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ARTICLE

THE PERNICIOUS EFFECT OF DUBIOUS MATERIALITY

Timothy M. Todd[†]

“As now construed, § 1014 covers 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.”¹

I. INTRODUCTION

According to many scholars and commentators, we live in an overly criminalized era.² Over-criminalization can take two main forms:³ first, actual over-authorization of criminal sanctions by legislatures,⁴ and second, over-application by prosecutors (or courts).⁵ This short symposium Article adds to the over-criminalization zeitgeist by arguing that the absence of express materiality qualifiers in statutes necessarily adds troubling overbreadth to statutes. Moreover, even when materiality is an element of the

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1. United States v. Wells, 519 U.S. 482, 502 (1997) (Stevens, J., dissenting).

2. See, e.g., Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 723 (2013); Stuart P. Green, *Why It's a Crime to Tear Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997); Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719-39 (2005); Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529 (2012); Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 79-80 (1933); George J. Terwilliger III, *Under-Breaded Shrimp and other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007); Dick Thornburgh, *The Challenge of Over-Criminalization*, 33-DEC PA. LAW. 36 (2011); Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1 (2011); see generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

3. Stuart P. Green, *Why It's a Crime to Tear Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1545-46 (1997).

4. See, e.g., Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 735 (2013) (“The principal form that overcriminalization takes is the passage of unnecessary criminal statutes.”).

5. Green, *supra* note 3, at 1545-46.

offense, its judicial construction can effectively nullify any purported protection. The net effect of both phenomena is a pernicious creep of over-criminalization that undercuts a free society.

II. BACKGROUND

The Framers were acutely concerned with the extent and power of criminal laws.⁶ For instance, Alexander Hamilton wrote as follows in *Federalist No. 83*:

I must acknowledge, that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury, in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions, have ever appeared to me the great engines of judicial despotism; and all these have relation to criminal proceedings.⁷

This concern is best embodied by the various protections provided in the federal Constitution to prevent such abuses by placing express limits on the government's ability to create and execute criminal penalties. Additional express examples of protecting the citizenry from the state's criminal law power are burdens of proof and persuasion; presumption of innocence; the Fifth Amendment and the privilege against self-incrimination; double jeopardy protections; and prohibitions on ex post facto laws and bills of attainder.⁸

Historical concerns about the rise of the criminal state are borne out by recent statistics. In 2005, about 2.2 million persons were incarcerated in federal or state prison, which is a rate of 737 inmates per 100,000 residents.⁹ In other words, 1 in every 138 residents was incarcerated.¹⁰ In 2015, the

6. See, e.g., Larkin, *supra* note 4, at 725–26 (“The Framers were concerned that a voluminous criminal code was a threat to liberty, so federal criminal law started out small, protecting only what was necessary to get the new, limited national government up and running.”). In fact, “[t]he first federal criminal statute outlawed no more than approximately thirty crimes, and each one was closely tied to the needs of the new enterprise.” *Id.* at 726.

7. THE FEDERALIST NO. 83 (Alexander Hamilton).

8. Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 14 (2014).

9. DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 4 (2008).

10. *Id.*

actively incarcerated population was 2,173,800,¹¹ with an incarceration rate of 670 per 100,000 residents.¹² Indeed, the prison population rates have nearly *quadrupled* since the 1980s.¹³

Looking internationally, as a point of comparison, “the United States has by far the highest rate in the world—nearly five times higher than that of any other Western industrialized country.”¹⁴ Even more troubling (and sad) is that “[a]n estimated 1 in 20 children born in the United States is destined to serve time in a state or federal prison at some point in his life.”¹⁵ Moreover, “[m]inorities are disproportionately represented behind bars: 12.6% of all black men ages 25 to 29 are in jails or prisons, compared with 1.7% of similarly-aged whites.”¹⁶ Perhaps surprisingly, only 7.9% of federal prisoners in 2009 were convicted of violent crimes.¹⁷

Although incarceration rates are a commonly used metric, a more robust measure of over-criminalization is the number of people under the supervision of the criminal justice system, such as those on probation or parole.¹⁸ Data from the early 2000s indicate that 4.2 million persons in the United States are on probation and approximately 784,000 are on parole;¹⁹ the latter are, of course, subject to incarceration if they violate the terms of their release. More recent data indicate that, as of 2015, there are 875,000 on parole and nearly 3.8 million on probation.²⁰ Between the actively incarcerated population and those on probation or parole, there are 6,741,400 persons under the control of the criminal justice system.²¹

The effects of over-criminalization do not end with release at the prison gates; they extend into reentry and often follow offenders for the rest of their lives. As Professor Michelle Alexander has noted, “[e]ven when released from the system’s formal control, the stigma of criminality lingers,”²² and other

11. Daniel Kaeble & Lauren Glaze, *Correctional Populations in the United States, 2015*, U.S. DEP’T OF JUST. (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

12. *Id.*

13. HUSAK, *supra* note 9, at 5.

14. *Id.*

15. *Id.* at 4.

16. *Id.*

17. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 101 (2012).

18. HUSAK, *supra* note 9, at 4–5.

19. *Id.*

20. Kaeble & Glaze, *supra* note 11.

21. *Id.*

22. ALEXANDER, *supra* note 17, at 141.

commentators have referred to a prison sentence as “the mark of Cain.”²³ Indeed, as Professor Alexander avers, a criminal record basically allows “discrimination in employment, housing, education, public benefits, and jury service.”²⁴ A troubling aspect of the many collateral consequences is that they make it difficult for offenders to fully reintegrate into society.²⁵ Consequently, “these sanctions can be the most damaging and painful aspect of a criminal conviction.”²⁶

Quantifying the actual level of over-criminalization is a devilishly nettlesome endeavor.²⁷ The number of criminal statutes and laws are used as a proxy for it, though even this is not an ideal metric.²⁸ The United States Code is approximately 27,000 pages of printed text.²⁹ In those 27,000 pages, there are approximately 3,300 provisions with criminal sanctions, many of which are codified in Title 18.³⁰ Other estimates peg the number at 4,000.³¹

When factoring in federal *regulations*, the provisions with sanctions balloon—to 300,000 regulations with sanctions, by some estimates.³² In fact, “[a] blue ribbon ABA task force found that more than forty percent of federal criminal provisions passed after the Civil War had been enacted in the twenty-eight year period between 1970 and 1998.”³³ A Federalist Society study found that “there had been a thirty percent increase in federal offenses

23. *Id.* at 142.

24. *Id.* at 141.

25. *Id.* at 143.

26. *Id.*; see also *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations*, A.B.A. (Jan. 2009), <https://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf>.

27. HUSAK, *supra* note 9, at 9.

28. See *id.* at 7–9.

29. *Id.* at 9.

30. *Id.* (citation omitted). Indeed, while the mere numerosity is compelling, this does not even broach the issues that are implicated by the federalization of local crime. See, e.g., John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673 (1999); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997). Chief Justice Rehnquist presciently warned against this trend: “The trend to federalize crimes that traditionally have been handled in state courts . . . threatens to change entirely the nature of our federal system Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be.” Chief Justice William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, 11 FED. SENT’G REP. 134, 135 (1999); see also Larkin, *supra* note 4.

31. Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 753 (2005).

32. See HUSAK, *supra* note 9, at 10.

33. Beale, *supra* note 31, at 753.

carrying criminal penalties between 1980 and 2004.”³⁴ It is shocking—and sad—that it has been said that “not even the Justice Department, knows the actual number of federal criminal offenses.”³⁵

Moreover, it is important to emphasize that over-criminalization cannot just be limited to a review of statutes and convictions; we must be mindful of all those interactions with the justice system that do not result in a conviction or even a prosecution. For instance, in 2004 there were approximately 14 million arrests made.³⁶ Of course, not all of those arrests ended in prosecution and conviction, but the people who were arrested still suffered consequences—both at the time of the arrest and going forward.³⁷

Over-criminalization research has often focused on over-authorization of criminal sanctions by legislatures. This stream of over-criminalization makes relatively innocuous conduct (or at least conduct without actual substantive harm) criminal. There are myriad examples of such over-criminalization in various penal codes. Professor Eric Luna provides some salient examples:

Delaware punishes by up to six months imprisonment the sale of perfume or lotion as a beverage. In Alabama, it is a felony to maim one’s self to “excite sympathy” or to train a bear to wrestle, while Nevada criminalizes the disturbance of a congregation at worship

34. *Id.* at 754.

35. Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 739 (2012); *see also* Larkin, *supra* note 4.

36. *See* HUSAK, *supra* note 9, at 13 (citation omitted).

37. For instance, in future questionnaires or applications that ask if the respondent has ever been arrested. This can affect many aspects of life such as employment and even international travel (e.g., in visa applications). Edwin Meese and Paul Larkin described the consequences of exposing a morally blameless person to the criminal justice system:

Dragging a morally blameless person into the criminal justice system forces him—as well as his family, friends, colleagues, and anyone else who cares for him—to endure the series of harms and indignities that a modern law enforcement bureaucracy inflicts on every suspect, the guilty and innocent alike: being arrested, undergoing a thorough probing of one’s person and whatever is worn or carried incident to a search following arrest; being handcuffed, driven to the police station in the back seat of a patrol car, booked, waiting for hours in a temporary holding cell, and doing the ‘perp walk’ before the media; waiting in jail until bail is posted (a cost that will never be recouped); paying for a lawyer with one’s life savings or child’s college fund; and spending a terribly long and painful period awaiting trial while the police and media investigate, and sometime publicize, every embarrassing aspect of one’s life.

Meese & Larkin, *supra* note 35, at 753–54. Moreover, these consequences are even more exacerbated now with the advent of Internet searches and archives, which puts this information indefinitely in easy grasp of everyone forever.

by “engaging in any boisterous or noisy amusement.” Tennessee makes it a misdemeanor to hunt wildlife from an aircraft, Indiana bans the coloring of birds and rabbits, Massachusetts punishes those who frighten pigeons from their nests, and Texas declares it a felony to use live animals as lures in dog racing. In turn, spitting in public spaces is a misdemeanor in Virginia, and anonymously sending an indecent or “suggestive” message in South Carolina is punishable by up to three years imprisonment.³⁸

Even more salient examples include the unauthorized use of “Smokey Bear” images³⁹ and unauthorized use of the 4-H Club insignia.⁴⁰

Professor Douglas Husak, in his book on over-criminalization, posits three categories of penal code innovations that spurred the growth of criminal laws: (1) overlapping crimes, which describe re-criminalizing the same conduct;⁴¹ (2) risk-prevention crimes, which describe offenses that do not necessarily require harm, but only the possibility of harm;⁴² and (3) ancillary crimes, which describe instances in which other statutes are charged or prosecuted when the underlying core offense cannot be established.⁴³

Another interesting thread in the over-criminalization literature is the problematic integration of criminal sanctions in complicated regulatory regimes.⁴⁴ As commentators have noted, “[t]hat practice can pose extraordinary compliance problems for the average person because criminal and regulatory laws exist for very different purposes.”⁴⁵ In sum, “[t]reating regulatory crimes as if they were no different than ‘street’ crimes ignores the profound difference between the two classes of offenses and puts parties

38. Eric Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 704 (2005) (citation omitted).

39. 18 U.S.C. § 711 (2012); *see also* Beale, *supra* note 31, at 761.

40. 18 U.S.C. § 707 (2012); *see also* Beale, *supra* note 31, at 761.

41. One provided example is criminalizing the destruction of library books, when property destruction in general is already proscribed. *See* HUSAK, *supra* note 9, at 37. As Husak argues, “the main effect of these overlapping statutes is to allow charge stacking that threatens defendants with increasingly severe punishments.” *Id.* at 38.

42. Examples are driving with a cell phone or juvenile curfew laws. *Id.* at 38.

43. An example is failure to file a Bank Secrecy Act report when required. *Id.* at 41.

44. *See, e.g.*, Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of Criminal Law*, 42 HOFSTRA L. REV. 745, 746 (2014).

45. *Id.*

engaged in entirely legitimate activities without any intent to break the law at risk of criminal punishment.”⁴⁶

As this Article argues, though, there are additional, more subtle and pernicious forms of over-criminalization. First, the absence of express materiality qualifiers in statutes necessarily adds troubling overbreadth to statutes. Second, even when materiality is an element, its judicial construction can nullify any purported protection.

III. ABSENCE OF EXPRESS MATERIALITY ELEMENTS IN CRIMINAL STATUTES

In *United States v. Wells*,⁴⁷ the Supreme Court was presented with the issue of whether materiality is an element of 18 U.S.C. § 1014, which basically makes it a crime to knowingly make a misstatement to a federally insured bank.⁴⁸ In a nutshell, the government charged the defendants under § 1014 for concealing the true terms of lease contracts, which placed on their corporation (and not its customers) the obligation to service equipment.⁴⁹ According to the government, the service obligations were hidden to avoid freeing up cash flow that the bank might have otherwise required to be in reserve had it known the true extent of the service obligations.⁵⁰ Additionally, the defendants were charged under § 1014 for “forging” their wives’ signatures on personal guarantees to the bank.⁵¹

In analyzing whether materiality was a required element under § 1014, the Court defined the term “materiality” in this context as “ha[ving] a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed.”⁵² The Court used a three-part framework in its analysis: (1) examine the text of the statute; (2) examine the common-law meaning of the terms used; and (3) examine statutory (legislative) history.⁵³

46. *Id.* As Larkin later notes, “If you lie, cheat, steal, or physically harm someone, you have broken the law. Said differently, if you know the Decalogue, you know what not to do. By contrast, regulatory statutes are long, elaborate, intricate, and reticulated.” *Id.* at 754.

47. 519 U.S. 482 (1997).

48. 18 U.S.C. § 1014 (2012).

49. *Wells*, 519 U.S. at 484–85.

50. *Id.* at 485.

51. *Id.*

52. *Wells*, 519 U.S. at 489 (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted)).

53. *Id.*; see also *Neder v. United States*, 527 U.S. 1 (1999); Megan L. Hoffman, Comment, *The Substantial Weight Test: A Proposal to Resolve The Circuits’ Disparate Interpretations Of Materiality Under The False Claims Act*, 58 U. KAN. L. REV. 181 (2009).

The Court, of course, noted that “[n]owhere does [§ 1014] further say that a material fact must be the subject of the false statement or so much as mention materiality.”⁵⁴ Rather, the Court emphasized that “its terms cover ‘any’ false statement that meets the other requirements in the statute, and the term ‘false statement’ carries no general suggestion of influential significance.”⁵⁵ Next, the Court concluded that, at common law, the term “false statement” did not have an acquired meaning requiring materiality.⁵⁶ Finally, the Court observed that when § 1014 was originally enacted, Congress explicitly included materiality requirements in other sections regarding false representations.⁵⁷ Therefore, the Court reasoned, “[t]he most likely inference in these circumstances is that Congress deliberately dropped the term ‘materiality’ without intending materiality to be an element of § 1014.”⁵⁸

The Court did at least pay lip service to the concern that by *not* reading materiality into § 1014, it may “impose substantial criminal penalties on relatively trivial or innocent conduct.”⁵⁹ In effect, the Court explained that the *mens rea* element in § 1014—requiring that “the speaker knows the falsity of what he says and intends it to influence the institution”⁶⁰—effectively mitigates the over-criminalization concern.⁶¹ As explained in Part IV, this is myopic and offers, at best, only a veneer of protection in some cases.

A. *The Problem of Eroding Materiality*

The rationale in *Wells* and cases of its ilk, which eliminate or erode materiality and other statutory safeguards, is hugely problematic because these cases needlessly expose citizens to the specter of criminal prosecution. As Justice Stevens explained in his *Wells* dissent,

54. *Wells*, 519 U.S. at 490.

55. *Id.* at 490 (citing *Kungys v. United States*, 485 U.S. 759, 781 (1988); *Kay v. United States*, 303 U.S. 1, 5–6 (1938)).

56. *Wells*, 519 U.S. at 490.

57. *Id.* at 492.

58. *Id.* at 493 (citing *United States v. Shabani*, 513 U.S. 10, 13–14 (1994)).

59. *Id.* at 498 (citing *United States v. Williams*, 12 F.3d 452, 458 (5th Cir. 1994); *United States v. Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992)).

60. *Wells*, 519 U.S. at 499.

61. Ironically, the Court noted that it *already* had to cabin the scope of § 1014 as applied to bad checks in order to prevent § 1014 from making a “broad range of unremarkable conduct a violation of federal law.” *Williams v. United States*, 458 U.S. 279, 286–87 (1982). Basically, the Court believes its ad hoc and post hoc declarations of overbreadth are sufficient to protect the facially broad sweep of § 1014.

As now construed, § 1014 covers 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. So long as the false statement is made “for the purpose of influencing” a bank officer, it violates § 1014.⁶²

Justice Stevens persuasively advanced three reasons why federal false statement statutes should have materiality qualifiers. First, he argued that, in common law, neither false statements nor misrepresentations encompassed “immaterial falsehoods, such as mere flattery.”⁶³ Second, and perhaps most compelling, is his point that many federal false statement statutes lack an express materiality requirement.⁶⁴ “[A]t least 100 federal false statement statutes may be found in the United States Code. About 42 of them contain an express materiality requirement; approximately 54 do not.”⁶⁵ Indeed, he noted that “[t]he kinds of false statements found in the first category are, to my eyes at least, indistinguishable from those in the second category. Nor is there any obvious distinction between the range of punishments authorized by the two different groups of statutes.”⁶⁶ Third, and finally, he emphasized that, in the jurisprudential ebb of the 1940s—when § 1014 was enacted—Congress relied more on the Court to fill gaps in the law based on the common-law tradition.⁶⁷

In sum, the concern is that criminal statutes without robust materiality and specificity invite “abuse on the part of prosecuting officials, who are left free to harass any individuals or groups who may be the object of official displeasure.”⁶⁸

B. *The Problems with Defining Materiality*

Having materiality expressly required as an element in a statute is, everything else being equal, better than not having it at all. There are still

62. *Wells*, 519 U.S. at 502 (Stevens, J., dissenting).

63. *Id.* at 504.

64. *Id.* at 505.

65. *Id.*

66. *Id.* at 505–06.

67. *Wells*, 519 U.S. at 509–10 (Stevens, J., dissenting). As he quipped, “[i]t was only three years earlier that one of the greatest judges of the era—indeed, of any era—had admonished us ‘not to make a fortress out of the dictionary.’” *Id.* at 510 (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)).

68. *Parker v. Levy*, 417 U.S. 733, 775 (1974).

issues, however, with using materiality in statutes, mainly related to the concept of legal (un)certainty.⁶⁹ Materiality can be a subjective and nebulous standard; it is challenging to demarcate its contours. Consequently, citizens who rely on materiality to inform and guide their conduct will likely find it a poor guide. Additionally, even express materiality may be in a weak form, offering only a veneer of protection, and the threshold to trigger materiality is so low that overbroad application is still an issue. These shortcomings are antithetical to a legal system rooted in individual freedom and liberty.⁷⁰

C. *Fuzzy Materiality and Predictability*

As Holmes remarked, “the tendency of the law must always be to narrow the field of uncertainty.”⁷¹ Indeed, legal uncertainty is undesirable and suboptimal.⁷² Uncertainty is the enemy of predictability, and predictability—which is a function of “[c]onsistency and stability”⁷³—is the hallmark of a just legal system.⁷⁴ Only with consistency and stability “can the law be predictable to those who must shape their conduct by it and to lower courts which must apply it.”⁷⁵

However, a wooden cry of “materiality” does not advance the dual interests of consistency and stability because the standard is so nebulous. Like Nero’s strategy of posting edicts too high for his citizens, our current system makes it easy for people to run afoul of the law,⁷⁶ oftentimes with the benefit

69. See generally H.W.R. Wade, *The Concept of Legal Certainty: A Preliminary Skirmish*, 4 MOD. L. REV. 183 (1941).

70. *Id.* at 189 (“As law exists for security, confidence and freedom, it must be invested with as much certainty and uniformity as can be provided by the wavering structures of human institutions.”).

71. OLIVER WENDELL HOLMES, *THE COMMON LAW* 127 (1881).

72. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (“Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law.”).

73. *Williams v. State of N.C.*, 317 U.S. 287, 323 (1942) (“This Court may follow precedents, irrespective of their merits, as a matter of obedience to the rule of stare decisis. Consistency and stability may be so served. They are ends desirable in themselves, for only thereby can the law be predictable to those who must shape their conduct by it and to lower courts which must apply it.”).

74. Scalia, *supra* note 72, at 1179 (“Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”).

75. *Williams*, 317 U.S. at 323.

76. “It is said that one of emperor Nero’s nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress.” Scalia, *supra* note 72, at 1179.

of hindsight to boot.⁷⁷ In sum, if materiality qualifiers still do not “effectively guide action,” then there is still undesirable uncertainty in the system.

A classic example of nebulous or “fuzzy” materiality is in the context of securities regulation. The Securities Act of 1933⁷⁸ and the Securities Exchange Act of 1934,⁷⁹ of course, make it illegal to, among other things, make a *material* misstatement of fact in connection with an array of securities-based transactions.⁸⁰

The Supreme Court, in *TSC Industries v. Northway, Inc.*,⁸¹ defined materiality in the context of SEC Rule 14a-9⁸² as

An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.⁸³

What exactly, then, constitutes an item of information that would significantly alter the “total mix” of information made available? Commentators and practitioners have critiqued this standard for its opaqueness;⁸⁴ some have referred to materiality as an “ulcerating experience” and as a “gotcha” standard.⁸⁵ Indeed, even courts have observed that

materiality has become one of the most unpredictable and elusive concepts of the federal securities laws. The SEC itself has despaired of providing written guidelines to advise wary corporate

77. That is, in retrospect, something may appear “material” given the development of other facts—and, of course, with the ever-granting clarity of hindsight bias, though, at the time, such clarity was murky at best.

78. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)).

79. Pub. L. 73–291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a et seq.).

80. 17 C.F.R. § 240.10b-5.

81. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

82. 17 C.F.R. § 240.14a-9 (1975). This rule provides that a proxy solicitation cannot be “false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.” *Id.*

83. *TSC Indus., Inc.*, 426 U.S. at 449.

84. See, e.g., Yvonne Ching Ling Lee, *The Elusive Concept Of “Materiality” Under U.S. Federal Securities Laws*, 40 WILLAMETTE L. REV. 661, 663–64 (2004); Richard C. Sauer, *The Erosion of Materiality Standard in the Enforcement of Federal Securities Laws*, 62 BUS. LAW. 317, 319 (2007).

85. Lee, *supra* note 84, at 664.

management of the distinctions between material and non-material information, and instead has chosen to rely on an after-the-fact, case-by-case approach, seeking injunctive relief when it believes that the appropriate boundaries have been breached.⁸⁶

Despite its decisional opaqueness and uncertainty, “[t]he ‘materiality’ threshold therefore ‘plays a critical gatekeeper[s]’ role’ by separating the essential information from the ‘less important information that would be extraneous or irrelevant to investors.’”⁸⁷ Nevertheless, “[m]ateriality determinations in individual cases tend to be so fact-specific that the accumulated body of published case law provides limited guidance for decision-making.”⁸⁸

As demonstrated, just adding a “materiality” qualifier does not necessarily provide sterling clarity and may just raise a different set of questions. Any ambiguity still subjects decision-makers to compliance costs, risk, and the possibility of needless scrutiny. As the Court noted in *Cardiff*, “[w]ords which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula.”⁸⁹

In sum, even express materiality requirements, if not sufficiently defined, do not serve the purpose of informing citizens what exact conduct is prohibited. It is axiomatic that vague statutes “violate[] the first essential of due process of law.”⁹⁰ Justice Sutherland noted,

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.⁹¹

86. SEC v. Bausch & Lomb Inc., 565 F.2d 8, 10 (2d Cir. 1977) (citing Address by Ray Garrett, Jr., Chairman of the SEC, “An Inside Look at Rule 10b-5,” ALI-ABA Conference, April 10, 1975)).

87. Lee, *supra* note 84, at 662 (internal citations omitted).

88. Sauer, *supra* note 84, at 319.

89. United States v. Cardiff, 344 U.S. 174, 176 (1952).

90. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

91. *Id.* at 391 (citations omitted).

Ambiguous materiality, therefore, can lead to inefficiencies, and certainly fails to educate the populace about their respective obligations.⁹² A more detailed and bright-line standard, on the other hand, is more efficient. As Ehrlich and Posner noted, “[a] perfectly detailed and comprehensive set of rules brings society nearer to its desired allocation of resources by discouraging socially undesirable activities and encouraging socially desirable ones.”⁹³ Moreover, they note,

The more (efficiently) precise and detailed the applicable substantive standard or rule is, the higher is the probability that the activity will be deemed illegal if it is in fact undesirable (the kind of activity the legislature wanted to prevent) and the lower is the probability that the activity will be deemed illegal if it is in fact desirable.⁹⁴

Continuing the analysis, individuals can only avoid criminal penalty by avoiding the criminal activity.⁹⁵ With a vague or unclear statute (or relevant standard—such as ambiguous materiality), they must not only avoid the core obviously criminal conduct, but also all other behavior that might possibly fall under “the penumbra of the vague standard”—even if that conduct is useful or beneficial.⁹⁶ Indeed, then, “the social costs of vague criminal standards might be high.”⁹⁷

D. *Weak-Form Materiality*

In addition to the subjective, nebulous, and fuzzy aspects of a generic materiality requirement, another issue is whether the materiality threshold has been lowered so much that it does not provide the intended prophylactic (or therapeutic) benefit. Stated otherwise, if it is overly inclusive and includes too many items within its ambit, then it offers no real protection at all—that is when *materiality* covers even the *trivial*.

92. “Contemporary statutes and regulations are often written in terms making it difficult for an experienced lawyer to understand their meaning, let alone someone untutored and inexperienced in the law.” Larkin, *supra* note 44, at 757.

93. Isaac Ehrlich & Richard Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUDIES 257, 262 (1974).

94. *Id.*

95. *Id.* at 263.

96. *Id.*

97. *Id.* To be sure, the more detailed a rule is, though, it will need to be changed more often. *Id.* at 278. The level of detail, then, is also a source of the rule’s costs. *Id.*

E. *Example of Weak-Form Materiality*

One potential example of weak-form materiality is 26 U.S.C. § 7206(1), which makes it a felony for any person who “[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be *true and correct as to every material matter*.”⁹⁸ Here materiality is expressly in the statute, yet the case law interpreting § 7206 has made its materiality element a nullity. Further, the government often “charges a taxpayer who files a false return under both the perjury and evasion penalty provisions because, unlike the evasion charge, the perjury charge doesn’t require proof that tax is due and owing.”⁹⁹

A material matter, in this context, is defined as “one that is likely to affect the calculation of tax due and payable.”¹⁰⁰ This standard, on its face, is of no help: Even a dollar misstatement as to income or expense items can affect the calculation of tax due and payable. It is possible—indeed likely—that a misstatement can be insubstantial (in dollar terms) but be material under § 7206.

There are two competing views to interpreting the § 7206 materiality standard: (1) the *Warden* test, which holds that anything that affects the tax calculation is material,¹⁰¹ and (2) the *DiVarco* test, which holds that an item is material if it “would have a tendency to influence the IRS in its normal processing of tax returns.”¹⁰² Under at least the *Warden* test, then, it seems that even a one-dollar misstatement would be material under § 7206.

Some taxpayers have advanced insubstantiality arguments.¹⁰³ However, those arguments generally have not been successful.¹⁰⁴ For instance, the Second Circuit noted, in the context of § 7206(1), that “[f]alse statements about income do not have to involve substantial amounts in order to violate

98. 26 U.S.C. § 7206(1) (2012) (emphasis added).

99. FEDERAL TAX COORDINATOR (RIA) ¶ V-3101.

100. *United States v. Griffin*, 524 F.3d 71, 76 (1st Cir. 2008); *United States v. Boulерice*, 325 F.3d 75, 82 n.3 (1st Cir. 2003) (citing *United States v. DiRico*, 78 F.3d 732, 735–36 (1st Cir. 1996)).

101. *United States v. Warden*, 545 F.2d 32, 37 (1st Cir. 2008); see, e.g., MICHAEL SALTZMAN & LESLIE BOOK, IRS PRAC. & PROC. ¶ 12.02; DOJ Criminal Tax Manual 12.10[4] (2012 ed.).

102. *United States v. DiVarco*, 343 F. Supp. 101, 103 (N.D. Ill. 1972); SALTZMAN & BOOK, *supra* note 101, at 12.02. This definition is also consistent with *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

103. See, e.g., DOJ Criminal Tax Manual, 12.10[5], at 18.

104. See, e.g., *id.* at 18–19.

this statute.”¹⁰⁵ The Seventh Circuit, as well, noted that “[t]his Court has previously held that false statements relating to gross income, irrespective of the amount, constitute a material misstatement in violation of Section 7206(1).”¹⁰⁶ The Eleventh Circuit affirmed a district court’s statement to the jury that “the issue in a section 7206(1) prosecution is whether the misstatements were material, not whether they were substantial.”¹⁰⁷ The court further emphasized that “the substantiality of the misstatements was not relevant to the prosecution under section 7206.”¹⁰⁸

Courts that have elucidated the rationale for § 7206 noted that the issue is not simply the collection of tax revenue. As the Second Circuit explained,

The purpose of § 7206(1) is not simply to ensure that the taxpayer pay the proper amount of taxes—though that is surely one of its goals. Rather, that section is intended to ensure also that the taxpayer not make misstatements that could hinder the Internal Revenue Service (“IRS”) in carrying out such functions as the verification of the accuracy of that return or a related tax return.¹⁰⁹

Consequently, under this rationale, the insubstantiality of the misstatement’s effect on actual tax collection is irrelevant. Another outgrowth, perhaps surprisingly, of that rationale is that an actual tax deficiency may not even be needed for a § 7206 prosecution.¹¹⁰

IV. THE RETORTS OF PROSECUTORIAL DISCRETION AND *MENS REA* PROTECTIONS

There are at least two (and probably more) legitimate responses to the critiques advanced by this Article. First, prosecutorial discretion (and the goal of efficiency) makes it likely that trivial offenses will not be prosecuted. Second, applicable *mens rea* requirements also insulate citizens from being prosecuted for “innocent” conduct. However, both of these grounds may not be as strong as they seem.

105. *United States v. Helmsley*, 941 F.2d 71, 92 (2d Cir. 1991).

106. *United States v. Hedman*, 630 F.2d 1184, 1196 (7th Cir. 1980).

107. *United States v. Gaines*, 690 F.2d 849, 857 (7th Cir. 1982).

108. *Id.* at 858.

109. *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984).

110. *See, e.g., Schepps v. United States*, 395 F.2d 749, 749 (5th Cir. 1968) (“[A]ppellant says that he should have been allowed to introduce proof showing that the falsity resulted in no tax deficiency. This proof was not relevant to the issue raised by the indictment and it was not error to reject it . . .”).

Enforcement is costly.¹¹¹ Normatively, then—at least from a law-and-economics perspective—“[t]he goal of enforcement, let us assume, is to achieve that degree of compliance with the rule of prescribed (or proscribed) behavior that the society believes it can afford.”¹¹² As Professor LaFave has written, “[o]ne of the most striking features of the American system of criminal justice is the broad range of largely uncontrolled discretion exercised by the prosecutor.”¹¹³ We hope, therefore, that prosecutors, with their great and often unchecked discretion, dedicate their limited resources to the prosecution of “real” crimes,¹¹⁴ which provides the greatest benefit to the community.¹¹⁵

Indeed, in the age of the plea bargain, the prosecutor is the “preeminent actor in the system.”¹¹⁶ Justice Robert Jackson commented that the federal prosecutor has “more control over life, liberty, and reputation than any other person in America.”¹¹⁷ Judge Easterbrook has described the prosecutor’s discretion well:

Prosecutors have absolute discretion. They may prosecute whom they please, for such crimes as they please. They may decline to prosecute particular crimes or whole categories of offenses, such as drug offenses or resale price maintenance They are responsible only to their superiors and the public. No public official has more discretion; few participants in private markets have more.¹¹⁸

111. George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970).

112. *Id.*

113. Wayne R. LaFave, *The Prosecutor’s Discretion in the United States*, 18 AM. J. COMP. L. 532, 532 (1970) (footnotes omitted).

114. Indeed, to make the prosecutor prosecute all crimes is simply unworkable—it would be “like directing a general to attack the enemy on all fronts at once.” LaFave, *supra* note 113, at 534 (citing T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 153 (1962)).

115. LaFave, *supra* note 113, at 534.

116. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718 (1996). Interestingly, the history of the American prosecutor is an amalgamation of historical influences. For example, like the English Attorney General, the prosecutor can end prosecutions; like the French “procureur publique,” the prosecutor starts prosecutions; and finally, like the Dutch “schout,” the prosecutor is normally a local official over a particular region. *See id.* at 728.

117. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940); *see* Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 165 (2004).

118. Frank H. Easterbrook, *Criminal Procedure as a Market*, 12 J. LEGAL STUDIES 289, 299 (1983).

Prosecutorial discretion—or the hope that prosecutors will only go after “real” crimes—in many instances is not adequate protection. As applied to vague laws, the Supreme Court has recognized that “[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis”¹¹⁹

Another aspect of prosecutorial discretion is that it is potentially subject to abuses. For example, Professor Alexander, in her compelling book, *The New Jim Crow*,¹²⁰ reviewed the literature and noted, “[t]hese studies have shown that youth of color are more likely to be arrested, detained, formally charged, transferred to adult court, and confined to secure residential facilities than their white counterparts.”¹²¹ She also noted, in the context of drug offenses, that “[r]acial bias is most acute at the point of entry into the system for two reasons: discretion and authorization.”¹²²

Moreover, as other commentators have argued in other contexts, “the existence of rarely-used statutes invites (if not demands) selective enforcement and unequal treatment of similarly situated defendants.”¹²³ Indeed, when this is the case, prosecutors may “single out and punish one defendant, or perhaps a handful of defendants, for conduct that is widespread.”¹²⁴ Ambiguous or vague statutes, moreover, “offend due process by failing to provide explicit standards for those who enforce them thus allowing discriminatory and arbitrary enforcement.”¹²⁵

Highly selective enforcement can also be problematic. For example, Dean Ronald Cass provides the following example:

Further, highly selective enforcement, if it is to affect underlying behavior, cannot reveal the bases on which enforcement targets will be selected—imagine the IRS announcing which deductions of what magnitude will cause the agency to audit tax filers. The result is that the basis for selecting a small number of potential targets for prosecution is not visible to, or predictable by, the public. That sort of discretion, which is largely insulated from

119. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

120. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 118 (2012).

121. *Id.*

122. *Id.* at 123.

123. Beale, *supra* note 31, at 757.

124. *Id.*

125. “[V]ague statutes offend due process by failing to provide explicit standards for those who enforce them thus allowing discriminatory and arbitrary enforcement.” *Parker v. Levy*, 417 U.S. 733, 775 (1974) (Stewart, J., dissenting).

significant sources of constraint in individual cases, is antithetical to the rule of law.¹²⁶

Unfortunately, selective enforcement challenges are often unsuccessful.¹²⁷

Other realities of the system need to be considered as well—factors that further weaken the perceived protection of prosecutorial discretion. The ability to stack (or multiply) charges, which compounds the potential sentence, “allows prosecutors to pressure defendants to settle rather than to fight, to enter a plea bargain that admits guilt (whether it truly existed or addressed conduct that was truly wrongful in any meaningful sense), and to take a small punishment.”¹²⁸ Charging decisions, moreover, are largely unreviewable, except in limited circumstances, such as race discrimination.¹²⁹

In addition, the risk is present even when the defendant might not have done anything wrong. Cass writes,

[I]f the risk is large enough—if the penalties that are threatened are sufficiently draconian—and the costs of litigating high enough, defendants might accept quite harsh punishment, even when they believe they’ve done nothing wrong and are confronted with criminal charges of which they’ve had no fair warning.¹³⁰

The drop in the number of actual trials and the corresponding increase in the number of plea bargains further erode the protection of prosecutorial discretion.¹³¹ Prosecutors have traditionally been checked by limited resources (like time and money) and by the judicial process (at trial).¹³² With most cases ending in a plea bargain—some estimate the federal settlement rate at 97%¹³³—those checks are largely gone. Although frivolous charges are unlikely to exert undue pressure, “arguably sustainable charges, even if based on weak and contestable grounds, combined with a large number of charges with at least a slight prospect of success can suffice to pressure defendants to

126. Ronald A. Cass, *Overcriminalization: Administrative Regulations, Prosecutorial Discretion, and The Rule of Law*, 15 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 11, 23 (2014).

127. See, e.g., Misner, *supra* note 116.

128. Cass, *supra* note 126, at 23–24.

129. Misner, *supra* note 116, at 717.

130. Cass, *supra* note 126, at 24.

131. *Id.* at 3.

132. *Id.* at 24.

133. Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL STREET JOURNAL, (Sept. 23, 2012), available at <https://www.wsj.com/articles/SB10000872396390443589304577637610097206808>.

settle.”¹³⁴ This phenomenon is compounded by the nature of overlapping provisions.¹³⁵ And the last check—the political process—may not be effective either.¹³⁶ At bottom, “[t]he plain fact is that more than nine-tenths of local prosecutors’ decisions are supervised or reviewed by no one.”¹³⁷

Another common refrain is that if a prosecutor does not level charges against the particular conduct, then “no harm, no foul.” However, this, too, is myopic. For one, it ignores the “freedom-limiting, anxiety-producing, and guilt-inducing effects the criminal law may have on those who take its demands seriously, even apart from the threat of punishment.”¹³⁸ Absent a well-demarcated line of legality, citizens may have to wait to see if their conduct is deemed “criminal” by the local or federal prosecutor. The alternative is to wait until the applicable statute of limitations runs out—if there is such a limitation.¹³⁹

Mens rea is also advanced as a defense against various criminal charges, and, of course, it does serve that purpose in various contexts. *Mens rea*—or evil intent—was a critical element of common-law offenses.¹⁴⁰ However, reliance on *mens rea* may not properly protect defendants or even properly isolate criminal conduct.¹⁴¹ For the reasons noted above, questions regarding intent may necessarily need to be litigated and challenged, potentially at great cost. In sum, if you have to litigate *mens rea* or intent, you may have already lost, and any victory is pyrrhic. This is even assuming the relevant statute has a *mens rea* requirement: “Today, Congress oftentimes creates felony offenses

134. Cass, *supra* note 126, at 24. Although Judge Easterbrook has argued that certain elements of the criminal justice system—such as the plea bargain process—operate as market mechanisms, helping set the “price” of crime. Easterbrook, *supra* note 118, at 289.

135. Misner, *supra* note 116, at 737.

136. As Professor LaFave argues, “And while the local prosecutor is in theory responsible to the electorate, the public can hardly assess prosecution policies which are kept secret.” LaFave, *supra* note 113, at 538; *see also* Misner, *supra* note 116 at 717 (“[B]ecause of the current diffusion of responsibility, the electorate cannot easily scrutinize the actions of any one official or hold that official independently accountable for the successes or failures of the entire system. In fact, no one is currently held accountable for the successes or failures of the criminal justice system.”).

137. KENNETH DAVIS, *DISCRETIONARY JUSTICE* 208 (1969); *see also* LaFave, *supra* note 113, at 538.

138. HUSAK, *supra* note 9, at 14.

139. For instance, Virginia has no general statute of limitations for felonious offenses.

140. “The common law deemed the presence of ‘evil intent’ necessary to distinguish morally blameworthy conduct from conduct that, while damaging, dangerous, or tortious, was not a fit subject for criminal sanction.” Larkin, *supra* note 44, at 754.

141. *See, e.g.*, Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 501, 512 (2004).

that do not require proof of Blackstone's 'vicious will.' These offenses authorize imprisonment and carry the same moral condemnation as common law crimes."¹⁴²

V. CONCLUSION

This Article has addressed two types of over-criminalization that are often not discussed in the literature. First, when legislatures omit (or when courts "read out") materiality requirements in statutes, the scope of criminal sanctions is likely expanded beyond what was intended. Second, when materiality (or similar) qualifiers *are* placed in a statute, the interpretation of those qualifiers may nullify the protection they were intended to provide. Both problems result in a pernicious and subtle form of over-criminalization.

142. Meese & Larkin, *supra* note 35, at 742 (footnotes omitted).