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WHEN IS LYING ILLEGAL? WHEN SHOULD IT BE? A CRITICAL ANALYSIS OF THE FEDERAL FALSE STATEMENTS ACT

STEVEN R. MORRISON*

I. INTRODUCTION

One can assess a law in a number of ways, and the lens through which the assessment is done often determines the results. The Federal False Statements Act, codified at 18 U.S.C. § 1001, is an excellent example of a law that produces widely divergent results depending upon the lens used. These divergent results suggest that section 1001 is in need of critical examination and fundamental reform. Section 1001(a)(2) prohibits knowingly and willfully “mak[ing] any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.”¹ This Article examines the statute through a number of different lenses: the apparent plain meaning of the law and court interpretations of it; the history of section 1001(a)(2); the congressional intent informing it; questions of its constitutionality based on vagueness and overbreadth; public policy arguments for and against it; and theories of criminal law (or lack thereof). The Article then addresses some solutions to the issues raised.

As a result of these examinations, the short answer regarding section 1001(a)(2) is that it likely is unconstitutional but has been and will be found by courts to be constitutional; probably is not applied in accord with its congressionally intended application; carries with it serious negative public policy implications; addresses, albeit poorly, the important interest the government has in receiving truthful information; is in disaccord with most theories of criminal law; and is troubling in light of the prevalence of lying by most parties in the criminal justice system and by most people in general. What emerges is a view of section 1001(a)(2) as a haphazardly constructed law that relies only on prosecutorial forbearance and discretion to prevent its abuse. Section 1001(a)(2)

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1. 18 U.S.C. § 1001(a)(2) (2006).

is also, however, a law with a long history of addressing real and specific problems in a narrowly tailored way. Even today, despite its overbreadth, section 1001(a)(2) can be an important tool in the prevention of false statements that negatively affect us all.

Section 1001(a)(2) has been the subject of numerous law review articles. Most criticize the statute,² and a few support it.³ As will be seen below, the Supreme Court and lower courts have upheld section 1001(a)(2), but a number of judges have expressed concern. Justice Ginsburg has provided an effective challenge to section 1001(a)(2)'s interpretation,⁴ and in one five-to-four decision, a dissenting Justice Rehnquist went so far as to call the statute unconstitutionally vague.⁵ Surprisingly, only a few commentators have followed suit.⁶ Section 1001(a)(2) persists as a constitutional law that criminalizes an extremely broad spectrum of false statements.⁷

2. E.g., Peter W. Morgan, *The Underfined [sic] Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U. L. REV. 177 (1992); Richard H. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 ARIZ. J. INT'L & COMP. L. 215 (1993); Alexandra Bak-Boychuk, Comment, *Liar Laws: How MPC §241.3 and State Unsworn Falsification Statutes Fix the Flaws in the False Statements Act (18 U.S.C. § 1001(a)(2))*, 78 TEMP. L. REV. 453 (2005); Giles A. Birch, Comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273 (1990); Michael Gomez, Comment, *Re-Examining the False Statements Accountability Act*, 37 HOUS. L. REV. 515 (2000); Alan Heinrich, Note, *Clinton's Little White Lies: The Materiality Requirement for Perjury in Civil Discovery*, 32 LOY. L.A. L. REV. 1303 (1999); William J. Schwartz, Note, *Fairness in Criminal Investigations Under the Federal False Statements Statute*, 77 COLUM. L. REV. 316 (1977); William Safire, *Fight It, Martha*, N.Y. TIMES, June 12, 2003, at A35."

3. Stephen Michael Everhart, *Can You Lie to the Government and Get Away with It? The Exculpatory-No Defense Under 18 U.S.C. § 1001(a)(2)*, 99 W. VA. L. REV. 687 (1997); Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001); Jeffrey L. God, Case Note, *Demise of the Little White Lie Defense—The Supreme Court Rejects the "Exculpatory No" Doctrine Under 18 U.S.C. § 1001(a)(2): Brogan v. United States*, 118 S. Ct. 805 (1998), 67 U. CIN. L. REV. 859 (1999).

4. *Brogan v. United States*, 522 U.S. 398, 408 (1998) (Ginsburg, J., concurring).

5. *United States v. Yermian*, 468 U.S. 63, 76 (1984) (Rehnquist, J., dissenting).

6. William L. Anderson & Candice E. Jackson, *Martha Down Under: Kangaroos in the Courtroom*, THE FUTURE OF FREEDOM FOUNDATION, Mar. 15, 2004, available at <http://www.fff.org/comment/com0403i.asp> (describing the dangers of section 1001(a)(2) as a "vague and expansive" criminal law); Morgan, *supra* note 2, at 198.

7. *United States v. Arcadipane*, 41 F.3d 1, 5 (1st Cir. 1994) (criticizing that "section 1001(a)(2) [in and of itself] constitutes a blanket proscription against the making of false statements to federal agencies . . . [t]he statute equally forbids falsification of any . . . statement."); *United States v. Connolly*, 9 F.3d 1535, 1993 WL 499819, at *1 (1st Cir. 1993) (falsifying "statements can be

What do we do with a statute that has been declared constitutional and addresses an important government interest, but whose constitutionality has been called into question and which criminalizes a broad range of conduct—lying—that many believe to be a part of human nature and society, and occasionally justified? Is section 1001(a)(2) constitutional? Does its application accord with its congressional intent? If the law is constitutional, is it nevertheless a “bad” law? How can we determine whether this or any law is “bad”? Can an exploration of public policy arguments, theories of criminal law, and the nature of lying in society and the criminal justice system answer this question?

This Article explores these questions and concludes that section 1001(a)(2) is in need of an overhaul, but is salvable. Its core values retain legitimacy, but its breadth makes it an unwise, if not illegal, statute. Limits ought to be imposed. A logical start to the discussion is the statute itself and its history.

II. SECTION 1001(A)(2) CURRENTLY

This Article, as well as those articles cited throughout, focuses on section 1001(a)(2), which states, in pertinent part, that:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

...

(2) makes any materially false, fictitious, or fraudulent statement or representation;

...

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.⁸

A violation of section 1001(a)(2) occurs if the government

material [and thus criminal] even if they were ignored, never relied upon, or never read by the agency”); Laura Perry & Stephanie Salek, *False Statements and False Claims*, 45 AM. CRIM. L. REV. 465, 472 (2008); Gomez, *supra* note 2, at 517; Heinrich, *supra* note 2, at 1315.

8. 18 U.S.C. § 1001(a)(2). Although not explored in this Article, the terrorism sentencing enhancement is a controversial subject in its own right. Enacted into law in 2004 (in Pub. L. 108-458, § 6703(a)), it has yet to be substantially tested by the courts. The question of what false statements “involve” international or domestic terrorism may be as vague as or more vague than section 1001(a)(2).

proves five elements: (1) a statement was made; (2) the statement was false; (3) the statement was made with specific intent; (4) the statement was material; and (5) there was government agency jurisdiction.⁹ Only element (2) has never been one of contention, although, as will be seen, it should be. Elements (1), (3), (4), and (5) have been subjects of court interpretation and congressional amendment. A lengthy judicial and legislative history surrounds each of these elements and also results in controversy over their meanings. A preliminary concise overview of each element, presenting their dominant interpretations as well as minority positions, will be helpful.

(1) *A statement was made.* In 1998, the Supreme Court rejected the “exculpatory no” doctrine.¹⁰ This doctrine had been the law in a number of circuits and provided an exception to criminal liability under section 1001(a)(2) for false statements that consist merely of denial of wrongdoing.¹¹ The Court rejected this doctrine because the statute, by definition, includes “any’ false statement—that is, a false statement ‘of whatever kind.’”¹² Justice Souter, concurring in part and in the judgment, expressed his concern that Congress could not have meant to criminalize denials of guilt.¹³ He went on to question whether Congress intended section 1001(a)(2) to cover non-custodial, informal interactions between government agents and their targets.¹⁴ A non-custodial setting differs significantly because the suspect is not informed of any of his rights.¹⁵ Nor is he under oath and therefore he is unlikely to weigh the importance of the veracity of his answers.¹⁶ Moreover, the purpose of section 1001(a)(2) was “to protect the Government from the affirmative, aggressive and voluntary actions of persons who take the initiative; and to protect the Government from being the victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities and functions.”¹⁷

A line of circuit court cases supports Justice Souter’s view. A First Circuit case, *United States v. Chevoor*,¹⁸ was overturned to

9. *United States v. Jiang*, 476 F.3d 1026, 1029 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1226 (11th Cir. 2007).

10. *Brogan*, 522 U.S. at 398.

11. *Id.* at 399, 401.

12. *Id.* at 400 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

13. *Id.* at 408 (Souter, J., concurring in part and in the judgment).

14. *Id.* at 410-11.

15. *Id.* at 411.

16. *Id.*

17. *Id.* at 413 (Ginsburg, J., concurring) (quoting *Paternostro v. United States*, 311 F.2d 298, 302 (5th Cir. 1962)).

18. 526 F.2d 178 (1st Cir. 1976).

the extent that it approved the “exculpatory no” doctrine.¹⁹ Beyond that, however, the *Chevoor* court acknowledged that other courts struggle to fit F.B.I. questioning within the scope of section 1001(a)(2).²⁰ Further, courts have found that when the F.B.I. or a United States Attorney initiates an interrogation, section 1001(a)(2) does not apply to any responses a defendant gives.²¹ This is because the defendant is not under oath.²² The questioning takes place in an informal setting, and the “negative responses” do not constitute a statement under section 1001(a)(2).²³ The First Circuit and Justice Souter are not alone in this reasoning.²⁴

While the Supreme Court overturned *Chevoor* and other cases as to their approval of the “exculpatory no” doctrine, it did not address their language described above. The question of what statements are prohibited should not, therefore, be put so easily to rest by stating that any false statement of whatever kind is prohibited by section 1001(a)(2). Not only is the materiality element supposed to limit what statements are prohibited (a problem in itself, as will be seen), but it is possible that Congress intended only certain types of statements to be prohibited, whether they are material or not. This intent to limit the application of section 1001(a)(2) will become apparent in the discussion of the history of the statute.²⁵

(2) *The statement was false.* To my knowledge, no court or Congress has questioned what it means for a statement to be false. Based on the lack of interpretation, the dominant view seems to be that everyone intrinsically knows what statements are “false”

19. *Brogan*, 522 U.S. at 408.

20. *Chevoor*, 526 F.2d at 183.

21. *Id.*

22. *Id.* at 184.

23. *Id.*

24. *United States v. Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972) (defendant’s giving of a false name to an F.B.I. agent “was not within the class of false statements that section 1001(a)(2) was designed to proscribe.”); *United States v. Ehrlichman*, 379 F. Supp. 291, 291-92 (D.D.C. 1974) (“Congress did not intend that [section 1001(a)(2)] be applied to statements given to the F.B.I. voluntarily and without oath or verbatim transcription during an interview initiated by the Bureau in the course of a criminal investigation.”); *United States v. Davey*, 155 F. Supp. 175, 178 (S.D.N.Y. 1957) (a false statement to the F.B.I. did not “pervert[] the true function of the [F.B.I.]”); *United States v. Stark*, 131 F. Supp. 190, 206 (D. Md. 1955) (“the legislative intent in the use of the word ‘statement’ does not fairly apply to the kind of statement . . . where the defendants did not volunteer any statement or representation for the purpose of making claim upon or inducing improper action by the government against others.”); *United States v. Levin*, 133 F. Supp. 88, 89 (D.C. Colo. 1953) (it is not a violation of section 1001(a)(2) “to intentionally fail to tell the truth to any investigator of any agency of the United States” where one is “under no legal obligation to speak.”).

25. See *infra* § III (outlining the history of section 1001(a)(2)).

statements for section 1001(a)(2) purposes and what statements are “true.” It is not casuistry, however, to question whether the line between the two can always be seen so clearly. For example, imagine that an F.B.I. agent visits your home. She asks you whether you heard about a recent shooting on the news. You had heard about it, and based on news reports, you know that the gun involved was a .45-caliber handgun. The agent asks you if you know a particular person. You reply, truthfully, that you do and that he is a close friend. The agent asks whether that friend owns any guns. You know that your friend owns only a .22-caliber rifle. You also know that your friend was not involved in the shooting because on the night in question, you were with him. You correctly assume that the agent is searching for a shooter who possesses a .45-caliber handgun. Wanting to be helpful to the agent, you reply, “No, my friend owns no gun.” Is this a false statement? Consider the following observation.

David Nyberg discusses the notion of “purposive communication.”²⁶ He envisions such communication as a continuum, with absolute truth on one end and bald-faced lying on the other. Along the spectrum are situations that require a careful use of information “for some purpose.”²⁷ Nyberg continues that “purposeful communication” requires some type of deception.²⁸ He argues that lying is merely a “special subset of deception” that affects any message.²⁹ In other words, to effectively communicate, people often need to engage in some form of deception. This is not lying, but is a method of selecting facts and making assumptions in order to provide the listener with the information the speaker believes she needs or wants to receive. In the example above, you literally deceived the F.B.I. agent, but based on your interpretation of her questioning, you answered her with the purpose of assisting her work. Is this a false statement?

According to section 1001(a)(2) case law, it most likely is. Based on the way human beings communicate, however, the issue of the statement’s falsity is open to debate.³⁰ Consider the following situation: a person’s religious beliefs compel him to believe that no one actually “owns” anything, and that God temporarily provides people with the things they need to survive. An F.B.I. agent asks this person, “Does your friend own any guns.”

26. David Nyberg, *Noble Lies, Narrative Truths, and the Art of Voice: Thoughts on Pragmatic Language and the First Amendment*, 64 U. CIN. L. REV. 1203, 1207 (1996).

27. *Id.*

28. *Id.* at 1207-08.

29. *Id.*

30. See *infra* § VI (discussing the nature of lying in general and in the criminal justice system).

The person might answer in the affirmative, wanting to be helpful to the agent. From his point of view, this would be a false statement, but he knows what the agent is after and wants to help her, so he engages in purposive communication. Alternately, he may answer in the negative, thus making a truthful statement from his point of view. When the agent, however, discovers that his friend actually does possess a gun, she reports this section 1001(a)(2) violation to the prosecutor, who initiates criminal proceedings against the man.

(3) *The statement was made with specific intent.* Under section 1001(a)(2), it is illegal to knowingly and willfully “make[] any materially false, fictitious, or fraudulent statement or representation.”³¹ Does this mean that to violate the law, one must knowingly and willfully make (1) a statement that turns out to be material and false; (2) a false statement that turns out to be material; or (3) a materially false statement? In other words, must one intend to make just the statement, or must one intend that the statement made also be either false or material, or both?³² As of yet, no case exists where the government has charged, much less convicted, a defendant who believed her statement to be true. The question that remains, therefore, is whether one must intend her statement to be material to be criminally liable.³³

In *Yermian*, the Supreme Court looked to basic grammar rules and concluded that the statute was written so that the terms “knowingly and willfully” only refer to “false, fictitious or fraudulent statements.”³⁴ Therefore, the Court reasoned that there was no language to suggest that intent is necessary to violate the statute.³⁵

In other words, the Court in *Yermian* held that to be

31. 18 U.S.C. § 1001(a)(2).

32. For example, assume a government agent asks an interviewee, “When was the last time you saw your friend Jason?” You have seen him twice in the last month. Three weeks ago, you saw him at a mutual friend’s birthday party, and last week you saw him at a local anti-war rally. Not wanting to reveal that your friend engaged in perfectly legal behavior, but behavior that you believe the agent would look at with suspicion, you tell the agent that you last saw your friend at a birthday party three weeks ago. This statement is clearly false, and you intended it to be false. To be sanctionable under section 1001(a)(2), must you have intended only to make the false statement, or must you have also intended for the statement to be material? That is, must you have intended that the agent be influenced in her decision making by the false statement? See *infra* § IV(1) (discussing the mindset of the decisionmaker).

33. A statement is material if it “has a natural tendency to influence, or was capable of influencing, the decision of the decision making body to which it was addressed.” *United States v. Kungys*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted).

34. *Yermian*, 468 U.S. at 69.

35. *Id.*

criminally liable, one need not intend the materiality, only the falsity of the statement.³⁶ Other courts have supported this view.³⁷ This is the dominant view. A “natural reading” of section 1001(a)(2), however, need not lead to this result. In *Yermian’s* dissent, Justice Rehnquist pointed out that from the majority’s opinion, one does not know “what the congressionally intended element of intent is.”³⁸

Other courts have drawn a conclusion different than the *Yermian* majority. The Ninth Circuit, for example, has folded the materiality and intent element together, describing the materiality test as whether the false statement was intended “to induce action or reliance by an agency of the United States.”³⁹ The Second Circuit noted that in one capacity, section 1001(a)(2) was designed to address the situation when a false statement was intended to provoke an investigation by an agency, such as the F.B.I., and in doing so, distract the agency from its official function.⁴⁰ Requiring that the statements be “calculated” to induce agency actions is tantamount to requiring that the defendant intend the materiality. This is just as plausible of a reading and a viable alternative to the *Yermain* holding.

This distinction is important because it places in dispute the mens rea of the crime as shown by the very purpose of section 1001(a)(2), which is to ensure that the government does not act to its detriment on false information. The majority view holds that a false statement is illegal under section 1001(a)(2) even if the statement-maker does not intend that the government rely on the statement. For example, assume I.R.S. agents arrive at a family’s house unannounced. The parents’ eighteen-year-old son answers the door and, after a brief conversation, is asked if his parents recently made any large purchases. The son is frightened and does not want to say anything that would get his parents in trouble. Although his mother recently purchased an expensive painting, in the heat of the moment he tells the agents that his parents have made no large purchases. If his knee-jerk reaction of stating a falsehood contained any mens rea, it was to protect his parents, not to induce the agents to rely on his false statement. Given the unannounced visit and his fright, the son did not have

36. *Id.*

37. *United States v. Jacobs*, 212 F. App’x 683, 684 (9th Cir. 2006) (“[t]he government need not prove a specific intent to deceive nor that [defendant] knew her conduct was unlawful.”); *United States v. Ranum*, 96 F.3d 1020, 1029 (7th Cir. 1996) (holding that intent requires “only a purpose to do the forbidden act, not a specific intention or awareness that the act will mislead the Government”).

38. *Yermain*, 468 U.S. at 76 (Rehnquist, J., dissenting).

39. *United States v. Silva*, 119 F. App’x 892, 894 (9th Cir. 2004).

40. *United States v. Adler*, 380 F.2d 917, 922 (2d Cir. 1967).

time to consider the possible consequences of his statement on the agents' future actions. He may have intended to make his false statement, but it was not calculated to induce any governmental action. Depending on the jurisdiction, the eighteen-year-old may or may not be criminally liable under section 1001(a)(2).

(4) *The statement was material.* Before section 1001(a)(2)'s amendment by Congress in 1996, materiality was not an explicit element, even though most circuits considered it to be one.⁴¹ The definition of materiality for purposes of section 1001(a)(2) was articulated in a 1988 Supreme Court case *Kungys v. United States*.⁴² In that case, the Court observed that a statement is material if it "has a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it [is] addressed."⁴³

Although the materiality amendment was Congress' attempt to limit the application of section 1001(a)(2),⁴⁴ the materiality element provides only a hollow promise. The standard for establishing materiality is quite low,⁴⁵ and its definition is "extraordinarily loose"⁴⁶ such that it is vague. Terms such as "natural tendency" and "capable of influencing" can mean largely what anyone wants them to mean. Indicative of this are courts' interpretations of the materiality standard: they have said that a statement is material if it was "predictably capable" of affecting a decision;⁴⁷ had a "natural and probable effect" of interfering with government decisionmaking;⁴⁸ had a "propensity" to influence;⁴⁹ "might have" influenced a government function;⁵⁰ had the "potential" to influence;⁵¹ and "could have" affected a decision.⁵² To be material, then, must a statement be very likely, somewhat likely, or merely possibly likely to influence a decisionmaker? Stated another way, must the statement have a greater than 50% chance of swaying a decisionmaker, or will a 1% chance suffice to

41. Perry & Salek, *supra* note 7, at 472; Bak-Boychuk, *supra* note 2, at 464.

42. Bak-Boychuk, *supra* note 2, at 465.

43. *Kungys*, 485 U.S. at 771.

44. *United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987); Chad B. Pimental, *False Statements*, 38 AM. CRIM. L. REV. 709, 716 (2001) (citing *United States v. Chandler*, 752 F.2d 1148, 1151 (6th Cir. 1985)); Bak-Boychuk, *supra* note 2, at 487-88.

45. Pimental, *supra* note 44, at 716; Heather L. Scanlon, *False Statements*, 39 AM. CRIM. L. REV. 507, 514 (2002); Gomez, *supra* note 2, at 524.

46. Morgan, *supra* note 2, at 234.

47. *United States v. Turner*, 551 F.3d 657, 663 (7th Cir. 2009).

48. *United States v. Johnson*, 485 F.3d 1264, 1270 (11th Cir. 2007).

49. *Silva*, 119 F. App'x at 894.

50. *United States v. Alemany Rivera*, 781 F.2d 229, 234 (1st Cir. 1985) (*italics omitted*).

51. *United States v. Odunze*, 278 F. App'x 567, 570 (6th Cir. 2008).

52. *United States v. Richey*, 279 F. App'x 779, 781 (11th Cir. 2008).

make the statement material?

Not only are courts split over the degree of a statement's capability of influencing a decisionmaker necessary for liability, but they also differ in terms of the nature of the statement. While a number of courts adhere to the *Kungys* definition of materiality, the Third Circuit in *United States v. McBane* seemed to break away and establish an objectively "reasonable decisionmaker" standard.⁵³ The court reasoned that the language in the statute, specifically the phrase "natural tendency," connoted a standard where liability is present only if the statement has the potential of influencing a "reasonable decisionmaker."⁵⁴

Given the *Kungys* definition of materiality, the government's concession in the first sentence should have resulted in a directed verdict of not guilty. It did not, however, and *McBane's* analysis has found favor in other courts. The Seventh Circuit quoted the above passage at length and held that a false statement can be material even if it does not actually influence agents; the statement need only have potential to influence a "reasonable agent under normal circumstances."⁵⁵ The dilemma is whether materiality is to be judged on an objective or subjective basis. The Third and Seventh Circuits have adopted an objective approach, whereas the *Kungys* definition of materiality indicates a subjective approach, asking whether the actual statement made was capable of influencing the actual government decisionmaker involved.

Even under the subjective approach, the materiality standard does not effectively limit section 1001(a)(2). This is so because a statement may be material even though the government never sees,⁵⁶ relies on,⁵⁷ or believes⁵⁸ the statement, and whether or not the statement-maker knew the government was involved⁵⁹ or even made the statement to the government.⁶⁰ These interpretations suggest some troubling conclusions. For example, consider a target of a federal investigation who, unbeknownst to him, is

53. *United States v. McBane*, 433 F.3d 344, 351 (3d Cir. 2005).

54. *Id.* at 350-51.

55. *Turner*, 551 F.3d at 659.

56. *Corsino*, 812 F.2d at 30-31.

57. *Turner*, 551 F.3d at 663; *United States v. Dwyer*, 238 F. App'x 631, 649 (1st Cir. 2007); *McBane*, 433 F.3d at 350.

58. *State v. Sarihifard*, 155 F.3d 301, 306-07 (4th Cir. 1998); *United States v. LeMaster*, 54 F.3d 1224, 1230 (6th Cir. 1995); *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992).

59. *United States v. Baker*, 626 F.2d 512, 516 (5th Cir. 1980); *United States v. Stanford*, 589 F.2d 285, 297 (7th Cir. 1978); *United States v. Dick*, 744 F.2d 546, 553 (7th Cir. 1984).

60. *United States v. Shafer*, 199 F.3d 826, 829 (6th Cir. 1999); *United States v. Wright*, 988 F.2d 1036, 1038 (10th Cir. 1993); *United States v. Gibson*, 881 F.2d 318, 322 (6th Cir. 1989); *United States v. Brantley*, 786 F.2d 1322, 1326 (7th Cir. 1986).

dealing with a confidential informant. The target makes a false statement to the informant that, if received by the government agency, could influence its decisionmaking. In the course of the investigation, the informant never tells the agency of this false statement, so the agency never hears it or relies on it. The target is indicted on a non-section 1001(a)(2) charge. At trial, the confidential informant testifies to the defendant's false statement. The prosecution might then be able to amend the indictment or issue a new one, alleging a section 1001(a)(2) violation.

Indeed, one criticism of section 1001(a)(2) is that it is being used to prosecute targets only when the government is unable to prove an underlying charge.⁶¹ After a period of trying to prove an underlying charge against the target described above, the government might give up. It might then conduct a detailed interview with the confidential informant, learning everything the target said to the informant. In so doing, the government might learn of a false statement the target made in the distant past and declare months or years later that this statement, if it had been received, could have influenced the agency. It could therefore proceed against the target based on section 1001(a)(2).

Since 1996, when Congress made materiality an element, the fact that the statement does not have to be made to the government agent in question to be material has not been challenged. This is, however, an open question because the *Kungys* definition of materiality has been altered by subsequent courts. *Kungys* declared that a statement is material if it "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed."⁶² A number of courts have applied this definition,⁶³ but others have excluded the last five words from this definition, so that their definition for materiality is a statement that "ha[s] a natural tendency to influence or was capable of influencing the [agency]."⁶⁴ The question, therefore, is this: if a section 1001(a)(2) indictment alleges that the F.B.I. might have been influenced, must the

61. Safire, *supra* note 2, at A35 (complaining that Martha Stewart was brought under section 1001(a)(2) when the government could not otherwise prosecute her).

62. *Kungys*, 485 U.S. at 770 (emphasis added).

63. *United States v. Rastegar*, 472 F.3d 1032, 1036-37 (8th Cir. 2007); *United States v. Beltran*, 136 F. App'x 59, 61 (9th Cir. 2005); *McBane*, 433 F.3d at 350; *United States v. Ntreh*, 142 F. App'x 106, 110-11 (3d Cir. 2005); *United States v. Finn*, 375 F.3d 1033, 1038 (10th Cir. 2004); *United States v. Whab*, 355 F.3d 155, 163 (2d Cir. 2004); *United States v. Wheeler*, 79 F. App'x 656, 663 (5th Cir. 2003).

64. *United States v. Hames*, 185 F. App'x 318, 324 (5th Cir. 2006); *United States v. Wintermute*, 443 F.3d 993, 1001 (8th Cir. 2006) (quoting *United States v. Rashid*, 383 F.3d 769, 778 (8th Cir. 2004)).

statement have been made to the F.B.I., or could the statement's influence have reached the F.B.I. through some intermediary? The *Yermian* Court, for example, upheld the conviction of a defendant who had made a false statement to a private employer, which had transmitted that statement to the Department of Defense for appropriate security clearances.⁶⁵ The defendant argued that he had no actual knowledge that his false statements would be transmitted to a federal agency,⁶⁶ and the Court held that proof of this knowledge was not necessary for a conviction.⁶⁷

Does this mean that a false statement made to a confidential informant who transmits that statement to the F.B.I. is actionable? What if, in a moment of braggadocio, you falsely tell your neighbor that you cheat on your taxes, and your neighbor contacts the I.R.S., which then initiates an audit? Under the *Yermian* analysis, these false statements would be criminal, but under the *Kungys* definition, they would not be material and thus not criminal. This contradiction suggests that section 1001(a)(2) may be both over- and underinclusive. *Yermian* makes section 1001(a)(2) overinclusive because its analysis means that lies such as the one to your neighbor may be criminal. *Kungys* makes section 1001(a)(2) underinclusive because it would not make criminal a serious false statement made to the F.B.I. that is then, pursuant to F.B.I. policy, automatically transmitted to a U.S. Attorney's office, which on the basis of the statement makes a decision. Because the statement did not influence and was not capable of influencing the F.B.I.—the agency to which the statement was addressed—*Kungys* would hold that the statement was not material, and thus not criminal. Neither of these outcomes makes sense. A possible resolution to this is found in *United States v. Gaudin*.⁶⁸

In *Gaudin*, the Supreme Court held that materiality under section 1001(a)(2) is a mixed question of law and fact to be decided by the jury.⁶⁹ The Court noted that the legal standard of materiality (presumably to be decided by the court as a matter of law) is its definition set forth in *Kungys*.⁷⁰ It also, however, noted that in order to determine if a statement is material, the court must first ask and answer two questions: (1) "what statement is made?" and (2) "what decision was the agency trying to make?"⁷¹ Only after these questions are resolved can a court decide if a

65. *Yermian*, 468 U.S. at 65-66.

66. *Id.* at 66.

67. *Id.* at 75.

68. See generally *United States v. Gaudin*, 515 U.S. 506 (1995).

69. *Id.* at 512.

70. *Id.* at 509, 512.

71. *Id.* at 512.

statement was material to the decision made, thus satisfying the materiality standard.⁷²

The Court went on to find that materiality of a statement depends on what inferences a “reasonable decisionmaker” would make, given the exact same facts known to the party involved.⁷³

After *Gaudin*, courts have uniformly ignored this enigmatic analysis, preferring to apply the broad *Kungys* definition (or its truncated version) however it suited them. But one case did seriously consider the *Gaudin* formulation. In *United States v. Finn*, the Tenth Circuit considered the case of Finn, a special agent head up a government agency charged with fighting drug and gun-related crimes around public housing.⁷⁴ Finn allegedly had misused government funds for personal uses, and falsified a government expenditure form in connection with the misuse.⁷⁵ He was charged under section 1001(a)(3).⁷⁶

Finn argued that the form was incapable of influencing any decision that the government agency was required to make.⁷⁷ The court applied the *Kungys* definition and the *Gaudin* analysis,⁷⁸ and asked “what decision, if any [was] HUD . . . trying to make in connection with the case expenditure form at issue.”⁷⁹ The court found that Finn had been allocated authority to determine the propriety of expenditures, and so it would not be a reasonable inference for a fact finder to infer that HUD could or would have looked at the form in order to determine “the propriety of the underlying expense or for any other articulated purpose.”⁸⁰

Finn thus suggests that the *Gaudin* analysis rejects the objective analysis set forth in *United States v. McBane* and, instead, stands for the proposition that the statement made must be reasonably connected to the decision to be made.⁸¹ For example, if the F.B.I. were investigating a gun-running operation headed by John, and the F.B.I. asked John’s neighbor Jane, “To your knowledge, does John ever have guns in his apartment,” and Jane lies and says no, her lie (“John has no guns”) is reasonably connected to the decision to be made (“Do we investigate further

72. *Id.*

73. *Id.*

74. *Finn*, 375 F.3d at 1034-35.

75. *Id.* at 1036-37.

76. *Id.* at 1037. The defendant was charged under 1001(a)(3) because he submitted a false writing rather than making false oral statement. See 18 U.S.C. § 1001(a)(3) (finding an individual guilty if he uses a false writing or document).

77. *Finn*, 375 F.3d at 1038.

78. *Id.*

79. *Id.* at 1040.

80. *Id.*

81. *Id.*

whether John runs guns?"). If, however, the F.B.I. intends to test Jane's credibility, and, knowing that Jane frequents a local lesbian club, the agents ask Jane, "Are you gay," Jane's lie that she is not gay is not material. This is so because the statement made ("I'm not gay") is not reasonably connected to the ultimate decision to be made ("Do we investigate further whether John runs guns?").

The prosecutor, faced with F.B.I. agents who wanted to test Jane's credibility, will argue that the decision to be made was whether to continue interviewing Jane with the assumption that she would answer truthfully. Although the statement made had some connection to this decision to be made, it was not a reasonable connection because people may be expected to lie to a federal agent about their sexual orientation or proclivities. Based on *Gaudin*, then, the question does not focus on which agency receives the statement and which agency is ultimately potentially influenced. Rather, the focus is on whether the statement made is reasonably connected to the decision to be made, by whichever government agency.

(5) *There was government agency jurisdiction.* This element is quite settled by now. In the past, courts have limited jurisdiction to only certain government agencies,⁸² but in the 1996 amendment to section 1001(a)(2), Congress did away with that limitation by prohibiting false statements "in any matter within the jurisdiction of the executive, legislative or judicial branch of the Government of the United States."⁸³ Now, section 1001(a)(2)'s jurisdiction covers a false statement to any of the three branches of government.⁸⁴

The evolution of these five elements has brought section 1001(a)(2) to its current state. The law now covers any false statement of whatever kind, made knowingly and willfully, that is capable of influencing any government agent. The maker of the false statement need not intend to deceive, and need not even know that his statement will be received by a government agent. Moreover, a government agent need never receive the statement for it to be covered under section 1001(a)(2). The law therefore has been called "broad,"⁸⁵ malleable,⁸⁶ "the flubber of all laws,"⁸⁷

82. See *Hubbard v. United States*, 514 U.S. 695, 715 (1995) (overruling *United States v. Bramblett*, 348 U.S. 503 (1955), and holding that a federal court is not an agency or department for section 1001(a)(2) purposes); *Friedman v. United States*, 374 F.2d 363, 365-66 (8th Cir. 1967) (stating that the F.B.I.'s jurisdiction to investigate crimes is not the jurisdiction envisioned under section 1001(a)(2)).

83. *United States v. Butler*, 351 F. Supp. 2d 121, 129 (S.D.N.Y. 2004) (quoting 18 U.S.C. § 1001(a)).

84. *Perry & Salek*, *supra* note 7, at 474.

85. *Id.* at 467.

86. Todd S. Kurihara & Kenneth T. Whang, *False Statements and False Claims*, 44 AM. CRIM. L. REV. 491, 493 (2007).

“notorious,”⁸⁸ and a felony generator.⁸⁹ Section 1001(a)(2) has not always been so broad, or so controversial. For much of its history, the law has narrowly addressed specific governmental needs. Only in the last fifty years has it developed into a catch-all statute.

III. HISTORY OF SECTION 1001(A)(2)

A number of articles and legal opinions have recounted the history of section 1001(a)(2).⁹⁰ Justice Ginsburg provided an excellent summary in her *Brogan* concurrence.⁹¹ There are three key themes in the statute’s history: (1) section 1001(a)(2) as a narrow, focused law vs. section 1001(a)(2) as a broad catch-all; (2) section 1001(a)(2)’s vagueness; (3) and the intended purpose of the statute.

The law that would become section 1001(a)(2) was passed on March 2, 1863,⁹² and arose during the Civil War to protect the federal government from a “spate of frauds” submitted by military con artists scamming the United States War Department.⁹³ It was intended to punish fraud perpetrated on the federal government,⁹⁴ and so made it criminal to “present . . . for payment . . . any claim upon or against the Government of the United States.”⁹⁵ The law prohibited the making of false statements “for the purpose of obtaining . . . the approval or payment of” a claim.⁹⁶ The original law, therefore, apparently required prosecutors to prove that a defendant, by his false statement, intended to (1) defraud the government and (2) thereby obtain financial benefit through his fraudulent war benefits claim. The prohibition of the statute was broad,⁹⁷ but it was limited to statements related to filing claims with the government.⁹⁸ The Supreme Court has issued contradictory interpretations of this statute. In *Bramblett*, the Court held that the law’s application was limited to military

87. Heinrich, *supra* note 2, at 1315.

88. *Id.*

89. *Brogan*, 522 U.S. at 409 (Ginsburg, J., concurring).

90. *Id.* at 412-14 (Ginsburg, J., concurring); *Hubbard v. United States*, 514 U.S. 695, 704-08 (1995); *Yermian*, 468 U.S. at 76; *Bramblett*, 348 U.S. at 504-08; *United States v. Gilliland*, 312 U.S. 86, 92-95 (1941); *United States v. Stoffey*, 279 F.2d 924, 927-28 (7th Cir. 1960); *Green*, *supra* note 3, at 191-93; *Morgan*, *supra* note 2, at 199-214; *Bak-Boychuk*, *supra* note 2, at 456-58; *Gomez*, *supra* note 2, at 518-20.

91. *Brogan*, 522 U.S. at 410-11 (Ginsburg, J., concurring).

92. *Bramblett*, 348 U.S. at 504.

93. *Bak-Boychuk*, *supra* note 2, at 456-57.

94. *Id.* at 457.

95. *Hubbard*, 514 U.S. at 704.

96. *Id.* at 705; *Bramblett*, 348 U.S. at 505.

97. *Bramblett*, 348 U.S. at 505.

98. *Brogan*, 522 U.S. at 412 (Ginsburg, J., concurring).

personnel,⁹⁹ but in *Hubbard*, the Court said that *Bramblett's* analysis was wrong, and that the law covered acts by all people, not just military personnel.¹⁰⁰ At least one commentator has supported *Bramblett's* interpretation.¹⁰¹ Whatever the correct analysis was, in 1874 the law was extended to cover "every person," not merely military personnel.¹⁰²

Other than the 1874 amendment, the law remained essentially unchanged until 1918.¹⁰³ In that year, Congress amended the statute to cover false statements made "for the purpose of and with the intent of cheating and swindling or defrauding the Government,"¹⁰⁴ not just "if made for the purpose of obtaining payment of a false claim."¹⁰⁵ Although the addition of the term "cheating and swindling" might have indicated an intention to criminalize false statements for non-pecuniary purposes, in 1926 the Supreme Court held in *United States v. Cohn* that the law was limited to "cheating the government out of property or money."¹⁰⁶ In addition, the *Cohn* Court held that to be criminally liable, a person must have intended to cause the "pecuniary or property loss."¹⁰⁷ In 1995, the *Hubbard* Court opined that while the scope of the 1918 amended language may have been unclear, the *purpose* was again to protect the government, this time from false statements made by successful corporations post-World War I, trying to garner federal benefits.¹⁰⁸

As the country moved into the 1930s and saw the advent of numerous New Deal programs and agencies, it became clear that the 1918 law's "restrictive scope" as interpreted in *Cohn* did not cover many of these New Deal programs.¹⁰⁹ On the contrary, government interests were crippled despite the fact that the government was not "deprived of any property or money."¹¹⁰

Up to 1934, the law prohibited false statements that were made with the purpose of fraudulently obtaining monetary claims against the government.¹¹¹ The two limiting elements in this

99. *Bramblett*, 348 U.S. at 505.

100. *Hubbard*, 514 U.S. at 704.

101. See Bak-Boychuk, *supra* note 2, at 457 (stating that the original section 1001 statute in practice applied only to military personnel).

102. *Yermian*, 468 U.S. at 70 n.8; *Bramblett*, 348 U.S. at 506 n.2.

103. *Hubbard*, 514 U.S. at 705.

104. *Brogan*, 522 U.S. at 412 (Ginsburg, J., concurring); *Yermian*, 468 U.S. at 70; *Hubbard*, 514 U.S. at 705.

105. *Bramblett*, 348 U.S. at 506 n.2.

106. *United States v. Cohn*, 270 U.S. 339, 346 (1926); *Gilliland*, 312 U.S. at 92.

107. *Cohn*, 270 U.S. at 346-47; *Yermian*, 468 U.S. at 70.

108. *Hubbard*, 514 U.S. at 706 (emphasis added).

109. Gomez, *supra* note 2, at 519.

110. *Id.*

111. *Gilliland*, 312 U.S. at 92; Gomez, *supra* note 2, at 519.

construction—that the defendant had to intend to deceive and defraud the government, and that the purpose of the false statement had to be to obtain a financial benefit—would prove contentious.

However, Secretary of the Interior Harold Ickes presented a draft bill to Congress that would have criminalized “the presentation of a false written instrument relating to any matter within the jurisdiction of the Secretary of the Interior, Administrator of the Federal Emergency Administration of Public Works, or Administrator of the Code of Fair Competition for the Petroleum Industry.”¹¹² The House Judiciary Committee added language that required that the government prove a specific intent to defraud.¹¹³ For this reason, President Roosevelt vetoed the bill.¹¹⁴

Ickes sent Congress another draft that protected all government agencies and did not require the government to prove specific intent to defraud.¹¹⁵ The law then covered statements made in “any matter within the jurisdiction of any department or agency of the United States.”¹¹⁶ The specific intent element then required the government to prove that the defendant had specific intent to make a fraudulent or false statement.¹¹⁷ This bill was signed into law and effectively created the statute known today as section 1001(a)(2).¹¹⁸

The current law rejects the *Cohn* interpretation, instead suggesting a “conscious choice” to expand the scope beyond statements made with specific intent to defraud the government.¹¹⁹ Like the 1918 iteration, the 1934 version of the law garnered criticism for its vagaries. The *Hubbard* Court found that the new law could be interpreted in two different ways: (1) as including new limitations, so that the statute only applied to agencies of the Executive Branch (thus creating an essentially new statute) or (2) as eliminating the “financial fraud requirement” but nonetheless maintaining the breadth of the statute.¹²⁰ The Court rejected the second interpretation despite lacking legislative history that would indicate congressional intent to narrow the scope of the statute.¹²¹

112. Morgan, *supra* note 2, at 202.

113. *Id.* at 205.

114. Yermian, 468 U.S. at 72; Morgan, *supra* note 2, at 205.

115. Morgan, *supra* note 2, at 205.

116. Brogan, 522 U.S. at 413 (Ginsburg, J., concurring); Bak-Boychuk, *supra* note 2, at 457.

117. Yermian, 468 U.S. at 72.

118. Hubbard, 514 U.S. at 706.

119. Yermian, 468 U.S. at 71.

120. Hubbard, 514 U.S. at 706.

121. *Id.*

Justice Rehnquist, in his dissent in *Yermian*, challenged the statute's clarity as to the required intent, arguing that it would be unlikely that Congress intended to drastically alter the scope of the statute, especially given the lack of legislative history supporting that proposition.¹²²

The final significant event in the legislative life of section 1001(a)(2) took place in 1948, when the law was divided into two separate sections.¹²³ One section prohibited false claims, and the other prohibited false statements.¹²⁴ This amendment put the statute into its modern form,¹²⁵ except for the materiality element which was added in 1996.¹²⁶ Still, vagaries remain. The majority of the *Brogan* Court held that section 1001(a)(2) makes punishable "any" false statement "of whatever kind."¹²⁷ In her concurrence, Justice Ginsburg had a different take. She wrote that the history of section 1001(a)(2) demonstrates that the purpose was to protect the government from affirmative fraudulent actions and from being a "victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities and functions."¹²⁸

The history of section 1001(a)(2) suggests the struggles that Congress and the Court have had in formulating an effective, intelligent, and clear law. With every iteration, Congress had intended to create a law to address a specific problem confronting the government, from con artists in the Civil War to those who attempted to shirk their duties under New Deal regulations. Perhaps because of the inherent difficulty in regulating lying in a limited yet effective way, Congress passed laws that were at turns too broad and too limited. The laws passed were open to interpretation, and the Supreme Court has wrestled with their great breadth over the course of the statute's life. Congress has attempted to address the law's vagaries, to little success. The final attempt to clarify the law came in 1996, when Congress amended the law to include the element of materiality. The definition of materiality, however, is so broad and vague that it provides no guidance or limitation. The law today is such that almost any false statement may be actionable under section 1001(a)(2). Even statements that never reach a federal agent may be criminal. Can

122. *Yermian*, 468 U.S. at 82 (Rehnquist, J., dissenting).

123. *Morgan*, *supra* note 2, at 208.

124. *Brogan*, 522 U.S. at 413 (Ginsburg, J., concurring).

125. *See Bramblett*, 348 U.S. at 508 (noting that the 1948 amendment put section 1001(a)(2) in present form).

126. *See generally* Pub. L. 104-292, § 2 (1996).

127. *Brogan*, 522 U.S. at 400.

128. *Id.* at 413 (Ginsburg, J., concurring) (quoting *Paternostro*, 311 F.2d at 302).

this be what Congress intended? By its inclusion of a materiality element, it is clear that Congress intended that some false statements be prohibited, and some not be prohibited. Can the legislative history help discern the line between criminal and non-criminal false statements?

IV. LEGISLATIVE HISTORY AND CONGRESSIONAL INTENT

In enacting section 1001(a)(2) and its precursors, Congress must have intended to limit its coverage to some lies only. This is the reason that Congress requires a false statement to be material if it is to be punishable. Given the all-encompassing definition of materiality, however, section 1001(a)(2) is limitless because it covers virtually any lie. This literal interpretation cannot be what Congress intended.¹²⁹ How, then, did Congress intend to limit section 1001(a)(2)?

One uncontroversial yet vague suggestion of intent is that Congress enacted section 1001(a)(2) with the goal of protecting the government from individuals who would “mislead it in the administration of its programs.”¹³⁰ Put another way, Congress intended that section 1001(a)(2) “protect the authorized functions of governmental departments and agencies from the perversion which might result from . . . deceptive practices,” such as making false statements.¹³¹ Questions inevitably arise: what are the “authorized functions” of an agency? What is “perversion”? For example, is the F.B.I.’s authorized function to investigate and detect crimes,¹³² determine the truth or falsity of claims,¹³³ or, more specifically, to investigate kidnappings and plots against the

129. See *United States v. Goldfine*, 538 F.2d 815, 824 (9th Cir. 1976) (Ferguson, J., dissenting) (deducing that a literal interpretation of section 1001(a)(2) is inappropriate); *Bedore*, 455 F.2d at 1110-11 (noting Congress intended section 1001(a)(2) to only cover fraudulent claims against the government and claims that interfere with authorized governmental functions); *Friedman*, 374 F.2d at 366-67 (agreeing that the jurisdiction of section 1001(a)(2) did not extend to F.B.I. investigations). *Contra* John Poggioli, Note, *Judicial Reluctance to Enforce the Federal False Statements Statute in Investigatory Situations*, 51 *FORDHAM L. REV.* 515, 524-525 (1982) (arguing that based on Supreme Court interpretation and statutory language, Congress did not intend to limit the application of section 1001(a)(2)).

130. *Corsino*, 812 F.2d at 29.

131. *United States v. Lambert*, 470 F.2d 354, 359 (5th Cir. 1973) (quoting *Gilliland*, 312 U.S. at 93).

132. See *Friedman*, 374 F.2d at 366 (examining the scope of section 1001 by looking at the F.B.I.’s investigatory function); *Davey*, 155 F. Supp. at 178 (stating that the F.B.I.’s authorized function was to conduct investigations and detect crimes).

133. See *Lambert*, 470 F.2d at 359 n.4 (concluding that it is the F.B.I.’s primary function to determine the truth or falsity of a complaint).

president?¹³⁴ If it is to investigate and detect crimes, it may not be a perversion of the F.B.I.'s function to make a false statement because part of the F.B.I.'s job in investigating and detecting crime is to evaluate the credibility of reports. If it is to determine the truth and falsity of claims, then a statement that is false should not pervert that function because the F.B.I.'s function depends on the existence of false claims from which the F.B.I. can separate the true ones. If it is to investigate a kidnapping, then a false report of a kidnapping may pervert the F.B.I.'s functions. The answers to these questions could, however, just as easily come out the other way. If one gives false information, the F.B.I. would be hampered in its goal of investigating and detecting crimes, as well as in determining truth and falsity. If a person files a false kidnapping report, the F.B.I.'s function may not be perverted because it is charged not only with investigating kidnappings, but also with determining whether a kidnapping actually occurred. The F.B.I.'s function would therefore include determining the truth or falsity of a kidnapping report. Based on the section 1001(a)(2) definition of materiality, whether a false statement perverts an authorized function of an agency is in the eye of the beholder.

What, then, can be said of Congress' intent? A review of the Congressional Record suggests that Congress intended section 1001(a)(2) to cover false statements made (1) with a view toward some financial benefit;¹³⁵ (2) by someone subject to government regulation;¹³⁶ (3) in documents required by law to be completed or certified to be true;¹³⁷ (4) in connection with a violation of some other law;¹³⁸ or (5) with specific intent to defraud.¹³⁹ Congress, it seems, intended section 1001(a)(2) to apply to individuals who have formal dealings with the government, in which they stand to gain or lose something of value based on their statements. Section 1001(a)(2) is also intended to apply when people have more ad hoc dealings with the government, for example when they have to submit a one-time form, such as a tax form. In such cases, Congress has expressed its intent to give fair warning that lying is

134. See *United States v. Rodgers*, 466 U.S. 475, 481 (1984) (noting that the F.B.I. has an authorized function to protect the president).

135. See 153 CONG. REC. S4912-02 (daily ed. Apr. 24, 2007) (reviewing regulations that subject participants in governmental spending program to section 1001 for falsifying application forms); 151 CONG. REC. H7043-01 (daily ed. July 28, 2005).

136. 152 CONG. REC. H3822-04 (daily ed. June 13, 2006).

137. 151 CONG. REC. H9077-01 (daily ed. Oct. 25, 2005); 145 CONG. REC. S4257-02 (daily ed. Apr. 27, 1999); 137 CONG. REC. S17044-02 (daily ed. Nov. 19, 1991).

138. 151 CONG. REC. H7043-01 (daily ed. July 28, 2005).

139. 150 CONG. REC. S9813-02 (daily ed. Sept. 28, 2004); 135 CONG. REC. H9253-01 (daily ed. Nov. 21, 1989).

a crime under section 1001(a)(2).

The problem with asserting this view of congressional intent is that it is at odds with section 1001(a)(2)'s very broad language. Congress may recognize that the statute can be literally applied in a way that goes far beyond its intent. It has, moreover, trusted the Department of Justice to be forbearing in its section 1001(a)(2) prosecutions. A congressional task force noted that internal DOJ policy mandates that a person be prosecuted under section 1001(a)(2) only if it is clear that the false statements were deliberately intended to "conceal improper or illegal conduct."¹⁴⁰ Therefore, charges should only be brought when it can be shown, beyond a reasonable doubt, that the statement was "made knowingly and willfully."¹⁴¹ The congressional task force therefore presumed that the DOJ would only pursue criminal violations in . . . "the most egregious cases" where the false statement was intended to hide an illegal act.¹⁴²

It is Congress' intent, therefore, to exclude "trifles" from section 1001(a)(2)'s coverage.¹⁴³ Also Congress certainly does not intend section 1001(a)(2) to be a crime manufacturer¹⁴⁴ or a "gotcha" statute. Justice Ginsburg best summarized Congress' intent when she wrote that section 1001(a)(2) is intended to capture those individuals who take the initiative in attempts to harm the government.¹⁴⁵ Congress could not have intended to grant the Executive branch such broad powers "so that even "unsworn statements to investigative officials" could be criminal.¹⁴⁶ Unfortunately, the Supreme Court can interpret the literal text of a statute more broadly than Congress intended it.¹⁴⁷ The Court has done just this with section 1001(a)(2), thereby making a statute of extensive breadth and vagueness and raising serious constitutionality questions.

V. VAGUENESS AND OVERBREADTH

A statute is void for vagueness when it forbids certain actions

140. 135 CONG. REC. H9253-01 (daily ed. Nov. 21, 1989).

141. *Id.*

142. *Id.*

143. See *Corsino*, 812 F.2d at 30 (noting that courts exclude trifle claims under section 1001 by requiring a materiality element to each claim).

144. Gomez, *supra* note 2, at 550-51 (arguing that it was not Congress' intent to allow section 1001 to create criminal offenses from innocent conduct).

145. *Brogan*, 522 U.S. at 413 (Ginsburg, J., concurring); see also *Goldfine*, 538 F.2d at 827 (Ferguson, J., dissenting) (acknowledging that section 1001 requires a willful intent to falsely influence the mind of a governmental body).

146. *Friedman*, 374 F.2d at 366-67.

147. See *Brogan*, 522 U.S. at 419 (Stevens, J., dissenting) (explaining that a court can conclude the text of a statute to be applied more broadly than what Congress initially intended).

in terms so vague that people of common intelligence must necessarily guess at the statute's meaning and differ as to its application.¹⁴⁸ Essentially, a statute must put a "person of ordinary intelligence" on notice that it prohibits specific conduct.¹⁴⁹

In 1984, Justice Rehnquist complained that section 1001(a)(2) was "ambiguous" especially since its language and legislative history provided no substantial insight into Congress' intent.¹⁵⁰ Justice Rehnquist's complaint has been buttressed by the argument that the scope or interpretation of the statute has not been made clearer despite prosecutions, DOJ guidelines, legislative history and case law.¹⁵¹ The law was essentially "opened as to what deceptions in the years ahead will and will not be prohibited."¹⁵² The statutory addition in 1996 of the materiality element (which a number of circuit courts had already established) was intended to limit and define section 1001(a)(2). The broad and vague definition of materiality, however, did not allow this. As the law stands today, a wide range of false statements may be criminal. Consider the following situations.

Richard works for an aerospace defense company, for which he needs government security clearance. In his job application, he is asked whether he has ever taken any illegal drugs. He answers "No," even though once, in college, he tried marijuana. This job application and all the others submitted to the company are subject to random audits by government agents. A "yes" answer to the drug question could cause the agents to initiate an investigation or deny the applicant a security clearance. The government never performs an audit that includes Richard's application, so it never sees or relies on his false statement. This false statement, if discovered, could be criminal under section 1001(a)(2).¹⁵³

148. See generally *United States v. Lanier*, 520 U.S. 259, 266 (1997); *United States v. Culbert*, 435 U.S. 371, 374 (1978) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

149. *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

150. *Yermian*, 468 U.S. at 76-77 (Rehnquist, J., dissenting) (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)).

151. Morgan, *supra* note 2, at 187.

152. *Id.*

153. See *United States v. Wilkins*, 308 F. App'x 920, 926-27 (6th Cir. 2009) (stating that "the government was not required to show that the form itself went to HUD in order to establish that the false information on the form was material."); *Connolly*, 1993 WL 499819, at *1 (1st Cir. 1993) (concluding that false "statements can be material [and thus criminal] even if they were ignored, never relied upon, or never read by the agency."); *Corsino*, 812 F.2d at 31 ("[s]tatements may be material even if ignored and never read by the agency."); Daniel Engelberg, *False Statements*, 41 AM. CRIM. L. REV. 545, 552 (2004) (explaining that "[t]he agency need not have actually believed or even

Lindsay is hosting a summer block party. She is speaking with her neighbor Jim, who is an administrative assistant at the Social Security Administration. Jim knows that Lindsay's father qualifies for social security benefits and, knowing the father is destitute, believes he needs these benefits desperately. He asks Lindsay whether her father gets social security benefits. Lindsay responds, with dismissive boldness, that her father does not get benefits and is doing just fine without them. Something in the way Lindsay answered Jim's question makes him suspect that Lindsay or her father are engaging in fraud. In fact, Lindsay knows her father receives benefits, but she lies to Jim because her father is ashamed that he has to rely on the government for support. The next day at work, Jim informs his supervisor of his suspicions, and the administration initiates an investigation. The investigation concludes that Lindsay's father is receiving only the benefits he is entitled to. Lindsay's false statement may be criminal under section 1001(a)(2).¹⁵⁴

Jay runs numbers for a local mob crew. One of his regular customers is Janice. Unbeknownst to Jay, Janice was recently arrested by the F.B.I. for transporting women across state lines for the purpose of prostitution. To obtain a good disposition, she goes to work for the F.B.I. as a confidential informant against the local mob. Her first target is Jay. During their next meeting, Janice asks Jay who in the mob he normally deals with as a numbers runner. Jay reports to Hank but, not wanting to reveal anything about the crew, Jay lies and says he reports to Mike. Janice tells the F.B.I. this information. The agents begin to construct a hierarchy of the crew and place Mike and Hank in positions based on the false information Janice gave to them. Jay's false statement could be prohibited under section 1001(a)(2).¹⁵⁵

Andy is a good friend of Matt. The I.R.S. is investigating Matt for tax evasion. An I.R.S. agent is assigned to interview Andy to find out whether Matt owns any boats, airplanes, or real estate. In the course of his assignment, the agent learns that Andy frequents a certain bar where gay men tend to congregate and is, in fact, homosexual. The agent approaches Andy at his

received the false statement for the materiality requirement to be met.”).

154. *Yermian*, 468 U.S. at 81 (Rehnquist, J., dissenting) (noting that one interpretation of section 1001(a)(2) would “extend the scope of the statute even to reach, for example, false statements privately made to a neighbor if the neighbor then uses those statements in connection with his work for a federal agency.”).

155. *Id.* at 69-70 (finding section 1001(a)(2) does not require actual knowledge of federal agency jurisdiction); *Wright*, 988 F.2d at 1038 (stating false statements need not be made directly to federal agency to be within its jurisdiction); *Gibson*, 881 F.2d at 322 (holding there is no implicit requirement that statement be made directly to federal department or agency).

worksite and asks him a number of innocuous questions about Matt and other of Andy's acquaintances. Midway through the interview, the agent asks Andy if he is gay. Andy, not wanting to share the truth with the agent or his co-workers, who are nearby, lies. As a result of this false statement, the agent concludes that he cannot trust any other answers Andy gives and, therefore, stops the interview. This false statement may be prohibited under section 1001(a)(2).¹⁵⁶

The First Circuit has held that the statute is "a blanket proscription against" any false statement to a government agency in any context, whether or not the citizen is required to tell the truth . . ."¹⁵⁷ This cannot be what Congress intended. The addition of the materiality element alone suggests that Congress intended some false statements (those that are material) to be prohibited, and some (those that are not material) not to be prohibited. The history of section 1001(a)(2) and the Congressional Record provide a rough sketch of the border between the two types of false statements. Instead of mapping out this border, court opinions have erased it and have declared that virtually any false statement is prohibited. In the statute's current form, a person of ordinary intelligence does not have fair notice of which statements are forbidden and which are allowed. Section 1001(a)(2) is an exemplary vague statute.

Conversely, one could say that section 1001(a)(2) is crystal clear: it prohibits making false statements in a way that could influence a federal agency. Citizens should feel a moral obligation to tell government investigators the truth because "it is the right thing to do."¹⁵⁸ If section 1001(a)(2) is clear in this way, then it is also overbroad.¹⁵⁹ Courts have never held that overbreadth of a statute outside the First Amendment realm is grounds for the statute's invalidation.¹⁶⁰ The First Amendment does have some applicability here, however, if only as a jumping off point to discussing public policy, criminal law theory, and the role of lies in

156. See *Bryson v. United States*, 396 U.S. 64, 72 (1969) (noting that a defendant does not have a privilege to lie in response to a question that the government has illegally asked); Diane H. Mazur, *Sex and Lies: Rules of Ethics, Rules of Evidence, and Our Conflicted Views on the Significance of Honesty*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 679, 721 (2000) (asking "[s]hould some 'sexual lies' be characterized as assertions of privacy rather than as breaches of honesty?").

157. *Arcadipane*, 41 F.3d at 5.

158. Everhart, *supra* note 3, at 719.

159. Morgan, *supra* note 2, at 189 (exemplifying the broad scope of section 1001 by examining scenarios of intra-governmental deception).

160. *United States v. Wilkinson*, 626 F. Supp. 2d 184, 188 (D. Mass. 2009); *State v. Neuman*, 683 S.E.2d 268, 271 (2009).

the criminal justice system and society in general.¹⁶¹ The precise question though is whether it makes practical or theoretical sense to criminalize virtually all false statements made to the government.

VI. PUBLIC POLICY

Courts have clearly stated that public policy considerations are the province of the legislature,¹⁶² and that courts should not and cannot make rulings based on public policy. On the other hand, it is clear that public policy does play a role in judicial decisionmaking¹⁶³ and has been instrumental in the development of American common law.¹⁶⁴ Although judges cannot explicitly base their decisions on public policy, legal opinions and opinions about what is right for society (however that is defined, and by whomever) are intertwined.¹⁶⁵ If section 1001(a)(2) satisfies congressional intent and legislative history, and is constitutional and not vague, it is still an extremely broad statute. It needs, therefore, to be evaluated in ways that will reveal whether it is a wise statute.

This question can be answered by first summarizing the arguments for and against section 1001(a)(2). The next logical

161. Although it is beyond the scope of this Article, I suggest that section 1001(a)(2) shares a link to the First Amendment that other statutes do not share because section 1001(a)(2) prohibits lies which have, on occasion, been the subject of First Amendment protection. Bill Haltom, *The Constitutional Right to Lie*, 43-NOV TENN. B.J. 32 (2007); Lyrissa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091 (2008); Nyberg, *supra* note 26.

162. Kentucky Retirement Systems v. E.E.O.C., 128 S. Ct. 2361, 2378-79 (2008); Rapanos v. United States, 547 U.S. 715, 752-53 (2006); Bd. of Trs. of Univ. of Ala v. Garrett, 531 U.S. 356, 374 (2001); Illinois v. McArthur, 531 U.S. 326, 338-39 (2001) (Stevens, J., dissenting).

163. 14 Penn Plaza LLC v. Pyatt, 129 S. Ct. 1456, 1476 (2009); Pasquantino v. United States, 544 U.S. 349, 379 n.8 (2005).

164. Norfolk Southern Ry. Co. v. Sorrell, 549 U.S. 158, 178-79 (2007) (citing Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 352 (1928)); JOSHUA M. DUNN, COMPLEX JUSTICE: THE CASE OF *MISSOURI V. JENKINS* 183 (The University of North Carolina Press 2008); Michael Quinn, *Do (Or, May) Insurance Defense Lawyers Also Represent the Defending Insureds*, 797 PLI/LIT 85, 112 (2009); Robert A. Sedler, *The Constitution, the Courts and the Common Law*, 53 WAYNE L. REV. 153, 159 (2006); Jeffrey A. Gruen, Comment, *Unconstitutional Mixing of Religion and the Judiciary: An Analysis of the Fugitive State Surrender Program Under Establishment Clause Jurisprudence*, 38 SETON HALL L. REV. 1533, 1562 (2008).

165. Van De Camp v. Goldstein, 129 S. Ct. 855, 860 (2009); Baze v. Rees, 128 S. Ct. 1520, 1541-42 (2008) (Alito, J., concurring); CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951, 1965-66 (2008) (Thomas, J., dissenting); Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1531 (2007).

step is to discuss section 1001(a)(2) as it pertains to a particularly controversial field, that of statements made in the course of criminal investigations. Finally, Sissela Bok, a philosopher who has written a seminal text on lying, which is often quoted by legal commentators, is relevant to this discussion. These theories must be put into context of current public policy arguments. This dialogue of how section 1001(a)(2) affects one field of statement-making will aid in proposing a framework for understanding whether section 1001(a)(2) is a wise or unwise law.

Stephen Michael Everhart provides perhaps the most direct and simple support for section 1001(a)(2): “[c]itizens should tell government investigators the truth. It saves time. It saves money. And it is the right thing to do”¹⁶⁶ His support of section 1001(a)(2) seems to come from a moralistic standpoint—telling the truth is “the right thing to do.” In supporting section 1001(a)(2) as he does, he dismisses the complaint that most people are not aware of 1001(a)(2)’s prohibitions¹⁶⁷ and instead believes that the fear that section 1001(a)(2) will be used to punish trivial lying is already addressed by the Eighth Amendment’s prohibition against extreme punishment for minor conduct.¹⁶⁸

Stuart P. Green offers similar broad support for section 1001(a)(2) because the false statements it prohibits are those that promote “obviously harmful or risk-producing conduct, and . . . [are] uncontroversially subject to criminal sanctions.”¹⁶⁹ It seems to be common sense, however, that not all lies—even material ones—are harmful or risk producing, and as this Article shows, section 1001(a)(2)’s prohibitions are anything but uncontroversial.

Alexandra Bak-Boychuk, although critical of section 1001(a)(2) herself, notes that as section 1001(a)(2) has evolved, some “judges, lawyers, and academics have viewed it as . . . an innocuous and flexible tool for law enforcement”¹⁷⁰ Jeffrey L. God is one of these academics and supports section 1001(a)(2) because it “has become one of the most effective weapons in the arsenal of investigative techniques to insure the integrity of these federal investigations.”¹⁷¹

Those who support section 1001(a)(2), then, justify it on grounds of morality (telling the truth is the right thing to do), necessity (making false statements is dangerous), and expediency (section 1001(a)(2) helps law enforcement). Each of these supporting arguments can easily be dismantled.

166. Everhart, *supra* note 3, at 719.

167. *Id.* at 708.

168. *Id.* at 693.

169. Green, *supra* note 3, at 159.

170. Bak-Boychuk, *supra* note 2, at 478.

171. God, *supra* note 3, at 859.

As to morality, it is a platitude—however true—that telling the truth is a good thing. When considering making lying a crime, however, absolute moral truths must combine with realism and lenity to produce statutes that answer to norms of morality as well as the goal of the law to maximize both public safety and liberty. In other words, outlawing all lies told to whomever might address a moral imperative, but would wreak havoc on the type of society Americans tend to desire. The arguments against section 1001(a)(2), most of which are based on the belief that the law is overbroad, suggest why section 1001(a)(2) may go beyond the requirements of morality and threaten the type of society Americans want.

As to necessity, it is doubtful that making false statements is always, or even often, dangerous. False statements may slow down government agencies in their work, and at worst they may produce a level of fraud and financial loss. There has been no case, however, in which anyone was physically, mentally, or emotionally harmed because of a false statement made in violation of section 1001(a)(2). Given the harm (or lack thereof) that false statements can produce, we should ask what we are willing to pay for the elimination of that harm. A democratic and free society such as ours is slow and expensive precisely because it is democratic and free. We like the fact that in any number of situations, we are free to lie. The question should not be, therefore, whether all false statements are dangerous but what we (as society) are willing to give up in return for requiring, by law, a certain extent of truthful statements. As the law prohibits an increasing number of false statements, society will be required to pay more. Society will have to pay for more extensive police work, more cases in the judicial system, and more individuals incarcerated or on probation. And society will have to pay with its current intangible freedom to make false statements in a number of situations.

As to expediency, the same argument holds. Due to the belief that crime harms society, it is preferable to give law enforcement authorities all the tools necessary to adequately discover, investigate, and prevent crime. Physical, emotional, and financial harms are all properly the subject of criminal sanction. False statements made that induce these harms can also legitimately be punished. The question is not, however, whether to punish acts that contribute to these harms because society generally agrees that prevention of these harms is a proper goal of the criminal justice system. The question is how far outside this core goal of harm prevention do we want to go in criminalizing acts? For example, a false statement made merely to protect a friend may not ultimately be harmful. A false report of a kidnapping made to

the F.B.I., when the reporter really just wants the F.B.I. to find his estranged wife, may cause additional work, but probably is not "harmful" in the traditional sense. Truthful information helps government to be more efficient. And we want an efficient government, but not at an excessive cost. Furthermore, we place all sorts of limits on law enforcement as shown by limits on police officers in their ability to search places and speak to suspects. Does section 1001(a)(2) satisfy the limits we want to place on making false statements?

Justice Ginsburg suggested that section 1001(a)(2)'s incredible breadth "empowers government officers with authority ' . . . to generate felonies.'"¹⁷² It is viewed by many as a way to trap the defendant.¹⁷³ An officer can casually withdraw a false statement, and is then guaranteed of some type of conviction even if proving the underlying substantive crime fails.¹⁷⁴ Additionally, it may be "use[d] . . . to beef up a weak indictment."¹⁷⁵

Not only is section 1001(a)(2) criticized for reflecting an overcriminalized state, but also for contributing to that state.¹⁷⁶ The underlying problem leading to these criticisms is that section 1001(a)(2) is incredibly broad and tends to mean whatever the beholder wants it to mean.¹⁷⁷ This overbreadth invites abuse¹⁷⁸ and provides too much discretion to prosecutors.¹⁷⁹ Although the DOJ at one point signaled that it would undertake section 1001(a)(2) prosecutions only in aggravated cases,¹⁸⁰ there is little or no statutory limit to prosecuting only such cases. Thus, there is a legitimate concern that section 1001(a)(2) has come to be and will continue to be applied to situations that Congress did not intend. The most problematic aspect of section 1001(a)(2) today is its application to criminal investigations.¹⁸¹ Such an application may chill citizens' willingness to aid investigations,¹⁸² and it also may violate congressional intent.

As described above, Congress likely intended section 1001(a)(2) to apply to active, positive, and aggressive lies made to the government, at the statement-maker's initiation, in order to

172. *Brogan*, 522 U.S. at 409 (Ginsburg, J., concurring).

173. *Id.* at 409, n.1.

174. *Id.*

175. Safire, *supra* note 2.

176. Morgan, *supra* note 2, at 191.

177. Heinrich, *supra* note 2, at 1315.

178. Morgan, *supra* note 2, at 226.

179. Perry & Salek, *supra* note 7, at 467-68.

180. 135 CONG. REC. H9253-01 (daily ed. Nov. 21, 1989).

181. Birch, *supra* note 2, at 1273.

182. *Friedman*, 374 F.2d at 369; *Everhart*, *supra* note 3, at 692. *But see Lambert*, 470 F.2d at 360 (arguing that the individuals will not stop themselves from aiding in investigations).

obtain some benefit. The language of the statute can be read to apply to a greater range of false statements, and Congress has been content to let the DOJ decide how far to take section 1001(a)(2). There must be some limit, however, and section 1001(a)(2)'s application in criminal investigations is particularly relative.

A number of courts have questioned and rejected section 1001(a)(2)'s application in criminal investigations. They note first that courts historically have had difficulty in extending section 1001(a)(2) coverage to criminal investigations,¹⁸³ although they have done so on different grounds.¹⁸⁴ The basis for denying this extension is the statute's legislative history or congressional intent. The Ninth Circuit held that the legislative history of section 1001(a)(2) makes it clear that section 1001(a)(2) is not enacted in order to encompass all false statements; rather, only those that may corroborate a fraudulent claim against the Government or statements that could "pervert or corrupt the authorized functions of those agencies to whom the statements were made."¹⁸⁵ Other courts have seconded both the "claims" and the "perversion" arguments. In prefacing its use of both arguments to reject section 1001(a)(2)'s coverage of criminal investigations, the Eighth Circuit first railed against section 1001(a)(2)'s breadth, concluding that it would be unthinkable that Congress intended for unsworn false statements to government investigators to carry a more severe punishment than perjury.¹⁸⁶ Further, the Eighth Circuit cautioned that such a literal interpretation would give police officers "sweeping power."¹⁸⁷ If Congress intended such a result, then it could have used "clear, direct and positive terms."¹⁸⁸

The court went on to argue that the "total view of the case law" supported its position, and that a reading of cases indicates four categories of section 1001(a)(2) prosecutions: (1) giving of false information in order to receive monetary or proprietary benefit; (2) resisting of monetary claims by the government by presentation of false information; (3) seeking of some governmental privilege such as employment or security clearance on the basis of falsified information; and (4) giving false information which frustrates lawful regulation.¹⁸⁹

183. *Chevoor*, 526 F.2d at 183; *Friedman*, 374 F.2d at 369; *Ehrlichman*, 379 F. Supp. at 292.

184. *Ehrlichman*, 379 F. Supp. at 292.

185. *Bedore*, 455 F.2d at 1111.

186. *Friedman*, 374 F.2d at 366.

187. *Id.*

188. *Id.* at 367.

189. *Id.* at 368.

Other courts have relied on the perversion argument¹⁹⁰ or the notion that false statements made to the F.B.I. are not "statements" for the purpose of section 1001(a)(2).¹⁹¹ Although neither of these arguments sound very convincing on their surface (doesn't false information pervert the F.B.I.'s function of discovering the truth, and doesn't the word "statement" have an obvious meaning?), courts' rationales provide more traction. For example, courts have held that a statement made merely in response to government-initiated questioning is not a section 1001(a)(2) "statement."¹⁹²

Although most courts have been content to give section 1001(a)(2) a very broad interpretation that can easily extend its coverage to criminal investigations, there is a legitimate counterargument that should give courts pause. These cases admonish courts to carefully consider congressional intent and not merely apply the broad plain language of the statute. It is not an easy task because Congress has been unable to clarify the law, and courts are reluctant to create boundaries to broadly-worded laws, lest they take on a less judicial and more legislative role. To effect congressional intent, however, either Congress needs to clarify the law or courts need to continue to wrestle with the issue. They have been doing so since the early twentieth century. As a resolution to section 1001(a)(2)'s problems is not apparent, the twenty-first century should see more judicial action regarding section 1001(a)(2).

Among legal scholars who deal with the issue of lies in the law, Sissela Bok has provided the seminal text.¹⁹³ Her thoughts can illuminate the propriety of section 1001(a)(2) and suggest where we might want to draw the line between criminal and non-criminal lies.

Bok begins by defining a lie as "any intentionally deceptive message which is *stated*."¹⁹⁴ Easily enough said, and uncontroversial, but she notes that lying is a difficult concept to explore and evaluate¹⁹⁵ for a number of reasons. Lying, writes Bok, pervades every aspect of our lives, especially in the law.¹⁹⁶ Furthermore, lying is ethically acceptable in some cases.¹⁹⁷ Finally, she notes that sometimes an individual may want to lie in

190. *Davey*, 155 F. Supp. at 178; *Stark*, 131 F. Supp. at 205.

191. *Chevoor*, 526 F.2d at 184; *Stark*, 131 F. Supp. at 194.

192. *Chevoor*, 526 F.2d at 183-84; *Bedore*, 455 F.2d at 1111; *Ehrlichman*, 379 F. Supp. at 291-92; *Stark*, 131 F. Supp. at 193-94, 205-06.

193. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (Vintage Books 1999) (1978).

194. *Id.* at xxiii, 13 (emphasis in original).

195. *Id.* at xxviii, 119.

196. *Id.* at xxix, xxviii, 242.

197. *Id.* at xxx, xxxiii, 45.

order to gain power,¹⁹⁸ avoid betraying a friend,¹⁹⁹ prevent some action from occurring, get out of a scrape, save face, or avoid hurting another's feelings.²⁰⁰ What lies should be legally acceptable, and what lies should not?

Bok believes that in general, we should not lie.²⁰¹ Lies should be given an initial negative weight, and when in any situation a lie is a possible choice, one should first seek truthful alternatives.²⁰² Only when a lie is a last resort should one even consider whether or not the lie is justified.²⁰³ This is so because lies harm individuals immediately and harm society in the long run through the erosion of trust and cooperation.²⁰⁴ The question, therefore, is the difficult one of drawing the line between acceptable and unacceptable lies.²⁰⁵

Bok proposes a number of factors to consider in evaluating the propriety of a lie. The first is the consequences of the lie.²⁰⁶ The evaluation should also consider the excuses people make for their lies and the principles to which they refer when explaining why they lied.²⁰⁷ Bok mentions four principles for lying, which can also be considered excuses: the lie was made in order to (1) avoid harm; (2) produce a benefit; (3) ensure fairness; or (4) promote veracity (by, for example, telling one lie to undo another).²⁰⁸ Other factors that Bok would consider are the degree to which the deceived person was expecting to hear the truth; the rules by which people communicate (perhaps there has been an explicit allowance for deception or, on the contrary, deception was clearly ruled out); the relationship between the liar and the deceived; the existence of a contract between the parties; the power relationship between them; the awareness of the liar to alternatives to lying; and the ingenuity of the liar.²⁰⁹ Based on these factors, Bok's

198. *Id.* at 22-23.

199. *Id.* at 40.

200. *Id.* at 20.

201. *Id.* at 30-31.

202. *Id.*

203. *Id.* at 31.

204. *Id.* at 19, 24.

205. *Id.* at 46, 119.

206. *Id.* at 46.

207. *Id.* at 54.

208. *Id.* at 76, 84.

209. *Id.* at 87-88. Orson Welles' 1975 film *F for Fake* illustrates well these factors and their interaction with each other. Welles narrates this film and appears at its beginning. The film explores the border between truth and illusion and, more immediately, concerns the renowned art forger Elmyr de Hory and de Hory's biographer Clifford Irving, who also wrote a false biography of Howard Hughes. At the outset of the film, Welles promises the viewer that for one hour, he will be entirely truthful. His ability to tell a story so that the viewer is thoroughly enchanted makes us forget his promise. For

question is whether a practice of telling lies in some contexts may not be harmful.²¹⁰ While she approaches the question from an ethical standpoint, our question is whether we can adequately describe which lies should be criminal, and which lies should not be criminal.

Bok's factors suggest at least four considerations that should be made regarding section 1001(a)(2). First, should there be room to consider the mindset of the hearer of the lie? For example, should the lie be criminal if the hearer knows that it is a lie? Second, should the fact that lying is prevalent in both society and the criminal justice system play a role in reforming or evaluating section 1001(a)(2)? Third, should a defendant have excuses available as a defense? If so, what might acceptable excuses be? Finally, can we construct a continuum of lies and determine where on the continuum the border between criminal and non-criminal lies should be set?

(1) *Should there be room to consider the mindset of the hearer of the lie?* Current law holds that even if the government agent knows that the statement she hears is untrue, the statement maker may still be criminally liable. In addition, even if the agent never hears the lie, is not deceived, or does not rely on the statement, the statement-maker may still be liable. In these situations, the mindset of the government agent was such that the false statement had little or no adverse effect. These situations are akin to attempted crimes: one may attempt an assault, but not succeed. Section 1001(a)(2) is different, however, because one either makes the false statement or one does not; the actual consequence of the false statement is largely immaterial. One cannot, under current law, attempt to make a false statement and thereby be guilty of a crime. This is so because there is no requirement that the false statement actually deceive any agent or cause any harm. It is the making of the statement alone that makes one criminally liable.

Should this be the case? Should we expose people to criminal liability for a lie that does not produce any harm? A number of crimes of attempt do just that, and we tend to agree that, for example, attempted murder should be punishable as a crime. We agree with this because the consequences of the act, if carried to fruition, are so severe that we need to punish the mere attempt. There is no case law in which a section 1001(a)(2) violation came close to causing such harm. In fact, the harm that section 1001(a)(2) false statements have caused is a slight amount of

the entirety of the film (which lasts longer than one hour), we believe that the avuncular Welles is on our side and is therefore not deceiving us. *F FOR FAKE* (Speciality Films 1975).

210. 18 U.S.C. § 1001(a)(2).

government delay, at best, and an expenditure of a relatively small amount of assets, at worst. Thus, by punishing someone for a false statement when no government agent was deceived is more akin to punishing someone for attempted speeding, or attempted operation of a restaurant without the proper licensing. The attempt itself causes no harm, and the act, if brought to fruition, will most likely cause little or no harm.

In the case of the unlicensed restaurant owner, moreover, the harm would come not from having no license, but from serving rotten food and making patrons sick. This illuminates the criticism of many commentators that section 1001(a)(2) is used only when another underlying charge cannot be proven. If a department of health cannot prove that a restaurant served bad food, it may still nab the restaurant owner by proving that he had no license. In the restaurant industry, the penalty will be minor; in the world of section 1001(a)(2), however, a defendant could receive up to five years of incarceration,²¹¹ simply because the prosecution could not prove the underlying charge. Is this something we want to make criminal? Or, rather, should we consider the mindset of the hearer to determine whether the false statement actually caused any harm?

The restaurant example shows the importance of the government agent's mindset and suggests that it should be considered. If the agent knows a particular statement is a lie, for example, that lie should not be material (even though a number of courts have held otherwise). Such a lie is not capable of influencing the agent, so it causes no harm. In addition, criminalizing such a lie serves no purpose. It does not protect a government function, and it does not deter would-be liars because a liar can never know which of his lies are known to an agent and which are not. Excluding such lies from section 1001(a)(2)'s coverage may actually have benefits. It would narrow section 1001(a)(2)'s application, which would reduce systemic costs associated with criminal prosecutions and increase the criminal law's perceived legitimacy among the populace.

(2) *Should the fact that lying is prevalent in society, and especially in the criminal justice system, play a part in reforming or evaluating section 1001(a)(2)?* The simple answer may be that if you think lying to a government agent is wrong, then the fact that it is widespread should not be a factor to consider. If it is considered, does that mean that we allow the prevalence of wrong behavior in society to lessen the penalties associated with that behavior? In other words, if everyone does it, it cannot be wrong

211. A defendant may receive eight years if the false statement involves domestic or international terrorism. *Id.*

(or illegal). It is not, however, always the role of the criminal law to punish all wrong conduct since people disagree as to what constitutes wrong conduct. Because we live in a pluralistic society with competing notions of right and wrong, we cannot rely solely on the notion of moral condemnation in formulating the criminal law. We must also consider what structure of law maximizes society's safety, happiness, and efficient functioning. This is one reason that alcohol is not illegal, and that the speed limit for automobiles is x m.p.h., when a speed limit of *less-than- x* m.p.h. would reduce accidents, deaths, and pollution. The fact that lying is everywhere should play a part in evaluating section 1001(a)(2)'s propriety; lying does not become right because everyone does it, but it does become less subject to effective and fair policing. We lie in most situations to some degree; it has become a habit, reinforced by politicians who deceive,²¹² television sitcoms that celebrate the little white lie, and realpolitik shows like *24* that treat deception as an unsavory, but acceptable, means to a good end.

The fact that law enforcement officers and prosecutors routinely use lying in police work should provide a further basis to evaluate section 1001(a)(2). The law gives privileges to law enforcement officers: it provides for more serious penalties where the victim of an assault and battery is an officer, it allows officers to carry firearms, and it allows officers to stop citizens under certain circumstances, search them and occasionally detain them. We do not question these privileges because we acknowledge that they are necessary in order for officers to carry out their duties. When assaulting an officer, observing a firearm on the side of an officer, or being stopped, the officer's privilege and purpose are apparent. There is no deception involved; the rules of the game are clear. Lying, however, is different. When an officer lies, the purpose is to deceive a citizen, perhaps to elicit a confession, or go undercover with a false identity. By so doing, the rules of the interaction between the state and the citizen are changed in favor of the state, and the citizen is left unaware of the rules change. Why should the citizen be prohibited from using the same tactic that the state uses? We may allow law enforcement officials special privileges to carry out their duties, but these privileges are usually clear and well advertised. Everyone knows, for example, about Miranda warnings and search warrants. When government lies, government changes the rules of the game and, unbeknownst to citizens, tips the balance of power in its favor. Do we want a system that allows the government that level of power over

212. The State of Washington has even apparently given its politicians a First Amendment right to lie. Haltom, *supra* note 161.

citizens, without citizens having the right to return the favor?

We may, because perhaps we want to give law enforcement the additional privilege of lying to us, so that crime can be detected and prevented. To decide this, however, there needs to be an open debate. Presently, most people are not aware of section 1001(a)(2)'s prohibitions. Most people know from popular entertainment such as the television show *Law and Order* that cops lie; but they also know from the same entertainment that suspects and criminal defense attorneys also lie. On these shows, no one is ever charged with making a false statement, leaving the popular impression of the criminal justice system as a game in which lying by both the cat and mouse are accepted practices. If we as a society are to decide that section 1001(a)(2) is a good law, we need to know about it. Most of us do not.

(3) *Should a section 1001(a)(2) defendant have any excuses available for a defense? If so, what might these excuses be?* In discussing four principles in favor of lying, Bok suggests excuses as well.²¹³ First, she advances the principle of avoiding harm.²¹⁴ A possible excuse could therefore be that one made a false statement in order to avoid harm. This is problematic, however, because the harm to be avoided in making a false statement to a government agent will usually be avoiding an admission of guilt, liability for a claim, or some other harm that society generally thinks the liar deserves. If false statements are to be generally prohibited, such statements should not be excused if they are used, for example, to avoid a required payment of taxes or exposure for a crime she committed.²¹⁵

Bok then advances the principle of production of a benefit.²¹⁶ Again, if false statements are to be illegal, then lies told to gain a benefit should not be excused. This is so because if one has to lie to gain the benefit, one is virtually always not entitled to that benefit. Bok's third and fourth principles, those of ensuring fairness and promoting veracity, tie into her second principle and suggest that they are rarely, in reality, principles with traction.²¹⁷ Consider a person who is owed a benefit such as Social Security. He needs to produce medical documentation to prove his disability, but this documentation was destroyed in a hospital fire. He has a capability of forging this documentation. The question is not whether he should be allowed to do so, because this situation

213. BOK, *supra* note 193 at 76, 84.

214. *Id.* at 76.

215. This latter "excuse" was contained in the now-extinct "exculpatory no" doctrine, in which one's denial of guilt of a crime that she did in fact commit was not sanctionable under section 1001(a)(2). *Brogan*, 522 U.S. at 398.

216. BOK, *supra* note 193, at 76.

217. *Id.*

virtually never arises. Documents are lost, but there is almost always a way to petition the government for benefits owed in such cases. Furthermore, crafting a statutory excuse to cover such rare situations would be exceedingly difficult and would only contribute to section 1001(a)(2)'s vagueness and confusion. Finally, no opinion concerning section 1001(a)(2) prosecutions considers such false statements in the service of truth. All are meant to deceive and not to promote fairness or veracity. Nevertheless, the lies that are told in order to deceive occupy a continuum, from very serious and harmful lies to mild deceptions that cannot cause any harm. Bok's four principles and the factors she uses to evaluate lies suggest the types of statements that may be on this continuum.

As discussed, Congress clearly intended some lies ("material" ones) to be covered under section 1001(a)(2) and some lies not to be covered. Court interpretation of the statute, however, has gone beyond congressional intent, and now nearly every false statement may be actionable. Should this be so? It seems that there are six types of lies of varying seriousness. In order of most serious (and least justifiable) to least serious (and most justifiable), they are: (1) lies that harm another person or entity; (2) lies that benefit the liar; (3) lies that benefit another person or entity; (4) lies that avoid harm to the liar; (5) lies that harm the liar; and (6) lies that are designed to avert harm to another person or entity. Under current section 1001(a)(2) interpretation, all of these types of lies may be actionable. Based on some moral viewpoints as well as practical legal theory, at least some of these types of lies should not be criminalized.

If the role of criminal law is both to express and encourage societal norms as well as structure society to maximize its happiness, safety, and efficiency, then lies (2) through (5) should be celebrated, not criminalized. If a lie provides a benefit to anyone and/or reduces a harm for anyone, then it should initially be encouraged.²¹⁸ Of course, lies have collateral negative effects that often outweigh the immediate positive effects. For example, if Eric knows where a murderer is hiding, Eric can help him avoid the harm of incarceration by lying to the police. The murderer's harm is avoided by the lie, but society's harm is increased because it continues to live in fear, and another person may die at the murderer's hands.

Balancing the many and diffuse effects of lying is often exceedingly difficult, if not impossible, and so the use of this continuum in evaluating lies is limited. It can, however, be used to better effect in evaluating what lies should be criminal and what lies should not be. This is so because most criminal laws,

218. Sissela Bok and Emmanuel Kant would disagree.

especially those with such severe penalties as section 1001(a)(2) has, have a requisite *mens rea*. The specific intent currently required by section 1001(a)(2) is the knowing and willful making of a false statement. The liar's *purpose* in making that statement is irrelevant. The continuum of lies set forth above suggests that it should not be irrelevant. For example, consider a criminal investigation into whether Stacey intentionally provided tainted blood to a blood bank in order to harm the recipient of the blood. Investigators come to the home of Stacey's friend and ask the friend whether he is aware that Stacey has HIV/AIDS. The friend believes that this information is private, does not want to disclose this sensitive fact to anyone, and so tells the investigators—falsely—that his friend does not have HIV/AIDS. The friend is unaware that the investigators believe Stacey is guilty of intentionally providing tainted blood in order to harm a blood donee.

Stacey's friend knowingly and willfully made a false statement. His purpose in doing so was, in fact, to deceive, but it was to protect his friend from what he thought was intrusive and unjustified questioning. The friend intended to help Stacey avoid harm, and he was unaware that by doing so, he might increase any harm to society that would come with the failure to bring Stacey to justice. The friend's purpose in lying was not to allow or increase the level of harm to society. One can imagine a false statements act that differentiates false statements based on the statement-maker's purpose in lying.

This hypothetical situation suggests another way to evaluate lies, which would be to look at the nature of the question posed by the governmental agent. Is the question merely regulatory in nature ("How many tons of garbage did your company process last month?"), is it accusatory ("Where were you last night at 10 p.m."), is it personal ("Do you frequent any local gay bars?"), or is it possibly protected by privacy rights ("Do you have any diagnosed medical conditions?"). Although section 1001(a)(2) legitimately focuses on the effect of a lie on the government and not the nature of the lie itself, it should not necessarily do so. There are a number of situations in which the government is limited in achieving its legitimate goals in order to protect citizens' rights. Officers must have probable cause to obtain a search warrant and no confession is admissible if made in a custodial interrogation absent the giving of Miranda warnings.

The fact, moreover, that section 1001(a)(2) allows interviewees to either speak the truth or remain silent is often an illusory choice. If the government agent's question is "Do you have HIV/AIDS," or "Do you possess any illegal guns or drugs," an interviewee's silence will usually be taken as an admission. This

is especially so when the agent sets up the question by first asking a number of innocuous questions, to which the interviewee readily provides truthful answers. Silence in response to that last, crucial question then speaks volumes. Section 1001(a)(2) pretends that all lies are created equal. They are not; they vary in their nature and seriousness, and a law designed to treat them all the same is an unwise law.

Lying is a complex form of communication that is deeply embedded in every interaction in our society. It may not be considered lying, but rather “purposeful communication,” or it may be an intentional fabrication designed to obtain some benefit for oneself. Section 1001(a)(2) is a black-and-white law that attempts to deal with a multicolor phenomenon. As such, it fails more often than it passes the public policy test. It fares no better when viewed through the lens of criminal law theory.

VII. CRIMINAL LAW THEORY

Whatever the underlying bases for judicial opinions are, federal judges virtually never refer to criminal law theory in rendering decisions.²¹⁹ Legislatures and politicians, for their part, rarely apply criminal law theory, preferring instead a “tough on crime” approach designed to ensure re-election.²²⁰ Despite the apparent inapplicability of criminal law theory, a discussion of it is important for at least two reasons. First, criminal law theory can help us evaluate section 1001(a)(2) in light of what we believe is the right way to go about criminally accusing, trying, and punishing people. Second, theory does play a role in construction of the criminal law, even if theory is comprised only of the rationales for punishment and the requirement that a defendant be found guilty beyond a reasonable doubt.²²¹ This Article cannot hope to relate fully the vast, controversial, and often contradictory field of criminal law theory; the goal is just to touch on a few central themes and place section 1001(a)(2) within them.

Criminal law theory may encompass a technical discussion of detailed doctrines, more abstract notions of a general framework,

219. A WestLaw search for “criminal law theory” or “theory of criminal law” returned just eleven federal opinions. Only two of these opinions are of note for the purposes of this Article, and those two are notable only tangentially.

220. See Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 595 (2005); Stephen Reinhardt, *Weakening the Bill of Rights: A Victory for Terrorism*, 106 MICH. L. REV. 963, 965 (2008); Jeffrey S. Jacobi, Note, *Mostly Harmless: An Analysis of Post-AEDPA Federal Habeas Corpus Review of State Harmless Error Determinations*, 105 MICH. L. REV. 805, 812 n.49 (2007).

221. *United States v. Fox*, 473 F.2d 131, 134 (D.C. Cir. 1972); *United States v. Ekwunoh*, 813 F. Supp. 168, 177 (E.D.N.Y. 1993).

or a historical analysis of the development of the law.²²² It could consist of what the criminal law is, or what it should be.²²³ There may be no coherent theory of criminal law,²²⁴ or theory might intertwine with chance and multivalent interests to produce the law as we know it.²²⁵ What one's focus is, whether one is descriptive or idealistic, and the degree to which one believes in consistency or randomness depends largely on one's subjective reference point.²²⁶ This may be so because criminal law theory is a new area of study,²²⁷ and we have not yet had time to establish an objective theory of criminal law that is consistent and substantial. Where can we situate section 1001(a)(2) in this inchoate field of study?

This Article has discussed the history of section 1001(a)(2) and the details of its construction and application. It has determined what the law is as interpreted by courts and what it is supposed to be based on congressional intent and some other courts' interpretations. We ought now to pull back and attempt to place section 1001(a)(2) in a wider theoretical framework. In doing so, it is tempting to eschew the notion that there is no consistent criminal law theory, and that one can say little of the structure of criminal law.²²⁸ The possibility that there is no theory of criminal law, however, is where we must begin.

Justin Miller said in 1934 that the development of the criminal law was inconstant, "highly fortuitous," and "frankly one of blundering along from case to case and hoping gradually to achieve certainty."²²⁹ Alan Norrie has written more recently that the "criminal law is neither rational nor principled": we cannot even aspire to 'a rational and principled criminal law', because legal reasoning is 'necessarily contradictory.'²³⁰ Gerald Leonard wrote that "[i]n every period . . . the criminal law has been

222. Nicola Lacey, *Philosophy, History and Criminal Law Theory*, 1 BUFF. CRIM. L. REV. 295, 300 (1998).

223. R.A. Duff, *Theorizing Criminal Law: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 353, 354 (2005).

224. *Id.* at 357 (quoting ALAN NORRIE, CRIME, REASON AND HISTORY 7, 10 (2d ed.)); Justin Miller, *Criminal Law—An Agency for Social Control*, 43 YALE L.J. 691, 698, 702 (1934).

225. Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 735 (2003).

226. Lacey, *supra* note 222, at 303.

227. George P. Fletcher, *Criminal Theory in the Twentieth Century*, 2 THEORETICAL INQUIRIES L. 265, 266 (2001); George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 687, 689 (2000).

228. Lacey, *supra* note 222, at 322.

229. Miller, *supra* note 224, at 702.

230. Duff, *supra* note 223, at 357 (quoting ALAN NORRIE, CRIME, REASON AND HISTORY 7, 10 (2d ed.)).

multivalent, not defined or limited by any master principle but buffeted and manipulated by chance, by interest, by social needs, as well as by theory."²³¹ Jerome Hall believed that the practice of criminal law has driven the theory, such that theory is directed to make sense of every provision of law.²³²

Section 1001(a)(2) seems to fit well into this theory of criminal law. At its birth, section 1001(a)(2) was a law that was limited to protecting the government against a distinct and real threat to the financial well-being of the government. Fraudulent war benefits claims were a real problem, and Congress passed section 1001(a)(2)'s precursor to address this specific problem. There was no attempt to protect a large swath of federal agencies through the law. The New Deal brought with it countless new federal agencies, most of which regulated society in one way or another but were not involved with financial transactions. The law was amended to address this new reality. Again, the law was altered to address a real issue in society; it was driven by chance and need, not theory. As the twentieth century progressed, section 1001(a)(2) came to be interpreted more and more broadly. The latter half of the twentieth century saw the increased criminalization of society,²³³ and section 1001(a)(2)'s increasing breadth reflected that. We arrive at the twenty-first century, in which the federal prison population has increased over 700% in the last thirty years,²³⁴ and section 1001(a)(2), as interpreted, can conceivably cover virtually any false statement. Section 1001(a)(2) seems to be the embodiment of an atheoretical criminal law that depends not on theory but on changing political needs.

And yet, the American system of laws—criminal as well as civil—seems quite stable and consistent. Due process rights are well-established, convicted defendants have access to appeals and the right to an attorney, and the citizenry supports all three branches of government. Certainly, there is injustice in the system, but the system has proven to be remarkably adept at evolving and remaining powerful. Wouldn't such a system be based on a consistent theory, however unstated?

Although people disagree, it is generally accepted that the criminal law operates on both a moral and functional level. When it operates on a moral level, it morally condemns the criminal for her act, and it also communicates that condemnation to the

231. Leonard, *supra* note 225, at 735.

232. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 13 (The Lawbook Exchange, Ltd. 2d ed. 1960).

233. Bak-Boychuk, *supra* note 2, at 479.

234. Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 857 (2009).

public.²³⁵ When it operates on a functional level, it is an institution whose job it is to achieve some benefit for society. For example, it may operate to maximize the dominion of individual people,²³⁶ promote societal efficiency,²³⁷ support the individual's contract with the state,²³⁸ or address the public's need to prevent certain harms that touch society and individuals.²³⁹ A middle ground that covers both the moral and functional operations is the norms approach. The norms approach reflects the law's moral operation because it seeks both to publicize society's norms as well as enforce them.²⁴⁰ It is also a supposedly value-free approach that seeks to manipulate norms to reach certain behavioral goals in order to increase efficiency in society.²⁴¹

Section 1001(a)(2) seems to operate as a functional law because its goal is to promote the efficient and cost-effective running of the government: the victim of a section 1001(a)(2) violation is usually subjected to speedy and certain government action. As a functional law, does it work?

Does it operate to maximize the dominion of individual people? In other words, does section 1001(a)(2) work to increase people's liberty while not detracting from anyone else's liberty? Based on the court opinions that have considered section 1001(a)(2), the answer seems to be that it does not. At worst, it delayed or frustrated a governmental operation. Courts' interpretation of section 1001(a)(2) takes us further away from fulfilling this functional goal; if a false statement can be criminal even if there is no way the government would rely on it, there is absolutely no liberty interest at stake.

Does section 1001(a)(2) operate to promote societal efficiency? Perhaps. If we assume that governmental efficiency supports societal efficiency and that governmental efficiency is increased when it receives truthful information, then section 1001(a)(2) promotes governmental and societal efficiency. The efficiency argument, however, is the Posnerian economic theory of law. If we unpack this theory a bit, section 1001(a)(2) no longer fares so well. Posner writes that the main function of the criminal law "is to prevent people from bypassing the system of voluntary,

235. Richard Nobles & David Schiff, *Communicating Moral Responsibility Through Criminal Law*, 26 OXFORD J. LEGAL STUD. 207, 210, 212 (2006).

236. JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 54 (Oxford University Press 1990).

237. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1194-95 (1985).

238. Leonard, *supra* note 225, at 710-12.

239. *Id.* at 773-74.

240. Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 485 (2003).

241. *Id.* at 474.

compensated exchange—the ‘market,’ explicit or implicit—in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange.”²⁴² Posner categorizes crimes into “acquisitive crimes” and “crimes of passion,”²⁴³ and then offers five sub-categories: (1) wealth-shifting crimes, like tax evasion; (2) voluntary exchanges of value, like prostitution; (3) menacing but unsuccessful acts like attempted murder; (4) “conduct that if allowed would thwart other forms of common law or statutory regulation,” like bribing judges; and (5) blackmail and certain other forms of private law enforcement that are made criminal.²⁴⁴

False statements made in the course of committing another crime, or false statements intended to circumvent regulations fall into Posner’s category of crimes that would thwart other forms of common law or statutory regulation. For example, if a sewage treatment plant falsely reports its discharges into a local river to the EPA, as it is required to do, it will be able to run a cheaper company, with greater profits, because it bypasses an aspect of the market in sewage treatment. This would thus be an acquisitive crime. Many section 1001(a)(2) false statements, however, do not result and are not intended to result in any acquisition or circumvention of common law or regulation. Furthermore, because section 1001(a)(2) does not take into account the hearer’s mindset, it prohibits behavior beyond that which thwarts common law or regulation. This is so because section 1001(a)(2) prohibits a false statement even if the hearer knows it is false and thus does not rely on it, or even if the hearer never receives or could not rely on the statement. Such false statements cannot thwart any law or regulation. False statements, as Bok and others have noted, are complex things. People lie for all sorts of reasons, including altruistic reasons. A number of false statements mentioned throughout this article simply do not fit Posner’s model.

Does section 1001(a)(2) promote the individual’s contract with the state? For Blackstone, “society was a matter of contract among a mass of individuals who had chosen to leave the ‘state of nature’ in preference for collective living. . . .”²⁴⁵ However, when an individual removed himself from the state of nature, he essentially gave a legislating body the power to enact law to secure the development of ever complex property law.²⁴⁶

Thus, every person had “obligated her- or himself to the

242. Posner, *supra* note 237, at 1195.

243. *Id.* at 1196-97.

244. *Id.* at 1199-1200.

245. Leonard, *supra* note 225, at 710.

246. *Id.* at 711.

cultivation of a public character under positive law.”²⁴⁷ For Blackstone, there was “an imperative that one always attend to the public.”²⁴⁸

Section 1001(a)(2) is problematic under Blackstone’s formulation. First, a contract with the state implies bargained-for exchange of value. In exchange for the truth, what do citizens subject to section 1001(a)(2)’s prohibitions receive? They do not receive a requirement that the government tell the truth in return. This is especially so in the field of law enforcement. They are supposed to receive a more efficient government because that government operates on true information and not false statements. Certainly one’s “public character” would consist in part of playing a positive role in one’s government, either to support it or reform it. False statements should play no part in either of these endeavors. Perhaps, then, what one receives from the government through section 1001(a)(2) is encouragement—or coercion—to do the right thing and not lie to the government. Given the prevalence of lying in society today, this encouragement has been an apparent failure.

As it stands today, section 1001(a)(2) does not further the goal of supporting the government. It could be amended to promote this goal and reduce the likelihood of its abuse as a “gotcha” statute. For example, section 1001(a)(2) could require a warning to be given to all citizens who are questioned by government agents.²⁴⁹ This would inform people of the legal requirement either to tell the truth or remain silent. Government agents would then be more likely to receive the truth or nothing at all, and would thus be less likely to be duped by a citizen’s false statement. This would increase governmental efficiency and provide the collateral benefit of greater legitimacy to the government because of the increased transparency of the law. Section 1001(a)(2) is a good, but flawed, start, and can be amended to satisfy Blackstone’s formulation.

Does section 1001(a)(2) promote societal and individual safety? As noted above, no judicial opinion has been found in which a defendant’s false statement led to society or any individual being less safe. Certainly one can conceive of a foreign or domestic terrorist who slips through national security with the use of a well-executed false statement and who then is able to detonate a bomb that kills a number of people. It appears thus far, however, that where national security has thwarted such attempts, it has not relied on section 1001(a)(2) to do so. In such a

247. *Id.* at 712.

248. *Id.* at 719.

249. Birch, *supra* note 2, at 1288.

situation, furthermore, it is doubtful that the American public would be satisfied if the government had to rely on section 1001(a)(2) to punish the terrorist. The terrorist, finally, would probably not be deterred by the existence of section 1001(a)(2).

The discussion above calls into question the theoretical validity of section 1001(a)(2). It should not, however, be understood to condemn the law. Reasonable people will see in section 1001(a)(2) an important tool for prosecutors to ensure our interest in effective and efficient government. Whether this goal calls for the criminalization of false statements is another question. Some false statements amount to financial fraud on the government—theft, essentially—and are more like traditional crimes than, say, lying when the F.B.I. comes to your door asking about your best friend. Some conduct that section 1001(a)(2) prohibits should be criminal, and some should not. What, then, do we do with this law?

VIII. SOLUTIONS

Section 1001(a)(2) is problematic in part because it is intended to address an important governmental interest, but does so in a vague, overbroad way that does not respect citizens' interests in a reasonably limited criminal law with notice as to what that law is. There are possible solutions to this problem based on the theory that the criminal law ought to operate to maximize the safety, stability, and efficiency of society. Because section 1001(a)(2) has not been shown to increase or decrease the level of safety, we should consider its role in promoting stability and efficiency. First, a note on the meaning of "stability" and "efficiency."

The term "stability," means that the law should promote consistent, transparent, and predictable operation of society. Societies tend to work better when everyone knows the rules and knows that the rules in effect today will probably be in effect tomorrow. If the rules change, the imperative of transparency requires that people be notified of the change and given the opportunity to weigh in on it.

The term "efficiency" means that the law should promote the speedy and cost-effective operation of society while retaining an adequate level of protection or, in other words, due process. An efficient society does not spend money, resources, or time on procedures or institutions that do not provide some adequate benefit in return.²⁵⁰

250. This theory I propose does not include a place for moral condemnation. This is not to say that I do not believe that moral condemnation should play a part in the criminal law. Although I am more sympathetic to the notion of the

The most radical solution to the problem of section 1001(a)(2) is either for courts to reinterpret or Congress to amend section 1001(a)(2) such that it accords with congressional intent. This Article has focused in large part on determining what that intent is. It has also, however, suggested that such a revision will probably not be forthcoming, at least from the courts. If only because Congress has not acted yet, it is also doubtful that a legislative resolution is forthcoming. If it were to do so, however, it should focus on narrowing the definition of materiality, which is now extraordinarily loose.²⁵¹ Congress should do this because it added the materiality requirement in 1996 in order to limit the application of section 1001(a)(2) to only some false statements, only to see subsequent courts interpret the word to mean virtually any lie. The materiality standard is a good focal point because it can provide real limits to section 1001(a)(2)'s coverage in a way that retains the statute's legitimate prohibitions.

Congress could also limit the objective circumstances under which a section 1001(a)(2) prosecution could be brought.²⁵² Congress could require, for example, that only statements voluntarily and positively initiated by a defendant to a government agent be covered. This would exclude all statements made in response to interviews initiated by the government. This solution would prove to be quite difficult, however, because of the myriad factual situations in which one would make a false statement. For example, assume that the I.R.S. initiates an interview with a person, in order to perform an audit on his tax return. The person claims he is unemployed, when in fact he earns money under the table. This false statement, even though made in a government-initiated interview, seems to fall into the core category of false statements Congress intended to criminalize.

William J. Schwartz offers another legislative revision as a solution, one that would address only the criminal investigation context.²⁵³ His solution would be to distinguish false statements made during a criminal investigation from other false statements.²⁵⁴ This solution would likely protect only suspects, and not witnesses, because the revision would focus on the intent of the declarant, and would generally exclude exculpatory

criminal law as a maximizer of the social good rather than an expression of norms or morals, morality obviously plays a part in criminal law. Given, however, that section 1001(a)(2) seems intended solely to protect the operation of the government, I do not here discuss questions of morality. That topic is left for another day.

251. Morgan, *supra* note 2, at 234.

252. *Id.* at 235.

253. Schwartz, *supra* note 2, at 328-30.

254. *Id.* at 328.

responses because they are “protective and there is a clear potential for police abuse.”²⁵⁵ When the interviewee has been informed of the possibility of prosecution under section 1001(a)(2), section 1001(a)(2) should still cover any false statements he makes.²⁵⁶

Although drawing a distinction between statements made in the course of a criminal investigation and those made in other contexts is a good idea, Schwartz’ solution still reflects a superficial solution to a complex factual situation. For example, why exclude false statements by suspects and not witnesses? If someone lies in order to “protect” his friend, would that person be criminally liable? Furthermore, the line between a civil and criminal investigation can often be hard to discern. An I.R.S. audit is a civil procedure, but can easily evolve into a criminal investigation. For section 1001(a)(2) purposes, when would this evolution be deemed to happen?

Beyond a radical revision of section 1001(a)(2), the most immediate suggestion is to require federal agents to give citizens a warning before interviews regarding their duty to tell the truth or remain silent.²⁵⁷ One commentator has suggested, based on Justice Ginsburg’s *Brogan* concurrence, that a warning might actually be required to sustain a section 1001(a)(2) conviction.²⁵⁸ Whether legally necessary or not, a warning would have substantial benefits. First, it would further section 1001(a)(2)’s purpose to increase the amount of truthful information being given to the government. If someone being interviewed by a federal agent is considering the option of lying, a warning will alert her to her criminal liability should she choose to do so. She will be less likely to lie, and the government will be spared the burden of dealing with a false statement. She may, of course, remain silent, which the government should prefer to a false statement. By cutting down on false statements, furthermore, fewer defendants exist to clog up the judicial system. Warnings also increase the perceived fairness of the system by providing greater transparency. On the other hand, if warnings decrease the number of false statements, they also decrease the opportunity for federal agents to gain leverage over someone to become an informant or to obtain a section 1001(a)(2) conviction when they are unable to prove another, more substantial, offense. These, however, are not the goals of section 1001(a)(2), and so should not be considered.²⁵⁹

255. *Id.* at 329.

256. *Id.*

257. Birch, *supra* note 2, at 1288.

258. God, *supra* note 3, at 874.

259. Section 1001(a)(2) warnings might be compared to Miranda warnings. I

Finally, Congress could amend section 1001(a)(2) to provide for a recantation defense. At least one of the federal perjury statutes provides such a defense, albeit in very limited circumstances.²⁶⁰ Congress would have to clearly delineate when the defense applies. For example, the defense might apply if the defendant recanted and informed the proper governmental agency of his false statement and told the truth before the agency had an opportunity to rely on the statement. Alternately, the defendant might have to take these steps before the agency actually worked to its demonstrable detriment based on the original false statement. This solution, if properly worked out, would increase governmental efficiency by providing it with more truthful information, and would provide a way for citizens to repair their wrong behavior and thus avoid criminal liability. It would be a humane addition to the law that would also serve section 1001(a)(2)'s purpose in a well-run government.

IX. CONCLUSION

At its base, section 1001(a)(2) means well. Stephen Michael Everhart is generally correct: people should tell the truth because it does save the government time and money. People should also refrain from assault, rape, and murder because these things hurt other people. Everhart's admonition is, however, overly simplistic because lying is not like assault, rape, or murder. Lying comes in many shades, from those told for personal monetary gain to those told to prevent harm coming to a loved one. Everyone "lies." Some false statements are part of "purposive communication," in that to achieve certain goals of communication, literal deception must be used in the service of the truth. Lies usually do not produce the level of harm generally associated with the criminal law. Section 1001(a)(2) is more akin to a regulatory law than a criminal law. Thus, Everhart's admonition is parallel to a warning that "everyone should be completely honest on their tax forms," and if they claim \$6,000 in deductions when they actually only had \$3,000, they deserve up to five years in prison.

What, then, do we do with a law that means well, but also covers virtually every false statement made, however minor?

have written elsewhere that Miranda warnings do not work to truly inform suspects of their rights. Steven R. Morrison, *Toward a New Confessions Test: Replacing Voluntariness with Power*, 3 INT'L J. PUNISHMENT & SENT'G 85 (2007). If section 1001(a)(2) warnings were required to be given, it might emerge that people would make false statements at rates similar to those before warnings were required. Answering this is probably not possible at this point, and it is certainly not the subject of this Article.

260. Linda Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. TOL. L. REV. 397, 400, 422 (2003).

Section 1001(a)(2) seems to be void for vagueness, but courts have repeatedly upheld it and interpreted it ever more broadly over its history. Congress' attempts to limit it have been unsuccessful, and there seems to be no impetus to amend it. The law doesn't satisfy its analysis in light of public policy or criminal law theory.

What needs to be done probably will not be done. Congress ought to reevaluate section 1001(a)(2) with some assumptions in mind. The first assumption is that courts will interpret any false statements act broadly, so Congress ought to be very clear in any revision it makes. This clarity could come through explicit statements of intent in the Congressional Record. Second, lying is a many-colored thing. The statements that may be considered lies range widely in terms of seriousness, nature, and intent. Any revision of section 1001(a)(2) ought to acknowledge this. It should also acknowledge that deception is a part of our culture, especially our criminal justice culture, and is, in many contexts, a necessary function of communication. Third, the focus of any revision must be on what lies are to be covered, and what lies are not to be covered. Congress should look to the history of section 1001(a)(2) and its own legislative history to determine this. Congress should also examine the public policy ramifications of a revision. Finally, section 1001(a)(2) is a functional, not moral, law. It seeks to enhance the operation of government rather than morally condemn. Its great breadth, however, and the fact that it prohibits conduct that most of us consider at a gut-level to be morally wrong suggest that its passage and interpretation are based in part on moral ground. Although moral condemnation should not, as a rule, be excluded from the criminal law, a statute that is meant to promote the efficient functioning of government should not be tainted by moral considerations that are neither acknowledged nor well thought out. It is as though a criminal law prohibited all expulsion of harmful emissions from coal power plants because it is morally wrong to pollute.

The purpose of section 1001(a)(2) is to maximize the safety, stability, and efficiency of government and, by extension, society. At its base, section 1001(a)(2) has the potential to further these important goals. Its vagueness, overbreadth, misuse, and lack of its notice among the populace prevent the accomplishment of these goals. Congress should act to create a false statements law that ensures the government's interest in receiving truthful information but does not criminalize behavior that is widespread, often accepted, practiced by government law enforcement agents, and does not harm governmental operations in any way.