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IS VAGUENESS CHOKING THE WHITE-COLLAR STATUTE?

David Kwok[*]

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I. INTRODUCTION

Legislators and prosecutors often argue that broad, expansive white-collar statutes are necessary given the creativity and expertise of corporate offenders.[1] The Supreme Court, however, has often been unsympathetic as it has frequently raised concerns that federal white-collar statutes are overly broad and vague.[2] In *McDonnell v. United States*, for example, the Supreme Court overturned the criminal bribery conviction of a state governor who had accepted expensive cars in exchange for setting up a meeting.[3] The Court recognized both overbreadth and vagueness concerns.[4] It rejected the Government's broad interpretation of federal anti-bribery statutes, questioning whether Congress truly intended to punish a public official who received a free lunch in exchange for meeting with a constituent.[5] It also highlighted the "vagueness shoal" motivating its decision: the statute was not sufficiently precise to put public officials on fair notice about acceptable behavior.[6] While the statute was not so vague as to be unconstitutional, the Court believed that Congress did not speak

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[1] *See* Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 520 (2011) ("If one attempts to key one's definition of fraud to descriptions of behaviors, new behaviors will inevitably be invented, or will simply arise, that expose the definition as faulty and underinclusive."); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 409-12 (discussing the use of statutory vagueness to deter loopholing); Robert A. Prentice, *Stoneridge, Securities Fraud Litigation, and the Supreme Court*, 45 AM. BUS. L.J. 611, 676 (2008) (noting that courts and legislatures create broad fraud laws to encompass novel fraudulent conduct); Jack Talbot, *Liability for Unintentional Misrepresentation in Arkansas*, 49 ARK. L. REV. 525, 555 (1996) ("[A] loose definition is required because the law needs enough flexibility to encompass the variety of crooked enterprises designed by intentional fraud-feasors.").

[2] *See, e.g.,* Skilling v. United States, 561 U.S. 358, 408 (2010) (declining to broaden scope of honest services fraud because "[r]eading the statute to proscribe a wider range of offense conduct . . . would raise the due process concerns underlying the vagueness doctrine"); United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 408-09 (1999) (discussing the reluctance to adopt a broad interpretation of a statute governing the acceptance of gifts by a public official); McNally v. United States, 483 U.S. 350, 360 (1987) (expressing concern that federal anti-corruption doctrine leaves "its outer boundaries ambiguous").

[3] McDonnell v. United States, 136 S. Ct. 2355, 2367–68 (2016) (rejecting a broad interpretation of the term "official act" to include setting up a meeting).

[4] *See id.* (stating that constitutional concerns caused the Court to adopt a more narrow reading of the federal bribery statute).

[5] *See id.* at 2372 (questioning whether Congress intended to count a lunch as *quid* in a *quid pro quo* exchange).

[6] *Id*. at 2373 (citing *Skilling*, 561 U.S. at 402–03).

sufficiently clearly so as to prohibit such an exchange.[7] The Court narrowed the scope of federal bribery, holding that Congress did not prohibit payment of public officials for simple meetings.[8]

Overbreadth and vagueness, however, are not coextensive concerns. While closely related, overbreadth and vagueness address distinct interests. A narrowing decision addresses the overbreadth problem, and this is a victory for the immediate defendant. Proof of liability becomes more difficult. Not all parties similarly situated to the defendant, however, may appreciate a narrower scope of liability. In *McDonnell*, the governor was pleased to have his conviction overturned. For public officials in general, however, it is unclear whether they all would prefer a world in which they could accept expensive cars in exchange for setting up meetings.[9] Public officials who represent poorer districts might resent such a rule because they have few constituents who have the capacity to offer large payments. Other officials might personally find such payments immoral and dislike the idea that federal law does not criminalize those payments.

In contrast, there is a common interest in clarity; individuals and companies want to know precisely what activity might subject them to liability. Reduced breadth may be helpful to particular companies, but it is possible that some companies simply prefer a level playing field in which everyone understands the clear rules. It is likely that public officials widely benefit from the improved clarity of the *McDonnell* holding. They now know the bright-line rule. Thus to the extent they consider accepting any payment or gift in

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[7] *Id.* at 2375 (avoiding invalidating the statute by narrowing construing "official act" to avoid vagueness concerns).

[8] *Id*. at 2372 (noting that the vague statute would raise constitutional concerns by causing public officials to hesitate when responding to even "commonplace requests for assistance" and to citizens seeking to participate in our democratic process).

[9] *See, e.g.,* Brief of the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of Respondent at*2, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 1388255, at *2 (arguing that what the "democracy [petitioners] have in mind is not one that those who adopted the First Amendment would recognize"); Brief of Amicus Curiae Citizens for Responsibility and Ethics in Washington in Support of Respondent at *3, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 1445327, at *3 ("The scope of prohibited conduct does not impinge on an official's ability to engage properly with the public."); Brief of Amici Curiae Public Citizen, Inc., and Democracy 21 in Support of Respondent at *3, *McDonnell*, 136 S. Ct. 2355 (No. 15-474), 2016 WL 1445328, at *3 (arguing that politicians trading responsiveness for personal gain is not accepted).

exchange for a meeting, they can safely make the decision knowing that there is no threat of federal criminal liability.

The Supreme Court's narrowing decision in *McDonnell* is a frequent response to these vagueness and overbreadth concerns for white-collar statutes. The decision reduces the breadth of the prohibited behavior: elected officials may not accept bribes in exchange for official acts, but solely setting up a meeting does not constitute an official act.[10] This narrowing decision fortunately also reduces vagueness.[11] Elected officials have a bright-line rule, knowing that they can confidently accept payment in exchange for a meeting. Public officials can thus make decisions regarding accepting a payment or gift in exchange for a meeting with greater certainty regarding the consequences.

There are a variety of narrowing strategies that courts can apply, however, and not all narrowing strategies result in reduced vagueness. In this article, I explore the range of narrowing strategies and their impact on the vagueness shoal. Some strategies may increase vagueness because they introduce a complex or unclear element of analysis. Other strategies increase vagueness because they introduce an element that has an unclear relationship with other existing elements of analysis. Even if the new element is not vague, the interaction with existing elements may exacerbate vagueness. The unpredictable situation may lead both to greater vagueness and potentially broader liability. I highlight the Supreme Court's recent decision in *Universal Health Services, Inc. v. United States ex rel. Escobar* attempting to narrow the scope of civil liability under the False Claims Act as an example of a strategy that exacerbates vagueness both through the complexity of the new element and the relationship of the element to the existing analysis.[12]

The Supreme Court's general strategy of narrowing liability in the face of vagueness as to the scope of white-collar offenses has often been sound, but it is vital that the Court not lose sight of the

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[10] *See McDonnell*, 136 S. Ct. at 2368 ("[S]etting up a meeting . . . does not, standing alone, qualify as an official act." (internal quotation marks omitted)).

[11] *See id.* at 2375 (stating that the Court's interpretation of "official act" avoids vagueness concerns).

[12] *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2003 (2016) (stating that the False Claims Act is not a "vehicle for punishing garden-variety breaches of contract or regulatory violations").

broader interests in clarity. Failing to address the vagueness concerns hinders the ability of corporations to comply with the law. Furthermore, the vagueness problems may also hinder the dialectic with Congress in improving these laws. In Part II, I compare the principles of vagueness and overbreadth, particularly as they apply to white-collar statutes. In Part III, I consider the spectrum of narrowing strategies. Part IV evaluates the Supreme Court's decision in *Escobar*, and I conclude in Part V.

II. VAGUENESS AND OVERBREADTH IN WHITE-COLLAR STATUTES

A. VAGUENESS

Vagueness is the antithesis of clarity, and the "vagueness shoal" described by the Supreme Court encompasses a variety of doctrines and concerns.[13] The most immediate legal doctrine concerning vagueness is void-for-vagueness: a "statute must clearly define the conduct it proscribes."[14] Courts may refuse to enforce imprecise statutes based on principles related to the Due Process Clause.[15] Vagueness concerns do not necessarily require invalidation of a statute, though.[16] The rule of lenity reflects this same vagueness concern, requiring that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[17]

The main principle underlying vagueness is fair notice: a person is entitled to fair notice of what is prohibited.[18] It seems unfair that a person should be punished if the statute was insufficiently clear

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[13] *McDonnell*, 136 S. Ct. at 2373 (citing Skilling v. United States, 561 U.S. 358, 402–03 (2010)).

[14] *Skilling*, 561 U.S. at 415 (Scalia, J. concurring) (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

[15] *See* Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1140 (2016) (stating that vague statutes violate the Due Process Clause and that the Supreme Court has often invalidated such statutes).

[16] *See, e.g., McDonnell*, 136 S. Ct. at 2375 (determining that the federal bribery statute should not be invalidated but instead narrowed to mitigate the vagueness concerns).

[17] United States v. Bass, 404 U.S. 336, 347 (1971) (citing Rewis v. United States, 401 U.S. 808, 812 (1971)).

[18] *See* United States v. Williams, 553 U.S. 285, 304 (2008) ("[A] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited."); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (asserting that nobody should be required to speculate about the meaning of a statute).

about the proscribed behavior.[19] Another is the concern that a statute "is so standardless that it authorizes or encourages seriously discriminatory enforcement."[20] This second concern recognizes the risk of excessive discretion in the hands of law enforcement.[21] A third, potentially related, concern is that the vagueness may be an improper delegation of legislative power.[22]

Vagueness usually concerns the scope of prohibited conduct.[23] Vagueness issues may also arise regarding the scope of parties subject to the statute.[24] Vagueness may also encompass the severity of punishment; the public should also be on notice as to the potential sanctions facing such conduct.[25] Vagueness challenges have also been used in non-criminal contexts.[26]

We can see the Court's concern regarding vagueness in *Smith v. Goguen*.[27] In *Goguen*, a man was prosecuted for wearing jeans that contained a U.S. flag because he "did publicly treat contemptuously the flag of the United States."[28] The Supreme Court struck down the conviction on void for vagueness grounds.[29] It recognized that

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[19] *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (stating that vague laws are unfair because such laws "may trap the innocent" and allow for inequitable enforcement); *Bass*, 404 U.S. at 348 ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear." (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)).

[20] *Williams*, 553 U.S. at 304.

[21] *See* Kolender v. Lawson, 461 U.S. 352, 358 (1983) (discussing the expansive discretion that broadly drafted statutes provide to law enforcement).

[22] *See* Hessick, *supra* note 15, at 1143–44 (discussing cases where the Court found vague laws to cause delegation problems, and the relationship between delegation and discretion).

[23] *See* Skilling v. United States, 561 U.S. 358, 415 (2010) ("A criminal statute must clearly define the conduct it proscribes." (citing *Grayned*, 408 U.S. at 108)).

[24] *See* Lanzetta v. New Jersey, 306 U.S. 451, 454–55 (1939) (addressing prohibition of gang membership).

[25] *See* Johnson v. United States, 135 S. Ct. 2551, 2554 (2015) (holding that increased sentences under the Armed Career Criminal Act's residual clause are unconstitutional); United States v. Evans, 333 U.S. 483, 494–95 (1948) (upholding dismissal of an offense due to ambiguity in statutory punishment); *cf.* United States v. Batchelder, 442 U.S. 114, 121–22 (1979) (holding that the statutory scheme not void for vagueness even though different statutes with different penalties addressed same behavior).

[26] *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 491 (1982) (considering vagueness challenge against business license ordinance); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) (allowing vagueness challenge regardless of statute's penal or civil nature).

[27] 415 U.S. 566 (1974).

[28] *Id.* at 570.

[29] *Id.* at 567–68.

"casual treatment of the flag in many contexts has become a widespread contemporary phenomenon . . . . It and many other current, careless uses of the flag nevertheless constitute unceremonial treatment that many people may view as contemptuous."[30] Thus, the statute

> fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not. Due process requires that all 'be informed as to what the State commands or forbids,' and that 'men of common intelligence' not be forced to guess at the meaning of the criminal law.[31]

Some Supreme Court decisions have suggested that the standards for vagueness vary depending on circumstances.[32] For example, statutes governing military behavior may be subject to less stringent vagueness analysis in comparison with statutes governing civilian society.[33] The presence of criminal penalties, in comparison with civil sanctions, may also call for a higher standard of certainty.[34]

While the precise contours of the doctrine are debated,[35] the interests of defendants and society can be summarized through these "vagueness principles," which I label as clarity. Other synonyms would be predictability and certainty.[36] Potential defendants have an immediate interest in clearly understanding the limits of acceptable behavior and the attendant consequences. These consequences include both civil and criminal sanctions.

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[30] *Id.* at 574.

[31] *Id.* (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1938)).

[32] Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983) (noting that the standard for vagueness is higher where the law could touch a large amount of constitutionally protected conduct or imposes criminal penalties).

[33] *Id.* (citing Parker v. Levy, 417 U.S. 733, 756 (1974)).

[34] *See id.* (citing Winters v. New York, 333 U.S. 507, 515 (1948); Colautti v. Franklin, 439 U.S. 379, 394–401 (1979); *Lanzetta*, 306 U.S. at 458) (noting that the court has invalidated criminal statutes on their face even when they could have had valid applications).

[35] *See* Kahan, *supra* note 1, at 346 (describing lenity enforcement as "notoriously sporadic and unpredictable").

[36] *See* Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1, 4 (1993) (noting that individuals can plan their life in accordance with legal obligations if they are certain and predictable).

B. OVERLY BROAD STATUTES

Overbreadth is a concern related to vagueness.[37] The normative concern is that a particular statute prohibits too broad a swath of behavior.[38] I refer to this generally as the overbreadth problem.

A statute may be overly broad for various reasons. One version of this problem can be found in overbreadth doctrine; a statute may be too broad and thus improperly infringe on an individual's First Amendment rights.[39] For example, the Supreme Court overturned the Child Pornography Prevention Act of 1996 on overbreadth grounds, noting that the statute appeared to punish protected speech that may have literary or artistic value.[40] The First Amendment is not the only overbreadth concern, though. Others have argued that laws may be overly broad because enforcement of the law violates cost-benefit analysis.[41] Overbreadth concerns are also often raised under the overcriminalization umbrella.[42] As a general matter, the problem of overly broad statutes may relate to a variety of rights or interests.[43] Neither do I limit the overbreadth

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[37] *See* William Trosch, *The Third Generation of Loitering Laws Goes to Court: Do Laws that Criminalize "Loitering with the Intent to Sell Drugs" Pass Constitutional Muster?*, 71 N.C. L. REV. 513, 545 (1993) ("The vagueness doctrine, at least in part, is closely related to the overbreadth doctrine.").

[38] *See e.g.,* United States v. Williams, 553 U.S. 285, 292 (2008) ("According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.")

[39] *See generally* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

[40] *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 246 (2002) ("The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value.").

[41] *See* Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 AM. U. L. REV. 783, 785 (2005) (suggesting that "a law overcriminalizes when the costs of treating conduct as a crime exceed the benefits of the new criminal law").

[42] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (noting that criminal law's breadth is well documented); Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 745 (2014) (arguing that overcriminalization targets conduct that is morally blameless); Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17, 19–27 (1968) (discussing examples of improperly criminalized private morality such as adultery, prostitution, gambling, and narcotics).

[43] *See* Kadish, *supra* note 42 (noting a variety of interests that are overly criminalized).

problem to criminal matters; civil sanctions may similarly be overly broad in coverage.[44]

Because of the normative nature of an overbreadth argument, the strength of the countervailing interest is often weighed against the sanction.[45] For example, courts applying overbreadth doctrine focus on the importance of the speech at play.[46] Some forms of speech, such as obscenity, may not receive any value, and thus overbreadth has little bite.[47] Moving up the scale, commercial speech receives some protection, but perhaps less than noncommercial speech.[48] These interests are weighed against the sanction applied. Courts recognize that comparatively stronger sanctions require greater judicial scrutiny.[49]

C. COMPARING VAGUENESS AND OVERBREADTH

Overbreadth and vagueness are distinct but related concerns. A statute might be vague but not overly broad. A statute might be vague in that it does not sufficiently put defendants on fair notice, but it is possible that the entire range of potentially prohibited behavior is undesirable and worthy of the relevant sanction.

In *United States v. Williams*, the defendant raised both overbreadth and vagueness defenses against the criminalization of child pornography under 18 U.S.C. § 2252A.[50] The Court first analyzed whether 18 U.S.C. § 2252A was overly broad.[51] It rejected the idea that the statute covered mainstream Hollywood movies

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[44] *See, e.g.*, Joan H. Krause, Skilling *and the Pursuit of Healthcare Fraud*, 66 U. MIAMI L. REV. 363, 370–71 (2012) (discussing the broad scope of the Anti-Kickback Statute in healthcare which can be enforced through civil penalties and other administrative sanctions).

[45] *See, e.g.*, United States v. Williams, 553 U.S. 285, 292 (2008) ("On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech . . . . On the other hand, invalidating a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects.").

[46] *Id.*

[47] *See e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.").

[48] *See* Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983) (citing Vill. of Hoffman Estates v. Hoffman Estates, Inc., 455 U.S., 489, 499 (1948)) (noting that regulation of "business behavior" is subject to less scrutiny because the subject matter is narrower).

[49] *See id.* (citing Winters v. New York, 333 U.S. 507, 515 (1948) ("[W]here a statute imposes criminal penalties, the standard of certainty is higher.")).

[50] *Williams*, 553 U.S. at 288. The relevant statute is known as the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT).

[51] *Id.* at 292–304.

that portrayed simulated sexual activity.[52] It next analyzed whether the statute was void for vagueness under the Due Process Clause of the Fifth Amendment.[53] It concluded that the statute was not so vague as to require facial invalidation, as its requirements of *mens rea* were as clear as the requirement for the crimes of fraud, conspiracy, or solicitation.[54]

Similarly, the defendant in *Goguen* raised both vagueness and overbreadth concerns.[55] *Goguen* was decided on vagueness grounds and the Court's majority did not rule on the overbreadth argument.[56] Nonetheless, Justice White in concurrence and Justices Rehnquist and Blackmun in dissent discussed whether the defendant's behavior actually contained expressive value and was thus entitled to protection under the First Amendment.[57] It is possible that there was no First Amendment protection for the ability to sew the American Flag onto a pair of jeans, and thus the statute was not overbroad. Nonetheless, the statute must still be sufficiently clear to put people on notice as to what behavior constitutes a violation.

Conversely, an overly broad statute does not have to be vague. A statute may be clear and specific as to the actions it prohibits, but the statute may still impinge on important rights and actions. For example, a criminal statute might clearly prohibit any involvement with prostitution, but there may be a variety of normative reasons why prostitutes should not be subject to criminal prosecution.[58] Thus, an overly broad statute does not necessarily trigger the same fair notice concerns as a vague statute.

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[52] *Id.* at 301–02.

[53] *Id.* at 304–07.

[54] *Id.* at 306–07.

[55] Smith v. Goguen, 415 U.S. 566, 568 (1974).

[56] *Id.*

[57] *Id.* at 591–92 (Blackmun, J., concurring) (examining whether the penalty was actually for harming the structural integrity of the flag).

[58] *See, e.g.*, Kadish, *supra* note 42, at 19–27 (discussing examples of improperly criminalized private morality such as adultery, prostitution, gambling, and narcotics).

Figure 1: Overbreadth vs. Vagueness

	Not overbroad	Overbroad
Not vague	U.S. v. Williams (PROTECT)	Prostitution, Ashcroft v. Free Speech (CPPA)
Vague	Smith v. Goguen	McDonnell v. U.S.

While overbreadth and vagueness are conceptually distinct, courts recognize the close relationship between the principles and doctrines.[59] Courts often acknowledge both vagueness and overbreadth concerns in a statutory scheme.[60] The Supreme Court has applied relatively high levels of scrutiny for vagueness arguments in First Amendment cases, thus mirroring overbreadth doctrinal concerns.[61] The vagueness of a particular statute may result in an overly broad interpretation.[62] Similarly, a court may be concerned about an overly broad statute and frame its concern as vagueness, because it feels the boundaries of the statute should be clearer. Prosecutors may make an overly broad interpretation of the statute, and the threat of criminal sanctions may prevent defendants from taking action that Congress did not intend to prohibit.[63] Both overbreadth and vagueness can create the same opportunities for excessive discretion in law enforcement.[64]

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[59] *See* Kolender v. Lawson, 461 U.S. 352, 371 (1983) (White, J., dissenting) (criticizing majority as "confound[ing] vagueness and overbreadth").

[60] *See, e.g.,* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 491 (1982) (challenging an ordinance as "unconstitutionally vague and overbroad"); United States v. Williams, 553 U.S. 285, 288 (2008) (analyzing a statute for both overbreadth and vagueness concerns).

[61] *See, e.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963) (requiring a compelling state interest in order for a state to justify regulating "limited First Amendment freedoms"); 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.3 (3d ed.) (stating that "due process . . . require[s] that a criminal statute be declared void when it is so vague that 'men of common intelligence must necessarily guess at its meaning and differ as to its application'").

[62] *See* Jordan v. Pugh, 425 F. 3d 820, 828 (10th Cir. 2005) ("Overbreadth and vagueness may overlap when the challenged statute is so unclear in its scope that officials enforce it in an overbroad manner.").

[63] *See* Broadrick v. Oklahoma, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting) (recognizing that "overbreadth review is a necessary means of preventing a 'chilling effect' on protected expression").

[64] *See id.* at 613 (addressing overbreadth claims "where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries") (citing Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Cox v. Louisiana, 379 U.S. 536,

As Professor Hessick has noted, analysis of vagueness or overbreadth concerns should not be limited to a single statute.[65] Non-vague statutes may trigger the underlying problems of vagueness through overbreadth.[66] Clear statutes may have overlapping coverage, which creates uncertainty for individuals whose behavior is covered by multiple statutes with different penalty regimes.[67] Analyzing a single statute in isolation may not reveal overbreadth or vagueness problems, but courts should consider the entire statutory and enforcement scheme. A single statute may be clear and independently desirable, but the existence of other statutes covering the same behavior might render the first statute overly broad. A potential defendant thus also faces the underlying problem of vagueness; it is uncertain as to the relevant sanction given the overlapping statutory regime.[68]

Overbreadth and vagueness are thus tightly intertwined concepts. For this article's purposes, however, I emphasize the distinctions between overbreadth and vagueness. The lack of clarity in vagueness creates uncertainty and the potential lack of notice for defendants. Overbreadth instead is a normative concern that a statute ensnares too wide a variety of behavior, some of which may not merit the relevant statutory sanctions.

D. IMPORTANCE IN WHITE-COLLAR OFFENSES

The vagueness and overbreadth concerns have particular salience in the white-collar context. First, the enforcement regimes governing white-collar offenses tend to raise vagueness and overbreadth concerns. The expansive, interconnected state of criminal, civil, and administrative law governing corporate behavior raises many opportunities for overlapping and potentially

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553–558 (1965); Kunz v. New York, 340 U.S. 290 (1951); Lovell v. Griffin, 303 U.S. 444 (1938)).

[65] *See* Hessick, *supra* note 15, at 1145–51 (noting that as criminal codes have expanded, vagueness concerns have increased).

[66] *See id* ("[T]he enforcement of non-vague laws can result in a lack of notice, lead to arbitrary and discriminatory enforcement, and represent an unwarranted delegation.").

[67] *See id.* at 1147 (describing how the expansion of criminal codes has resulted in statutes that overlap with existing crimes).

[68] *See id.* at 1147–49 (describing how the newly enacted criminal codes give different sanctions for the same conduct, which results in broad prosecutorial discretion when deciding between different punishments).

conflicting sanctions.[69] Legislators and prosecutors often argue that broad, vague statutes are necessary given the creativity and expertise of white-collar offenders.[70] Second, the presence of sophisticated corporate entities highlights the importance of resolving the vagueness concerns in contrast with overbreadth concerns.[71]

1. Prevalence of vagueness and overbreadth concerns.

Judicial concerns of vagueness and overbreadth are common in the white-collar context for a variety of reasons. First is the perceived need for broad, general statutes in confronting fraud.[72] Fraud requires deception, and criminals thus require novel ways of deceiving victims.[73] The legislative process may be slow to keep up with new schemes.[74] Changes in commercial activity and development of new technologies force courts to consider the legality of novel economic practices.[75] The diversity of beliefs in the U.S. business and political realms requires development of clear guidance regarding appropriate limits.[76] Even if those broad criminal statutes are intended to be temporary measures, courts

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[69] *See, e.g.*, Paul J. Larkin, Jr, *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 751 (2013) ("Like a vague law, a surfeit of laws makes it difficult to know what is and what is not outlawed."); *see also* Stuntz, *supra* note 42, at 586 (explaining how the expansion of criminal codes has resulted in arbitrary guidelines in which "morally similar cases yield very different sentences").

[70] *See* Kahan, *supra* note 1, at 409–12 (discussing the use of statutory vagueness to deter loopholing).

[71] *See infra* Part II.D.2.

[72] *See* Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 520 (2011) (stating that "the social realities of fraud . . . exert great pressure on legal regimes to address fraud with open-textured rules that are vulnerable to complaints of intolerable vagueness").

[73] *See* Jack Talbot, *Liability for Unintentional Misrepresentation in Arkansas*, 49 ARK. L. REV. 525, 555 (1996) ("[A] loose definition [of fraud] is required because the law needs enough flexibility to encompass the variety of crooked enterprises designed by intentional fraud-feasors.").

[74] *See* United States v. Turner, 465 F.3d 667, 674 (6th Cir. 2006) (describing theory of honest services fraud as a "stopgap" and "temporary fix" (citing 135 CONG. REC. S1025-02, (daily ed. Feb. 2, 1989) (statement of Sen. Biden))).

[75] *See* Robert A. Prentice, *Stoneridge, Securities Fraud Litigation, and the Supreme Court*, 45 AM. BUS. L.J. 611, 676 (2008) (stating that courts have created flexibility in fraud law to confront novel economic practices).

[76] *See* Harvey A. Silverglate & Emma Quinn-Judge, *Tawdry or Corrupt?* McDonnell *Fails to Draw A Clear Line for Federal Prosecution of State Officials*, 2015 CATO SUP. CT. REV. 189, 213 (2015) (arguing that the lack of standards results in different theories of liability that are both vague and inconsistently applied).

express concern when prosecutors continue to use those same criminal statutes even after Congress passes more specific legislation.[77]

Another consideration is that the vague nature of white-collar statutes may be a product of structural contradictions in the legislative process.[78] In contrast to the first argument, this structural concern suggests that Congress is not fully committed to limiting white-collar offenses. According to this theory, Congress must reconcile fundamentally competing structural forces, such as the benefits of economic productivity from unregulated labor contrasted against the political pressures of workers' interest groups.[79] These structural conflicts constrain Congress's ability to produce effective law, resulting in vague and potentially ineffective laws.[80]

A third factor leading to overbreadth and vagueness concerns is the scope and depth of the modern administrative state.[81] Beyond the simple growth of federal criminal laws, businesses are subject to a wide variety of civil and administrative regulations. This is evident in the U.S. healthcare industry, as courts seek to understand the complex relationship between regulatory violations and civil or criminal offenses.[82] If a corporate entity knows it is violating a regulation, does its claim to be a law-abiding entity constitute fraud?

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[77] *See* United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, J., dissenting) (noting that the mail fraud statute should only be temporarily utilized for any "new" fraud that develops).

[78] *See* Kitty Calavita, *Employer Sanctions Violations: Toward A Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1046 (1990) (conveying that lawmakers have been able to circumvent the structural contradictions they face).

[79] *See* KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR, 1820-1924 7–8 (Z. Bankowski et al. eds., 1984) (explaining that under a structuralist theory, a state must promote political stability as well as resolve inherent conflicts in order to ensure the success of their economic system).

[80] *See* Calavita, *supra* note 78, at 1046 (describing the process by which white-collar law is rendered "symbolic").

[81] *See* Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391, 392 (1994) (linking growth of federal offenses and corporate criminal liability as sources of ambiguity in the white-collar context).

[82] *Compare* United States *ex rel.* Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707, 719 (6th Cir. 2013) (finding no FCA liability for improperly identified supervising physician), *with* United States v. Mackby, 261 F.3d 821, 829 (9th Cir. 2001) (upholding FCA liability for improperly identified physician provider).

In confronting the combination of broad statutes and overlapping regulatory schemes, courts fundamentally encounter a sorting problem.[83] A single wrongful act may constitute a variety of offenses.[84] At times, courts express significant uncertainty due to a lack of common agreement as to the harms and governing social norms.[85]

For some white-collar offenses, measuring harm is relatively straightforward. A huckster may sell sham investments to a victim, and the victims can measure their monetary losses. If those sold investments are entirely worthless, a huckster who has illicitly obtained $100 million has caused more harm than a huckster who illicitly obtained $20,000. The $100 million huckster seems deserving of greater punishment in comparison to the $20,000 huckster.

Other white-collar offenses are more difficult, though. For example, if a company lies about its contractually-required small business status but otherwise delivers a legitimate product, what is the harm from such a fraud?[86] What if a government official receives the use of a Ferrari in exchange for attending a luncheon?[87] When the harm is difficult to ascertain, courts face challenges in determining whether the offense is properly treated as deserving punishment.[88]

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[83] *See* Miriam Baer, *Sorting White Collar Crime,* 97 TEX. L. REV. (forthcoming 2019) (arguing that ungraded white-collar statutory schemes make it difficult to determine the severity of a specific offense).

[84] *See* Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for A Law of Counts,* 109 PENN ST. L. REV. 1107, 1120 (2005) (stating that the breadth and variety of the federal criminal code makes it "likely that a defendant's behavior will potentially violate a multitude of overlapping criminal statutes, especially where white-collar crime is involved"); *see also* Julie Rose O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 HARV. J.L. & PUB. POL'Y 57, 60 (2014) (describing how prosecutors must pick and choose which statutes to enforce because of the overlapping federal criminal code).

[85] *See, e.g.,* United States v. Weimert, 819 F.3d 351, 358 (7th Cir. 2016) (expressing uncertainty as to propriety of criminal sanction for deception in the course of negotiation).

[86] *See* Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995) (declining to grant damages because the Government could not demonstrate harm from Ab-Tech's falsehood).

[87] McDonnell v. United States, 136 S. Ct. 2355, 2363–65 (2016).

[88] *See* Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CAL. L. REV. 1515, 1559, 1563 (2009) (proposing limits to fraud liability linked to measurement of harm).

In the criminal context, courts are concerned about disproportionate punishment. While not necessarily rising to the level of an Eighth Amendment challenge, courts are suspicious about legislative intent and the proper scope of coverage for an offense. For example, 18 U.S.C. § 1014 punishes bank fraud with up to 30 years in prison and/or a fine of up to one million dollars.[89] Despite 18 U.S.C. § 1014's broad definition of fraud, Justice Stevens expressed doubt that Congress truly intended to punish minor lies with such a strong penalty.[90] Taken on its face, the statute's prohibition of false statements for the purpose of influencing a bank officer could technically include "false explanations for arriving late at a meeting, false assurances that an applicant does not mind if the loan officer lights up a cigar, false expressions of enthusiasm about the results of a football game or an election, as well as false compliments about the subject of a family photograph."[91] This uncertainty regarding Congressional intent creates the possibility of vagueness and overbreadth concerns.[92]

The uncertainty in harm also generates problems with civil actions, because courts are concerned that the civil sanctions are actually punitive in nature and thus deserving of greater scrutiny.[93] Without clear measures of relative harm, however, how does a court determine whether a particular monetary sanction is punitive or compensatory?[94] Even if a particular statute were sufficiently clear and narrow to satisfy a civil standard, the potential for punitive application may lead a court to recognize an overbreadth or vagueness challenge. Courts recognize that comparatively stronger sanctions require greater protections for defendants.[95] Criminal

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[89] United States v. Wells, 519 U.S. 482, 500 (1997).

[90] *See id.* at 502.

[91] *Id.*

[92] *See* Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 459–60 (2012) (describing laws against deception as inherently incorporating "highly structured, if rarely explicitly formulated, rules").

[93] *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground between Criminal and Civil Law*, 101 YALE L.J. 1816–17 (1992) ("[T]he recognition of a punitive purpose has important procedural consequences . . . .").

[94] *See, e.g.*, Cook Cty. v. United States *ex rel.* Chandler, 538 U.S. 119, 130 (2003) ("[T]he tipping point between payback and punishment defies general formulation.").

[95] *See* Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983) (citing Winters v. New York, 333 U.S. 507, 515 (1948)) ("[W]here a statute imposes criminal penalties, the standard of certainty is higher.").

defendants are entitled to greater protections than civil defendants, for example.[96] Defendants also receive greater protection when facing punitive sanctions in comparison to simply paying compensation for harms they have generated.[97]

2. Corporate compliance.

The distinction between overly broad and vague laws is particularly important in the context of corporate compliance due to the centrality of uncertainty. Considering the above arguments, it is possible that bright-line rules regarding fraud and other white-collar offenses are not socially optimal. Deference to prosecutorial discretion is one possible response to unclear rules. Consider, however, the role of effective corporate compliance professionals. While there may be companies that are looking to gain every possible advantage by exploiting loopholes in a statutory regime, there may also be companies making a good faith effort to comply with a statutory regime.[98] A clear understanding of what the laws require would be helpful to good faith efforts at compliance. Companies making this effort perform a rational compliance function in which they police their employees, contractors, and partners to ensure that all are following the relevant laws.[99] This is rather distinct from non-white collar crimes, where the concept of "fair notice" more emphasizes the "fairness" aspect rather than actual notice for offenders. In some ways, internal compliance acts as a substitute or complement to external enforcement from prosecutors and regulators.

Uncertainty as to the law's requirements is a significant challenge if the compliance officers are to be effective. For corporate compliance regimes to be effective, the officers creating those

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[96] *See* Niki Kuckes, *Civil Due Process, Criminal Due Process,* 25 YALE L. & POL'Y REV. 1, 18 (2006) ("[A]t trial, a criminal defendant receives an impressive degree of 'process' constitutionally required to adjudicate his guilt or innocence.").

[97] *See* Mann, *supra* note 93, at 1816–17 ("The Supreme Court [has] made the imposition of punitive sanctions contingent on heightened procedural protections.").

[98] *See* H. Lowell Brown*, Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 308–12 (1995) (discussing the importance of recognizing corporate good faith efforts).

[99] *See, e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1236–37 (1984) (discussing the importance of contract incentives on a company's agents); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1495 (1996) (noting how shareholders can and cannot monitor corporate activity).

regimes require actual notice as to prohibited and acceptable behavior.[100] Vague, unclear rules might even exacerbate compliance problems, as they may facilitate employee rationalization of illegitimate behavior.[101] Furthermore, to ensure that the compliance regimes are designed in a rational fashion, the relative consequences of violations should also be clear.[102] Society benefits when companies invest heavily to prevent serious cases of wrongdoing.[103] Vagueness as to the laws creates uncertainty for compliance officers.

Clearly communicated prosecutorial discretion is one solution to both overly broad and vague statutes. If prosecutors can consistently and clearly explain to companies how they should comply with a statutory scheme, the company's compliance efforts are manageable.

If, however, such a trusting relationship between prosecutors and companies is infeasible, the challenge presented by overly broad laws in comparison to vague laws can differ.[104] Vague laws create uncertainty, but overly broad laws do not necessarily create

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[100] *See* Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391, 401 (1994) (arguing that existing legislation needs to be corrected to increase certainty about what constitutes illegal conduct); Khanna, *supra* note 99, at 1495 (discussing the importance of minimizing monitoring costs); Peter C. Kostant, *From Lapdog to Watchdog: Sarbanes-Oxley Section 307 and A New Role for Corporate Lawyers*, 52 N.Y.L. SCH. L. REV. 535, 539 (2007) (describing ABA Model Rule 1.13 as "too vague to provide any meaningful guidance for lawyers trying to ensure corporate compliance with the law").

[101] *See* Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215, 1218 (2017) (noting that vagueness can lead to employees viewing the rules as illegitimate, "creating an environment ripe for rationalizations"); D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 807–08 (2013) (noting that vagueness in compliance may lead to a "decoupling" of actual illegal employee behavior from official corporate standards).

[102] *See* Jeff T. Casey & John T. Scholz, *Beyond Deterrence: Behavioral Decision Theory and Tax Compliance*, 25 LAW & SOC'Y REV. 821, 838–39 (1991) (discussing impact of vagueness on compliance rates in tax).

[103] *See* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 834–35 (1994) (noting that society benefits from corporate compliance when corporations are in a better position to sanction their agents than the state).; Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 323-24 (1996) (corporate monitoring is desirable "up to the point at which its marginal cost would exceed the marginal social gain in the form of reduced social harm.").

[104] The existence of private litigation may be another avenue by which companies cannot rely upon prosecutorial discretion. For example, the possibility of whistleblower actions under the False Claims Act may expose the company to civil liability even if the Department of Justice would not otherwise have litigated a particular case of corporate wrongdoing. 35 U.S.C. § 3729 (2012).

uncertainty for compliance purposes. For example, a company might believe the Foreign Corrupt Practices Act (FCPA) to be overly broad but not vague, because it broadly prohibits providing "things of value" to foreign officials, even though such entertainment would generally be provided to any private potential customer.[105] Although the company might feel that the FCPA should not penalize entertainment of public officials, the role of the company's compliance officers is understandable. They must oversee the decision to invite any potential customers to a corporate golf outing or trade show.[106] It may be costly to have compliance attorneys investigate and approve each invitation, but their responsibility is clear.[107] If the company cannot rely upon prosecutorial discretion to avoid liability for inviting a government official to an otherwise legitimate business development event, then the company has a clear compliance reaction to an overly broad statute: it must avoid inviting known government officials.[108]

Predicting a company's response to vague laws when lacking prosecutorial guidance is more difficult. A risk-averse company might address a vague law in similar fashion to an overly broad law by eliminating any possibility of violation. In the FCPA example, if the statute instead were unclear as to whether a public official could be invited to a corporate golf outing, a risk-averse company might similarly instruct its corporate compliance officers to avoid inviting any known government officials. Companies with greater risk tolerance or resources to absorb risk might behave differently, though, and they may have some advantage over companies with lower risk tolerance. They may be able to afford more for creative legal representation, and legal uncertainty provides more room for creative legal action. Thus, if the goal is to control corporate behavior through their internal compliance regimes and if prosecutorial discretion is an insufficient substitute for clear, well-

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105 Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 1003 (2010).

106 *See id.* (describing how companies utilize costly investigations in deciding who they can invite to "corporate events in which some fun may take place (e.g. golf)").

107 *See* Miriam Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1036 (2008) (describing the expensive lengths to which corporations will go to impress prosecutors *ex ante* that they are acting in compliance).

108 *See* Koehler, *supra* note 105, at 1003 (describing how companies fear providing anything that might be deemed "things of value" to foreign officials because of FCPA restrictions).

defined laws, it is possible that overly broad statutes may result in more predictable corporate behavior than vague statutes.

Nonetheless, the general approach of the Supreme Court in addressing white-collar statutes is that vagueness and overbreadth are both undesirable characteristics.[109] This article does not purport to establish some optimal level of vagueness or overbreadth. Rather, the article's claim is that the problems of vagueness and overbreadth each introduce distinct costs to society. An optimal solution would reduce both vagueness and overbreadth problems, but such optimal solutions may be unrealistic. A solution that reduces the problem of overbreadth could theoretically exacerbate vagueness problems, while a solution that addresses vagueness could similarly create further overbreadth problems. Such tradeoffs may be desirable, but they deserve careful analysis.

III. NARROWING STRATEGIES

In the face of these overbreadth and vagueness concerns, the Supreme Court can take a variety of actions. One possibility is to strike down a statute. As the Court has recognized, the invalidation of a statute is "strong medicine" and not to be taken lightly.[110] The more common strategy in addressing white-collar statutes is a narrowing strategy; it narrows the scope of the statute.[111] These narrowing decisions typically come on the basis of statutory interpretation, but they may implicate Constitutional concerns.[112]

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[109] *See supra* note 2 and accompanying text.

[110] United States v. Williams, 553 U.S. 285, 293 (2008) (quoting New York v. Ferber, 458 U.S. 747, 769 (1982)).

[111] *See, e.g.,* Skilling v. United States, 561 U.S. 358, 408 (2010) (declining to broaden scope of honest services fraud because "[r]eading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine"); McNally v. United States, 483 U.S. 350, 360 (1987) (expressing concern that federal anti-corruption doctrine leaves "its outer boundaries ambiguous"); United States v. Sun-Diamond Growers of California, 526 U.S. 398, 399 (1999) (utilizing a "narrow, rather than sweeping" interpretation of a statute prohibiting giving things of value to public officials).

[112] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 268 (2002) (Rehnquist, C.J., dissenting) (expressing judicial preference for "a limiting construction . . . on the challenged statute" (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973))); Stuart Buck & Mark L. Rienzi, *Federal Courts, Overbreadth, and Vagueness: Guiding Principles for Constitutional Challenges to Uninterpreted State Statutes*, 2002 UTAH L. REV. 381, 391 (2002) (citing Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997)) (distinguishing between constitutional "classical avoidance" and "modern avoidance"); *see also* John F. Manning, *Clear*

In *McDonnell*, the Supreme Court narrowed the scope of federal bribery law by permitting public officials to receive payment in exchange for meetings.[113]

Narrowing strategies face a variety of criticisms. First is the substantive concern: the possibility of leaving harmful behavior unpunished.[114] Despite the holding in *McDonnell*, society may be worse off by allowing public officials to accept payment in exchange for meetings. The second concern is the role of the Court.[115] Regardless of whether the narrowed statutory scope is socially optimal, the narrowing decisions are displacing legislative decisions; Congress intended for broad coverage and wrote the statutes to encompass such broad coverage.[116] The Court's decision to intervene is a naked, and perhaps somewhat arbitrary, policy choice to apply a "clarity tax" on Congress for certain offenses.[117]

The latter concern regarding the role of the court is somewhat ameliorated by viewing the process as a dialectic.[118] At times, these decisions have been an express invitation to Congress to clarify the precise boundaries. The Court's decision may not be a normative rejection of a potential enforcement scheme. For example, for forty years lower federal courts had interpreted the mail and wire fraud statutes to encompass a public official accepting bribes in exchange for official actions, known as "honest services" fraud.[119] The more straightforward forms of fraud involve deprivation of tangible property: a victim is tricked or deceived into parting with money, for example. Under honest services fraud doctrine, a victim might be deprived of an intangible right: "the right to have public officials perform their duties honestly."[120] In 1987, the Supreme Court

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Statement Rules and the Constitution, 110 COLUM. L. REV. 399, 400 (2010) (discussing Henry Monaghan's view of judicial review as "constitutionally inspired, but not compelled, rules").

113 *See* McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016) (finding that a meeting did not fit into the definition of "official act").

114 *See* Deborah Hellman, *A Theory of Bribery*, 38 CARDOZO L. REV. 1947, 1948–50 (2017) (expressing the importance of properly addressing bribery in a functioning democracy).

115 *See id.* at 1992 (discussing whether the Court should decide this limitation).

116 *See* Manning, *supra* note 112, at 402 ("[M]any contend that because clear statement rules direct courts to select something other than the most natural and probable reading of a statute, they too displace congressional choice . . . .").

117 *Id*. at 403.

118 *See* Calavita, *supra* note 78, at 1065 (utilizing dialectic models of lawmaking which put the "conflicts confronting policymakers within the context of contradictory structural forces").

119 Skilling v. United States, 561 U.S. 358, 400 (2010).

120 McNally v. United States, 483 U.S. 350, 358 (1987).

rejected this approach, noting that the honest services theory of mail or wire fraud left the "outer boundaries ambiguous" and declared that "If Congress desires to go further, it must speak more clearly than it has."[121] *McNally* dealt with a public official who obtained insurance for the state of Kentucky and received personal kickbacks from the insurance companies.[122] The Supreme Court hesitated in allowing the kickbacks alone to constitute fraud.[123] It emphasized the importance of finding harm to Kentucky itself; there would be mail fraud if Kentucky "would have paid a lower premium or secured better insurance" in the absence of the kickbacks.[124] Thus, while the Court agreed that the State could be defrauded in this fashion, the government would actually have to prove the harm rather than taking a shortcut through honest services fraud doctrine.[125] Congress did answer the Supreme Court's call by enacting 18 U.S.C. § 1346 to re-establish honest services fraud.[126]

This article explores a further concern regarding the Supreme Court's reliance on narrowing strategies for white-collar offenses: the relationship between narrowing and vagueness.

A. THE IMPACT OF VAGUENESS ON THE NARROWING STRATEGY

Concerns regarding vagueness dovetail with the two aforementioned criticisms of narrowing strategies. First is the substantive concern. To the extent that the narrowed scope of the statute is vague, compliance in the vague areas may be reduced. Whether this is desirable depends on the nature of the narrowing. Consider *McNally*. If society is better off allowing public officials to be punished for accepting kickbacks without proof of actual harm to the government, then it may be desirable for the *McNally* opinion to be vague. The vagueness might increase the probability that lower courts would find room to punish such kickbacks with little proof of actual harm. In contrast, if society is better off only

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[121] *Id.* at 360.
[122] *Id.* at 352–353.
[123] *Id.* at 360–61.
[124] *Id.* at 360.
[125] *See id.* ("We note that as the action comes to us, there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property.").
[126] *See* Skilling v. United States, 561 U.S. 358, 402 (2010) (discussing the statute).

punishing public officials who tangibly harm the government through the acceptance of kickbacks, then a clearer rule would be more desirable.

Vagueness also impacts the potential dialectic regarding the scope of prohibited behavior. *McNally* incorporated an express call for Congress to speak more clearly regarding honest services fraud,[127] and Congress responded by passing 18 U.S.C. § 1346.[128] *McNally* is an example of a clear narrowing strategy, and the impact of the decision was straightforward for both lower courts and Congress to understand and respond. Clear judicial holdings can facilitate the legislative-judicial dialectic.[129]

Narrowing strategies that increase vagueness create the potential for delays in the dialectic. Congress may be uncertain as to the precise impact of the Supreme Court's decision, so it may delay in statutory clarification. The vagueness gives lower courts flexibility in interpreting the Supreme Court's guidance, and Congress may be reasonably waiting to see how lower courts apply the Supreme Court's holding. To the extent that both Congress and the Supreme Court are truly uncertain as to the proper course of action, such a delay in clarity may be desirable. Nonetheless, such delay remains costly to the parties subject to the statutory constraints. It is possible that the importance of the rule and the severity of the vagueness are so great that Congress would still respond with statutory clarification.

Beyond simple delays, however, the increase in vagueness may provide the opportunity for a detrimental dialectic.[130] Following the structural theory constraining Congressional efforts in passing effective white-collar statutes[131], it is possible that Congress actually desires vagueness. Politicians may be able to convince different interest groups that the vague law is in each group's

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[127] *See McNally*, 483 U.S. at 359–60 (refusing to choose a harsher reading until "Congress has spoken in clear and definite language").

[128] *See Skilling*, 561 U.S. at 402.

[129] *See, e.g.,* Luke Meier, *RLUIPA and Congressional Intent*, 70 ALB. L. REV. 1435, 1435–38 (2007) (discussing dialogue between Congress and the Supreme Court concerning the Religious Land Use and Institutionalized Persons Protection Act and the Religious Freedom Restoration Act).

[130] *See* Calavita, *supra* note 78, at 1045 (introducing the political repercussions of vague statutory language).

[131] *See id.* (noting how the political economy can make it difficult for Congress to effectively regulate white-collar crime).

interest, and the lack of clarity may make such a message palatable. There may be little interest for Congress to clarify the vagueness.

B. SOURCES OF VAGUENESS IN NARROWING STRATEGIES

One common narrowing strategy in the white-collar context is a simple elimination of a path of liability. As described above, the Court's decision in *McNally* eliminated honest services fraud as a potential path for liability.[132] This was relatively straightforward; parties no longer considered that potential doctrinal path.[133] Elimination of this doctrinal path did not directly increase vagueness or create uncertainty.

Similarly, in *McDonnell*, the Court narrowed the scope of the offense by narrowing the definition of an "official act."[134] The official act requirement was a basic requirement of federal bribery law. In *McDonnell*, the governor of Virginia had been convicted of federal bribery offenses on the theory that he had accepted things of value, such as expensive cars, in exchange for official actions.[135] The Government argued that "Congress used intentionally broad language" in § 201(a)(3) to describe the scope of an "official act," while the governor argued for a narrower definition.[136] The Court disagreed with the Government's broad interpretation, indicating that both Congress and prior caselaw supported a narrower definition of official act that did not include simply setting up a meeting or organizing an event.[137] The Court went further to reference a number of concerns that supported its statutory interpretation.[138] One, that there might be a chilling effect on political interaction between public officials and constituents.[139] Another was a "vagueness shoal": that the statute did not provide

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[132] *See infra* notes 119–24 and accompanying text.

[133] It is possible that *McNally* forced greater complexity because prosecutors had to demonstrate actual harm in bribery cases. Nonetheless, proof of intent to harm was generally a requirement in the first place for fraud, so the decision can be understood as placing bribery cases on the same level as other frauds.

[134] *See* McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016).

[135] *Id.* at 2365.

[136] *Id.* at 2367.

[137] *Id.* at 2371–72.

[138] *Id.* at 2372–73.

[139] *See id.* ("Officials might wonder whether they could respond to even the most commonplace requests for assistance…").

sufficient precision to put public officials on fair notice about acceptable behavior.[140] Despite the Court's concerns, however, it did not dismiss the charges against the governor nor did it invalidate the federal bribery statutes at play.[141] While noting that the governor received "tawdry" or "distasteful" benefits of expensive cars and watches, the Court noted that criminal law might not be the appropriate sanctioning mechanism.[142]

There are, however, more complex narrowing strategies. In this section, I describe two separate considerations that increase the threat of vagueness in a narrowing decision. One is the complexity or vagueness of the element of analysis. A second consideration is the relationship between the introduced element and the existing elements of the offense. Both of these aspects of the narrowing strategy can contribute to increased vagueness.

1. Vagueness of the element itself.

The Court may narrow the breadth of the statute by introducing an element of analysis that is vague or complex. Consider the Supreme Court's narrowing strategy in *Skilling*. Skilling was the former CEO of Enron Corporation, an energy company that went into bankruptcy shortly after Skilling's departure.[143] The Government uncovered a conspiracy to prop up Enron's stock prices by overstating corporate financials.[144] Skilling was prosecuted under an honest services theory of fraud, alleging that he sought to "deprive Enron and its shareholders of the intangible right of honest services."[145] The Government alleged that Skilling deceived shareholders by misrepresenting the company's health, and that he profited by selling Enron stock at artificially inflated prices.[146] Skilling argued that the honest services statute, 18 U.S.C. § 1346,

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[140] See *id.* at 2373 (citing Skilling v. United States, 561 U.S. 358, 402-03 (2010)) ("Our more constrained interpretation of 201(a)(3) avoids this 'vagueness shoal'").

[141] *See id.* at 2375 ("Because we have interpreted the term 'official act' . . . in a way that avoids the vagueness concerns raised by Governor McDonnell, we decline to invalidate those statutes under the facts here").

[142] *Id.*

[143] *See Skilling*, 561 U.S. at 368 (describing the facts surrounding Skilling's departure and Enron's subsequent bankruptcy).

[144] *Id.*

[145] *Id.* at 369.

[146] *Id.* at 413.

was unconstitutionally vague.[147] The statute appears straightforward, stating that "For the purposes of th[e] chapter [of the United States Code that prohibits, inter alia, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[148] Skilling looked at the caselaw describing this intangible right and described it as a "hodgepodge of oft-conflicting holdings that are hopelessly unclear."[149] The Court rejected Skilling's argument and held that there was a clear core to the caselaw: "§ 1346 criminalizes only the bribe-and-kickback core" of right of honest services fraud.[150] The Government argued that Congress also intended to cover "undisclosed self-dealing by a public official or private employee."[151] The Court did not agree, finding Congress's language insufficiently specific to encompass such behavior and noting that previous court decisions did not reach a consensus on which schemes of "non-disclosure and concealment of material information" qualified.[152] We can read the holding of *Skilling* as that 18 U.S.C. § 1346 prohibits bribes and kickbacks but does not prohibit undisclosed self-dealing.

The challenge with *Skilling*, however, is that the line between undisclosed self-dealing and a kickback is unclear.[153] Consider *Stayton v. United States*, in which two men were convicted of honest services fraud after which *Skilling* was decided.[154] Stayton was an aviation officer for the Department of Defense who directed a five million dollar contract to his close friend Childree.[155] Childree was the principal of Maverick Aviation, and because of their friendship, Stayton intended to take over Maverick Aviation one day.[156] Two weeks after Stayton released the first one million dollar payment to Maverick Aviation, Childree directed over $60,000 of those funds to

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147 *Id*. at 399.
148 *Id*. at 402 (quoting 18 § U.S.C. 1346 (2012)).
149 *Id*. at 406–07 (internal quotations omitted).
150 *Id*. at 409.
151 *Id.*
152 *Id*. at 410.
153 *See, e.g.,* United States v. Black, 625 F.3d 386, 391–93 (7th Cir. 2010) (discussing the distinction between honest services fraud and pecuniary fraud).
154 Stayton v. United States, 766 F. Supp. 2d 1260, 1262 (M.D. Ala. 2011).
155 *Id*. at 1263.
156 *Id*.

pay off Stayton's second mortgage.[157] The two men were acquitted of bribery but convicted of honest services fraud.[158] In overturning the verdict post-*Skilling*, the court noted that the $60,000 payoff could have been both a kickback and an undisclosed conflict of interest.[159] If the $60,000 payoff had been paid because of the one million dollar contractual award, it would constitute a kickback and be prohibited as honest services fraud. If, however, the $60,000 payoff represented Stayton's compensation reflecting his employment or ownership interest in Maverick Aviation, then the transaction would be an undisclosed conflict of interest and not be prohibited under honest services fraud.

Thus, while *Skilling* narrows the scope of honest services fraud by ruling out undisclosed self-dealing, it introduces vagueness through an unclear test: is financial gain by a government employee more like an illegal kickback or more like undisclosed self-dealing?

We can also contrast *Skilling* with *Yates v. United States*. In *Yates*, the Supreme Court addressed whether 18 U.S.C. § 1519 covered the destruction of physical evidence.[160] The statute prohibits tampering with "any record, document, or tangible object" in an attempt to obstruct a federal investigation, and the Court focused on whether Congress broadly intended for the phrase "tangible object" to encompass any physical evidence.[161] The plurality determined that Congress did not intend such a broad definition, reaching its conclusion in part on significant statutory overlap.[162] Existing statutes already covered physical evidence tampering, which could result in a vagueness related concern due to overlapping statutory coverage.[163] The dissent, however, thought Congress's intent was straightforward, stating that "[t]he term 'tangible object' is broad, but clear."[164] The narrowing in *Yates*

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[157] *Id.*

[158] *Id.* at 1265.

[159] *Id.* at 1269; *see also* J. B. Perrine & Patricia M. Kipnis, *Navigating the Honest Services Fraud Statute After* Skilling v. United States, 72 ALA. LAW. 295, 298 (2011) (describing other ways prosecutors could target the conduct in *Stayton v. United States*).

[160] *See* Yates v. United States, 135 S. Ct. 1074, 1077 (2015) (discussing the Court's focus in the case).

[161] *Id.* at 1090–91 (Kagan, J., dissenting) (quoting 18 U.S.C. § 1519 (2012)).

[162] *See id.* at 1084–85 (discussing the Court's conclusion on the statute's interpretation).

[163] *See id.* ("Virtually any act that would violate § 1512(c)(1) no doubt would violate § 1519 . . . .").

[164] *Id.* at 1091 (quoting 18 U.S.C. § 1519 (2012)).

emphasized a bright-line rule that minimized vagueness. Tangible objects did not include physical evidence such as fish, but rather constituted objects that contained information.

2. The element's relationship with existing elements.

A separate avenue of vagueness is the relationship between the introduced element of analysis and existing elements of the offense. First, this relational threat increases the potential for vagueness and complexity. Second, there is the possibility that the addition of the element may not actually narrow the scope of liability.

Multifactor balancing tests present an example of this challenge.[165] Multifactor balancing tests incorporate a number of discrete elements, and the relationship between the elements is not transparent. An element might overlap significantly with another element, and it may be unclear how much weight any particular element carries.[166] This indeterminate relationship can create uncertainty.[167] Multipart balancing tests may be useful at post-hoc explanation or justification of a decision, but they are less useful in providing future guidance.[168] Because of this limitation, multipart balancing tests may be more desirable in areas where consistency and clarity are less important.[169]

Such uncertainty may be compounded by the possibility that judges may not actually apply the factors as stated. The prevalence of multiple other factors in a balancing test may cause judges to not

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[165] *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 643–49 (1988) (discussing problems of consistency and clarity with balancing tests); *In re* Kellogg Brown & Root, Inc., 796 F.3d 137, 144 (D.C. Cir. 2015) (expressing dismay at multifactor balancing test and noting that a test which creates "[a]n uncertain privilege, or one which purports to be certain but results in widely varying application by the courts, is little better than no privilege at all." (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981))).

[166] *See* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 41 (2007) (discussing the problem of overlap in multifactor tests).

[167] *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 136 (2014) (expressing concern that "open-ended balancing tests . . . can yield unpredictable and at times arbitrary results"); Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1169 (2010) ("[B]alancing, unlike a bright-line rule, does not allow the parties to predict the applicable law."); David Crump, *Takings by Regulation: How Should Courts Weigh the Balancing Factors?*, 52 SANTA CLARA L. REV. 1, 3 (2012) ("[A] multifactor balancing test is unavoidably vague.")

[168] *See* McFadden, *supra* note 165, at 643–49 (noting balancing tests are "particularly deficient" in providing guidance for future actions).

[169] *See id*. at 649–51 (suggesting criminal sentencing as a particularly individualized area in which failure to provide future guidance is less harmful).

actually rely upon particular factors.[170] Despite formalistic satisfaction of working through each element, complex analysis without clearly defined relationships between the elements may lead to post-hoc justification. This post-hoc justification can lead to vagueness and uncertainty as defendants have difficulty predicting actual results based on the added elements of analysis.[171]

A third problem is that a new element may be highly correlated with an existing element. Under this scenario, the new test does not actually change the end result because of its correlation with an existing element.

Consider the multifactor balancing tests for confusion in trademark infringement cases.[172] Nearly all circuits balance at least five factors in analyzing whether trademark infringement is causing or likely to cause consumer confusion: the similarity of the marks, the proximity of the goods, evidence of actual confusion, the strength of the plaintiff's mark, and the intent of the defendant.[173] In explaining their decisions, courts methodically consider each factor and often then explicitly balance the factors.[174]

Empirical analysis of judicial decisions applying these tests, however, suggests that there is likely a single dispositive factor; the similarity of the marks, which by itself accurately predicts 90% of the case outcomes.[175] As Professor Beebe discusses, it is possible that judges may be allowing final outcomes to drive their formal analysis of other factors.[176] Thus, adding another factor into a multifactor analysis may not result in any actual change regarding outcomes. The additional factors may instead obscure the reasoning for the underlying decision.[177]

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[170] *See* Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1645–46 (2006) (noting that balancing ten different factors may be impractical for a judge).

[171] *See* Brilmayer & Anglin, *supra* note 167, at 1169 (expressing concern that multifactor balancing tests allow judges to simply impose their personal preferences).

[172] *See* Beebe, *supra* note 170, at 1586–90 (noting the plethora of different tests across circuits).

[173] *Id.* at 1589–90.

[174] *See id.* at 1592–93 ("[D]istrict courts give every appearance of scrupulously following a basic weighted additive decision strategy.").

[175] *See id.* at 1603 (providing research showing that the similarity factor predicted whether there would be a preliminary injunction 90% of the time).

[176] *Id.* at 1614–15.

[177] *See* Kenneth C. Haas, *The Supreme Court Enters the "Jar Wars": Drug Testing, Public Employees, and the Fourth Amendment*, 94 DICK. L. REV. 305, 323 (1990) (noting that

We can compare the balancing of these five factors with a bright-line rule regarding the first factor: two trademarks must be similar if there is any possibility of consumer confusion. Some courts have acknowledged that similarity of the marks is a threshold factor rather than one of five factors to be balanced.[178] Compared to the scenario in which similarity of the marks is one of five factors to be balanced, all parties can enjoy reduced vagueness if they know that similarity of the marks is a threshold factor. Regardless of whether measuring similarity of the marks is vague or uncertain, to the extent that the marks are not similar, there is less uncertainty when that determination is a threshold matter. There is no likelihood of consumer confusion if the marks are not similar as a threshold matter. If it is an element of a balancing test, though, then the parties must still deal with the possibility that some other factor may outweigh, even if the marks are not similar.

Next, there is the possibility of similarity or relationship between factors. The Federal Circuit is the one circuit that does not incorporate the intent of the defendant element.[179] Whether the Federal Circuit has a more expansive or narrow view of consumer confusion depends on the relationship of defendant intent with the other elements. According to both doctrine and empirical evidence, inference of ill defendant intent can be imputed from knowledge of the similarity of the marks, which is roughly the first element of the balancing test.[180] If these two elements are highly correlated, the addition of the defendant intent element may not make any difference in determining consumer confusion.

The lack of specificity regarding the relationship of different elements in a multipart balancing test creates uncertainty and unpredictability.

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multifactor balancing tests "can be criticized for lacking clarity and for being susceptible to results-oriented manipulation" in Fourth Amendment cases).

178 *See* Beebe, *supra* note 170, at 1623 ("As some courts have recognized, the similarity inquiry is a threshold inquiry.").

179 *See id.* at 1589–90 ("[T]he intent of the defendant, is found in all but the Federal Circuit's test.").

180 *See id.* at 1630 ("It is black-letter doctrine across the circuits . . . that bad faith intent may be inferred solely from the fact that the parties' marks are similar . . . [and] [t]he data suggests that this circumstantial inference is the leading basis for a finding of bad faith intent.").

This is not an exhaustive categorization of potential narrowing strategies. Instead, the goal here is to highlight two distinct channels by which narrowing strategies may have differing impacts on vagueness concerns. Historically, many of the Supreme Court's narrowing efforts in the white-collar context have employed a relatively straightforward narrowing strategy that does not raise serious vagueness concerns.[181] Nonetheless, courts should be cautious regarding these two potential avenues of increased vagueness, as they can work against the effectiveness of the Court's underlying goals in narrowing the scope of the statute.

IV. MATERIALITY AND THE FALSE CLAIMS ACT

We can see evidence of these vagueness problems in the Supreme Court's recent decision on the False Claims Act (FCA). The FCA addresses fraud against the federal government,[182] and courts have struggled to articulate the conditions under which a lie constitutes legally actionable civil fraud under the FCA. Some lies are relatively straightforward; an individual might make a claim for disaster relief reimbursement from the federal government when he did not actually incur the disaster expense.[183] In contrast, some claims are more complex because they involve some contractual or regulatory violation, but the claim is not completely false because some service or product was actually provided. For example, a healthcare provider bills Medicare for a service that is provided, but it lies about the physician involved. Federal appellate courts had held that knowingly identifying the wrong physician *supervisor* is not fraud under the FCA, but knowingly identifying the wrong physician *provider* is fraud.[184]

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[181] *See infra* Part III.

[182] 31 U.S.C. § 3729(a) (2012).

[183] *See, e.g.,* United States v. Lloyd, 205 F.3d 1348, 1348 (8th Cir. 2000) (explaining that the government investigated the defendant's claims and found that he falsely marked rental bills).

[184] *Compare* United States *ex rel.* Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707, 714 (6th Cir. 2013) (finding no FCA liability for improperly identified supervising physician), *with* United States v. Mackby, 261 F.3d 821, 824 (9th Cir. 2001) (upholding FCA liability for improperly identified physician provider).

In 2016, the Supreme Court stepped in, recognizing both vagueness and overbreadth concerns in *Escobar*.[185] The Court recognized the need to clarify lower court decisions that it condemned as creating "arbitrariness."[186] It also recognized the potential for overbreadth, noting that Congress did not intend the FCA to be an "all-purpose antifraud statute."[187] It attempted to narrow liability by establishing a materiality standard, requiring lies to concern a matter that had the natural tendency to influence the listener.[188] Justice Thomas described the requirement by posing a hypothetical: a healthcare provider signs a contract to provide medical services via the Medicare program.[189] As part of the express contract, the provider is required to use American-made staplers in assembling the paperwork for reimbursement. The contract states that this is a material element of the contract and that the contract is voidable if not satisfied. The provider knows that they do not have American-made staplers and intends to deceive the federal government by signing the contract anyway. Can the government claim it has been defrauded under the FCA? In dicta, Justice Thomas declared that the hypothetical provider has not defrauded the government because the matter was not material, emphasizing his belief that the government would continue to pay despite actual knowledge of the foreign staplers.[190]

Unfortunately, the Supreme Court's decision greatly varies from previous attempts to address vagueness and overbreadth concerns. Rather than focusing on a straightforward element of analysis, its choice of materiality is both complex and highly relational. It is likely to lead to greater vagueness problems, and it may not reduce the breadth of coverage.

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185 *See* Universal Health Servs., Inc. v. U.S. *ex rel.* Escobar, 136 S. Ct. 1989, 2002–03 (2016) (noting that the term "materiality" may have different meanings in contract law and tort law, and that the FCA raises overbreadth concerns because "billing parties are often subject to thousands of complex statutory and regulatory provisions").

186 *Id.* at 2002.

187 *Id.* at 2003 (quoting Allison Engine Co. v. U.S. *ex rel.* Sanders, 553 U.S. 662, 672 (2008)).

188 *See id.* at 2003 (noting that "Section 3789(b)(4) defines materiality . . . [as having] a natural tendency to influence . . .").

189 *Id.* at 2004.

190 *See id.* (noting that the "Government routinely pays claims despite knowing that foreign staplers were used").

A. MATERIALITY IS NOT A SIMPLE ELEMENT

Consider the test suggested by *Escobar*: focusing on whether the matter lied about has the natural tendency to influence the governmental body to which it is addressed.[191] This analysis can be either objective or subjective in that materiality may encompass what might tend to influence a reasonable person, or it may also incorporate what the speaker knows is likely to influence a specific listener.[192] Some courts have interpreted this as a strict causation requirement; the listener would not have agreed to the contract had they known the truth about the lie.[193] In *AccuSoft Corp. v. Palo*, for example, the First Circuit seemed to hold that a confidentiality provision was "important" to the parties, but that it was not material because it was not an "essential and inducing feature of the contract."[194] Similarly, the Fifth Circuit held that although housing contracts specified "decent, safe and sanitary" conditions, the "decent, safe and sanitary" language was not material because the government continued to pay for the unsafe, unsanitary housing.[195]

There are two major complications with this emphasis on causation. The first complication is the tendency towards binary analysis: either the fraud induced the contract or it did not. The second complication is a conflation of normative and descriptive analysis.

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[191] *See id.* at 1996 ("What matters is . . . whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision.").

[192] *See* RESTATEMENT (SECOND) OF CONTRACTS § 162 cmt. c (AM. LAW INST. 1981) ("[A] misrepresentation may be material if it would be likely to induce a reasonable person to manifest his assent."); RESTATEMENT (SECOND) OF TORTS § 538 (AM. LAW INST, 1977) ("[T]he maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.").

[193] *See*, *e.g.*, United States v. Hill, 676 F. Supp. 1158, 1176 n.25 (N.D. Fla. 1987) ("In the absence of reliance on the false statement, it is difficult to see how the defendant's false statement could have 'caused' the false claim.").

[194] AccuSoft Corp. v. Palo, 237 F.3d 31, 54 (1st Cir. 2001) (quoting Lease-It, Inc. v. Mass. Port. Auth., 600 N.E.2d 599, 603 (Mass. App. Ct. 1992)).

[195] *See* United States v. Southland Mgmt. Corp., 326 F.3d 669, 681 (5th Cir. 2003) (Jones, J., concurring) ("Since HUD routinely made Section 8 housing assistance payments to owners of property irrespective of their compliance with the decent, safe and sanitary standard, the owners' certifications were not material to HUD's decision to pay.").

1. Binary analysis.

Causation often seems like binary analysis: either the lie caused the victim to agree or it did not, which sounds like but-for causation. Nonetheless, many authorities acknowledge that materiality is not equivalent to but-for causation.

For example, in looking at false statements, the Seventh Circuit limited the importance of but-for causality. The court acknowledged that the FBI could not have been misled by the defendant's deception because the FBI knew the truth of the situation, but a statement could still "be material even though the agency did not rely on it and was not influenced by it."[196] Rather, it is sufficient that a misrepresentation "could" cause agents under normal circumstances to change their behavior.[197]

Similarly in contracts, material fraud must be likely to induce manifestation of assent, but:

> It is not necessary that this reliance have been the sole or even the predominant factor in influencing his conduct. It is not even necessary that he would not have acted as he did had he not relied on the assertion. It is enough that the manifestation substantially contributed to his decision to make the contract.[198]

The Restatement (Second) of Torts also affirms a "substantial factor" rather than but-for causation in evaluating materiality.[199]

These arguments reflect the idea that decisions are rarely binary between sophisticated parties. Once we move away from but-for causality, though, we are left with little guidance. A contract might involve greater compensation or oversight in the face of deception. One party might demand greater concessions in the face of evidence that the other party engaged in deception. It is likely difficult for judges or juries to intuit the level of impact minor clauses might have on a sophisticated party's decision making process. The meaning of this substantial contribution is unclear and only seems

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[196] United States v. Turner, 551 F.3d 657, 663 (7th Cir. 2008) (quoting United States v. Dick, 744 F.2d 546, 553 (7th Cir. 1984)).

[197] *Id*. at 663 (quoting United States v. Ranum, 96 F.3d 1020, 1028 (7th Cir.1996)).

[198] RESTATEMENT (SECOND) OF CONTRACTS § 167 cmt. a (AM. LAW INST. 1981).

[199] RESTATEMENT (SECOND) OF TORTS § 546 cmt. b (AM. LAW INST. 1977).

to reflect the intuitive response concerning triviality. Particularly with relatively sophisticated parties, economic theory suggests that nearly any fact may have influence on the execution of a contract; it is rather that transaction costs might limit the parties from actively negotiating relatively trivial elements.[200] On deontological, rather than consequential grounds, theorists further argue that even disbelieved lies have a negative impact on listeners and society.[201]

2. Confusing normative and positive analysis.

This causal line of reasoning also seems to conflate positive and normative approaches towards materiality. Does this "substantial factor" analysis reflect a description of how individuals consider information or rather a normative approach from courts?

Consider one variant of materiality analysis in puffery. Various legal authorities suggest that companies may lie through puffery: making exaggerated or grandiose claims about their products and services.[202] For example, the Restatement (Second) of Torts notes that:

> The habit of vendors to exaggerate the advantages of the bargain that they are offering to make is a well recognized fact. An intending purchaser may not be justified in relying upon his vendor's statement of the value . . . as carrying with it any assurance that the thing is such as to justify a reasonable man in praising it so highly.[203]

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[200] *See, e.g.,* Alan Schwartz & Robert Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 941–42 (2010) (arguing that courts should interpret contracts in a way that reflects the parties' preferences); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 292–93 (6th ed. Addison Wesley 2016) ("The parties expect to save transaction costs by leaving gaps in contracts whenever the actual cost of negotiating explicit terms exceeds the expected cost of filling a gap.").

[201] *See* SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORTALITY, AND THE LAW 20–21 (2014) ("Although lies may but need not deceive their recipients, I have assumed that lies without any connection to deception are nonetheless wrong and that their moral defect is shared with those lies that also involve deception or its attempt.").

[202] *See* Stefan J. Padfield, *Is Puffery Material to Investors? Maybe We Should Ask Them*, 10 U. PA. J. BUS. & EMP. L. 339, 340 (2008) ("'Puffery' has been defined as ambiguous, promotional, or hyperbolic speech commonly known as 'sales talk.'").

[203] RESTATEMENT (SECOND) OF TORTS § 539 cmt. c (AM. LAW INST. 1977).

If a statement is puffery, it is not material for fraud purposes.[204] The problem, however, is that empirical research suggests people actually are influenced by puffery.[205] Naturally, if courts protect such lies as immaterial and thus not actionable fraud, companies have every reason to lie. Not surprisingly, judicial decisions based on puffery as immaterial fraud are conflicting. In consumer false-advertising law, for example, a claim that motor oil provided "longer engine life and better engine protection" was material and thus actionable,[206] but the sale of the "Most Advanced Home Gaming System in the Universe" was puffery and thus not material.[207] In securities litigation, some courts have claimed that reasonable investors would not rely on "[i]mmaterial statements [that] include vague, soft, puffing statements or obvious hyperbole," and courts should not facilitate litigation of "generalized statements of optimism that are not capable of objective verification."[208] Other courts, however, have noted that a director's imprecise opinion that a transaction is of "high" value or has "fair" terms can be deemed a material fraud.[209]

This confusion regarding normative versus descriptive efforts is sometimes described as a vagueness or opinion problem. In contracts, for example, misrepresentations of fact may make a contract voidable, while misrepresentations of opinion do not.[210] This rule has been criticized as "logical absurdity."[211] The Fifth Circuit has raised parallel concerns about whether deception regarding "[d]ecent, safe, and sanitary" in housing can be the basis of a fraud claim, noting that "'[d]ecent, safe, and sanitary' is a meaningful and useful description of homes and apartment houses,

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[204] *Id.*

[205] *See* Padfield, *supra* note 202, at 358 (noting numerous empirical studies finding that individuals cannot ignore optimistic statements and expressions of confidence); David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1395 (2006) (arguing that many individuals rely on puffery despite the law's assumption that they do not).

[206] Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 953 (3d Cir. 1993).

[207] Atari Corp. v. 3DO Co., No. C 94-20298 RMW (EAI), 1994 WL 723601, at *1 (N.D. Cal. May 16, 1994).

[208] *In re* Ford Motor Co. Sec. Litig., 381 F.3d 563, 570 (6th Cir. 2004) (quoting *In re* K-tel Int'l., Inc. Sec. Litig., 300 F.3d 881, 897 (8th Cir. 2002)).

[209] Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1093 (1991).

[210] 7 CORBIN ON CONTRACTS § 28.17 (citing RESTATEMENT (SECOND) OF CONTRACTS § 168).

[211] *Id.* (citing 7 WIGMORE, EVIDENCE § 1919 (3d ed. 1940)).

but it is not precise or measurable.[212] The Court further pointed out that "[t]here will be wide difference of opinion of what is, and what is not, decent, safe, or sanitary."[213] It is hard to believe that people are not deceived when they receive unsafe or unsanitary housing, but the Fifth Circuit decision seems to imply that people who actually want decent, safe, and sanitary housing should not believe such general claims.

This causation line of arguments surrounding materiality provides little guidance to judges or jurors. This problem is only magnified in dealing with sophisticated parties: how should a juror determine what might influence a complex entity such as the federal government? Moreover, courts may conflate the normative and descriptive approaches to causation, as it is unclear whether a juror should apply her judgment as to what lies should influence the government as opposed to which lies actually influence the government.

B. MATERIALITY IS HIGHLY RELATED WITH EXISTING ELEMENTS OF FRAUD

Not only is analysis of materiality itself complex, but the element of materiality is likely related to existing elements of fraud. Evaluating materiality likely requires reconsideration of these other factors, and a failure to understand the interaction may create vagueness and uncertainty. Moreover, it may also fail to narrow the scope of the offense.

1. Materiality's link to mens rea.

Materiality may be connected with the *mens rea* of fraud. If the defendant's lie has the natural tendency to influence the listener, the defendant is demonstrating his intent to deceive the listener. As an example, consider 18 U.S.C. § 1014, a federal statute prohibiting bank fraud.[214] The statute does not contain any express mention of materiality. The Supreme Court determined that 18 U.S.C. § 1014 does not contain an implied materiality element, noting that:

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[212] United States v. Southland Mgmt. Corp., 326 F.3d 669, 675 (5th Cir. 2003).

[213] *Id.*

[214] 18 U.S.C. § 1014 (2012).

> A statement made "for the purpose of influencing" a bank will not usually be about something a banker would regard as trivial, and "it will be relatively rare that the Government will be able to prove that" a false statement "was . . . made with the subjective intent" of influencing a decision unless it could first prove that the statement has "the natural tendency to influence the decision."[215]

Therefore, the Supreme Court in *Wells* seemed to believe that the *mens rea* requirement for purposely influencing the victim would greatly overlap with any potential materiality requirement.[216] Some courts, following the *Wells* logic, describe materiality as equivalent to *mens rea*; a "representation is material if 'it is made to induce action or reliance by another'"[217] Under this formulation of materiality, there is no need to prove an independent element of materiality for a fraud conviction.

This is of particular importance in the FCA context because the civil FCA incorporates a *mens rea* of knowledge and expressly rejects "specific intent to defraud."[218] One possible interpretation of the Supreme Court's addition of the materiality standard is to narrow the scope of the FCA by increasing the effective *mens rea* requirement to "intent to defraud." Lower courts may find this reasoning difficult, though, as it seems to contradict the express statutory language.

An alternative interpretation of the Supreme Court's addition of the materiality standard is that courts should apply a sliding scale. For serious lies, the standard *mens rea* of knowledge is sufficient to

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[215] United States v. Wells, 519 U.S. 482, 499 (1997) (citing Kungys v. United States, 485 U.S. 759, 780–781 (1988)).

[216] *See id.* ("[T]he literal reading of the statute will not normally take the scope of § 1014 beyond the limit that a materiality requirement would impose."). *Cf.* Digital Equip. Corp. v. Diamond, 653 F.2d 701, 716 (1st Cir. 1981) ("Questions of 'materiality' and 'culpability' are often interrelated and intertwined, so that a lesser showing of the materiality of withheld information may suffice when an intentional scheme to defraud is established, whereas a greater showing of the materiality of withheld information would necessarily create an inference that its nondisclosure was 'wrongful.'").

[217] United States v. LeVeque, 283 F.3d 1098, 1103–04 (9th Cir. 2002) (citing United States v. Halbert, 712 F.2d 388, 390 (9th Cir. 1983)).

[218] *See* 37 U.S.C. § 3729 (b)(1)(B) (2012) ("For the purposes of this section . . . the terms 'knowing' and 'knowingly' . . . require no proof of specific intent to defraud.").

establish liability. For more trivial lies, however, the prosecution must either prove a higher level of *mens rea* or demonstrate how the victim (the government) would have been influenced by the lie.

Beyond the confusion as to the precise interaction between *mens rea* and materiality, note that the application of this test could also theoretically increase the scope of liability. Normally, the application of a materiality standard should decrease the scope of liability; trivial lies that do not have the natural tendency to influence the victim should not incur liability. It is possible, though, that it may be difficult to establish the defendant's knowing *mens rea* of the trivial lie: large corporations may not pay significant attention to the actual truth of small details. By applying this materiality standard, however, a court might be satisfied by the demonstration of intent to deceive. Even if the corporation did not know the truth about its assertion, the demonstration of its intent to deceive the government might find a basis for liability through materiality analysis.

2. Materiality's link to harm.

Analysis of materiality may also force reconsideration of the harm caused by the lie. Some courts claim that there are lies that do not cause harm and therefore are not material. One version of this is a triviality argument that parallels a *de minimis* harm function; the Second Circuit has described an undisclosed bribe such as a "free telephone call, luncheon invitation, or modest Christmas present" as not material fraud.[219]

Some courts go even further, however, and claim that there is no harm from some lies. The case of *Security Life Insurance Co. of America v. Meyling* embraces this strong approach. Meyling was an executive of a small company that purchased health insurance from the plaintiff insurance company; Meyling lied about his medical history and obtained a discounted premium, resulting in at least $5,775 in savings to Meyling.[220] The policy included language indicating that retroactive adjustments to the premium were

[219] United States v. Rybicki, 354 F.3d 124, 146 (2nd Cir. 2003); *see also* United States v. Brown, 459 F.3d 509, 519–23 (5th Cir. 2006) (finding that illegal fraud requires "sufficient detriment" to the deceived party).

[220] Sec. Life Ins. Co. of Am. v. Meyling, 146 F.3d 1184, 1186 (9th Cir. 1998).

permissible if misstatements were discovered.[221] Meyling suffered a coronary aneurysm, resulting in medical bills totaling $670,000.[222] The insurance company then discovered Meyling's prior undisclosed negative medical history and attempted to rescind Meyling's insurance contract based on fraud.[223] The court held that, although Meyling attempted to defraud the insurance company, rescission was not permissible in this case.[224] "[W]hen an insurer does not claim it altered its conduct in reliance on the misrepresentation and cannot demonstrate net economic consequences, it has not established materiality."[225] Because the insurance company could not show that it would not have issued health insurance had it known the truth of Meyling's prior conditions but would rather have simply charged the proper non-discounted premium in the first place, the court indicated that the fraud did not influence the insurance company's decision.[226] Because it included a clause in the contract that allowed for the company to retroactively adjust premiums, the court believed there were no net losses to the insurance company.[227]

An older criminal fraud materiality case is *United States v. Regent Office Supply Co. Regent* dealt with salespeople who lied to prospective customers to get them to engage in conversation, such as falsely claiming that the seller was in financial distress or had been personally referred to the prospective customer.[228] While the lie was effective in convincing the customers to engage in conversation, the customers received accurate information about the products they purchased.[229] The court held that there was no fraud because the lies were immaterial although the court also noted its distaste for the salespeople's deception by explaining "[w]e do not, however, condone the deceitfulness such business practices represent . . . . On the contrary, we find these 'white lies' repugnant

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221 *Id.*
222 *Id.* at 1187.
223 *Id.*
224 *Id.* at 1193.
225 *Id.*
226 *Id.* at 1192.
227 *Id.*
228 United States v. Regent Office Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970).
229 *Id.* at 1182.

to 'standards of business morality.'"[230] The Second Circuit decision demonstrates the link between materiality and harm. It states that the salespeople's lies were not fraud because "no injury was shown to flow from the deception," as the customers received accurate information about the products they purchased.[231]

We can compare the *Regent* style of analysis with a damages decision by the Fifth Circuit. In *Ab-Tech Construction Inc. v. United States*, the contractor did not comply with the terms of the Small Business Act; the government intended to award the contract to a company that was legitimately a small business.[232] Despite not properly being a small business, the contractor did construct the automated data processing facility in accordance with the physical specifications.[233] While the government paid $1.4 million to Ab-Tech and requested $4.2 million plus interest as trebled damages, the court found there were no damages to treble.[234] The court reasoned that "viewed strictly as a capital investment, the Government got essentially what it paid for."[235] The required element of being a small business was certainly material, as the government would not have awarded the contract had the business not qualified under the SBA, but the court did not find damages in the scenario.

These decisions recognize the link between materiality and harm. If materiality is simply a restatement of the harm requirement, analysis of materiality may not contribute much to a court's inquiry into FCA liability. Note, however, that incorporating a materiality standard might also *expand* contract liability. *Ab-Tech* demonstrates the possibility that materiality analysis would expand liability over a purely damages-based decision. Even though there were no actual damages, the lie was material and thus actionable in *Ab-Tech*. In contrast, materiality may be a shortcut to restrict the scope of liability if harms are difficult to calculate. It is not true that there is no harm from the deception in *Regent*; the customers ended up doing business with "repugnant"[236] entities,

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230 *Id.* at 1179.

231 *Id.* at 1182.

232 Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 432–33 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

233 *Id.* at 434.

234 *Id.*

235 *Id.*

236 *Regent Office Supply Co.*, 421 F.2d at 1179.

and we can certainly understand how customers, knowing the truth, would rather not reward such behavior. Similarly, the Ninth Circuit's decision in *Meyling* does a disservice to the idea of harm. Dealing with customers who lie and cheat is costly; the fact that the contract stipulates a compensatory remedy to deal with a different payment does not mean that the insurance company is actually in the same position as before. The process is costly, and we can also intuit that an honest insurance company would not want to sign up customers that are deliberately lying from the start.

Deliberate lies are costly, and it can be difficult to ascertain the harms caused to both the listener and to society at large. It is entirely possible that some lies are so trivial that no one actually cares about the lies, and thus there is no tangible harm. These cases suggest, however, that the harm approach is not limited to such trivial matters.

C. OTHER CONFUSING FACTORS

I should acknowledge that there are other reasons to find *Escobar* confusing. First, *Escobar* is based off an untrue claim. Contrary to Justice Thomas's assertions, there is no prior agreement as to the need for the element of materiality across various areas of law.

Justice Thomas claims that materiality is a nearly universal element across criminal and civil law.[237] This argument is plainly incorrect. In the narrow FCA context alone, lower courts do not even agree as to whether the criminal FCA contains a materiality requirement. [238] In the broader criminal context, there is similarly

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[237] *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016) (emphasizing that "the common law could not have conceived of fraud without proof of materiality" (citing Neder v. United States, 527 U.S. 1, 22 (1999)).

[238] *Compare* United States v. Pruitt, 702 F.2d 152, 155 (8th Cir. 1983) (holding that materiality is an essential element of a § 287 charge), *and* United States v. Snider, 502 F.2d 645, 652 n.12 (4th Cir. 1974) (explaining that "materiality' has been required as an element of the offense") *with* United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992) (noting that "materiality is not an element required by 18 U.S.C. § 287"), United States v. Logan, 250 F.3d 350, 358 (6th Cir. 2001) ("[M]ateriality is not an element of . . . 18 U.S.C. § 287"), United States v. Upton, 91 F.3d 677, 685 (5th Cir. 1996) (holding that "materiality is not an element of § 287"), *and* United States v. Elkin, 731 F.2d 1005, 1009 (2d Cir. 1984) ("Since the language of § 287 in no way suggests that materiality is an element of the offense, we conclude that proof of materiality was not required."); *see also* United States v. White, 27 F.3d 1531, 1535

little agreement. A survey of roughly 100 federal criminal false statement offenses finds that roughly half contain a materiality requirement.[239] At times, courts have interpreted the absence of an express materiality term as intentional Congressional removal of such a requirement.[240] Other times, courts have found an implied materiality requirement despite the lack of express language.[241] Judge Kozinski compiled his list of criminal statutes in 1994,[242] and courts continue to vary. A review in 2017 shows that courts have since held that some of these statutes do not contain an implied materiality element.[243]

Compounding matters, Justice Thomas declined to address whether common law or the statutory text governed regarding the origins of the materiality standard the Court imposed.[244]

Second, *Escobar* adopts an unusual materiality standard that conflates criminal and civil law principles. It imposes a materiality standard for civil fraud that does not reflect existing civil contract principles, and it counterintuitively makes imposition of civil fraud liability more difficult than criminal fraud liability.

(11th Cir. 1994) ("The four circuits that have addressed the issue of whether materiality is an element of a section 287 offense are evenly split.").

239 *See* United States v. Wells, 519 U.S. 482, 505 (1997) (finding that forty-two of one hundred federal false statement statutes contain a materiality requirement).

240 *See id.* at 483 (inferring that removal of materiality implies that materiality is not an element of making false statements to a federally insured bank under 18 U.S.C. § 1014).

241 See*, e.g.,* Neder v. United States, 527 U.S. 1, 22 (1999) (citing BMW of North America, Inc. v. Gore, 517 U.S. 559, 579 (1996)) (noting that fraud cannot be conceived of without proof of materiality).

242 U.S. v. Gaudin, 28 F.3d 943, 959–60 (9th Cir. 1994) (J. Kozinski, J., dissenting).

243 *See* United States. v. Condon, 132 F.3d 653, 656 (1998) (finding that 15 U.S.C. § 645 does not include a materiality requirement); Abramski v. United States., 573 U.S. 169, 191 (2014) (noting that there is no materiality requirement in gun dealer statements under 18 U.S.C. § 924); United States v. Youssef, 547 F.3d 1090, 1094 (9th Cir. 2008) (holding that there is no materiality requirement in naturalization proceedings under 18 U.S.C. § 1015); United States v. Eriksen, 639 F.3d 1138, 1151 (9th Cir. 2011) (finding that there is no materiality requirement for false ERISA documents under 18 U.S.C. § 1027); United States v. Lebreault-Feliz, 807 F.3d 1, 5–6, (1st Cir. 2015) (finding no materiality requirement in passport applications under 18 U.S.C. § 1542). *But see* United States v. Pirela Pirela, 809 F.3d 1195, 1202 (11th Cir. 2015) (finding implied materiality element in immigration documents under 18 U.S.C. § 1546).

244 *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016) ("We need not decide whether § 3729(a)(1)(A)'s materiality requirement is governed by § 3729(b)(4) or derived directly from common law.").

As Justice Thomas correctly noted, materiality can be found as a term in contract law.[245] Materiality can be an element of analysis in determining whether a party has a right to void a contract. A mistaken assumption, for example, can void a contract if it has "a material effect."[246] For example, if a party agrees to sell a piece of land whose value is tied to the presence of timber, the buyer can void the contract if it turns out the trees had unknowingly been destroyed by fire.[247] The mistake regarding the presence of trees had a material effect on the transaction. In contrast, assume a buyer and seller agree to transfer Blackacre for $100,000, and both parties believe Blackacre contains 100 acres of land. It turns out both parties are mistaken; Blackacre actually contains 110 acres of land. Without any additional facts, the sales contract is not voidable by either party.[248]

According to the Restatement (Second) of Contracts, however, materiality is not an element of fraud when voiding a contract.[249] The Restatement allows a party to void a contract due to misrepresentation under two circumstances: if a misrepresentation is either material or fraudulent.[250] Under this disjunctive construction, voiding a contract does not require materiality if the plaintiff can establish fraud. In contrast to the Blackacre example above, if the seller knew Greenacre contained only 90 acres but told the buyer Greenacre contained 100 acres, the buyer could void the contract regardless of the materiality of those 10 additional acres.[251] If the plaintiff wishes to void the contract but cannot establish fraud, then the misrepresentation must be material.

The express disregard of materiality in voiding a contract for fraud has attracted some questions. Some commentators are suspicious, noting that nonmaterial fraud is unlikely because it must still induce behavior from the victim.[252]

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[245] *Id.* at 2003 (citing RESTATEMENT (SECOND) OF CONTRACTS §162 (AM. LAW INST. 1981)).

[246] *Id.* at §§152, 153.

[247] *Id.* at §152 illus. 1.

[248] *Id.* at illus. 8.

[249] *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (AM. LAW INST. 1981) (noting that either a fraudulent or material misstatement that induces assent justifies voiding a contract).

[250] *Id.* at § 164.

[251] *Id.* at illus. 1.

[252] *See*, *e.g.*, Stephanie R. Hoffer, *Misrepresentation: The Restatement's Second Mistake*, 2014 U. ILL. L. REV. 115, 141–42 (2014) (citing FARNSWORTH ON CONTRACTS §4.12, at 459 (2d ed. 1998) (stating that cases granting rescission for non-material fraud are "difficult to find")).

In one way, the materiality standard presented in *Escobar* makes sense when comparing criminal fraud to contractual breach. These two conceptions of materiality are functionally similar. In the same way that a breach must be sufficiently serious, or material, to allow a plaintiff to void a contract, criminal fraud materiality must be sufficiently serious to merit punishment. This is not to say that these two categories fully overlap; it is possible that a lie might be sufficiently serious to merit punishment even though a breach concerning the same matter might not be sufficient grounds to merit voiding the contract. Nonetheless, the two standards serve a similar purpose: removing some less serious breaches or lies from consideration.

The problem, however, is that *Escobar* addresses civil fraud materiality. Under the Restatement (Second) of Contracts, materiality is expressly rejected as an element for voiding a contract if fraud is alleged.[253] Thus, if the defendant lied and the basis for rescission is the lie, the Restatement indicates that there is no materiality limitation.[254]

This is not to say that there is no limit to the triviality of a lie in fraud in contract law. Plaintiffs still must satisfy the standard civil requirements of demonstrating harm and causation. If the plaintiff did not suffer any harm, or if the lie did not influence the plaintiff, then there is no basis for a civil action. The key here, however, is that in contract law the limitation for fraud is distinct from the materiality limitation. Stated another way, contract law recognizes that it is possible to tell a material lie about an immaterial matter. Materiality is an element of contractual breach, but contractual breach materiality is not the same as materiality in civil fraud. The fact that contractual breach materiality is similar to criminal fraud materiality is an unfortunate coincidence in the civil fraud context.

Worse yet, the *Escobar* formulation of materiality actually narrows civil fraud materiality in comparison to criminal fraud materiality. The common law describes the materiality requirement as applying to the misrepresentation: the lie must be material.[255] A

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[253] RESTATEMENT (SECOND) OF CONTRACTS §162 (AM. LAW INST 1981).

[254] *Id.*

[255] *See, e.g.*, Wilcox v. First Interstate Bank of Or., N.A., 815 F.2d 522, 532 (9th Cir. 1987) (Boochever, J., dissenting) (explaining one of the elements of common law fraud is the representation's materiality).

lie must have the capability or natural tendency to influence the listener. Instead, the Supreme Court rephrased the civil fraud materiality requirement as applying to the facts: "well-settled meaning of 'fraud' require[s] a misrepresentation or concealment of material fact."[256] This is a narrowing of the doctrine, stemming from contract law in which specific terms of a contract can be designated material or not. As noted above, if there is no fraud, voiding a contract requires that the breach concern a material term.

This reformulation focusing on material facts rather than material lies requires justification. Consider the rock band Van Halen's infamous "brown M&M" contract provision.[257] Van Halen would include a clause in their performance contract requiring provision of a bowl of M&Ms with the brown candies removed.[258] The band had no personal preferences regarding the brown candies, but they recognized that their musical production was highly complex and technical.[259] Upon arrival, they could quickly check for the presence of brown M&Ms.[260] If a site failed to follow the brown M&M provision, the band interpreted that as a signal that the site was not careful in reading and following the technical contract provisions.[261] The band could then exercise greater caution in verifying compliance with the technical provisions that were a real danger, such as electrical and structural requirements.[262]

Phrased in terms of materiality as importance, the factual presence of a brown M&M itself was not material to Van Halen, but the fact that the other party had not paid proper attention to the clause was material to the band. The site's failure to respect the brown M&M clause affected their decision-making process and was costly because the band would then perform additional inspections of the site's setup.

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256 Neder v. United States, 527 U.S. 1, 22 (1999) (citing RESTATEMENT (SECOND) OF TORTS § 538 (AM. LAW INST 1977).

257 *See* Tom W. Bell, *Unconstitutional Quartering, Governmental Immunity, and Van Halen's Brown M&M Test*, 82 TENN. L. REV. 497, 532 (2015) (citing David Mikkelson, *Van Halen's Concert Contract Required No Brown M&Ms?*, SNOPES, Jan. 19, 2017, http://www.snopes.com/music/artists/vanhalen.asp (providing details on the Van Halen clause)).

258 *Id.*

259 *Id.*

260 *Id.*

261 *Id.*

262 *Id.*

Besides the signaling value, this distinction is also important because civil fraud should not simply replicate simple contractual breach. As the Restatement notes, simple contractual breaches should be treated differently than fraud.[263] It is one thing to be negligent in satisfying a contract; it is another thing to lie about the contract.

The Court may have good reasons for selecting this particular formulation of the materiality standard, but it is not apparent from the *Escobar* decision. If, as the Court emphasizes, the common law is the basis for its decision, perhaps civil fraud should return to the original common law formulation: the materiality of the lie, as opposed to the narrower materiality of the factual provision itself. A lie may be material because the listener attaches importance to the lie itself, or it may also be material because the listener attaches value to the factual matter underlying the deception.

Let us return to the *Escobar* hypothetical. From a criminal fraud perspective, we likely agree with Justice Thomas's intuition: it seems unreasonable to imprison an individual for lying about the stapler's country of origin when the contract focuses upon healthcare services. If the case had been a simple contractual breach case, we similarly would agree that a breach of the stapler's country-of-origin provision would not be material. The government would not be entitled to void the entire healthcare contract based solely on such a breach.

Less clear, however, is if such a lie is material for civil fraud purposes. Under contract law principles, we would consider whether such deception would influence the government. Justice Thomas emphasizes his belief that the government would continue to do business with a healthcare provider that lied about the stapler's country of origin, and that the continued business implies a lack of influence.[264] The Restatement, however, recognizes that "influence" is not synonymous with an actual change in decision.[265]

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[263] *See* RESTATEMENT (SECOND) OF CONTRACTS §164 (AM. LAW INST. 1981) (providing for voiding a contract if there is a fraudulent misrepresentation).

[264] *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2004 (2016) (disagreeing with the government that liability would attach if they routinely used the staplers).

[265] *See* RESTATEMENT (SECOND) OF CONTRACTS §164 (AM. LAW INST. 1981) (allowing for rescission of a contract regardless of whether the fraud actually influenced the party's decision).

Unsurprisingly, Justice Thomas's hypothetical provides little clarification as to the civil fraud materiality standard.

D. POST-*ESCOBAR* EVIDENCE

We can see evidence of the confusion post-*Escobar*. Appellate courts continue to conflict about the importance of the *Escobar* materiality test. The Ninth Circuit, for example, has noted that there might be various reasons why the government would continue to pay despite actual knowledge of the violations and has declined to hold such violations immaterial.[266] Other circuits have held in favor of defendants, emphasizing the government's continued payments as evidence of immateriality.[267]

Consider the recent *Trinity* case in the Fifth Circuit.[268] Trinity was a company that produced highway guardrail products that prevent drivers from running off the road; these products were often paid for by the federal government.[269] To be eligible for federal reimbursement, the guardrail products could be subjected to required testing unless they were "nearly certain to be safe."[270] Trinity's products were approved for federal use in 2000 by the FHWA (Federal Highway Administration).[271] In 2005, Trinity modified its product and submitted documentation and test results for federal approval, which was granted.[272] A whistleblower discovered, however, that Trinity had made additional, undocumented changes to the product, including a reduction of a

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[266] *See* United States *ex rel.* Campie v. Gilead Scis., Inc., 862 F.3d 890, 906 (9th Cir. 2017) (explaining that continuing to pay a party after learning that a certain requirement was violated is not dispositive on the issue of materiality). *But see* United States *ex rel.* Kelly v. Serco, Inc., 846 F.3d 325, 334 (9th Cir. 2017) (holding government's continued payment as evidence of immateriality).

[267] *See* D'Agostino v. ev3, Inc., 845 F.3d 1, 7 (1st Cir. 2016) (explaining that the FDA failure to withdraw approval after alerted makes it both not material and not causal); United States ex rel. Petratos v. Genentech Inc., 855 F.3d 481, 490 (3d Cir. 2017) (noting that the Center for Medicare and Medicaid Services continual payments after full knowledge of noncompliance rendered the provision immaterial); United States ex rel. McBride v. Halliburton Company, 848 F.3d 1027, 1034 (D.C. Cir. 2017) (dismissing the suit because the Administrative Contracting Officer continued payments even with knowledge of noncompliance).

[268] United States *ex rel.* Harman v. Trinity Indus. Inc., 872 F.3d 645 (5th Cir. 2017).

[269] *Id.* at 648.

[270] *Id.*

[271] *Id.*

[272] *Id.*

five inch guide channel to a four inch guide channel that allegedly made the product more dangerous.[273] The whistleblower notified the FHWA, which then contacted Trinity. Trinity explained that the non-disclosure was inadvertent, and that the reported test results were actually based upon the four inch guide channel design.[274] The FHWA declined to intervene in the case and continued to reimburse for the Trinity product.[275] Although the federal government declined to intervene, one of the states intervened in litigation.[276] Harman, the whistleblower, proceeded with litigation and won in a jury trial.[277] After the jury result, the FHWA ordered independent testing by a joint task force of transportation experts that examined over one thousand Trinity guardrail installations.[278] They found no evidence of multiple versions of Trinity products, nor did they find any products that deviated from the 2005 crash test results.[279]

The Fifth Circuit reversed the jury award, holding that any misrepresentation to the government was not material.[280] The court emphasized that the FHWA did not change its consistent position that Trinity's products were reimbursement eligible, thus satisfying the *Escobar* dicta.[281] Although there was a serious nationwide investigation as to the allegations post-jury verdict, the court described that investigation as to the materiality of the jury verdict rather than the materiality of the initial non-disclosure.[282]

Of particular note in *Trinity* is the appellate court's decision to consider, but not base, its holding on a variety of other elements of the case. It recognized that the case could have been decided on the basis of *mens rea*, namely that Trinity did not know that its certification was false.[283] It also expressed concern that "the proper measure of damages should be zero" in the case, but again did not

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[273] *Id.* at 649.
[274] *Id.* at 650.
[275] *Id.*
[276] *Id.* at 665.
[277] *Id.* at 651.
[278] *Id.*
[279] *Id.*
[280] *Id.* at 664.
[281] *See id.* at 668 (noting that FHWA's unwavering position regarding the eligibility of Trinity's products for reimbursement indicated that the statements were immaterial to its decision to pay).
[282] *Id.* at 665.
[283] *See id.* at 657–60 (discussing whether Trinity acted with the requisite scienter).

overturn the verdict on this basis.[284] As other courts have recognized, the decision on materiality effectively is a reconsideration of the government's decision in addressing the discovered problem.

I highlight *Trinity* first to demonstrate *Escobar*'s impact on lower court's decisions. My intent is not to determine whether a materiality element in the FCA is in society's best interests or part of Congress's original intent. Rather, my interest is to consider the impact on companies like Trinity and whistleblowers.

1. Impact on Trinity.

As an immediate matter, Trinity should be pleased to escape FCA liability for the non-disclosure of the guide channel size change. From a broader perspective, however, the decision emphasizes the ongoing, significant uncertainty for companies like Trinity in determining whether they are subject to FCA liability for nondisclosure of regulatory violations or contractual breaches. The materiality decision in *Trinity* focused primarily upon the government's immediate actual response in learning of the nondisclosed information. It did not, for example, focus on how the government *should* respond nor some objective standard by which companies should be judged. As applied, this materiality standard is beneficial to companies that can accurately predict government responses to their improper behavior. Some courts have been suspicious about relying on government reactions, recognizing the possibility that government officials may also display a disregard for the law.[285] The bottom line, though, is that the decision gives minimal future guidance as to the types of contractual problems and regulatory violations that create FCA liability. Unless companies have an excellent relationship with regulators, it is unclear how much effort they should dedicate towards compliance efforts given the numerous regulations and terms involved in government

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[284] *Id.* at 652–53.

[285] *See, e.g.*, United States *ex rel.* Durcholz v. FKW Inc., 189 F.3d 542, 545 n.2 (7th Cir. 1999) (recognizing that officials "may have stretched the contracting regulations to or beyond their limits"); United States *ex rel.* Asch v. Teller, Levit & Silvertrust, P.C., No. 00 C 3289, 2004 WL 1093784, at *3 (N.D. Ill. May 7, 2004) (expressing concern that "a contractor in cahoots with a government official would be insulated from a [FCA] suit"); *see also* David Kwok, *The Private Partners in Public Corruption*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 467, 467 (2018) (discussing how public officials can enable fraud).

contracts. In the future, if Trinity should discover an undisclosed two-inch deviation in the guide channel size, rather than a one-inch deviation, the court's decision gives little guidance outside of relying on Trinity's prediction of how the government is likely to react in learning of such information.

2. Impact on whistleblowers.

Similarly, the uncertainty surrounding the materiality standard places a burden on whistleblowers. Although the whistleblower in *Trinity* was not an employee of the company, many whistleblowers take significant risks with their careers in bringing FCA actions. A clear understanding of the types of contractual violations or breaches that would be material under the FCA would be helpful to a potential whistleblower. As noted above, though, *Trinity*'s definition of materiality seems to hinge on the government's actual response to learning of the violations. It is highly unlikely that a whistleblower would be able to accurately predict the government's response. Subjecting whistleblowers to the risk that the government may fail to act on their offered information likely deters some whistleblowers from coming forward.

E. PROMOTING CLARITY IN THE FCA

The premise of this Part is not that the *Escobar* materiality standard for the FCA is necessarily wrong, but rather that the attempt at narrowing liability has created vagueness problems. The Supreme Court recognized both overbreadth and vagueness problems, and it could have chosen other narrowing strategies that would have been clearer. For example, the Supreme Court could have established a minimum harm requirement to narrow the scope of liability. The government would have to demonstrate a minimum amount of harm, perhaps $75,000, from fraud in order to bring an FCA action. This minimum harm requirement could mimic the intended function of the *Escobar* materiality standard. This is not a claim that calculating damages is easy. The key, however, is that the court already must address the question of damages, so attaching a minimum harm requirement does not add significant complexity. A minimum harm requirement also gives lowers courts and Congress room to experiment with different damages calculations.

Another alternative for the Supreme Court would have been to focus on the *mens rea* requirement of knowledge. It could have addressed concerns regarding trivial violations by emphasizing proof of knowledge. Returning to Justice Thomas's hypothetical, a relatively remote issue such as the country of origin of a stapler may be straightforward to prove, but it will be difficult to prove that a person submitting the healthcare paperwork was actually aware of the improper country of origin. Similar to damages, this is not to say that *mens rea* is an easy analysis, but rather that *mens rea* is already a part of the analysis required to demonstrate fraud.

Finally, even if the Court believes that a complex analysis of the combined factors of *mens rea*, damages, and causation is necessary, it could have attempted to shift that analysis to a different stage. Rather than requiring such analysis for determination of liability, that analysis could be applied in the calculation of sanctions.[286] Shifting the uncertainty to the area of sanctions is a well-established tool from the criminal context, in which courts exercise substantial discretion in establishing penalties.

V. CONCLUSION

The Supreme Court plays an essential role in balancing a variety of important societal interests when addressing white-collar offenses. Statutes should be, to some extent, sufficiently broad to encompass the creative ways individuals and corporations may obtain improper advantages, but those statutes should still provide sufficient notice to potential defendants for reasons of both general deterrence and fairness. Congress has often adopted relatively broad white-collar statutes. The Supreme Court has expressed concern about vagueness and overbreadth in those statutes, though, and it has often narrowed the scope of liability through statutory interpretation. These narrowing decisions can be beneficial to potential defendants for two distinct reasons. First, they limit the scope of liability, which is in the immediate interest of the defendant

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[286] *See, e.g.*, Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1250 (1997) (noting the "extraordinarily broad discretion" that federal judges exercise in sentencing); Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1328 (2006) (advocating for more individualized judgments at sentencing based on what the defendant deserves).

facing prosecution. Second, these narrowing decisions may improve clarity, as they may facilitate a conversation among lower courts and Congress to better specify the limits of liability.

Unfortunately, these narrowing decisions do not automatically provide greater clarity. Some narrowing decisions require courts to engage in complex or unclear analysis, which may increase the potential for vagueness and uncertainty. Other narrowing decisions incorporate an element of analysis which is highly related to other existing elements of the offense, and these highly relational analyses are also prone to vagueness and uncertainty. Furthermore, the uncertainty due to the relationship with other elements also raises the possibility that the actual scope of liability was not reduced. Thus, beyond the basic concern that companies may have difficulty deploying effective compliance regimes in light of vague and uncertain laws, the Supreme Court incurs significant risks by employing highly vague narrowing strategies. It incurs the risk that their narrowing efforts may not actually narrow the scope of the statutory scheme, and the resulting vagueness may impede a productive dialectic with Congress in improving the statutory scheme.