction based on self-preserving statements made to nongovernmental parties).

81. See, e.g., Press Release, Dep't of Justice, *Former Abramoff Colleague Kevin Ring Indicted on Public Corruption and Obstruction of Justice Charges* (Sept. 8, 2008) http://www.usdoj.gov/usao/md/Public-Affairs/press_releases/press08/FormerAbramoffColleagueKevinRingIndictedonPublicCorruptionandObstructionofJusticeCharges.html.

82. See Alex Berenson, *Software Chief Admits to Guilt in Fraud Case*, N.Y. TIMES, Apr. 25, 2006, at A1. The government's theory was that defendant Kumar effectively misled federal prosecutors when the results of an internal investigation were passed on to federal investigators by his counsel. Prosecutors contended that internal statements were intentionally, albeit only constructively, made to the government. See *id.*; Alex Berenson, *Case Expands Type of Lies Prosecutors Will Pursue*, N.Y. TIMES, May 17, 2004, at C1; see also *Superseding Indictment*, at 23, 28, *United States v. Kumar*, No. 04-CR-846 (E.D.N.Y. June 28, 2005).

83. Information, *United States v. Steven Woghin*, No. 04-CR-847 (E.D.N.Y. Sept. 21, 2004). Furthermore, in the case of Computer Associates CFO Ira Zar, the government alleged that he had provided explanations to outside counsel that armed the attorneys with “false justifications,” thereby misleading the government. Information, *United States v. Ira Zar*, No. 04-CR-331 (E.D.N.Y. Apr. 6, 2004).

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his employer.⁸⁴ The indictment recalls the “failure to expedite” theory from the Woghin case; it alleges that Singleton “did not disclose” to outside counsel, “falsely denied,” and “otherwise concealed” the fact that employees had provided false information to trade publications.⁸⁵ The obstruction charges cite only the private exchanges and do not allege that Singleton made false statements directly to government agents. Instead, the indictment states that Singleton understood that his comments could be disclosed to “third parties, including government agencies” and consequently that his conversations with counsel amounted to intentional obstruction.⁸⁶ Another recent example comes from the Rite Aid prosecution, where the defendants were convicted of obstruction charges stemming from interactions with internal investigators retained by the company.⁸⁷ How far could these derivative obstruction theories reach in the § 1001 context? If statements made to private counsel are obstructive because they will be relayed to investigators, do defendants who make exculpatory statements at press conferences risk liability because those will reach the government as well? That the government can complain of deception even when it is not the audience for a statement affords prosecutors still more discretion to target ill-defined wrongdoing.

II

INTERPRETING ENFORCEMENT DISCRETION

Because false statements arise from and concern the relationship between the government and the targets of investigations, they raise unique questions about “why enforcers make the decisions they do.”⁸⁸ What interests do § 1001 prosecutions serve and what social value do they have? Punishing investigative lies neither preserves the institution of the courts in the way that prosecuting perjury does⁸⁹ nor protects individual victims from the consequences of fraud. Although on its face the statute protects the accuracy of the information that individuals convey to the government, the desire for efficiency, the assertion of authority, and a preoccupation with apology better explain charging decisions.

Many investigations do founder on the dishonesty of witnesses, but interviews with targets are rarely about truth-seeking. They typically stem from interactions where the government is in an aggressive rather than reactive

84. Indictment at 16–21, *United States v. Singleton*, No. 06-CR-080 (S.D. Tex. Mar. 8, 2006).

85. *Id.* at 20.

86. *Id.* At trial, Singleton was convicted of one count of wire fraud. The jury deadlocked or acquitted on the false reporting and obstruction charges. John C. Roper, *Verdict, Deadlock in Gas Trading Case*, *HOUS. CHRON.*, Aug. 4, 2006, at 3.

87. *See* Indictment at 76–80, *United States v. Grass*, No. 02-CR-146 (M.D. Pa. June 21, 2002).

88. Stuntz, *supra* note 4, at 1899.

89. *See, e.g.*, *United States v. Manfredonia*, 414 F.2d 760, 764 (2d Cir. 1969) (“[Perjury is punished] for the wrong done to the courts and the administration of justice . . .”).

posture. In a scenario where agents provide no warnings and ask questions with known answers, they predict that suspects will lie and hope that they do. While questioning might produce a confession, agents generally have passed the primary information-gathering stage of the investigation when they confront the target. If the interview is unsuccessful, little harm comes to the investigation. As the Ninth Circuit has recognized, a dishonest response in a confrontation with a suspect does not deter the agency because a competent investigator “will anticipate that the defendant will make exculpatory statements.”⁹⁰ Although agents rely on self-inculpatory statements or other cooperation, they generally ignore the foreseen exculpatory ones.

Social psychology offers some helpful insights into the limited potential of protective and reflexive lying. Bella DePaulo, for example, has documented experiments indicating that lies are more often revealed in settings in which motivation to succeed at deceiving the audience is high, but expectations for success are low.⁹¹ Cues to deception also appear strongest when the lie concerns a transgression, and the lies that deceivers are most highly motivated to get away with are precisely the ones that are easily detected.⁹² Another study concluded that the higher the degree of “detection apprehension,” the stronger the signals of deception.⁹³ As David Livingstone Smith describes:

Our impressive skill at thinking several moves ahead is a mixed blessing, for it makes us painfully conscious of the consequences awaiting those cheaters who trip up. The greater the risk, the more self-conscious we become, and heightened consciousness creates a brand new problem. We become nervous liars, and the more nervous we become, the more likely we are to betray our dishonesty accidentally.⁹⁴

90. *United States v. Medina de Perez*, 799 F.2d 540, 546 (9th Cir. 1986). *See also* *United States v. Philippe*, 173 F. Supp. 582, 584 (S.D.N.Y. 1959) (concluding that the “only possible effect of exculpatory denials” is to “stimulate the agent to carry out his function”).

91. *See* Bella M. DePaulo, Carol Steele LeMay & Jennifer A. Epstein, *Effects of Importance of Success and Expectations for Success on Effectiveness at Deceiving*, 17 *PERSONALITY & SOC. PSYCHOL. BULL.* 14–24 (1991). *Compare* Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 *PERSONALITY & SOC. PSYCHOL. REV.* 214–34 (2006) (studies show that subjects with no special training will correctly judge deception 54 percent of the time).

92. *See* Bella M. DePaulo et al., *The Motivational Impairment Effect in the Communication of Deception*, 12 *J. NONVERBAL BEHAV.* 177 (1988); Bella M. DePaulo et al., *Cues to Deception*, 129 *PSYCHOL. BULL.* 74 (2003).

93. *See* SULLIVAN, *supra* note 5, at 145–46 (documenting an experiment conducted by Paul Ekman with student nurses).

94. LIVINGSTONE SMITH, *supra* note 5, at 75. As Livingstone Smith describes:

In an effort to quell the rising tide of anxiety, liars may automatically raise the pitch of their voices, blush, perspire, scratch their noses, or make small movements with their feet as though barely suppressing an impulse to flee. Alternatively, they may rigidly control their voices, suppress any telltale stray movements, and raise suspicion by their conspicuously wooden demeanors. Either way, our bodies seem to sabotage our minds’ best efforts at deceit.

Id.

Effective deception under stress is notoriously ill fated, and never more so than “when the perpetrator has to face a skeptical audience that is prepared to penalize dishonesty.”⁹⁵ Detection apprehension increases when the audience has some expertise and may be tough to fool, and when the stakes involve avoiding punishment not just for the original transgression but for the act of deception itself.⁹⁶ To lie to agents is thus a natural response but an uncalculated risk. Once an investigation has proceeded to a confrontation with the target, she has little opportunity to successfully derail the prosecution. The exchange will generally be stylized and predictable, and transparent falsehoods that have no impact on the course of the investigation are the most likely result.⁹⁷

A. Efficiency

Practical considerations thus provide the most straightforward explanation for the government’s reliance on false statements. Often, the basic scaffolding of the evidence is largely in place when the interview occurs; agents do not need confessions, nor are they fooled by denials. They would, however, find it expedient either to obtain the interviewee’s cooperation or to have an easily provable offense to charge as insurance for a conviction.⁹⁸ This suits prosecutors’ institutional risk aversion and supplies two potential efficiencies: more certain resolution of the existing case or advantageous substitution of a simpler one. False statement charges also supply leverage to induce cooperation against other defendants.

Furthermore, juries easily understand lying, and false statement charges can simplify courtroom narratives. Deception is common on a crime scene, and no less so in the context of street crime.⁹⁹ Yet it is in white collar cases, where the underlying misconduct can be tricky to prove in court, that deception is typically charged as a freestanding crime. It can be difficult, for example, to prove accounting fraud beyond a reasonable doubt, and focusing on criminal deception makes a more straightforward appeal to the jury.¹⁰⁰ In cases such as

95. *Id.* at 73 (“Under this kind of pressure, even the most determined con artist is likely to get the jitters. Consequently, human liars tend to follow the example of Pinocchio and rat on themselves by involuntary, nonverbal signs.”).

96. Paul Ekman & Mark G. Frank, *Lies That Fail*, in LYING AND DECEPTION, *supra* note 17, at 188–89.

97. For an overview of some of the common techniques of criminal interrogations, see, e.g., FRED E. INBAU ET AL., CRIMINAL INTERROGATION & CONFESSIONS (4th ed. 2001); see also *id.* at 8 (noting that interrogations should be conducted “only when the investigator is reasonably certain of the suspect’s guilt”).

98. As Ronald Gainer puts it: “Sometimes the operating philosophy seems to be that, if the government cannot prosecute what it wishes to penalize, it will penalize what it can prosecute.” Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 63 n.19 (1998).

99. See SULLIVAN, *supra* note 5, at 75 (“As any policeman will tell you, the answer to ‘Did you rob the bank, fire the shot, use the stolen credit cards, drink a bottle of scotch while driving?’ is ‘No.’”).

100. See ABRAMS & BEALE, *supra* note 42, at 756 (noting that the government has been

public corruption prosecutions, where the elements are complicated to establish and the jurisdictional issues can restrict charging options, § 1001 often provides prosecutors with substitute offenses.¹⁰¹ It has also been widely used in the context of cases classified by the Justice Department as terror-related. Among those cases, charges for lying to the government are more common than national security offenses.¹⁰² The statute thus functions as a lesser-included offense, often in the absence of the necessary elements for a “greater” charge.

B. Authority

A more complicated explanation for the exercise of enforcement discretion is that charges for defensive lying are a symbolic assertion of government power, or of government entitlement to information as property. Defendants risk exposure not only for fraudulent conduct, or active obstruction to conceal it, but also for the failure to expedite investigations into their own wrongdoing. The government seems to be enforcing a requirement that, even though no statement can be compelled, any statement made must advance the investigation.

Section 1001 originated with concerns about government property and was passed as a response to Civil War procurement fraud. The predecessor of § 1001 is an 1863 statute prohibiting “false, fictitious, or fraudulent” claims against the government.¹⁰³ The statute was broadened in 1918 to cover statements made “for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States.”¹⁰⁴ With the advent of the New Deal in the 1930s, regulatory programs expanded and self-reporting grew in importance. Information thus became equated with government property, and the statute was no longer restricted to “cases involving pecuniary or property loss to the government.”¹⁰⁵ Rather than protect proprietary interests,

pursuing “ancillary charges like obstruction, perjury and false statements” in corporate fraud cases and that it is “often much easier to prove such ancillary charges than to engage in a long drawn out trial involving complex accounting and corporate business matters”).

101. See *United States v. Bush*, 503 F.2d 813, 814–19 (5th Cir. 1974) (charges arising from IRS agent questioning without accompanying tax charges), *abrogated by* *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994); *United States v. Stark*, 131 F. Supp. 190, 207 (D. Md. 1955) (section 1001 indictment for denying charges of bribery, without bribery charges); see also *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962), *abrogated by* *Rodriguez-Rios*, 14 F.3d 1040.

102. See Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A1.

103. See Green, *supra* note 16, at 191–92.

104. *Id.*

105. *United States v. Gilliland*, 312 U.S. 86, 93 (1941); see also *Brogan v. United States*, 522 U.S. 398, 412 (1998) (Ginsburg, J., concurring) (explaining that § 1001 expanded during the New Deal because false reports from regulated industries subverted government interests “even though the Government would not be deprived of any property or money”). Stuart Green describes the “hot oil frauds” against which the expanded statute was directed in Green, *supra* note 16, at 192 n.125.

the statute now “has for its object the protection and welfare of the government,”¹⁰⁶ specifically the protection against “deceit, craft or trickery” that will interfere with its functions.¹⁰⁷

The origins of the statute are telling because, despite the passage of time, the government’s perspective that it has a property interest in information remains roughly the same. The government as victim in those early cases made sense; society requires that the government protect its property and resources. Whether the government is victimized by recent § 1001 offenses is a more interesting question. Modern cases treat information itself as property, and suggest that the refusal to cooperate is “theft by language” that is little different from physical theft.¹⁰⁸ The offense is now a hybrid of an institutional harm like perjury and a proprietary harm like fraud, but with a stronger relationship to the latter. False statements made in the context of civil discovery are rarely prosecuted, despite their potential—and often potentially greater—impact on judicial proceedings.¹⁰⁹ “Information-gathering offenses” in the criminal context, however, theoretically defraud the government itself.¹¹⁰

When false statements mislead investigators, they can cause diffuse harm to the integrity of government.¹¹¹ The harm of a false statement that does not disrupt an investigation is instead an affront to government authority,¹¹² with the government standing in as a victim of something akin to “honest services” fraud, which imposes liability for disloyalty without any loss of tangible

106. *McNally v. United States*, 483 U.S. 350, 359 n.8 (1987) (quoting *Curley v. United States*, 130 F. 1, 7 (1st Cir. 1904)), *superseded by statute*, Pub. L. No. 100–690, § 7603(a), 102 Stat. 4508 (1988), *as recognized in* *United States v. DeFries*, 129 F.3d 1293, 1304 (D.C. Cir. 1997).

107. *See McNally*, 483 U.S. at 359 n.8 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

108. The concept of deception as “theft by language” is described in Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1113 (2006).

109. *See* Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 35–36 (2005).

110. *See* Norman Abrams, *The New Ancillary Offenses*, 1 CRIM. L.F. 1, 17 (1989) (identifying an “enforcement and information-gathering” category of offenses that includes both false statements that arise during an investigation and the failure to provide required information).

111. *See* 1 JOEL FEINBERG, *THE MORAL LIMITS OF CRIMINAL LAW: HARM TO OTHERS* 63–64 (1984). As Feinberg explains:

Like community interests, governmental interests in the last analysis belong to individual citizens. But the maintenance or advancement of a specific government interest may be highly dilute in any given citizen’s personal hierarchy. *I* am not seriously harmed by a single act of contempt of court or of tax evasion, though *if* such acts became general, various government operations that are as essential to my welfare as public health and economic prosperity would no longer be possible.

Id.; *see also* Murphy, *supra* note 25, at 1441 (noting the collective interest in the integrity of the justice system “without regard to the effects to any particular victim or outcome of any single case”).

112. *See* Murphy, *supra* note 25, at 1439 (questioning the propriety of the state’s interest in “formalistic respect” as a basis of criminal liability).

property.¹¹³ As with honest services fraud, the breadth of false statement charges allows for easy exploitation without regard to the central concerns of the offense.¹¹⁴ To extend the fraud analogy, the fiduciary obligation at issue is to cooperate in an investigation against yourself.¹¹⁵ Erin Murphy has recently identified a category of “obstinacy” charges, the substance of which “is nothing other than the insult to the efficiency and authority of the state itself.”¹¹⁶ False statements fit within that group. Investigations often involve a power struggle between the government and suspects. Responding with silence when confronted leaves some control in the hands of defendants because it ordinarily requires the government to prove the underlying charges. Once defendants speak, any unsuccessful attempt at deception shifts the balance of power almost entirely to the prosecution. At that point, the government can impose liability on the defendant for “obstinacy” alone, or use the newly created crime to induce a plea to the original misconduct.

False statement offenses involve not only deception but also disobedience.¹¹⁷ Although most criminal law requires forbearance or inaction, prosecuting defensive lies punishes the failure to act cooperatively and imports the concept of contempt into the investigative context.¹¹⁸ Public conceptions of legitimacy focus on procedural justice when the authorities “have imposed themselves on a person” and contact with the authorities has not been “freely chosen.”¹¹⁹ Process crimes generally do involve the government imposing itself in the sense that it is approaching the subject and requiring the production of evidence. The assertion of authority can be counterproductive because rather than restoring public confidence in criminal justice institutions, prosecutions of barely recognizable harm instead raise “ethical issues about the state’s power in relation to the individuals on whose behalf it exercises power.”¹²⁰ If there is

113. See Editorial, *Martha Stewart Misgivings*, WALL ST. J., Mar. 8, 2004, at A16 (quoting U.S. Attorney’s statement that Martha Stewart was prosecuted to protect “the integrity of this system”). On the victim of obstruction, compare *United States v. Hand*, 863 F.2d 1100, 1104 (3d Cir. 1988) (victim of contempt of court is the U.S. Attorney’s Office), with *id.* at 1107 (Mansmann, J., dissenting) (arguing that the court should be viewed as the victim), cited in Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1818 n.73 (1999).

114. See David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1398 (2008).

115. See Murphy, *supra* note 25, at 1452 (“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.”).

116. *Id.* at 1449.

117. See *id.* at 1439.

118. Doug Husak has noted the similarity between information-gathering offenses and common-law misprision of felony. See DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 41 (2008). Stuart Green has also found the relationship between “contempt” offenses and criminal lying telling. See Green, *supra* note 109, at 30 (noting the strand of “defiance of governmental authority” in criminal deception).

119. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 83 (2006).

120. PETER BROOKS, *TROUBLING CONFESSIONS* 7 (2000). In his recent book, Louis Michael Seidman also considers the perils of criminal laws that force action rather than requiring inaction.

some doubt about the blameworthiness of this class of offenders, then the criminal law may appear “not to reflect community notions of desert but rather as a tool of a powerful government to intervene destructively in the lives of ordinary people.”¹²¹

C. Apology

In addition to requiring cooperation, false statement cases are sometimes resolved in part by forcing contrition. The desire for an appropriate apology thus has some power to explain which cases prosecutors bring as well. Defendants may be punished not only for failing to confess and cooperate but also for hesitating to offer a timely apology for the underlying conduct. There is precedent from the other end of the adjudicative process, in the Sentencing Guidelines themselves, for rewarding repentance and penalizing recalcitrance.¹²² The “acceptance of responsibility” adjustment in the Guidelines turns in part on the efficiency of forgoing a trial and on a defendant’s cooperation with the government, but it chiefly emphasizes the defendant’s remorse.¹²³

Pursuing false statements reflects broader cultural pressure to be honest about transgressions.¹²⁴ It both sanctions the defendant’s reluctance to accept responsibility and brings about a public apology for the primary offense. Apology can have a reintegrative effect, and there is renewed interest in the restorative possibilities of alternative sanctions like shaming.¹²⁵ Proponents of restorative justice have explained that apologies promote harmony by offering truth, breaking punitive cycles, and analyzing the original cause of discord.¹²⁶

Apology asks forgiveness as a “symbolic corrective” and is “one means of precluding or containing socially disruptive conflicts.”¹²⁷ In recent years, politicians, sports figures, entertainers, members of the clergy, university presidents, and religious denominations have all offered apologies.¹²⁸ Peter

See LOUIS MICHAEL SEIDMAN, *SILENCE AND FREEDOM* 25 (2007) (analyzing Hubbel and Schmerber’s theory).

121. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 482 (1997).

122. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.1(a) (2008).

123. See Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”*: *The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1524–26 (1997).

124. Cf. Pamela Druckerman, *After the End of the Affair*, N.Y. TIMES, Mar. 21, 2008, at A23 (“We Americans are particularly preoccupied with honesty. [Regarding infidelity, w]e’re the only country that peddles the idea that ‘It’s not the sex, it’s the lying.’”).

125. See, e.g., Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006).

126. See, e.g., John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, in 25 CRIME & JUSTICE: A REVIEW OF RESEARCH 1 (Michael Tonry ed., 1999).

127. NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 34–35 (1991).

128. See SEIDMAN, *supra* note 120, at 25 (citing examples of all of the above, as well as the September 11 Commission hearings and South Africa’s Truth and Reconciliation Commission as

Brooks describes the importance of this social ritual:

[T]he imperative to ‘fess up, to take verbal responsibility for one’s acts, is deeply ingrained in our culture, in our pedagogy, even in our law. Children are daily told that they must confess to their misdeeds, that confessing will be seen as possible grounds for mitigating punishment, that the refusal to confess will on the contrary aggravate the sanction, and—perhaps even worse—prevent reintegration into the community of parental affection. Confession of wrongdoing is considered fundamental to morality because it constitutes a verbal act of self-recognition as wrongdoer and hence provides the basis of rehabilitation. It is the precondition of the end to ostracism, reentry into one’s desired place in the human community. To refuse confession is to be obdurate, hard of heart, resistant to amendment. Refusal of confession can be taken as a defiance of one’s judges . . . whereas confession allows those judges to pass their sentences in security, knowing that the guilty party not only deserves and accepts but perhaps in some sense wants punishment, as the penance that follows confession.¹²⁹

A sincere apology requires “remorseful acceptance of responsibility for one’s wrongful and harmful actions, the repudiation of the aspects of one’s character that generated the actions, the resolve to do one’s best to extirpate those aspects of one’s character, and the resolve to atone or make amends.”¹³⁰ Stephen Garvey has described how apology constitutes “the wrongdoer’s public expression of his repentance, whereby he openly acknowledges his wrongdoing and simultaneously disowns it.”¹³¹

examples of apology). Recall also some unconvincing apologies. On allegations that he lied about performance-enhancing drugs in the 1990s, track star Ben Johnson stated: “I said I’m sorry. What else can I say? I’ve lied and I admitted it. Life goes on.” Henry Alford, Op-Ed, *Regrets Only*, N.Y. TIMES, Oct. 14, 2007, Week in Review, at 12. Or consider the even less apologetic Pete Rose in a 2004 comment on his betting scandal: “I’m sure that I’m supposed to act all sorry or sad or guilty now that I’ve accepted that I’ve done something wrong. But you see, I’m just not built that way.” *Id.*

129. BROOKS, *supra* note 120, at 1–2 (noting the emphasis on President Clinton expressly acknowledging that he had lied, without regard to his existing admissions of misconduct and other expressions of contrition). See also TAVUCHIS, *supra* note 127, at 23. According to Tavuchis’s description:

Something more is at stake in its genesis than the advantages sought in such social maneuvers. . . . [A]n apology is an intricate set of speech acts that is evoked and vivified by actions that challenge the putatively secure achievements of membership in a moral community. An apologizable breach thus constitutes a threat to such an order and its accompanying definitions of reality that calls for the elimination of discrepancy and uncertainty through unmediated confrontation.

Id.

130. Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 143, 147 (Amitai Etzioni & David E. Carney eds., 1997).

131. Garvey, *supra* note 113, at 1815; see also *id.* at 1813 (“If a wrongdoer responds as he should to his wrongdoing, he will feel guilt; and if he responds to his guilt as he should, he will seek to set things right through the process of atonement.”).

There is a sense, however, in which punishing defendants for the failure to own up, and treating that failure as a lesser-included offense itself, is counter-productive to the goal of reintegration. The apology explanation may simply be a subset of the authority thesis.¹³² We are not, and perhaps should not be, entirely comfortable with those apologists who back into expressions of remorse because of the leverage of the criminal law. An apology for the failure to atone earlier seems somewhat removed from remorse for the wrongdoing itself. Also, such an apology does not carry with it the same promise of mitigation or redemption. Bargained-for or manipulated confession may not have much restorative power. Consider David Simon's account of an interrogation as "a carefully staged drama, a choreographed performance that allows a detective and his suspect to find common ground where none exists."¹³³ In that "controlled purgatory," Simon explains, "the guilty proclaim their malefactions, though rarely in any form that allows for contrition or resembles an unequivocal admission."¹³⁴ Seidman also sees contrition in the criminal justice process as a complicated exchange:

The ultimate trade, then amounts to this: the victim gets to see the perpetrator squirm before him and to feel magnanimous when he exhibits mercy. The perpetrator, in turn, emerges from the encounter with his ego bruised but otherwise unscathed. Needless to say, this entire sadistic and masochistic dance has nothing to do with the unbargained-for and unmediated communication and connection that apology's advocates so admire. Instead it amounts to a complicated and brutal struggle, with each side using the tools at hand to its advantage.¹³⁵

"Once the apology is in the public sphere," Seidman emphasizes, "it inevitably becomes entangled with questions of power."¹³⁶

Thus, the apology for a false statement may look more like stigmatizing than reintegrative shaming, especially where offenders do not address the underlying violation.¹³⁷ Marion Jones, for example, cheated by using

132. See, e.g., *Roberts v. United States*, 445 U.S. 552, 557 (1980) (defendant's failure to cooperate with the government indicates that he is unwilling "to shape up and change his behavior," and accordingly can be considered at his sentencing).

133. DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 206 (2006).

134. *Id.*; cf. Saul M. Kassin, *A Critical Appraisal of Modern Police Interrogations*, in *INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH AND REGULATION* 207, 220 (Tom Williamson ed., 2006) (stating that the confessions that reach the public are comparable to a "Hollywood drama—scripted by the police theory of the case, rehearsed during hours of unrecorded questioning, directed by the questioner and ultimately enacted on paper, tape or camera by the suspect").

135. SEIDMAN, *supra* note 120, at 44.

136. *Id.* at 39.

137. Nor, many skeptics argue, can repentance and reconciliation even be achieved in the criminal justice system. As Abe Fortas stated: "Mea culpa belongs to a man and his God. It is a plea that cannot be exacted from free men by human authority. To require it is to insist that the state is the superior of the individuals who compose it, instead of their instrument." Abe Fortas,

performance-enhancing drugs in track and field and was then convicted under § 1001 for not confessing to it.¹³⁸ After her conviction and sentencing, she made no direct mention of her use of performance-enhancing drugs or her involvement in a counterfeit check scheme, although those were the subjects of the charged false statements. Instead, she acknowledged that “[m]aking these false statements to federal agents was an incredibly stupid thing for me to do, and I am responsible fully for my actions.”¹³⁹ The statement, though presented as repentance, notably failed to specify the actions for which she took responsibility and thus had little reintegrative potential.

Broad application of the false statement statute may create efficiencies by shortcutting some investigations and pleas, but it also increases the incidence of trivial cases at the expense of more salient prosecutions. That “may ease the burden for prosecutors,” but it also “dilutes the moral significance of a successful prosecution.”¹⁴⁰ The assertion of government authority through false statement charges comes at a price as well because it may affect the legitimacy of other criminal provisions.¹⁴¹ If many false statement prosecutions punish offenses that do not necessarily cause harm and produce apology rituals that do not have their intended social meaning, it is worth considering how courts and legislatures might strike a better balance and safeguard against abuse.

III

IDENTIFYING POTENTIAL DISTORTIONS

The foregoing analysis provides some structure for evaluating the content and posture of false statements and considering the motivations for prosecuting them. It does not, however, address the obvious threshold question: why should we care about defendants who attempt to deceive the government? The answer, in part, is that these cases matter because they are within the realm of borderline criminal activity where the moral authority of the criminal law has its most significant effect,¹⁴² and where its messages should resonate clearly.

The Fifth Amendment: Nemo Tenetur Prodere Seipsum, 25 JOURNAL 95, 100 (Cleveland Bar Ass’n 1954); see also Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371, 375–77 (2006).

138. See Mitch Albom, *Marion Jones: The Needle, The Lying Done*, DETROIT FREE PRESS, Jan. 13, 2008, at 1B (suggesting that Jones will be imprisoned while Mark McGwire, Jose Canseco, and Andy Pettitte (who have all either refused to testify or admitted steroid use) go free because of her “hubris” in denying it so consistently).

139. See, e.g., *Track Star Marion Jones Pleads Guilty to Doping Deception*, CNN.COM, Oct. 5, 2007, <http://www.cnn.com/2007/US/10/05/jones.doping/index.html>; see also Harvey Araton, *Blinded and Broken By Ambition*, N.Y. TIMES, Jan. 12, 2008, at D1 (Jones admitted in her sentencing colloquy that she had made mistakes but identified those mistakes as the lies).

140. Paul H. Robinson, *Moral Credibility and Crime*, ATLANTIC MONTHLY, Mar. 1995, at 72, 77.

141. See Part III.B., *infra*.

142. Robinson & Darley, *supra* note 121, at 475 (“[A]s a matter of common sense, the law’s moral credibility is not needed to tell a person that murder, rape, or robbery is wrong.”).

Current enforcement strategies distort those signals and may undercut both the consequentialist and retributive aims of criminal law.

The case for deterring defensive deception parallels in some respects theories about regulation of social behavior via “broken windows” policing, which focuses on public order offenses to prevent more serious crimes.¹⁴³ It is grounded in the argument that aggressive prosecution of harmless lies will deter harmful ones, thereby reducing overall criminal behavior and encouraging obedience to the law.¹⁴⁴ As with curfews and graffiti ordinances, false statement charges have a high ratio of violation to prosecution, and as with other broken windows strategies, enforcers do not randomly select the targets of order-maintenance policing.¹⁴⁵

Strategically policing a deep technicality may enhance law and order, but it may also trivialize sanctions more broadly and detract from the stigmatizing effect of the law. Bill Stuntz has explained the collateral consequences of inattention to the salience of visible prosecutions:

If the most salient examples of political corruption involve cash bribes in brown paper bags, the public will probably feel strongly about corruption. If the most salient examples involve dialing from the wrong telephone when soliciting campaign contributions, the public reaction will probably be more tepid. That tepid reaction may affect the public’s view of corruption more generally, may make it seem more trivial than before. Perhaps that has something to do with the different public reaction to the fund-raising scandals of the 1996 presidential campaign than to the Watergate scandal a generation earlier. Criminal law expanded, the nature of marginal cases changed, and attitudes toward what might be called “core” cases seemed to change as well. Again, the story is of criminal law working against the very norms it seeks to enforce.¹⁴⁶

Similarly, because not everyone would condemn defensive lies, it may dilute signals to comply to penalize them in cases where the wrongfulness of the act covered up is not apparent, the societal interest in knowing about it is minimal, and the cover-up itself is unsuccessful. Using false statement charges in an effort to increase cooperation with the government may thus have the byproduct of diminished clarity, credibility, and public trust.

143. See George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, 29–31.

144. See BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 59–89 (2001). Some moral absolutists make arguments about lying that parallel the theory of broken windows policing. Take, for example, St. Augustine’s exhortation to avoid even the beneficial lie: “[L]ittle by little and bit by bit this evil will grow and by gradual accession will slowly increase until it becomes such a mass of wicked lies that it will be utterly impossible to find any means of resisting such a plague grown to huge proportions through small additions.” SULLIVAN, *supra* note 5, at 62.

145. See Kelling & Wilson, *supra* note 143.

146. Stuntz, *supra* note 4, at 1886.

A. Accountability Costs

That dilution effect results in part from the ease with which prosecutors can deploy false statement charges as substitute offenses. Section 1001 opens a particularly large gap between overbreadth and underenforcement. According to Douglas Husak's recent analysis of overcriminalization, discretion shifts within the criminal justice system and settles in the place where it is least visible, and unreviewable prosecutorial discretion governs the space between actual and potential uses of the statute.¹⁴⁷ The lack of accountability makes it impossible to predict whether and when defendants will be indicted. Despite stated policies against, for example, the prosecution of an "exculpatory no,"¹⁴⁸ federal prosecutors do charge false statements in a broad range of cases.¹⁴⁹ And when some aspect of an investigation fails to bear fruit, or some evidentiary problem exposes the government to trial risk, everyday lies in the course of the investigation remain actionable.

Moreover, § 1001, as noted above, is part of a complex group of overlapping statutes. The federal criminal code includes literally hundreds of misrepresentation offenses, and prosecutors can rely on some provision to punish any lie or even an "almost-but-not-quite" lie that "one might tell during the course of any financial transaction or transaction involving the government."¹⁵⁰ The concept of falsehood itself includes further prosecutorial license because it encompasses reckless disregard for the truth,¹⁵¹ and it may turn on contested interpretations of accounting standards and other professional duties. The combination of an ambiguous offense like dishonesty and the broad, vague statutes criminalizing it implicitly authorizes prosecutors to classify inconvenient or otherwise undesirable interactions as criminal, and there is little incentive to screen cases for worthy defendants.¹⁵² With narrow

147. HUSAK, *supra* note 118, at 21.

148. *See, e.g.*, *Brogan v. United States*, 522 U.S. 398, 415 n.6 (1998) (Ginsburg, J., concurring) (noting DOJ's policy against charging a § 1001 "violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government") (quoting United States Attorneys' Manual ¶ 9-42.160 (Sept. 1997)).

149. *See, e.g.*, Patrick Fitzgerald, Special Counsel, Announcing Indictment of Lewis Libby, Oct. 28, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/28/AR2005102801340.html> ("We, as prosecutors and FBI agents, have to deal with false statements, obstruction of justice and perjury all the time. The Department of Justice charges those statutes all the time.").

150. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517 (2002).

151. *See, e.g.*, *United States v. Gonsalves*, 435 F.3d 64, 71–72 (1st Cir. 2006) (reckless disregard for the truth is tantamount to knowing falsehood under § 1001).

152. *See* Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 179–81 (2004) (explaining that the prosecutor "first interprets statutory language when determining whether the statute covers the conduct at issue," and that pattern "leads to an incremental, but inexorable, expansion of the laws" and allows charges for such offenses as Stewart's public assertion of her innocence); *see also* Stuntz, *supra* note 150, at 571 ("That makes the prosecutor the effective adjudicator of the fraud offense—and if she adjudicates badly, the legal system will

proof requirements and a rate of disposition by plea agreement approaching 97 percent, the false statement offense provides a low-visibility charging option.¹⁵³

As Richman and Stuntz have described in political economic terms, strategic enforcement diminishes deterrence when penalties are not “publicly and transparently attributed to the crimes that prompt . . . prosecutions.”¹⁵⁴ Targeting defendants for one crime while prosecuting them for another ultimately can “undermine faith in the criminal justice system as a whole, thus encouraging the view that ‘beating the system’ is neither immoral nor antisocial.”¹⁵⁵ Furthermore, the pursuit of unsuccessful obstruction, like that of Enron accounting firm Arthur Andersen or Martha Stewart, when it is the only misconduct left standing in a case, signals nothing useful about the primary norms concerning accounting failures or insider trading.¹⁵⁶ The untested theory of securities fraud for which Stewart originally was targeted was never adjudicated.¹⁵⁷ When Marion Jones was sentenced for lying about using

impose no penalty on her.”).

153. The plea rate for offenses categorized as “false statements” in 2008 was 96.6 percent, which is consistent with the overall percentage of plea bargaining in the federal system. See BUREAU OF JUSTICE STATISTICS, 2008 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, Table 5.24.2008, available at <http://www.albany.edu/sourcebook/pdf/t5242008.pdf>.

154. Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 631 (2005); see also *id.* at 586–87. Richman and Stuntz assert:

[T]he political economy of criminal law enforcement depends on a reasonably good match between the charges that motivate prosecution and the charges that appear on defendants' rap sheets. When crimes and charges do not coincide, no one can tell whether law enforcers are doing their jobs. The justice system loses the credibility it needs, and voters lose the trust *they* need to have in the justice system.

Id.

155. O'Sullivan, *supra* note 30, at 676. And where a retributive rationale is lacking along with transparency, the public experiences generalized discomfort about government methods without some “segregable and visible ‘bad’ law to blame,” as there was, for example, in the case of Prohibition. See Robinson & Darley, *supra* note 121, at 484. Without such a specific source, “the observer can do little other than be suspicious of the entire enterprise.” *Id.*

156. As Steven Bainbridge observed:

I find something 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. Yet, if that investigation did not result in charges, it seems vindictive to charge obstruction (especially since in neither case was the obstruction very successful in interfering with the investigation).

Steven Bainbridge, *Quattrone Conviction*, PROFESSORBAINBRIDGE.COM (May 3, 2004, 5:00 PM) <http://www.professorbainbridge.com/Lists/Posts/Post.aspx?ID=119>.

157. See Moohr, *supra* note 152, at 215 n.182. Moohr asserts:

Despite Arthur Andersen's conviction for obstructing justice, accountants may still not understand the standard for assessing an accounting firm's criminal liability when it fails to discover or aids a client's deception about its actual financial condition. The conviction of Martha Stewart for lying to investigators suggests that the underlying conduct—selling stock on the basis of some kind of nonpublic information—was criminal. But because that offense was not charged and tried, those in a position to violate insider trading regulations are not able to determine whether a prospective trade

performance-enhancing drugs, the judge's statement suggested that he remained concerned primarily about Jones's cheating, rather than the false statement for which he sentenced her to six months of imprisonment. "Athletes in society have an elevated status," he said. "They entertain, they inspire and perhaps most importantly, they serve as role models for kids around the world. When there is this widespread level of cheating, it sends all the wrong messages to those who follow these athletes' every move."¹⁵⁸ Yet we have seen how the offense itself, and Jones's public acceptance of responsibility for it, emphasized lies to federal agents in the investigation rather than the cheating or the years she spent publicly denying it. Other celebrity athletes have likewise faced charges concerning their words rather than their conduct, even though the federal focus on steroid abuse among professional athletes has been justified by concerns about the "integrity of competition," "general public health," the dangers of steroid abuse by children, and the health of the athletes themselves.¹⁵⁹ In the 2008 sentencing proceeding for cyclist Tammy Thomas after her conviction for false statements concerning steroid use, Judge Susan Ilston concluded that prison time would be excessive when the "underlying miscreants" who had distributed the steroids all received lesser sentences.¹⁶⁰ Similarly, the "real crime" in *Brogan* involved fraud on the defendant's union, but "it was enough to prove that Brogan denied something embarrassing in a brief conversation with a federal agent."¹⁶¹

Although some scholars have identified pretextual charging as a legitimate use of the range of process crimes,¹⁶² that view overlooks the wholesale problem of opacity in white collar enforcement. Pretextual charges against notorious defendants like Al Capone find some support in a retributive rationale, but expressive considerations may cut the other way.¹⁶³ Broad

based in similar circumstances violates insider trading law.

Id.

158. Lynn Zinser, *Six-Month Sentence for Jones Meant to Be Message*, N.Y. TIMES, Jan. 12, 2008, at D3. The judge did state as well that he wanted "people to think twice before lying" and to "realize that no one is above the law." *Id.*

159. See Paul H. Haagen, *The Players Have Lost That Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 833, 843 (2006).

160. Carol Pogash & Michael S. Schmidt, *Cyclist Avoids Prison Time, Which May Benefit Bonds*, N.Y. TIMES, Oct. 11, 2008, at D6.

161. Stuntz, *supra* note 150, at 571.

162. See, e.g., Murphy, *supra* note 25, at 1444 ("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."); cf. Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1526, 1553 (2008) (suggesting that overbreadth in federal criminal law such as the fraud prohibitions might provide the necessary tools to deal with "sanction-resistant violator[s]" and "inventive and resourceful persons determined to appropriate the interests of others").

163. See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1297 (2001). Brown underscores the expressive considerations:

charging strategies also raise a retail-level problem by capturing defendants who tell harmless and predictable lies about ill-defined underlying misconduct.¹⁶⁴ The lack of accountability mutes deterrent signals, and this perceived lack of fairness further undercuts legitimacy and therefore the “system’s ability to command obedience.”¹⁶⁵

B. Expressive Consequences

It is not merely that the public cannot see the underlying wrong or hold prosecutors accountable for strategic charges, but also that what is visible may not be considered harmful. If that is so, then the prosecution of harmless self-preserving falsehoods not only hazards prosecutorial abuse but also could undermine broader norms governing substantive misconduct.¹⁶⁶

Recently, many criminal law scholars have turned their attention to the interaction between law and social norms, the earned credibility of the code, and the expressive or signaling function of the criminal justice system.¹⁶⁷ Their work finds support in social science demonstrating that voluntary compliance

Criminal law’s expressive and retributive functions sometimes conflict because punitive approaches alienate offenders, reduce cooperation toward compliance, and may damage the legitimacy of law that is important for deterrence. Even when morally justified, retributivist sanctions can harm prevention efforts and reduce voluntary compliance. Faced with that irony, we sometimes decide to forgo prosecution of offenders for whom we have affirmative, justifying reasons to punish.

Id.

164. See, e.g., *United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007) (“Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch.”).

165. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 797 (2006).

166. See Stuntz, *supra* note 4, at 1886 (noting that prosecuting marginal misbehavior undermines the norms that define good behavior, specifically that “white collar crime is likely to come to seem increasingly trivial as the laws forbidding it become increasingly broad”); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 47 (1997) (“Both in justice to those . . . labeled [as criminal], and to preserve the always-threatened moral capital of the criminal law from dilution, conviction of crime must ordinarily be reserved for those who violate deeply held and broadly agreed social norms.”).

167. Paul Robinson and John Darley, for example, illuminate the link between retributive norms and the moral credibility of criminal prohibitions. See Robinson & Darley, *supra* note 121, at 475–76 (analyzing the “connection between perceptions of the law’s moral credibility and obedience to the law”). See also generally Bernard E. Harcourt, *After the “Social Meaning Turn”: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC’Y REV. 1 (2000); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2031 (1996); Stuntz, *Pathological Politics*, *supra* note 150, at 520 n.73 (collecting citations to recent work on law and norms). For critical treatments of the focus on social meaning, see, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1374–75 (2000); Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 489–95 (2003).

flows from the sense that the law is just and the governing body legitimate.¹⁶⁸ Paul Robinson, in particular, has emphasized the danger that overbroad crimes can pose to the credibility of the criminal law. He concludes that:

Expanding the criminal law beyond the bounds of perceived desert initially weakens the stigmatizing effect that that expansion seeks to enlist. Finally, it destroys the stigmatizing effect; criminal penalties for non-condemnable conduct cause the public to sympathize with the person charged, and to despise the legal system that brings the charge. And it is the credibility of the criminal law in general that may be destroyed. Criminal conviction for a violation that the community sees as non-condemnable conduct affects not just the meaning of liability imposed for those offenses but the condemnatory message for all criminal convictions.¹⁶⁹

Robinson has also argued that retributive philosophy should incorporate lay views of justice and that utilitarian analysis should account for the influence of lay tastes.¹⁷⁰ In order to harness “personal moral commitment and the power of social disapproval,” criminal law must align with societal norms.¹⁷¹

168. See TYLER, *supra* note 119, at 65 (“This high level of normative commitment to obeying the law offers an important basis for the effective exercise of authority by legal officials. People clearly have a strong predisposition toward following the law. If authorities can tap into such feelings, their decisions will be more widely followed.”); *id.* at 24 (“The suggestion that citizens will voluntarily act against their self-interest is the key to the social value of normative influences.”); see also Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, in 40 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 193, 235 (Mark P. Zanna ed., 2008) (“The ‘rule of law’ is threatened when the rules of law violate citizen intuition.”); Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L. REV. 391 (2000) (regression analysis about the sources of compliance); PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 194–95 (1997) (“Behavioural science research suggests that people better understand rules that mirror their own intuitive judgments about assessing liability. . . . [A] code of conduct inspires greater compliance if, in the public’s view, it describes conduct that the public sees as wrongful.”).

169. Robinson & Darley, *supra* note 121, at 482; see also *id.* at 481 (“With each additional non-blameworthy use, the meaning of ‘criminal liability’ becomes incrementally less tied to blameworthiness and incrementally less able to evoke condemnation.”).

170. Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145 (2008). On the retributivist perspective, see MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 91 (1997) (setting forth a leading modern statement of the retributivist theory of punishment, claiming that “[w]e are justified in punishing because and only because offenders deserve it”); Garvey, *supra* note 113, at 1823 (“[A] wrongdoer’s punishment should be proportional to his desert, which is typically thought to be some function of the wrong he did and the culpability with which he did it.”). Utilitarian theories of deterrence counsel in favor of a norms/crimes alignment as well. The economic perspective on the signaling function is that people observe criminal prohibitions instrumentally because they are “likely to obtain future returns when others see them as obeying a legitimate law.” ERIC POSNER, LAW & SOCIAL NORMS 111 (2000); see also Jack Knight, *Social Norms and the Rule of Law: Fostering Trust in a Socially Diverse Society*, in TRUST IN SOCIETY 354, 354–65 (Karen S. Cook ed., 2001); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 516–17 (1987).

171. Robinson, *supra* note 140, at 76 (stating that “criminal law must be seen by the potential offender and by the potential offender’s social group as an authoritative source of what is

Although morality is but one source of the criminal law's credibility, it functions best when it imposes requirements perceived as just and punishes those deemed deserving.¹⁷² Stuart Green has drawn a similar connection between public perceptions of morality and the authority of the criminal label. He observes that "when there is a gap between what the law regards as morally wrongful and what a significant segment of society views as such, moral conflict and ambiguity are likely to be the result."¹⁷³ Crude boundaries can diminish the "informational influence" of the law and thus its power to bring about law-abiding behavior.¹⁷⁴

With regard to fraud and deception offenses, the legitimacy of the fine line-drawing that enforcers do is particularly significant. Shifting the focus to social psychology gives a better sense of the problem. Some white collar prohibitions are counterintuitive, but individuals will follow the law reflexively if they view its source as authoritative and reliable.¹⁷⁵ This operates, for example, as follows:

Without knowing quite why insider trading is morally wrong, most of us accept the conclusion that it is wrong, because the relevant authorities have thought about it, and assert that it is wrong. It is what we all count on when, as we travel down a highway that is new to us, we slow down when we see a sign saying "caution, blind curve," and count on others to slow down as well. It is, in one sense, blind obedience, but it is extremely socially useful, and it functions based on attitudes of trust toward the source, in turn based on past experiences of the source providing credible messages.¹⁷⁶

Where criminality itself is in question, as it often is in § 1001 cases, the credibility of authorities is essential to compliance. And the preference-shaping

moral, of what is right—much as, within a functional family, a parent may be seen as such an authoritative source").

172. *But see* RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 109 (1999). Posner explains:

[M]uch of the conduct to which the law does attach sanctions is morally indifferent, such as fixing prices, trading securities on inside information, hiring an illegal alien when no one else is available to do the work, driving with your seat belt unfastened, breaking a contract involuntarily, and inflicting unavoidable injury in the course of a hazardous but socially necessary activity.

Id.

173. GREEN, *supra* note 38, at 46 (citing, inter alia, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404–05, 422 (1958) (emphasizing that criminal sanctions can only be justified if accompanied by "the judgment of community condemnation")).

174. *See* PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME* 202 (1995).

175. *See* Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 *S. CAL. L. REV.* 1, 29 (2007) (the source of the criminal law must be "legitimate in its authority, expert in its knowledge, and trustworthy in its motives") (citing RICHARD E. PETTY & JOHN T. CACIOPPO, *ATTITUDES AND PERSUASION: CLASSIC AND CONTEMPORARY APPROACHES* 62–69 (1996)).

176. *Id.* at 30.

at which white collar prosecutions often aim is most effective when enforcement promotes public trust.¹⁷⁷

Tom Tyler's empirical work underscores this relationship between credibility and compliance. Social psychologists regard normative bases for compliance as more powerful than instrumental ones, and Tyler has concluded that the "most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong."¹⁷⁸ Although this morality-based motivation has power, "legitimacy-based" forces are even more stable,¹⁷⁹ and Tyler has also documented the importance of procedural justice to public acceptance of legal rules.¹⁸⁰

There is thus strong social scientific support for the general proposition that divergence between commonsense views of justice and the conduct of enforcers diminishes compliance. But now we come to the rather more difficult question whether there are sophisticated and stable consensus views about harmless investigative lies and whether we can identify and account for them. The harm caused by an offense does factor into public perceptions of its seriousness.¹⁸¹ Clinical assessments of the blameworthiness of offenses can be highly nuanced, and controlled experiments on the grading of offenses record perceptions of the resulting harm.¹⁸² Whether the public actually perceives

177. See Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CALIF. L. REV. 1513, 1519–20, 1538 (2002) (noting the relationship between public trust and regulatory outcomes); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 966–67 (2008) (a "critical facet of the relationship of trust that sustains the rule of law is the confidence of the governed that the fidelity of their governors" to rule-of-law values "does not result in law that the governed do not recognize as their own"); *id.* at 964 (rule of law is based on political trust between the government and the governed) (citing TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURT 204, 204–208 (2002) (effective legal regulation depends on "the public's trust in the motives of legal authorities"))).

178. TYLER, *supra* note 119, at 64. Tyler's seminal Chicago study illustrated the central role that the blameworthiness of an offense plays in predicted peer attitudes about crime. Violating laws directed at conduct that appears harmless is not expected to provoke much criticism, and those laws are thus less likely to be obeyed.

179. See *id.* at 57–64 (summarizing regressions indicating that personal morality strongly correlated with compliance, and that legitimacy, though more weakly correlated, was still five times more likely than deterrence to stimulate compliance).

180. See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 239 (2008) ("[L]egitimacy develops from the manner in which authority is exercised.") (citing MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968)).

181. See Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 55 (1997) ("[P]ublic conceptions of seriousness emphasize the consequences of the crime and the harm done, rather than the offender's intent or the potential for harm.").

182. See Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1832–46 (2007) (setting forth empirical research on sophisticat-

harm in defensive lying may be particularly challenging to assess. Sound bites are not experiments, and the messages the public receives from a decentralized media are not uniform. ESPN viewers have one set of opinions on the Marion Jones case, regular watchers of *Martha Stewart Living* considered her prosecution in the light of her celebrity, and perceptions of President Clinton's perjury and Scooter Libby's obstruction turn in part on whether signals about those cases were received from MSNBC, CNN, or Fox News. It is thus possible that even though there are fine-grained moral norms about defensive lying, they are not widely shared.

Although the content of community views is methodologically complicated to access,¹⁸³ several telling signs of a disjunction between those views and the conduct of law enforcement warrant further exploration.¹⁸⁴ What follows is admittedly either anecdotal or extrapolated from theory in other realms, but the available impressionistic evidence is a starting point.¹⁸⁵ Lying in response to an accusation is among the most ordinary of human failings.¹⁸⁶ While there may be a widely held belief about the wrongfulness of lying in general, there is no consensus about the social harmfulness of defensive deception. One could argue that broad legal condemnation of deception tracks the moral code in the abstract and comports with "deontological desert" at a transcendent level.¹⁸⁷ But some philosophers stop short of categorically condemning dishonesty and recognize the context-based nature of lies, particularly in confrontations with authority.¹⁸⁸ Utilitarians, for example, "see

ed, and widely shared, grading of offenses by laypersons).

183. See Christopher Slobogin, *Foreword: Is Justice Just Us?*, 28 HOFSTRA L. REV. 601, 609 ("Even if [divining the content of the community's views accurately] is achieved, a consensus among the citizenry may not emerge, or any consensus that does surface may stem from common misimpressions about crime and the legal system, rather than informed judgments."); see also Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1540 (2000); see also Robinson & Darley, *supra* note 175, at 8 ("[C]ulturally shared judgments of the relative blameworthiness of different acts of wrongdoing are commonly intuitive rather than reasoned judgments.").

184. In a future project, I intend to supplement the non-empirical analysis here with structured interviews and survey data that will explore both insider understanding and public perceptions of the harm caused by different categories of investigative lies.

185. See, e.g., Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1246 (2004) ("[I]mpressionistic evidence—though unreliable in general—may be conveying at least some real information . . .").

186. See William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1229 (1988) (proffering an excuse rationale for the privilege against self-incrimination on the theory that confessions to criminal conduct, while perhaps the "right" thing to do, "require more courage and integrity than most of us possess"); see also *id.* at 1242–80 (arguing that self-preserving lies are among the most human of frailties and do not merit punishment).

187. Philosophers from Aquinas to Kant to Bok have theorized that lying is always morally wrong and that truth is a "categorical imperative." See BOK, *supra* note 18; Immanuel Kant, *On the Supposed Right to Lie from Altruistic Motives*, in ETHICS 280 (Peter Singer ed., 1994); see also FRIED, *supra* note 16 (arguing that lying is an inherent wrong).

188. See SULLIVAN, *supra* note 5, at 61; see also, e.g., Green, *supra* note 109, at 14–16 (wrongful inculpation is more harmful than wrongful exculpation).

deception by itself as morally neutral and judge it entirely by its consequences.”¹⁸⁹ Some religious thinkers also classify lies “according to underlying motive and effect on those lied to and on society in general, and according to the corresponding degree of moral failure or sinfulness.”¹⁹⁰ Even the absolutists like St. Augustine assign degrees of severity to lying, with the lie “harmful to no one” low on the scale, albeit a sin.¹⁹¹

It is not, moreover, moral philosophy that sets norms, but rather community standards of correctness that do so. And harsh legal treatment of defensive deception may not reflect a widely internalized sense of duty to the government.¹⁹² To this extent, I disagree with Stuart Green’s premise that false statements involve “obviously harmful or risk-producing conduct”¹⁹³ and that they are “uncontroversially subject to criminal sanctions”¹⁹⁴ in the same way that perjury and fraud are. Because everyone tells lies occasionally, context matters when evaluating their impact. Although it is noble to take responsibility for serious misconduct, there is a countervailing norm concerning the right to self-preservation. It is the ordinary course that individuals “not only fail to do the virtuous thing but actually compound their wrongdoing by attempting to conceal it.”¹⁹⁵ One could plausibly argue that organic, defensive lies are excusable, and that many reasonable people would lie under the same circumstances. While the defendant’s conduct is wrong, “the harm the conduct causes in any one case is both slight and diffuse while the pressure is both substantial and concentrated.”¹⁹⁶ Collective intuition thus holds that “there is something potentially unfair about making it a crime for one suspected of criminal activity to shield himself from government scrutiny.”¹⁹⁷ There is a strong positive norm favoring contrition and personal responsibility, but the duty to cooperate with the government against yourself is at best a “sticky norm” about which there is significant ambivalence.

189. SULLIVAN, *supra* note 5, at 61.

190. *Id.*

191. *Id.* at 62.

192. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining norms as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both”).

193. GREEN, *supra* note 16, at 159.

194. *Id.*

195. *Id.* at 172–73. *But see* Roberts v. United States, 445 U.S. 552, 558 (1980) (the “deeply rooted social obligation [to cooperate] is not diminished when the witness to crime is involved in illicit activities himself” and accordingly the failure to assist the government in an investigation is a legitimate consideration at sentencing).

196. Stuntz, *supra* note 186, at 1254 (suggesting that there is a classic excuse rationale applicable in the slightly different context of self-protective perjury, which “looks a good deal like the commission of any victimless crime under great pressure”).

197. Green, *supra* note 109, at 33; see also R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 29 (1981) (identifying a “right to avoid very destructive consequences to [oneself] even if submission would serve the welfare of others”).

To support these theoretical accounts of a divide between informal rules and the formal crime of defensive deception, anecdotal evidence suggests that some defendants have avoided the normative pressures classically associated with punishment. These social punishments include “commitment costs” that put past accomplishments in jeopardy, “attachment costs” that cause the loss of valued relationships, and the “stigma” of discredit in the eyes of others.¹⁹⁸ In Martha Stewart’s case, for example, her brand has endured, and her company’s stock price nearly tripled during her incarceration.¹⁹⁹ Marion Jones’s fan base has long since eroded, and she forfeited her five Olympic medals, but that occurred because natural speed did not propel all of her achievements, not because she resisted confessing to federal agents. Many believe that President Clinton survived impeachment with high approval ratings in part because his “apparent falsehoods came in the form of false denials made ‘defensively,’ in response to specific questions put to him, rather than ‘offensively,’ on his own initiative.”²⁰⁰ And some baseball fans have begun to demonstrate fatigue with the assemblage of athletes implicated in steroid use and then investigated for false statements.²⁰¹ Public response to these cases provides further evidence that norms may not track the broadest applications of the crime, and that the social meaning of these cases may be rather different from the government’s intended message.

C. Backfire Effects

To the extent there is a divide between norms and crimes, it can affect both general compliance (by trivializing criminality)²⁰² and specific compliance

198. Robinson & Darley, *supra* note 121, at 469.

199. Keith Naughton, *Martha Breaks Out*, NEWSWEEK, Mar. 7, 2005, at 36; Richard Siklos, *Stewart’s Next Big Project: Justifying Her Investors’ Expectations*, N.Y. TIMES, July 18, 2005, at C1; cf. Schroeder, *supra* note 50, at 2023 (“[I]t is far from clear whether Stewart’s trades were unlawful, let alone illegal, and it is hard to identify any harm her acts directly caused anyone.”).

200. Green, *supra* note 16, at 162.

201. Reactions to Alex Rodriguez’s acknowledgment that he concealed steroid use—and the 2009 revelations that several players, including Manny Ramirez and David Ortiz, tested positive for steroid use in a 2003 screen—have been muted in contrast to the erosion of Barry Bonds’s fan support in response to his steroid use and obstruction indictment. *See, e.g.*, Bill Shaikin, *On Baseball: Game (not) Over for Gagne*, L.A. TIMES, July 5, 2009, at D1 (“What was once a national outrage over baseball’s steroid era has evolved into a national fatigue.”).

202. *See, e.g.*, HUSAK, *supra* note 118, at 12 (“The state cannot effectively stigmatize persons for engaging in conduct that few condemn and most everyone performs.”); 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, 1536 (1997) (“[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.”); Robinson & Darley, *supra* note 175, at 21 (stigmatization controls conduct far more efficiently than the criminal justice system, but it occurs only when legal codes accurately represent “moral condemnation from the community’s point of view”); Stuntz, *supra* note 4, at 1894 (“The more ‘crime’ includes things that only a slight majority of the population

(by signaling widespread deception). Allowing for prosecutions in the absence of harm and without accompanying social stigma may produce a variety of counterproductive effects. The theory of “broken windows” policing of technical lies—and the idea that punishing some harmless lies will deter more harmful ones—is undercut by experience and recent social science.

Janice Nadler has conducted experiments supporting the “flouting thesis,” according to which the perceived illegitimacy of one legal outcome negatively impacts people’s willingness to comply with unrelated laws. Nadler exposed a group of undergraduates to mock newspaper stories designed to elicit a perception that the laws described were either just or unjust and then administered a criminal behavior survey testing their willingness to engage in drunk driving, tax evasion, speeding, illegal parking, underage drinking, and minor thefts. The participants who had been exposed to unjust laws demonstrated, across the board, a greater likelihood of committing these crimes. “When a person evaluates particular legal rules, decisions, or practices as unjust,” Nadler concluded, “the diminished respect for the legal system that follows can destabilize otherwise law-abiding behavior.”²⁰³ If prosecutors are perceived as pressing an unfair advantage from the broad terms of the statute, creating crimes during strategic interviews, and overcharging to induce a plea by defendants not otherwise guilty, then the enforcement strategy may produce a net loss of compliance.

Nadler further observes that “the expressive power of law can backfire when a law inadvertently generates disrespect,” for example by sending a message that everyone cheats on taxes.²⁰⁴ Dan Kahan has noted as well that “a person’s beliefs about whether other persons in her situation are paying their taxes plays a much more significant role in her decision to comply than does the burden of the tax or her perception of the expected punishment for evasion.”²⁰⁵ Similarly, athlete-doping scandals created the widespread perception that drug use was the norm and necessary to compete. To signal that lying to the government is the standard response to an investigative inquiry may also decrease cooperation, or at least undermine the norm in its favor.²⁰⁶ This

thinks is bad, the harder it is to sell the idea that ‘criminal’ is a label that only attaches to very bad people.”).

203. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1401 (2005).

204. *Id.* at 1402 (citing Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 342 (2001)); see also Emanuela Carbonara, Francesco Parisi & Georg von Wangenheim, *Unjust Laws and Illegal Norms*, (Minn. Legal Studies Research Paper No. 08-02, 2009), <http://ssrn.com/abstract=1088742> (explaining that social opposition to unjust laws may trigger social norms with countervailing effects on legal intervention and citing the example of increased sanctions against copyright infringers and music downloaders in the U.S.).

205. See Kahan, *supra* note 167, at 354–56 (summarizing empirical, statistical, and experimental studies of the role of social influence on law-breaking).

206. See Stuntz, *supra* note 4, at 1882 (noting that broader criminalization of lying has not led to stronger norms against lying and citing “the common perception that politicians lie constantly, notwithstanding that politicians’ lies are among those most commonly covered by

problem is particularly acute with offenses that derive what social stigma they carry from criminalization and not from more entrenched norms such as those against violence.²⁰⁷ Moreover, trivial cases necessarily draw resources from more salient prosecutions of deception and obstruction that could enhance compliance.²⁰⁸

Another sort of backfire effect may be at work too, in the form of what Darryl Brown has called “the psychology of resentment.”²⁰⁹ Resentful offenders, Brown explains, “are not likely to experience punishment [or the threat of punishment] as virtue-inculcating experiences,” and a command-and-control approach to cooperation may have the same anticompliance effect that it does with regard to regulation.²¹⁰ If prosecutors deploy false statement charges selectively and strategically, they also risk the perception of differential enforcement, which may itself “breed[] resentment.”²¹¹ In another illustration, researchers have documented an increase in file sharing after music companies started suing users of peer-to-peer technology for illegal music downloading.²¹² When the expressive power of the law is not very strong, a sudden increase in the strictness of the law may lead to countervailing effects.²¹³ Deep deterrence of a relatively harmless technical offense can make the odds of escaping detection appear high (because of its perceived prevalence) and render the stigma of criminality low.²¹⁴

Furthermore, aggressive enforcement can have an anticooperative impact on bystanders. Witnesses who have no exposure to liability may cooperate less for fear of running afoul of § 1001. This is true of “bystanders” in the corporate

criminal codes”).

207. See *supra* text accompanying notes 142–46 (discussing the importance of prosecuting the most salient examples of white collar crime).

208. See Buell, *supra* note 162, at 1525 (“In game-theoretic terms, salient enforcement action against the most determined defectors maintains the belief among those inclined to cooperate in conditions of reciprocity that others who are similarly inclined, and who have observed the same enforcement action, can be expected to continue to cooperate rather than defect.”). On the power of social influence, see also Richard H. McAdams, *supra* note 192, at 355 (law can give rise to norms that induce compliance).

209. See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1313–14 (2001).

210. See Darryl K. Brown, *What Virtue Ethics Can Do for Criminal Justice: A Reply to Huigens*, 37 WAKE FOREST L. REV. 29, 37 (2002).

211. William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1795 & 1835 (1998).

212. See Ville Oksanen & Mikko Valimaki, *Theory of Deterrence and Individual Behavior: Can Lawsuits Control File Sharing on the Internet?*, 3 REV. L. & ECON. 693 (2007).

213. See Carbonara, Parisi & von Wangenheim, *supra* note 204, at 5, 23 (subsequent softening of deterrence can thus actually increase compliance by allowing a gradual internalization of the law’s aim).

214. See Kahan, *supra* note 167, at 394–95 (severity and certainty are not, as the standard economic rationale would have it, interchangeable; rather, substituting severity for certainty can diminish social influence against criminality); cf. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (deterrent force stems from the combination of the probability of detection and the severity of sanction).

setting as well. When the government prosecutes minimizing misstatements that employees make to their own corporate counsel, it compromises its long-term ability to share the fruits of productive internal investigations.²¹⁵ As a result, an offense that is supposed to protect the government's access to information ultimately produces less of it.²¹⁶ In addition, a single-minded focus on the secondary norm against defensive deception can distract investigators and prosecutors from effectively enforcing the primary norm (against, for example the use of steroids, creative accounting, or government corruption).²¹⁷

IV

ANIMATING MATERIALITY

In light of this account of the expressive harms and unintended consequences that may flow from false statement prosecutions, the prescriptive possibilities of improved line-drawing merit some analysis. As a general matter, innocence in white collar cases is not factual but turns on an argument that the defendant did nothing wrong. The definition of crime tends to dominate, particularly with regard to offenses like false statements. They are neither patently wrongful nor strict liability regulatory offenses, different in kind from a violent crime but not in the mattress-tag-tearing category either.²¹⁸ One could credibly argue that all deception is wrongful, but there is substantial disagreement as to how wrongful,²¹⁹ and thus a need for objective rather than subjective "tool[s] for separating the few cases where prosecution is appropriate from the many where it isn't."²²⁰

215. See Julie Rose O'Sullivan, *The DOJ Risks Killing the Golden Goose Through Computer Associates/Singleton Theories of Obstruction*, 44 AM. CRIM. L. REV. 1447, 1472 (2007).

216. Editorial, *Martha Stewart Misgivings*, WALL ST. J., Mar. 8, 2004, at A16 (Stewart case provides "a huge new incentive for CEOs to clam up the next time the feds ask questions"); Albom, *supra* note 138, at 1B (what we've learned from the Marion Jones case is to "choose lies carefully and stay away from the feds"); see also Tyler & Fagan, *supra* note 180, at 235 (explaining that the feeling of obligation to obey the law and to defer to the decisions made by legal authorities not only encourages compliance with the law but also motivates cooperation with law enforcement).

217. In the steroids investigation, for example, Brian McNamee has thus far avoided prosecution for steroid distribution by providing evidence of Roger Clemens's false statements about his own steroid use. Likewise, Patrick Arnold, Greg Anderson, and Angel Heredia, who distributed steroids through BALCO, all received cooperation deals that resulted in lesser sentences than those received by the athletes who lied about being their clients. See Pogash & Schmidt, *supra* note 160, at D6; Lance Williams & Mark Fainaru-Wada, *Short Prison Terms for BALCO Defendants*, S.F. CHRON., Oct. 19, 2005, at A1; see also Sanchirico, *supra* note 185, at 1316 (explaining that the law of evidence tampering is "an area where the goal of finding truth ex post is a poor proxy for the goal of shaping truth ex ante").

218. See Richman & Stuntz, *supra* note 154, at 589–90 (noting the "in-between quality" that offenses like false statements have).

219. See SULLIVAN, *supra* note 5, at 65 ("Personality, morality, religious upbringing, view of the world—all enter into one's sense of right or wrong and influence judgment on whether or not a lie is deplorable, forgivable, or even laudable.").

220. Richman & Stuntz, *supra* note 154, at 590.

Section 1001's broad conduct rule—"do not lie the government"—sends a useful message to the public, but it also gives free reign to the discretionary power of prosecutors. This is an instance where the decision rule addressed to officials ought to differ in content—by accounting for the investigative significance of the falsehood—to mitigate the potential for abuse of power.²²¹

A. Restrictive Judicial Interpretation

The vague wording of § 1001 and the judiciary's failure to clarify it through interpretation make it susceptible to manipulation. This pushing of "the substantive envelope" is, in Erin Murphy's terms, one more "foreseeable side effect of the generally overwhelming breadth of discretion granted to the executive by the legislative and judicial branches" and "enabled by the copious number of substantive criminal offenses and their dwindling definitional constraints."²²² It is also a product of the expansion of liability rules by courts, which can lead to criminal prohibitions "broad enough to permit sanctioning of persons who do not produce the serious harms that gave rise to the liability rule in the first place."²²³ Although the interpretive trend has been to broaden rather than narrow, courts could construe the existing elements of the offense to distinguish false statement charges that address institutional harm from those that just represent prosecutorial opportunism.

I propose restrictive interpretation by the courts mindful of the legitimate objections other scholars have raised about incremental judicial reforms.²²⁴ The standard prescription in these analyses is instead to cabin overbroad enforcement with an appeal to prosecutorial discretion.²²⁵ But executive self-regulation is difficult to enforce or even observe, given that it is "largely exercised outside the public eye."²²⁶ Only a small fraction of potential criminal

221. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 650 (1984) (conduct rules may be coextensive with extant moral norms, but the corresponding decision rule "should define, as clearly and precisely as possible, a range of punishable conduct that is unquestionably within the bounds of the community's relevant moral norm").

222. Murphy, *supra* note 25, at 1493–94; see also John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1067 (1999) ("If Congress writes vague and encompassing federal crimes, it is likely to get [vague] and encompassing federal prosecutions.").

223. Buell, *supra* note 162, at 1523.

224. O'Sullivan, *supra* note 30, at 670; cf. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 662–68 (1997) (stating that the Court's failure to apply any restrictive interpretation to jurisdictional elements of federal criminal law has created an excess of offenses for federal prosecutors to charge).

225. See Buell, *supra* note 162, at 1561 (observing that DOJ is best positioned to "channel its prosecutors toward the judicious use of broad statutes against the limited set of the most industrious and harmful actors"). See also generally Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) (describing the advantages of internal regulation of prosecutors).

226. See *United States v. Wells*, 519 U.S. 482, 512 n.15 (1997) (Stevens, J. dissenting) (citing *Baggett v. Bullitt*, 377 U.S. 360, 373–74 (1964) ("It will not do to say that a prosecutor's

lying cases are prosecuted, but internal sorting to date has focused more on subjective considerations like the identity of the defendant than an objective assessment of the gravity of the harm. Nor is legislative pruning likely given the political economy of criminal justice.²²⁷ On the contrary, in recent years both the House and the Senate have voted to expand the penalties for violations of § 1001 in terrorism cases and for false statements related to sex offenses.²²⁸ The Model Penal Code's more modest version of the offense—excising unsworn oral statements, and requiring the “purpose to mislead” an official—has also been rejected.²²⁹

Although there are institutional consequences to after-market modifications by judges, the courts at least provide a starting point for clarification. In theory, federal crimes are defined only by statute, and there are no federal common law crimes,²³⁰ but that is “a truth so partial that it is nearly a lie.”²³¹ Opportunities for interstitial lawmaking may have diminished,²³² but the terms of § 1001 leave room for judges to distinguish between trivial and nontrivial versions, and thus for judicial intervention to restrain prosecutorial discretion.²³³

The materiality requirement could be activated with the harm principle so that the statute reaches only “those false representations that might

sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions.”); O’Sullivan, *supra* note 30, at 674.

227. See Barkow, *supra* note 225, at 911 (increased legislative oversight over prosecutors “sound[s] promising on paper” but “cannot serve as a realistic check in today’s political climate”).

228. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 141, 120 Stat. 587, 603 (2006); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, § 6703(a), 118 Stat. 3638, 3766 (2004); see also Murphy, *supra* note 25, at 1465 (“[T]he 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 . . .”).

229. Compare MODEL PENAL CODE § 241.3 cmt. 2 (Official Draft and Revised Comments 1980), with H.R. REP. NO. 96–1396, at 181–83 (1980). Legislation also failed in 1981 that would have allowed for a defense when “a false statement consists solely of a denial of involvement in a crime” and would have limited the criminal prohibition to volunteered statements or statements in response to questioning “after a warning designed to impress on the defendant the seriousness of the interrogation and his obligation to speak truthfully.” See S. REP. NO. 97–307, at 407–08 (1981).

230. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

231. Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 471 (1996) (“To be sure, Congress must *speak* before a person can be convicted of a federal crime, but it needn’t *say* much of anything when it does.”).

232. See Richman & Stuntz, *supra* note 154, at 635 (noting that in recent years Congress has passed broad criminal prohibitions and left judges out of the process of defining exceptions or defenses).

233. *Id.* at 637 (proposing that statutory interpretation “should focus less on plain language arguments and more on the kind of open-ended criminal justice policy arguments that, not so long ago, dominated judicial opinions in this area”); see also Stuntz, *supra* note 4, at 1895 (“We could return to a system in which criminal law is a species of common law, in which judges rather than legislatures decide how far a given offense extends. That process will not necessarily produce supermajoritarian criminal law, but it might come closer than the current regime.”).

‘substantially impair the basic functions entrusted by law to [the] agency.’”²³⁴ The government will be in the best position to assess harm to the investigation, and it would be the government’s burden to demonstrate that impact as an element of the offense. In formulating a more precise standard, whether a lie is induced, how central it is to an investigation, whether a statement actually misleads or merely inconveniences investigators, and whether the initial investigation is completed will all factor into the harm it causes. Multifactor inquiries complicate the task of decisionmakers, particularly jurors, but a bimodal question as to whether a statement had an actual or potential impact on the investigation might be viable.²³⁵ Such an approach would comport with the standard definition of material: actually influencing or having a natural tendency or capacity to influence a decision or function of a federal agency.²³⁶ Shifting the focus to the impact on the investigation would also align false statement cases more closely with the elements of obstruction charges. Although there is no materiality requirement in the obstruction statute, the necessary showing of intent often turns on the “nexus” between the obstructive conduct and an official proceeding.²³⁷ More than some remote possibility of harm should be required to justify punishment, although quantifying the degree of potential harm might over determine *ex ante* rather than allow a standard supple enough to reflect social norms.²³⁸

234. *United States v. Olson*, 751 F.2d 1126, 1128 (9th Cir. 1985) (quoting *United States v. Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978)).

235. In the context of determining liability for misrepresentations in contract law, for example, only material misstatements are actionable. This has required courts to deal with materiality as “a matter of degree, rather than an either-or binary characteristic.” Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 627 (2006). Judges and FTC commissioners, however, have fashioned context-specific and objective measures of materiality that account for the percentage of consumers likely to interpret an ad as making a given claim, and the importance of the product attribute in question, among other factors. *Id.* at 595–98.

236. *See Kungys v. United States*, 485 U.S. 759, 770 (1988) (a material statement has “a natural tendency to influence or [is] capable of influencing, the decision of” the decision-making body to which it [is] addressed”); *see also Neder v. United States*, 527 U.S. 1, 22 n.5 (1999) (a matter is material if “a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question”) (quoting RESTATEMENT (SECOND) OF TORTS § 538 (1977)).

237. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (defendant lacks the requisite intent if there is no nexus between the obstructive act and the proceeding); *United States v. Wood*, 6 F.3d 692, 697 (10th Cir. 1993) (no obstruction if false statements to FBI did not have the natural and probable effect of impeding the administration of justice).

238. *See Robert C. Post & Neil S. Siegel, Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1499 (2007). According to Post and Siegel’s account:

Because the exact meaning of a standard is indeterminate until the circumstances of its concrete application, a standard always incorporates considerations that cannot be fully articulated or made explicit. These considerations come from outside the law, so that law which uses standards necessarily renders itself permeable to the influence of implicit social norms.

Id.

The weight of current case law requires consideration only of the “intrinsic capabilities” of the statement and not its ultimate success, as measured by collateral circumstances.²³⁹ In *Brogan*, for example, the Court concluded that “disbelieved falsehoods” give rise to liability because “making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange.”²⁴⁰ Other courts have held that even the impossibility of influencing agency action does not constitute a defense.²⁴¹ The inquiry need not, however, start with the subjective vantage point of a particular investigator; it should focus instead on the likely impact of a given statement or omission on a reasonable investigator under the circumstances. Total disregard for the real or potential impact of deception precludes meaningful judicial boundary definition. It is hard to imagine a statement with no “intrinsic capabilities” at all, unless it is gibberish or unstructured thinking out loud.

The Court has held that materiality is a mixed question of law and fact,²⁴² and standards that incorporate harm rather than the more bright-line “intrinsic capabilities” rule are workable. I suggest an objective rather than a subjective standard and would not require specific reliance on false statements. Liability attaches in the criminal fraud context, for example, even in the absence of specific reliance.²⁴³ In the realm of civil fraudulent representations, objective requirements of reliance can operate in tandem with concepts of materiality. Deception is proscribed in very broad terms in tort and contract law; it encompasses “words and conduct, active deception and passive non-disclosure, false suggestions and concealment of truth,” falsehoods about “facts, opinions, or law,” and “evasive half-truths and intentional ambiguities.”²⁴⁴ But all of that is bounded by the requirement of justified reliance. Fraudulent statements that are clearly untrue, for example, do not give rise to actions for breach of contract where it is “objectively unreasonable” to rely on them.²⁴⁵

239. See *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979).

240. *Brogan v. United States*, 522 U.S. 398, 402 (1998).

241. See, e.g., *Valdez*, 594 F.2d at 728–29. This is consistent with the courts’ reception of impossibility arguments in obstruction cases. See *United States v. Rosner*, 485 F.2d 1213, 1228 (2d Cir. 1973) (legal impossibility not a defense to the crime of endeavoring to obstruct justice even though the government knew of defendant’s actions at all times).

242. See *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995).

243. A reliance approach has been widely rejected in the mail and bank fraud context subsequent to the Supreme Court’s insertion of a materiality requirement. *Neder v. United States*, 527 U.S. 1 (1999). See *United States v. Rosby*, 454 F.3d 670, 674 (7th Cir. 2006); *United States v. Merklinger*, 16 F.3d 670, 678 (6th Cir. 1994) (“[T]he mail and wire fraud statutes do not require proof that the intended victim was actually defrauded; the actual success of a scheme to defraud is not an element of either [18 U.S.C.] § 1341 or § 1343.”).

244. Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 *LAW & PHIL.* 393, 404–05 (2003).

245. See, e.g., IAN AYRES & GREGORY KLASS, *INSINCERE PROMISES* 151 (2005) (discussing promissory statements that are “mere puff”).

Materiality as it is currently construed means nothing more than relevant or on topic, and the definition thus encompasses even patently harmless lies.²⁴⁶ But relevance concerns only the relationship between the statement and the subject at hand; materiality requires some probative weight to the statement. Thus, even in the absence of a specific reliance requirement, what the agency does in response to the lie should factor into the calculus.²⁴⁷ The Ninth Circuit held as much in overturning a false statement conviction for a defendant who claimed to customs officials that he had \$7,000 in cash when in fact he had \$8,177 but was sent to secondary inspection regardless.²⁴⁸ The possibility, although not necessarily the actuality, of some form of detrimental reliance should be analyzed. Although the deception need not ultimately impede the investigation to be actionable, it ought to have real potential to do so, and the potential impediment should be more than the bare failure to confess.

The nexus between the primary transgression with which an investigation originated and the false statement itself should matter as well.²⁴⁹ Lying about personal issues like transgressions in the context of financial investigations concerning unrelated conduct will rarely cause material harm. And the prosecutor's or agent's motives also merit consideration.²⁵⁰ Whether there is a legitimate purpose for questioning, beyond the design to elicit a false statement, should factor into the inquiry.²⁵¹ An interaction involving questions with

246. See *United States v. Sarihifard*, 155 F.3d 301, 306–07 (4th Cir. 1998) (false statements were material even though U.S. Attorney recognized them as false); *United States v. LeMaster*, 54 F.3d 1224, 1230 (6th Cir. 1995) (false statements are material even when the agent suspects deception); *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992) (statement deemed material even though it was “so ludicrous that no IRS agent would believe [it]”); cf. *United States v. Wells*, 519 U.S. 482, 505–09 (1997) (Stevens, J., dissenting) (the forty-two false statement statutes with an express materiality requirement and fifty-four without are indistinguishable).

247. Cf. *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956) (the definition of perjury is not met if “no regard is paid” to the statement) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *137).

248. *United States v. Beltran*, 136 Fed. App'x 59 (9th Cir. 2005). *But see* *United States v. Woodward*, 469 U.S. 105, 106 (1985) (defendant convicted of false statement for answering “no” on customs declaration form when carrying more than \$5,000, even though referred to secondary for a search regardless).

249. See, e.g., *Glastris*, *supra* note 51, at 25 (“You’re seeing more and more prosecutions now of lies in which there is no underlying criminal conduct.”) (quoting former Independent Counsel Michael Zelden in 1998).

250. Cf. *Monroe H. Freedman, The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1034–35 (1967) (“[T]here are few of us who have led such unblemished lives as to prevent a determined prosecutor from finding some basis for an indictment or an information. Thus, to say that the prosecutor’s motive is immaterial, is to justify making virtually every citizen the potential victim of arbitrary discretion.”); *Gershman*, *supra* note 61, at 629 & n.15 (“[C]ourts have frequently suggested that it is impermissible for a prosecutor to deliberately trap a witness into perjury.”); *id.* at 687 (proposing that perjury prosecutions be barred where the prosecutor’s “overriding or ‘dominant purpose’” in questioning a witness “is to extract perjury”).

251. This objective inquiry would parallel the test for entrapment, which focuses on governmental intent. See *Stephen Michael Everhart, The Clinton Case: Materiality and the ‘Exculpatory No’ Bar to Prosecution?*, 108 PENN. ST. L. REV. 727, 738 (2004) (advocating an

known answers already a matter of record would counsel against a materiality finding. To borrow from J.L. Austin's formulation of the functions of speech, an actionable falsehood must perform more than the locutionary act of answering investigators' questions and the illocutionary act of falsely denying; it must also have some perlocutionary force in terms of contingent effects.²⁵² That is, it ought to produce some effect in the listener, by "convincing, persuading, or deterring."²⁵³

B. Materiality in Related Contexts

A look at the materiality element in related contexts supports this active reading. Even as fraud liability has expanded, courts have tethered it to materiality or harm and applied limiting principles such as requiring that the material misrepresentations or omissions at issue be of the sort that "would lead a reasonable employer to change its business conduct."²⁵⁴ Other courts have considered harm to the victim or gain to the defendant before sustaining a deprivation of honest services theory.²⁵⁵

Sentencing Guideline § 3C1.1 provides for an enhancement if the defendant "willfully obstructed or impeded" the administration of justice, and the commentary to the guideline requires a showing of materiality when the enhancement is premised on a false statement. According to the application notes, a defendant's false denial of guilt, unless it is under oath, is not a basis for applying the enhancement.²⁵⁶ In *United States v. Aguilar-Portillo*, the Seventh Circuit considered whether "unembellished denials" could support the sentencing enhancement.²⁵⁷ Although the court concluded that no "exculpatory no" exception could be sustained, it ruled that the denials themselves were not actually perjurious. Judge Posner also commented, in *United States v. Buckley*, that "a lie that is immaterial to the justice process is not a potential interference with it,"²⁵⁸ and that to be material there must be some "reasonable probability"

entrapment or due process defense to § 1001 charges that would separate those cases where there is "a bona fide investigation proceeding on some underlying crime" and "the defendant's false 'exculpatory no' can impede and obstruct an investigation" from those in which "the investigator is interviewing the defendant with the sole purpose of trapping him into committing a crime"); see also *United States v. Regan*, 103 F.3d 1072, 1079 (2d Cir. 1997) ("[T]he existence of a 'legitimate basis' for an investigation and for particular questions answered falsely precludes 'any application of the perjury trap doctrine.'" (quoting *Wheel v. Robinson*, 34 F.3d 60, 68 (2d Cir. 1994))).

252. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 95–109 (1962) (defining these terms).

253. *Id.* at 109.

254. *Mills & Weisberg*, *supra* note 114, at 1398 (citing *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) and *United States v. Jain*, 93 F.3d 436, 441–42 (8th Cir. 1996)).

255. *Id.* at 1399 (citing *United States v. Jordan*, 112 F.3d 14, 18 (1st Cir. 1997) and *United States v. Czubinski*, 106 F.3d 1069, 1074–77 (1st Cir. 1997)).

256. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.1 (2008).

257. *United States v. Aguilar-Portillo*, 334 F.3d 744, 748 (8th Cir. 2003).

258. *United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999).

that the lie will “affect the outcome of the process.”²⁵⁹

A harm-based materiality determination makes sense in light of analogous state laws as well. While the federal statute has evolved as a broad prohibition, many state legislatures have adopted more restrictive versions. Several states maintain a distinction between passive and active dishonesty by witnesses and suspects in evaluating their interactions with police.²⁶⁰ Courts have distinguished mere responses to inquiries and required not only that defendants act with intent but that they take the initiative to contact law enforcement as well.²⁶¹ Some jurisdictions also account for the harm of a statement or its impact on the course of the investigation, exclude unsworn false oral statements from the prohibition or treat them as misdemeanors,²⁶² and tie the penalties for false statements to the seriousness of the underlying offense being investigated.²⁶³

C. Alternatives to Redefining Materiality

One could conclude that applying the materiality standard in light of the harm caused by a false statement is unnecessary because the mens rea element already accounts for context and prevents the criminalization of “a broad range of apparently innocent conduct.”²⁶⁴ Section 1001 does specify that the false

259. *Id.*

260. *See, e.g., Jones v. State*, 765 A.2d 127, 129 (Md. 2001) (false statement to a police officer does not include answering an investigating police officer’s inquiries untruthfully; the offense is only committed by one whose false statement causes the police initially to undertake an investigation or other action).

261. *See, e.g., Johnson v. State*, 542 A.2d 429, 438 (Md. Ct. Spec. App. 1988); *State v. McMasters*, 815 S.W.2d 116, 118 (Mo. Ct. App. 1991); *State v. D’Addario*, 482 A.2d 961, 964 (N.J. Super. Ct. Law Div. 1984) (statute proscribing the volunteering of false information to law enforcement applies only to persons who come forward with information); *People ex rel. Morris v. Skinner*, 323 N.Y.S.2d 905, 908 (Sup. Ct. 1971) (statute penalizing false reports applies only where the information is “volunteered and is unsolicited,” not when the statement is made in response to questions); *State v. Bailey*, 644 N.E.2d 314, 318 (Ohio 1994); *Commonwealth v. Neckerauer*, 617 A.2d 1281, 1285 (Pa. Super. Ct. 1992); *Commonwealth v. Gettemy*, 591 A.2d 320, 323 (Pa. Super. Ct. 1991) (the term “volunteer” in statute making it unlawful to hinder prosecution means that the accused must take the initiative in offering false information); *State v. Levandowski*, 955 S.W.2d 603, 604 (Tenn. 1997) (“report” as used in statute criminalizing false reports to law enforcement does not apply to responses to inquiries by law enforcement).

262. *See State v. Brandstetter*, 908 P.2d 578, 580 (Idaho Ct. App. 1995) (where defendant could have remained silent when questioned by law enforcement, unsworn oral misstatement did not increase officers’ burden and rise to the level of obstruction); *see also* 18 PA. CONS. STAT. § 4904 (2005) (requiring a purpose to mislead public officials and downgrading the offense to a misdemeanor); Mosteller, *supra* note 36, at 440–41 nn.49–50 (citing N.C. GEN. STAT. § 14–225 (2005); N.Y. PENAL LAW § 240.50 (McKinney Supp. 2007); OHIO REV. CODE ANN. § 2921.31(b) (LexisNexis 2006); WIS. STAT. § 946.41(1) (2005); CONN. GEN. STAT. ANN. § 53a–157b (West 2007) (second degree false statement requires intention “to mislead a public servant in the performance of his official function”). *But see, e.g., ARIZ. REV. STAT. ANN. § 13–2704* (West 2004) (broad prohibition on any statements made in connection with benefits, privileges, licenses, or official proceedings).

263. *See, e.g., UTAH CODE ANN. § 76–8–306* (2008).

264. *Liparota v. United States*, 471 U.S. 419, 426 (1985).

statement be made “knowingly and willfully.” Courts are divided on whether a specific intent to deceive is required,²⁶⁵ or whether knowingly and willfully making the statement in question suffices.²⁶⁶ A few decisions have carved out passive replies to investigative questions,²⁶⁷ and an argument could be made that deception is not the conscious object²⁶⁸ of a defendant deflecting questioning, responding to an awkward situation, or avoiding self-incrimination. But reliance on an elevated intent standard is always complicated because intent is subjective; this complexity is inherent in the assessment of an intent to lie, which has a multi-dimensional nature and arises from a “cluster of thoughts.”²⁶⁹ Descriptive and normative mens rea are largely intertwined because of the nature of the offense.²⁷⁰ There is not always a clear answer to the question “why make the false statement?”²⁷¹ In many cases, it may be more a reflexive response than a conscious choice.

Parallel definitional moves by the courts, moreover, have sometimes broadened rather than narrowed liability when focused on mens rea. In the obstruction context, courts have interpreted “corruptly” to mean acting with an improper “purpose of obstructing justice.”²⁷² As Sam Buell points out, that “question-begging mens rea formulation has meant that the answer to the question of what behavior counts as criminal obstruction of justice is, in essence, ‘Anything that is intended to obstruct justice.’”²⁷³ The result is “no ex ante limit on the forms that impermissible obstructive behavior can take.”²⁷⁴

Another alternative limiting principle is a notice requirement. Citizen-police interactions with “some measure of self-protective falsehoods” are so common, and the offense is so underenforced, that it is the rare defendant who

265. See, e.g., *United States v. Leo*, 941 F.2d 181, 200 (3d Cir. 1991).

266. The First, Fifth, Sixth, and Eleventh Circuits have held that intent to deceive is required. See, e.g., *United States v. Shah*, 44 F.3d 285, 289 (5th Cir. 1995); *United States v. Guzman*, 781 F.2d 428, 431 (5th Cir. 1986).

267. See cases cited *supra* note 261.

268. See R.A. DUFF, *INTENTION, AGENCY & CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 58, 61 (1990) (explaining that an outcome is intended if an action fails absent achieving that result—when we act “in order to bring about the result”).

269. Kimberly Kessler Ferzan, *Beyond Intention*, 29 *CARDOZO L. REV.* 1147, 1176 (2008).

270. See Kimberly Kessler Ferzan, *Holistic Culpability*, 28 *CARDOZO L. REV.* 2523, 2535–39 (2007) (reasoning that the evaluation of internal state, or descriptive mens rea, which is definitional with regard to the offense (i.e., the mental state element), is not wholly separate from the assessment of blamefulness, or normative mens rea, about the meaning (i.e., wickedness) of the actor’s choice).

271. See G.E.M. ANSCOMBE, *INTENTION* 9 (2d ed. 1963) (defining intentional actions as ones “to which a certain sense of the question ‘why?’ is given application”).

272. See *United States v. Laurins*, 857 F.2d 529, 536–37 (9th Cir. 1988) (“The specific intent required for obstruction of justice under sections 1503 and 1505 is that . . . the act must be done with the purpose of obstructing justice.”).

273. Buell, *supra* note 162, at 1544 & n.208 (citing *Bosselman v. United States*, 239 F. 82, 86 (2d Cir. 1917) (“[A]ny endeavor to impede and obstruct the due administration of justice . . . is corrupt.”)).

274. *Id.*

is on notice that false statements may expose her to prosecution.²⁷⁵ Particularly where no warning is given, and the false statements concern activities that are not themselves criminal, it is reasonable to question whether an ordinarily law-abiding person in the same situation would have behaved differently.²⁷⁶ Congress has not, however, adopted any mistake of law defense for this category of crimes, and few courts have entertained it. Justice Ginsburg's *Brogan* concurrence contemplates a possible notice-based safety valve in the intent requirement; she queries whether knowledge of illegality is required, and whether the "mere denial of criminal responsibility would be sufficient to prove such [knowledge]."²⁷⁷

Outside of a narrow context of regulatory offenses, though, willfulness generally does not require "violation of a known legal duty."²⁷⁸ For example, in *United States v. Whab*, the Second Circuit held that "it is not necessary for the Government to establish that the defendant knew that he was breaking any particular law or particular rule."²⁷⁹ But the court went on to say that, while a defendant need not have specific knowledge that lying to a federal agent is a crime, he must be aware of the generally unlawful nature of his actions. This calls to mind the Supreme Court's decision in *Andersen*, which was silent on the question of a mistake of law defense but concluded that the jury instructions on the element of obstruction "failed to convey the requisite consciousness of

275. See Mosteller, *supra* note 36, at 441.

276. See, e.g., Geraldine Szott Moohr, *Securities Fraud and Its Enforcement: The Case of Martha Stewart*, in INSIDER TRADING: GLOBAL DEVELOPMENTS AND ANALYSIS 13, 24 (Paul U. Ali & Greg N. Gergoriou eds., 2008). Moohr states:

When the law is unclear, persons who are considering some action may not realize they are in danger of violating criminal laws. This point is particularly relevant in the white collar context where conduct is often based on ethical lapses, betrayals of trust, and deceptions that are not always crimes.

Id.; see also A.P. Simester & A.T.H. Smith, *Introduction: Criminalization and the Role of Theory*, in HARM AND CULPABILITY, *supra* note 1, at 1, 10 ("[I]f there is widespread exposure to state interference for inadvertent wrongdoing, then it is going to be much harder for citizens to plan and get on with their lives . . .") (citing H.L.A. Hart, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY, 158, 181–82 (1968)); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, VA. L. REV. 189, 205 (1985) ("Crimes must be defined in advance so that individuals have fair warning of what is forbidden . . .").

277. *Brogan v. United States*, 522 U.S. 398, 416 (1998) (Ginsburg, J., concurring) (adding that "a trier of fact might acquit on the ground that a denial of guilt in circumstances indicating surprise or other lack of reflection was not the product of the requisite criminal intent") (quoting *United States v. Wiener*, 96 F.3d 35, 40 (2d Cir. 1996)).

278. See Stuntz, *supra* note 150, at 561–65 (summarizing *Ratzlaf* and its progeny and noting the Court's current unwillingness to expand on mens rea requirements); see also Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 2009 nn.109–10 (2006) (obstruction is not the sort of crime that ordinarily allows for a mistake of law defense). *But see* *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994) (knowledge of illegality required to support conviction for false reports to the FEC).

279. 355 F.3d 155, 159 (2d Cir. 2004).

wrongdoing.²⁸⁰ An intermediate standard along these lines could give more content to willfulness and provide a useful sorting mechanism to ensure that the minimum conditions for the attribution of blame are met. The approach to materiality discussed here actually accounts for notice and for the defendant's consciousness of wrongdoing by weighing warnings on the side of materiality. If a defendant has been apprised of potential liability for false statements—as she would be, for example, when making an unsworn proffer statement in the formal setting of the prosecutor's office—then agents will be more likely to act on the information she offers.

D. Objections to a Harm-Based Approach

One difficulty with operationalizing this sort of harm-based materiality standard is that narrowing prosecutions to instances where the statement has some impact would also increase the number of cases in which a § 1001 charge is a substitute for another offense.²⁸¹ If the defendant's falsehood successfully raised a barrier to prosecution on the original offense, then it clearly caused harm to the investigation. There is a tension between the concern with pretextual prosecutions and a robust materiality requirement. But that might be addressed by inquiring further into what the focus of the initial investigation was, whether it was pursued to its logical end, and whether the cover-up prosecution was a legitimate detour.²⁸² The government should complete investigations where possible, initiate questioning only with a reasonable expectation that it will yield probative evidence, and prosecute freestanding deception only if it stymies the investigation.²⁸³ If courts consider false statements in context, they can distinguish between prosecution of an unsuccessful lie as a placeholder for some other wrongdoing and the prosecution of deception that actually masked underlying fraud.

Another objection to this approach to materiality is that it reconstitutes the discarded "exculpatory no" defense. That defense failed in part because it was simultaneously too broad and too narrow. A distinction between direct and indirect assertions does not necessarily correlate with moral content or

280. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005).

281. *Cf. O'Sullivan*, *supra* note 30, at 678 ("It is difficult to promote respect for law, and law administration, when attempts to impede the effective administration of justice are essentially permitted if they are *successful* in preventing prosecutions.").

282. *See GREEN*, *supra* note 38, at 190.

283. Ellen S. Podgor, *Arthur Andersen, LLP and Martha Stewart: Should Materiality Be an Element of Obstruction of Justice?*, 44 *WASHBURN L.J.* 583, 600. Podgor maintains:

Reading in an element of materiality limits prosecutorial discretion to using obstruction charges in instances when it is material to the investigation, precluding its use when it would be inconsequential. In these latter instances, the government is forced to proceed with the investigation and pursue the substantive conduct that it originally considered charging.

Id.

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objective impact.²⁸⁴ It may well be that an “exculpatory no” has a detrimental effect on an investigation, and whether or not it does is a more important question than the form of the statement.²⁸⁵ Moreover, unlike materiality, the “exculpatory no” exception found no support in the language of § 1001 and was struck down on statutory interpretation grounds. A strong materiality requirement actually comports with § 1001’s language and legislative history. The 1988 version of the provision provided:

Whoever, in any matter within the jurisdiction of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.²⁸⁶

The 1996 amendments to the statute made materiality an element of the false statement clause as well, clarifying that only “materially false, fictitious, or fraudulent” statements give rise to liability.²⁸⁷ This change, according to the legislative history, was intended to confine the statute’s reach to “reasonable bounds and not allow[] [it] to embrace trivial falsehoods.”²⁸⁸

Although the language has evolved, the question whether a lie will “pervert” government functions has long informed the statute’s reach.²⁸⁹ Its New Deal iteration was a prohibition on falsifications that would “seriously pervert” the work of newly created regulatory agencies,²⁹⁰ and that terminology found its way into many of the cases upholding the exculpatory no exception.²⁹¹ In *Brogan v. United States* Justice Scalia rejected “the major premise that only those falsehoods that pervert governmental functions are covered by § 1001,” but he went on to argue that “since it is the very *purpose* of an investigation to uncover the truth, any falsehood relating to the subject of

284. See, e.g., Alexander & Sherwin, *supra* note 244, at 403–04.

285. See, e.g., *United States v. Gabriel*, 125 F.3d 89, 95 (2d Cir. 1997) (false statements made to FAA in the form of an “exculpatory no” potentially affected air safety), *overruling recognized by* *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006).

286. 18 U.S.C. § 1001 (2006).

287. See Restoration of False Statement Penalties, H.R. REP. NO. 104–680, at 8 (1996). The amendments also clarified that § 1001 applies to all three branches of the federal government. False Statements Accountability Act of 1996, Pub. L. No. 104–292, § 2, 110 Stat. 3459, 3459 (1996).

288. See *United States v. Gafyczk*, 847 F.2d 685, 691 (11th Cir. 1988).

289. See, e.g., *United States v. Gilliland*, 312 U.S. 86, 93 (1941) (section 1001 imposes liability for statements “to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described”).

290. See *Friedman v. United States*, 374 F.2d 363, 366 (8th Cir. 1967), *abrogated by* *United States v. Rodgers*, 466 U.S. 475, 484 (1984), *as recognized in* *United States v. Rodriguez-Rios*, 14 F.3d 1040, 1050 (5th Cir. 1994).

291. See, e.g., *United States v. Tabor*, 788 F.2d 714, 717–19 (11th Cir. 1986); *United States v. Chevoor*, 526 F.2d 178, 183–84 (1st Cir. 1975).

the investigation perverts that function.”²⁹² What we know about the structure of investigations and the social psychology of agent interviews is that not just “any falsehood” can derail an investigation. A Fourth Circuit decision summarizes this view:

A trained agent cannot be overly surprised when a suspected criminal fails to admit his guilt. . . . “[A] thorough agent would continue vigorous investigation of all leads until he personally is satisfied he has obtained the truth.” A false denial of guilt does not pervert the investigator’s basic function in the manner the statute was intended to combat, but is merely one of the ordinary obstacles confronted in a criminal investigation.²⁹³

Even though the modern version of the statute dispenses with the “perversion” requirement, it still, on its face, demands proof that a lie was capable of deceiving, affecting, or influencing agency action.²⁹⁴ Congress’s extension of the materiality standard is not, in its present form, carving out trivial falsehoods as intended. Reading the materiality element to require more than some falsehood “related” to the investigation and accounting as well for the actual or potential impact of the deception would better accomplish that purpose.

Evaluating the resulting harm before imposing criminal liability also raises the problem of “moral luck”²⁹⁵ because it means that culpability will depend in part on factors outside the control of the defendant.²⁹⁶ The distinction between lies that have an impact on the underlying investigation and trivial falsehoods thus implicates a much broader dispute about the significance of harm in the criminal law. On the question of liability for inchoate offenses, for example, “[g]enerations of theorists have sought to explain why we punish actual homicide more severely than attempted homicide, the real spilling of blood more severely than the unrealized intent to do so.”²⁹⁷ One theory holds that state interference with a citizen’s behavior ought to be “reasonably necessary,”²⁹⁸ and that threshold requirements should shield harmless conduct from liability. Doug Husak has argued, for example, that criminal liability can only be imposed where a statute punishes a nontrivial harm.²⁹⁹ Another substantial

292. *Brogan v. United States*, 522 U.S. 398, 402 (1998).

293. *United States v. Cogdell*, 844 F.2d 179, 184 (4th Cir. 1988) (quoting *United States v. Medina de Perez*, 799 F.2d 540, 546 (9th Cir. 1986)), *abrogated by Brogan*, 522 U.S. at 401, 408.

294. *Brogan*, 522 U.S. at 402–04; *see also, e.g., United States v. Sidhu*, 130 F.3d 644, 650 (5th Cir. 1997).

295. *See* Dana K. Nelkin, *Moral Luck*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, June 3, 2008, <http://plato.stanford.edu/entries/moral-luck/>.

296. *See* H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 131 (1968) (“Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?”).

297. GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE* 82 (1988). As Fletcher explains, the account is not satisfactory. But while we “cannot adequately explain why harm matters,” “matter it does.” *Id.* at 83.

298. *See* FEINBERG, *supra* note 111, at 11.

299. HUSAK, *supra* note 118, at 66; *see also, e.g., ROBINSON & DARLEY, supra* note 174, at

body of scholarship rejects the objectivist account³⁰⁰ and concludes that results are irrelevant to responsibility and blameworthiness.³⁰¹ Although I cannot rehearse even a fraction of this rich debate here, I do want to suggest that investigative lies that neither risk nor gain anything offer one lens through which the discussion could come into focus. Making finer distinctions to determine which false statements merit prosecution provides one example of how attention to harm might address broader concerns about overcriminalization.

CONCLUSION

The risk of overcharging and the potential expressive consequences of the divide between norms and crimes call for a morally justifiable and practically workable grading of false statements. It is impossible to predict the impact of refining the materiality inquiry with the sort of “scientific confidence” that governs social science, but the foregoing analysis provides at least some “political confidence” in the net effect of taking the materiality element of the false statement offense seriously.³⁰² A requirement informed by the harm principle could draw sharper lines that better comport with the community’s views of just deserts.³⁰³ Narrowing the liability rule could lower the threat value of the offense and raise the costs of prosecution,³⁰⁴ thereby motivating

202 (concluding that “each time the criminal law convicts a blameless person, it calls into question, in some small way, the legitimacy of every other criminal conviction”); Wiley, *supra* note 222, at 1051 (“The Court will interpret a statute to require the government to prove moral blameworthiness if the Court can imagine an extreme hypothetical in which the government’s interpretation would reach action that is not culpable according to an unwritten moral code.”).

300. According to R.A. Duff’s summary of the subjectivist approach:

[I]n any particular case either success or failure, either the occurrence or the non-occurrence of harm, will typically involve an element of luck; and subjectivists can thus argue, without exaggerating the role of luck, that such luck should not affect criminal liability. . . . [I]f criminal convictions and punishments are to reflect, as they should, appropriate judgments of culpability, they too should therefore be based on the agent’s active choices, not on the actual outcomes of his actions.

R.A. Duff, *Subjectivism, Objectivism and Criminal Attempts*, in HARM AND CULPABILITY, *supra* note 1, at 19, 35–36.

301. See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME & CULPABILITY: A THEORY OF CRIMINAL LAW 195 (2009) (“[R]esults do not matter for blameworthiness or punishability.”). See generally Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

302. See Tracey L. Meares & Dan M. Kahan, *Laws and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805, 807 (1998); cf. Dan-Cohen, *supra* note 221, at 637 (much “jurisprudential theorizing” “is incapable of empirical proof, because it claims not the status of a falsifiable causal theory, but only the more modest one of a plausible and occasionally illuminating interpretation”).

303. Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. CONTEMP. LEGAL ISSUES 299, 322 (1994); see also R.A. DUFF, CRIMINAL ATTEMPTS 352 (1997) (“The character of [a defendant’s] wrongdoing depends . . . upon its actual outcome: it matters to us, and should matter to him, whether he did the harm which he attempted to do.”).

304. Stuntz, *supra* note 150, at 552; see also Andrew von Hirsch, *Extending the Harm Principle: ‘Remote’ Harms and Fair Imputation*, in HARM AND CULPABILITY, *supra* note 1, at

prosecutors to focus on the underlying offenses rather than on the defendant's response to the investigation itself. It could also encourage prosecutors and agents to privilege accuracy over efficiency by expanding warning requirements and notice to defendants. If the incidence of charges for trivial misconduct and pretextual prosecutions decreases as a result, the prosecutions that do proceed will also clarify signals to cooperate with investigators and comply with the law.

259, 259 ("The harm principle served as a valuable antidote, a way of keeping the scope of the criminal law modest.").