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## Wanting the Truth: Comparing Prosecutions of Investigative and Institutional Deception

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# Wanting the Truth: Comparing Prosecutions of Investigative and Institutional Deception\*

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## Abstract

Defensive dishonesty in criminal investigations has increasingly been prosecuted without standards for identifying harmful deception or other meaningful checks on prosecutorial discretion. Although they are often grouped together statistically and evaluated as comparable crimes, there is a clear distinction between investigative lies and in-court perjury. The differences between the offenses—including the standards for prosecution, the perceived victim, and the purposes of bringing charges—suggest reasons to reconsider the current approach to investigative lies such as false statements. More truth is produced, and arguably more cooperation results, when the government focuses on the quality of the information flow. The structural protections in place with regard to institutional perjury can be explained in part as truth-seeking tools, and I propose translating warning requirements and distinctions between active and passive lies into the context of investigative deception. Efforts to get accurate information could more effectively curtail evidentiary foul play than strategies designed just to get defendants. And being attentive to whether a false statement actually causes harm—a mitigating principle seemingly at work in the perjury context—might further optimize deterrence.

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\*Professor of Law, Duke University School of Law. This essay stems from remarks made at the Evidence Section's Program on "Evidentiary Foul Play: Deception, Destruction, and Just Deserts" at the January 9, 2009 meeting of the American Association of Law Schools. My thanks to Chris Sanchirico for organizing the panel, to participants in the program for their constructive comments and questions, and to Craig Callen for his editorial contributions.

## INTRODUCTION

In this essay, I contrast the broad range of conduct within the ambit of the false statements statute that criminalizes investigative lies with the narrower scope of perjury liability in the institutional context of the courts. The government more actively prosecutes defensive dishonesty outside of court, including lies induced by investigators. Those prosecutions increase efficiency and symbolically assert government authority, but they create some distortions in the process. I suggest translating the truth-seeking tools from court into formal warnings and a robust materiality requirement in the investigative setting. That shift in focus from targeting defendants to obtaining accurate information could increase compliance in both general and specific terms.

## THE BROAD SWEEP OF INVESTIGATIVE LIES

Process offenses that arise in the course of criminal investigations have often supplanted the misconduct that triggered the investigation as the focus of federal prosecutions. This is particularly true of what I call investigative lies, which are defensive misrepresentations that arise from interviews with agents or prosecutors. They are charged as false statements under 18 U.S.C. § 1001, which prohibits making a “materially false, fictitious, or fraudulent statement or representation” or falsifying, concealing, or covering up “by any trick, scheme, or device a material fact” in any matter within the jurisdiction of the federal government.<sup>1</sup> The breadth of the statute allows prosecutors to impose liability for lies that are induced by investigators and pose no risk to the investigation, as well as for statements made to non-governmental parties and subsequently passed on to the government.

Actionable false statements under section 1001 can arise in the most informal of circumstances.<sup>2</sup> Interviews often involve surprising suspects at odd hours in uncomfortable places, and the conversation at issue need not be transcribed or otherwise memorialized by agents.<sup>3</sup> The informal setting does little to warn subjects about potential liability for their responses, and agents rarely frame interviews with any admonitions that would assure honest responses. Nor is any precision required in terms of the questions or responses.<sup>4</sup> False statements can concern topics other than the underlying wrongdoing, need not be in response

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<sup>1</sup> 18 U.S.C. § 1001 (1996).

<sup>2</sup> *See, e.g.*, *Brogan v. United States*, 522 U.S. 398, 410-11 (1998) (Ginsburg, J., concurring) (expressing concern about the “extremely informal circumstances” of agent interviews).

<sup>3</sup> *See United States v. Erlichman*, 379 F. Supp. 291, 292 (D.D.C. 1974).

<sup>4</sup> *Compare Bronston v. United States*, 409 U.S. 352 (1973) (holding that “precise questioning is imperative” as a predicate for the perjury offense).

to clear inquiries, and can merely imply an inaccuracy or mislead by omission.<sup>5</sup> And once a witness responds to questioning, she “has an obligation to refrain from telling half-truths or from excluding information necessary to make [her] statement truthful.”<sup>6</sup> Although there is a jurisdictional requirement in the statute, the statement itself need not concern a matter within a federal agency’s regulatory jurisdiction so long as the general subject matter of the investigation bears some relationship to the agency’s authority.<sup>7</sup>

The open-textured nature of the statute leads to the prosecution of induced offenses, which include deception that is organic and reactive, arising from the relationship between the defendant and the government and dependent on the context of the investigation. It is a natural, self-protective instinct to “deny and conceal any shameful or guilty act.”<sup>8</sup> This is true even of defendants who have no exposure to criminal liability but lie to avoid embarrassing revelations, for example by disguising a non-criminal indiscretion with a false alibi. The initial response of most subjects confronted by criminal investigators is such an attempt to deflect scrutiny and forestall liability, and agents can exploit that instinct. The statute thus allows 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.”<sup>9</sup>

Recent examples of organic deception pursued as false statements come from all the “crying in baseball” over the use of steroids. Most of the players involved did not commit underlying crimes and at worst engaged in off-label uses of substances that were not yet banned by Major League Baseball at the relevant time. Yet several have come under scrutiny for statements they made to congressional investigators. A congressional referral concerning Miguel Tejada asserts that he “materially influenced” the House Oversight Committee’s

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<sup>5</sup> See *United States v. Brown*, 151 F.3d 476, 485 (6<sup>th</sup> Cir. 1998).

<sup>6</sup> *United States v. Cisneros*, 26 F. Supp.2d 24, 42 (D.D.C. 1998); see also *United States v. Gonzalez*, 520 U.S. 1 (1997) (section 1001 covers false statements “of whatever kind”). Cf. STUART P. GREEN, *LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME* 78-79 (2006) (discussing “caveat auditor” principles, according to which “a listener is responsible, or partly responsible, for ascertaining that a statement is true before believing it”).

<sup>7</sup> See, e.g., *United States v. Yermian*, 468 U.S. 63, 68-70 (1984) (government need not prove that defendant knew of federal agency jurisdiction).

<sup>8</sup> See *Ashcraft v. Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting); see also EVELIN SULLIVAN, *THE CONCISE BOOK OF LYING* 75 (2001) (“[O]nly a perpetrator who is repentant or out to be punished is honest.”); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 U.C.L.A. L. REV. 637, 652 (1990) (“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 . . . and probably for most, the threat of serious criminal punishment is sufficient.”).

<sup>9</sup> *Brogan v. United States*, 522 U.S. 398, 416 (1998) (Ginsburg, J., concurring).

investigation when he stated that *another* player, Rafael Palmeiro, had been truthful when *he* denied using performance-enhancing drugs in 2005.<sup>10</sup> Another figure in athletics, track coach Trevor Graham, has been convicted in federal court of one count of lying to federal agents in a steroids probe. When he was confronted by investigators in 2004, Graham claimed that he had no contact with a steroids dealer after 1997. Before they approached him, however, prosecutors had obtained phone records documenting nearly 100 calls from Graham to the dealer between 1998 and 2000. Jurors acquitted Graham of two additional counts, including falsely stating that he had never met the dealer in person. After the verdict, one juror expressed skepticism about the case, wondering why there were no contemporaneous notes of the interview, and why Graham was not confronted with the phone records and other accusations. “It was like they wanted to catch him,” the jury foreperson remarked, and “it got me to questioning the government themselves.”<sup>11</sup>

The statute also criminalizes deception that takes the unadorned form of an “exculpatory no”: a false response to an investigator’s accusation with a version of “no,” or “wasn’t me.” These reflexive reactions were once treated in the majority of circuit courts as constructive “not guilty” pleas,<sup>12</sup> and courts recognized an “exculpatory no” defense to section 1001 charges until the 1998 decision in *Brogan v. United States*.<sup>13</sup> In *Brogan*, federal agents knocked on the defendant’s door one evening, unannounced. As in the *Graham* case, before they went to his home, agents 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, simply, “no.” Agents then told him that they had the records of payments to him and that he had just committed the crime of lying to them. The Supreme Court subsequently affirmed Brogan’s false statement conviction, rejecting his “exculpatory no” defense on statutory interpretation grounds.<sup>14</sup>

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<sup>10</sup> Letter from Henry A. Waxman, Chairman, Comm. on Oversight and Gov’t Reform, H. Rep. & Tom Davis, Ranking Minority Member, to Michael B. Mukasey, Att’y General, U.S. D.O.J. (Jan. 15, 2008).

<sup>11</sup> See Amy Shipley, *Graham Is Convicted of Lying to Investigators*, WASH. POST, May 30, 2008, at E3.

<sup>12</sup> See, e.g., *Moser v. United States*, 18 F.3d 469, 473-74 (7<sup>th</sup> Cir. 1994); *United States v. Taylor*, 90 F.2d 801, 804 (8<sup>th</sup> Cir. 1990); *United States v. Equihua-Juarez*, 851 F.2d 1222, 1224 (9<sup>th</sup> Cir. 1988); *United States v. Tabor*, 788 F.2d 714, 719 (11<sup>th</sup> Cir. 1986); *United States v. Fitzgibbon*, 619 F.2d 874, 880 (10<sup>th</sup> Cir. 1980); *United States v. Chevoor*, 526 F.2d 178, 183-84 (1<sup>st</sup> Cir. 1975).

<sup>13</sup> 522 U.S. 398, 410 (1998).

<sup>14</sup> See *Brogan*, 522 U.S. at 410.

The loose jurisdictional requirements in the statute also leave room for prosecutions of what I have termed derivative obstruction, which encompasses false statements made only in an indirect or constructive way to the government. Proxy deception is particularly common in the parallel realm of obstruction prosecutions under 18 U.S.C. § 1503.<sup>15</sup> For example, one theory under which defendants in the *Computer Associates* case were prosecuted was that they knew statements they made to their own counsel would be passed on to the government.<sup>16</sup> General Counsel Stephen Woghin was in turn indicted, partly because he professed innocence in a press release, provided false justifications to inside auditors, and “fail[ed] to expedite” the investigation.<sup>17</sup> Along the same lines, Greg Singleton, a gas trader employed by El Paso Merchant Energy, was charged with falsely reporting market information, and the government added obstruction charges arising from statements that Singleton made solely to an outside law firm retained by his employer.<sup>18</sup> According to the indictment, Singleton “did not disclose” to outside counsel, “falsely denied,” and “otherwise concealed” the fact that employees had provided false information to trade publications. There was no allegation that Singleton made misstatements directly to the government. Likewise, in the recent *Rite Aid* prosecution, defendants were convicted of obstruction largely as a result of interactions with internal investigators retained by the company.<sup>19</sup>

The broad charging discretion prosecutors enjoy in the investigative context is constrained by more rigorous standards of proof when deception occurs in court. Perjury has stringent statutory requirements, and the case law has further curtailed the reach of the perjury provision. Liability requires a willful false statement as to material facts, made under oath.<sup>20</sup> The Supreme Court has held that a defendant cannot be convicted if answers are literally true or merely

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<sup>15</sup> See, e.g., Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 371-73 (2007) (discussing derivative obstruction charges in various cases).

<sup>16</sup> See Alex Berenson, *Software Chief Admits to Guilt in Fraud Case*, N.Y. TIMES, Apr. 25, 2006, at A1. Kevin Ring, a defendant in one of the cases arising from the Jack Abramoff investigation, also was recently charged with obstruction for allegedly lying to private counsel retained to conduct an internal investigation.

<sup>17</sup> Information, *United States v. Steven Woghin*, 04 CR 847 (E.D.N.Y. Dec. 1, 2004).

<sup>18</sup> Superseding Indictment, *United States v. Singleton*, Crim. No. H-06-080, 2006 WL 1984467 (S.D. Tex. July 14, 2006).

<sup>19</sup> See Indictment at 76–80, *United States v. Grass*, No. 1:02-CR-00146 (M.D. Pa. June 21, 2002), available at [www.usdoj.gov/dag/cftf/chargingdocs/grassetalind.pdf](http://www.usdoj.gov/dag/cftf/chargingdocs/grassetalind.pdf).

<sup>20</sup> 18 U.S.C. §§ 1621 & 1623 (2006). The statutory definition leaves the common law requirements largely intact. At common law, perjury was defined as “a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely and falsely, in a matter material to the issue or point in question.” 4 WILLIAM BLACKSTONE, COMMENTARIES 136-37.

evasive,<sup>21</sup> which leads to defenses that parse “the meaning of is.”<sup>22</sup> In perjury cases, the allegedly misleading answer has less import than the precision of the questioning.<sup>23</sup> Nor does perjury extend to superfluous testimony, and recantation in the same proceeding can provide a defense.<sup>24</sup> Perjury also takes place in the formal context of official proceedings, and the requirement that the defendant make the critical statement under oath is calculated to “awaken the witness’ conscience.”<sup>25</sup> Investigative lies present a sharp contrast: Rather than seek compliance with section 1001 *ex ante*, the government typically reveals its application only after subjects make the statements that give rise to liability.

#### DEGREES OF EVIDENTIARY FOUL PLAY

Different kinds of evidentiary foul play merit different treatment, and the effect of upstream investigative lies seems more likely to be diluted than that of institutional deception at the end of the adjudicative process. Arguably, the rationale for the deterrence of deception changes and gathers force once a case is presented in court, where deceptive testimony hazards the destruction of evidence and is not just the refusal to cooperate with the government’s efforts to create evidence.

The criminalization of investigative lies introduces sanctions for dishonesty at the first point in a suspect or witness’ interaction with law enforcement. Falsehoods are actionable even before an investigation is fully underway and even when they pertain to topics unrelated to underlying wrongdoing. They can occur, not because of consciousness of guilt, but because

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<sup>21</sup> *Bronston v. United States*, 409 U.S. 352 (1973); *see also* *United States v. Shotts*, 145 F.3d 1289, 1297 (11<sup>th</sup> Cir. 1998) (“An answer to a question may be non-responsive, or may be subject to conflicting interpretations, or may even be false by implication, [but] if the answer is literally true, it is not perjury.”).

<sup>22</sup> JEREMY CAMPBELL, *THE LIAR’S TALE* (2001) (quoting President Clinton’s legal brief to the Arkansas Supreme Court committee considering his disbarment) (“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.”).

<sup>23</sup> *See* *Bronston*, 409 U.S. at 362; *id.* at 360 (“[T]he perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner—so long as the witness speaks the literal truth.”).

<sup>24</sup> 18 U.S.C. § 1623(d).

<sup>25</sup> *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”— which “impress[es] 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).

of consciousness of risk, or even indignation about innocence.<sup>26</sup> Although false statements may inconvenience the government, perjury undermines far broader systematic goals and has an impact on the integrity of the court system. In-court perjury is solvent to the social glue of the justice system, “an obvious and flagrant affront to the basic concepts of judicial proceedings.”<sup>27</sup> The failure to cooperate may also cut off the flow of information to prosecutors and jurors and thereby prevent the “fine judgments”<sup>28</sup> necessary in sound criminal investigations and just trials. But actual evidence destruction more obviously “impedes the search for truth.”<sup>29</sup> It “creates inaccuracy if the fact of destruction is unknown and uncertainty if the fact of destruction is revealed.”<sup>30</sup> Penalizing evidence destruction “further[s] the interest of truth-finding and allow[s] the prosecution’s case to be put to the test.”<sup>31</sup> Leveraging defensive false statements can have the opposite effect by inducing pleas for relatively innocuous conduct, mitigating the government’s trial risk, and reducing judicial oversight.

Yet it is the earlier-stage deception that appears to inspire the most expansive enforcement strategies. And *Brogan*, in which the Supreme Court enlarged the scope of section 1001 by rejecting an “exculpatory no” defense for investigative lies,<sup>32</sup> pushes in the opposite direction from *Bronston*, which significantly contracted liability for perjury by requiring literal falsehoods rather than just misleading answers.<sup>33</sup> Why has liability for false statements expanded while in-court perjury prosecutions have narrowed? One explanation is that perjury is simply less prevalent than is widely assumed.<sup>34</sup> Apart from anecdotal and impressionistic evidence, it is difficult to document the frequency of any form

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<sup>26</sup> See, e.g., Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1161 (1987) (quoting *Commonwealth v. Webster*, 59 Mass. (5 Chsh.) 295, 317 (1850) (“An innocent man, when placed by circumstances in a condition of suspicion or danger, may resort to deception in the hope of avoiding the force of such proofs.”)).

<sup>27</sup> *United States v. Mandujano*, 425 U.S. 564, 576 (1976); see also *United States v. Norris*, 300 US 564, 574 (1937) (“Perjury is an obstruction of justice; its perpetration may well affect the dearest concerns of the parties before a tribunal.”); GREEN, *supra* note 6, at 134 (noting that even if the jury’s verdict turns out to be correct, perjury seriously undermines the integrity of the system).

<sup>28</sup> See Transcript of Patrick Fitzgerald News Conference (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 very fine judgments we want to make”).

<sup>29</sup> Solum & Marzen, *supra* note 26, at 1138.

<sup>30</sup> *Id.*

<sup>31</sup> GREEN, *supra* note 6, at 181.

<sup>32</sup> See *Brogan v. United States*, 522 U.S. 398 (1998).

<sup>33</sup> See *Bronston v. United States*, 409 U.S. 352, 353 (1973).

<sup>34</sup> See Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1240-45 (2004) (noting competing media accounts and statistical disparities that highlight the difficulty of determining whether perjury is relatively under-enforced).

of evidentiary foul play. But because the criminal lying prohibitions can be stretched to cover very ordinary human behavior, and because lying is an everyday occurrence, there is an obvious gap between statutory over-deterrence and on-the-ground under-enforcement. Recent cases suggest that whether and when prosecutors choose to close that gap by prosecuting investigative lies has little to do with truth-seeking in the false statements context and more to do with the need for efficiency where those statements are pretexts for more serious but unprovable crimes, with the assertion of authority where defendants are recalcitrant, and with the desire for apology where defendants have failed to take responsibility.

#### THE GOVERNMENT AS VICTIM OF INVESTIGATIVE LIES

The government's choice to exercise enforcement discretion as broadly as it does seems, in many false statement cases, to be a symbolic assertion of government power. During investigations, prosecutors may view information as government property and see themselves as enforcing a corollary to the notion that "the public has a right to every man's evidence."<sup>35</sup> The government, however, is not necessarily prosecuting falsehoods that succeed in defrauding the government itself, and by extension the public, of information. There is both a stability interest in the force and meaning of "calling in the authorities"<sup>36</sup> and a "collective interest" that the people together hold in the integrity of the system overall, without regard to the effects to any particular victim or outcome of any particular case."<sup>37</sup> But organic or derivative deception is merely the failure to expedite an investigation or the refusal to acquiesce in the government's theory of the trajectory of the case. As Erin Murphy recently observed, with "obstinacy" charges, including false statements, "[t]he substantive offense is nothing other than the insult to the efficiency and authority of the state itself."<sup>38</sup>

By staying silent, defendants retain some power and put the government to its proof on the underlying charges. By successfully deceiving the government, they exercise some control over the course of the investigation. The criminalization of a broad range of investigative lies shifts the balance of power

<sup>35</sup> *United States v. Nixon*, 418 U.S. 683, 709 (1974).

<sup>36</sup> See JOEL FEINBERG, HARM TO OTHERS 63-64 (1984) ("Like community interests, governmental interests in the last analysis belong to individual citizens. But the maintenance and 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.").

<sup>37</sup> Erin Murphy, *The Crime Factory: Process, Pretext, and Criminal Justice*, (manuscript at 5), available at <http://ssrn.com/abstract=1279681>.

<sup>38</sup> *Id.* at 58.

back to the prosecution, enabling it to impose responsibility on the defendant for some offense, whether that is the original misconduct or the newly created crime. The line between criminal and noncriminal lying thus appears to have more to do with prosecutorial power and procedural expediency than social good. Another celebrity athlete provides an example. Marion Jones used performance-enhancing drugs in track and field and was then convicted under section 1001 for not owning up to it rather than for any underlying wrongdoing. In her subsequent public apology, Jones made no mention of using the drugs or of 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.”<sup>39</sup>

The pursuit of false statements as pretexts for other crimes or as leverage offenses to induce pleas underscores the adversarial posture in which the government approaches investigative interviews. Although there is a veneer of truth-seeking and a cooperative relationship, agents and prosecutors often pursue questions with known answers. Interviews resemble the “carefully staged drama[s]” of police interrogations, which have been described as “choreographed performance[s] that allow[] a detective and his suspect to find common ground where none exists.”<sup>40</sup> In a trial setting, on the other hand, there is clarity about the adversarial nature of the process, overt concern about the defendant’s rights, and a systemic interest in encouraging testimony.<sup>41</sup>

Arguably, recognizing, asserting, and preserving the court’s power as a shared social institution stands as a higher priority than enforcing the government’s authority to extract information from potential witnesses and suspects. But perjury is prosecuted less often, and under less yielding standards, perhaps because the court’s institutional authority is less fragile. Another explanation is that enforcement decisions for both perjury and false statements rest in the hands of the government. False statements made in the context of civil discovery are rarely prosecuted, despite their potential (and often potentially greater) impact on judicial proceedings.<sup>42</sup> When perjury is prosecuted, it often arises from the grand jury context, which is an extension of the government’s criminal investigation more than an arm of the court. And as with earlier forms of

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<sup>39</sup> *Marion Jones’ Statement After Pleading Guilty to Lying to Federal Investigators*, SPORTING NEWS, Oct. 5, 2007, available at <http://www.sportingnews.com/yourturn/viewtopic.php?t=286406>.

<sup>40</sup> DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 209 (1991).

<sup>41</sup> See *Bronston*, 409 U.S. at 360 (“The seminal modern treatment of the history of the offense concludes that one consideration of policy overshadowed all others during the years when perjury first emerged as a common-law offense: ‘that the measures taken against the offense must not be so severe as to discourage witnesses from appearing or testifying.’”).

<sup>42</sup> Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 35-36 (2005).

investigative deception, the grand jury setting raises “the disturbing opportunity for abuse in conducting inquiries into ancient misdeeds of the witness, with the object of eliciting a denial that can then be charged as perjury.”<sup>43</sup>

#### STRUCTURAL PROTECTIONS AND TRUTH-SEEKING

Protections against perjury, moreover, are not limited to perjury prosecutions but are also embedded in the adjudicative process itself.<sup>44</sup> Although the actual goal of trial is contested, on one theory, trials are primarily an effort to get at the truth, or at least some outcome that will stand for the truth.<sup>45</sup> Many investigations, on the other hand, privilege authority and efficiency over fairness and accuracy. In a scenario where agents ask questions to which they already have answers, they want and expect guilty suspects to lie, and the statute arguably does little to protect the integrity of information-gathering. Questioning may produce a confession or a supplemental charging option, but informational advances from these interviews are few, and only minimal investigative harms stem from unsuccessful ones. A dishonest response in a confrontation with a suspect does little to harm the agency because a competent investigator “will anticipate that the defendant will make exculpatory statements.”<sup>46</sup> Agents are seeking inculpatory statements or cooperation with the investigation, and they may rely on those statements, but exculpatory statements are by and large ignored. It appears, then, that the state’s primary interest in punishing defensive deception is strategic efficiency rather than substantive truth-seeking.

<sup>43</sup> See MODEL PENAL CODE § 208.20, Comments (Tent. Draft No. 6, 1957) cited in Bennett L. Gershman, *The “Perjury Trap,”* 129 U. PA. L. REV. 624, 625 n.4 (1981); see also *id.* at 632 n.23 (“The grand jury is in many ways a legal fiction, clothing with respectability, neutrality and independence what are in truth the actions of the prosecutor.”).

<sup>44</sup> See *Bronston v. United States*, 409 U.S. 352, 360 (1973) (noting that perjury prosecutions are not, in our adversary system, “the primary safeguard against errant testimony”; it is the questioner’s burden to “pin the witness down to the specific object” of inquiry).

<sup>45</sup> Compare H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 845 (1982) (“The process of litigation is designed for the reconstruction of an event that occurred in the recent past . . . for the most part, the rules by which a trial is conducted are supposed to enhance the accuracy of the synthetic fact.”) and Roger C. Park, *Character at the Crossroads*, 49 *Hastings L.J.* 717, 749-54 (1998) (trials primarily aim at truth-seeking) with Sanchirico, *Evidence Tampering*, *supra* note 34 at 1287 (“[U]ncovering microhistorical truths about past transactions and occurrences is not, in fact, the primary purpose of trial . . . trial’s primary purpose lies not in discovering what happened, but in shaping what happens.”) and Charles R. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 *HARV. L. REV.* 1357, 1359, 1362-63 (1985) (noting that the aim of the factfinding process is to “generate acceptable [verdicts]” rather than probable ones and suggesting that judicial process induces individuals to internalize the instruction of the law in their primary activities rather than finds out “what actually happened.”).

<sup>46</sup> *United States v. Medina de Perez*, 799 F.2d 540, 546 (9<sup>th</sup> Cir. 1986).

On the more level playing field of the courtroom, perjury is deterred through formal mechanisms designed to get at the truth rather than enforcement strategies aimed at the defendant. Many scholars have discussed the role of trials in shaping preferences,<sup>47</sup> and trials do function as morality plays.<sup>48</sup> But it is difficult to explain the particular context of perjury, and the differential enforcement with regard to investigative lies, through the lens of this primary activity purpose.

In my view, the treatment of in-court deception is animated by the truth-finding approach, and structural protections have the “dual purpose of deterring tampering and correcting litigation outcomes that are skewed by tampering that was undeterred.”<sup>49</sup> Those safeguards distinguish investigative and institutional deception. With regard to the former, the government is focused on asserting authority and the *ex ante* desire to control truth production; deterrence in the latter context is driven more by the *ex post* desire for an accurate outcome.

Other sanctions designed to prevent perjurers from testifying in the first place supplement the deterrent impact of the perjury statute, including discovery provisions requiring the disclosure of impeachment material, the potential revelation of prior convictions, and the admissibility of prior inconsistent statements. The trial is then structured to make perjury more easily identifiable to fact finders should perjurers nonetheless take the stand, through the oath requirement, demeanor evidence, and the availability of information on which to make credibility judgments. Federal Rule of Evidence 608(a), for example, allows an impeaching party to offer opinion or reputation evidence of a witness’s character for truthfulness and to inquire on cross-examination about prior conduct that suggests a poor character for truthfulness.<sup>50</sup> And cross-examination itself—often described in Wigmore’s terms as “the greatest legal engine every invented

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<sup>47</sup> Sanchirico, *Evidence Tampering*, *supra* note 34, at 1287; *id.* at 1316 (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*”); *see also* Solum & Marzen, *supra* note 26, at 1232 (“[O]ur desire to find the truth is subordinate to our desire, in effect, to shape it through the provision of incentives.”).

<sup>48</sup> William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1882 (2000) (the “public nature” of criminal trials, “and the rituals that surround them, seem designed for sending messages”).

<sup>49</sup> Sanchirico, *Evidence Tampering*, *supra* note 34, at 1316.

<sup>50</sup> *See, e.g.*, Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIAMI L. REV. 1069, 1086 (1992) (emphasizing the prevention of perjury as a core function of the rules of evidence: [C]ommon law judges “were acutely interested in both deterring and exposing perjury [and] the liberal admissibility of character evidence of untruthfulness advances both objectives.”) *see also* Friedman, *supra* note 8, at 639 (“[I]n some circumstances a prior crime may have sufficient bearing on the truth-telling inclination of a witness, other than an accused, to warrant admissibility . . . even if the prior crime did not in itself involve dishonesty and was not particularly serious, and even if it occurred rather remotely in the past.”).

for the discovery of truth”<sup>51</sup>—is a structural safeguard designed to expose perjury and enhance truth-seeking. As the Supreme Court explained in *Bronston* when it articulated the limitations on perjury prosecutions in part as a function of the alternative means to prevent perjury: “It is the responsibility of the lawyer to probe; testimonial interrogation and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, *to flush out the whole truth with the tools of adversary examination.*”<sup>52</sup>

Thus, rather than imposing direct penalties by separately charging obstruction or perjury, exposing “evidence destruction” procedurally can punish “detection avoidance by effectively increasing the probability of sanction for the conduct whose detection is being avoided.”<sup>53</sup>

#### MITIGATING EXPRESSIVE HARMS IN THE FALSE STATEMENTS CONTEXT

In court, the focus is on the detection and deterrence of falsehood, and the structure of trial both guards against and signals the seriousness of perjury. Perhaps few perjurers are prosecuted *per se*, but many are “caught” and sanctioned in the web of procedure itself: Lies are exposed, witnesses disbelieved, and defendants convicted despite their heartfelt denials to juries.

In the false statements context, there is no such balance between *ex ante* and *ex post* preference-shaping. Under current enforcement policy, prosecutors pursue false statements without regard to the harm they cause to investigations and with an eye instead on their utility as substitutes for primary wrongdoing. The aggressive pursuit of defensive lies has some counterproductive effects. Leveraging defensive false statements can ultimately produce less information because witnesses who have no exposure at all may not cooperate for fear of running afoul of section 1001. Janice Nadler has also observed 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.<sup>54</sup> Scandals about athlete-doping created the widespread perception that drug use was the norm and necessary to compete. Likewise, frequent prosecutions of

<sup>51</sup> 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (3d ed. 1940).

<sup>52</sup> *Bronston*, 409 U.S. at 358 (emphasis added).

<sup>53</sup> Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. Rev. 1331, 1379 (2006) (noting the possibilities of sanctioning evidence destruction “by effectively increasing the probability of sanction for the conduct whose detection is being avoided”); *see also id.* at 1380 (“The SEC, for example, might explicitly announce a kind of counterpunch strategy; should it come across evidence of obstructive behavior in the course of investigating insider trading, for instance, it would respond by stepping up the investigation of insider trading.”).

<sup>54</sup> Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1402 (2005) (citing Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 342 (2001)).

harmless falsehoods, which detract from a clear focus on the most salient cases of deception and obstruction, might suggest that lying to the government is both a standard and an understandable response to investigative inquiries.

In terms of general compliance, section 1001 prosecutions may ultimately undermine legitimacy if they 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.”<sup>55</sup> There is some social science evidence supporting a “flouting thesis,” according to which the perceived illegitimacy of one legal outcome negatively impacts the willingness to comply with unrelated laws, both major and minor. “When a person evaluates particular legal rules, decisions, or practices as unjust,” Janice Nadler has concluded, “the diminished respect for the legal system that follows can destabilize otherwise law-abiding behavior.”<sup>56</sup> Instead of reinforcing the authority of the government and enhancing public confidence in criminal justice institutions, false statements prosecutions occurring beyond the margins of recognizable harm may raise “ethical issues about the state’s power in relation to the individuals on whose behalf it exercises power.”<sup>57</sup> 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.”<sup>58</sup> When government investigators impose themselves and then bring strategic prosecutions according to crude boundaries, that interaction diminishes the “informational influence” of the law and its power to bring about law-abiding behavior.<sup>59</sup>

## CONCLUSION

Considering investigative and institutional lies separately, and evaluating their different scopes and contrasting incentive structures, highlights some opportunity for reform in the false statements context. The balance between limited enforcement and procedural deterrence in the perjury context may offer a better imperfect approach to false statements. Formalizing more investigative interactions in settings such as proffer-protected interviews in prosecutors’ offices, offering warnings about potential liability for false statements before questioning, and distinguishing active obstruction from passive responses could all mitigate some of the expressive distortions that arise from prosecuting organic

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<sup>55</sup> Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 N.W. U. L. REV. 453, 481 (1997).

<sup>56</sup> Nadler, *supra* note 54, at 1401.

<sup>57</sup> PETER BROOKS, TROUBLING CONFESSIONS 1-2 (2000).

<sup>58</sup> TOM TYLER, WHY PEOPLE OBEY THE LAW 83 (1990).

<sup>59</sup> See PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME 202 (1995) (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.”).

deception. Limiting prosecutions to those cases in which the primary activity involves serious wrongdoing and false statements actually harm investigations could also lead to better sorting. In the perjury context, precise questioning and literal falsehoods are prerequisites for liability. In *Bronston*, the Court held that if “a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark.”<sup>60</sup> In *Brogan*, however, the Court concluded that “disbelieved falsehoods” can 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.”<sup>61</sup> But the materiality standard in section 1001 ought to have some independent content that would more closely align the standards for investigative and institutional deception. Whether a statement “actually influenc[es] or ha[s] a natural tendency or capacity to influence a decision or function of a federal agency” should require some attention to the impact of a statement. Although the inquiry need not start with the subjective vantage point of a particular investigator, it should focus on the likely effect of a given statement or omission on a reasonable investigator under the circumstances. If enforcement strategies against evidentiary foul play were thus fashioned as tests for accurate information rather than traps for the unwary, they might increase cooperation with the government and better deter harmful deception.

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<sup>60</sup> *Bronston*, 409 U.S. at 358.

<sup>61</sup> *Brogan*, 522 U.S. at 402.