

1995

## United States v. Gaudin: A Decision with Material Impact

Jeffrey Saks

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Jeffrey Saks, *United States v. Gaudin: A Decision with Material Impact*, 64 Fordham L. Rev. 1157 (1995).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol64/iss3/19>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## United States v. Gaudin: A Decision with Material Impact

### Cover Page Footnote

My deepest thanks to Daniel C. Richman, Associate Professor, Fordham University School of Law, for his endless assistance in the formation and development of this Note. My thanks as well to Assistant United States Attorney Richard K. Hayes and to my wife, Lori Riga, J.D., for their generous and insightful comments on earlier drafts of this Note.

## UNITED STATES V. GAUDIN: A DECISION WITH MATERIAL IMPACT

Jeffrey Saks\*

### INTRODUCTION

In *United States v. Gaudin*,<sup>1</sup> the Supreme Court reviewed a case in which a real estate broker and developer was convicted, among other things, of defrauding the government by falsely filling out housing loan forms,<sup>2</sup> thereby violating 18 U.S.C. § 1001.<sup>3</sup> The Court held that materiality was an element of a prosecution for making false statements to the government under 18 U.S.C. § 1001.<sup>4</sup> The Court noted that materiality, while not necessarily a purely factual element, was a mixed question of law and fact.<sup>5</sup> Thus, in order to comply with the

---

\* My deepest thanks to Daniel C. Richman, Associate Professor, Fordham University School of Law, for his endless assistance in the formation and development of this Note. My thanks as well to Assistant United States Attorney Richard K. Hayes and to my wife, Lori Riga, J.D., for their generous and insightful comments on earlier drafts of this Note.

1. *United States v. Gaudin*, 115 S. Ct. 2310 (1995).

2. Michael Gaudin was a real estate broker and developer from Montana. He was convicted of one count of equity skimming for failing to pay loans insured by the United States Housing & Urban Development/Federal Housing Administration, a violation of 12 U.S.C. § 1709-2. He also was convicted of 43 counts of violating 18 U.S.C. § 1001 for making false statements on the loan applications. Prosecutors said Gaudin bought houses, then entered into fraudulent sales transactions with friends and family members at inflated appraised prices before obtaining federal mortgages on the basis of the inflated prices. He later repurchased the houses and rented them while failing to make the mortgage payments. See *United States v. Gaudin*, 997 F.2d 1267, 1268-69 (9th Cir. 1993), *aff'd* 28 F.3d 943 (9th Cir. 1994) (en banc), *aff'd* 115 S. Ct. 2310 (1995). The manner in which Gaudin filled out the HUD/FHA forms was the key to the § 1001 convictions because the buyer, designated on the form as the "borrower," was to indicate on line 303 of the form whether there was a balance due to the borrower or owed by the borrower and for what amount. The form also had a certification stating: "I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction." *Gaudin*, 28 F.3d at 944-45. Thus, because Gaudin, not the buyer, either paid or received the cash balances, the government was able to prosecute him under § 1001 for having made false statements. See *Gaudin*, 115 S. Ct. at 2312-13; see also *Gaudin*, 28 F.3d at 944-45.

3. 18 U.S.C. § 1001 provides:

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

18 U.S.C. § 1001 (1994) (emphasis added).

4. See *Gaudin*, 115 S. Ct. at 2314-15, 2320.

5. See *id.* at 2314.

Due Process Clause of the Fifth Amendment<sup>6</sup> and the right to a jury trial granted by the Sixth Amendment,<sup>7</sup> the Court held that the jury must determine materiality.<sup>8</sup>

---

6. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

7. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

8. *United States v. Gaudin*, 115 S. Ct. 2310, 2314, 2319-20 (1995). Thus, because the district court had deemed materiality a question of law, allowing it to be determined by the court, the Ninth Circuit was correct in reversing Gaudin's conviction. See *U.S. States v. Gaudin*, 997 F.2d 1267 (9th Cir. 1993), *aff'd*, 28 F.3d 943 (9th Cir. 1994) (en banc), *aff'd*, 115 S. Ct. 2310 (1995).

The Supreme Court in *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), detailed the jury right:

In *Duncan v. Louisiana* we found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice," and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements.

*Id.* at 2080 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)) (citations omitted).

For a detailed discussion on the history of the Sixth Amendment, see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 869-75 (1994); see also James B. Thayer, "Law and Fact" in *Jury Trials*, 4 Harv. L. Rev. 147, 147-50 (1890) [hereinafter *Law and Fact*] (detailing the history of jury formation and the allotment of roles between the judge and jury). According to Thayer, the maxim "ad quaestionem juris respondent iudices, ad quaestionem facti respondent juratores" ("matters of law are for the court and matters of fact are for the jury") likely dates back to the 16th century. *Id.* at 148-49.

At first glance, the Supreme Court's decision in *Gaudin* looks rather simple. After all, it is not a very long opinion,<sup>9</sup> especially by Supreme Court standards.<sup>10</sup> Furthermore, despite the divergent views held by the individual justices,<sup>11</sup> the Court voted 9-0 in *Gaudin*. Why the Court even bothered granting certiorari may be questioned.<sup>12</sup> That *Gaudin* was one of last term's least-heralded decisions certainly is no surprise.<sup>13</sup>

Nonetheless, despite its superficial innocuousness, *Gaudin* is a very significant case. The opinion is important not only for the stance taken by the Court, but for the questions the Court did not answer and the implications the holding may have.

*Gaudin* reconciled the seemingly conflicting Supreme Court decisions of *In re Winship*<sup>14</sup> and *Sinclair v. United States*.<sup>15</sup> In *Winship*, the Court held that the Constitution entitles a defendant to a jury determination, beyond a reasonable doubt, of the facts required to establish the elements of a crime.<sup>16</sup> In *Sinclair*, however, the Court found

---

9. See *Gaudin*, 115 S. Ct. at 2310. The entire opinion, including the syllabus, headnotes, and a concurring opinion, is just less than 12 pages in the Supreme Court reporter. The opinion of the court is approximately eight pages.

10. For example, *Buckley v. Valeo*, 424 U.S. 1 (1976), is a per curiam opinion that runs almost 150 pages in the U.S. Reports. The entire opinion, with an appendix and concurrences by Chief Justice Burger, and Justices White, Marshall, and Rehnquist, concludes at 424 U.S. 294.

11. See, e.g., Tony Mauro, *Tug of War in the 1994-1995 Term: Can the Center Hold?*, Legal Times, July 31, 1995, at S23 (noting the Court's shift to the conservative side in several significant 5-4 decisions, and depicting the Court as having three staunchly conservative members, three staunch liberals, and three moderates that tip the balance in close cases); see also *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995) (overruling, by a 5-4 margin, *Fullilove v. Klutznick*, 448 U.S. 448 (1980), bringing congressional power to enact affirmative action programs in line with the states's power, under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)); *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding, by a 5-4 margin, that the Gun-Free School Zones Act of 1990 exceeded Congress' power to enact legislation under the Commerce Clause).

12. See 115 S. Ct. 713 (1995). Of course, a clear circuit split on the issue may have prompted the Court's grant of certiorari. See *infra* note 22 and accompanying text.

13. For example, both *Lopez* and *Adarand Constructors* received extensive coverage by the *New York Times*, including front-page stories. See Linda Greenhouse, *High Court Kills Law Banning Guns in a School Zone*, N.Y. Times, Apr. 27, 1995, at A1; Linda Greenhouse, *Justices, 5 to 4, Cast Doubts on U.S. Programs That Give Preferences Based on Race*, N.Y. Times, June 13, 1995, at A1. The major story regarding the Court the day of the *Gaudin* decision was the Court's holding in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 115 S. Ct. 2338 (1995) (holding homosexuals did not have a right to march in the annual Boston St. Patrick's Day parade). See Linda Greenhouse, *High Court Lets Parade in Boston Bar Homosexuals*, N.Y. Times, June 20, 1995, at A1. By contrast, the *Gaudin* decision was not reported in the *New York Times*.

14. 397 U.S. 358 (1970).

15. 279 U.S. 263 (1929).

16. *Winship*, 397 U.S. at 364. The Supreme Court stated:

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof [to a proper factfinder]

materiality to be a legal issue in false statement prosecutions.<sup>17</sup> The government in *Gaudin* initially argued to the Supreme Court that materiality is a question of law, not a question of fact, and thus no conflict existed between the two cases.<sup>18</sup> At oral argument, however, the government's position was severely damaged when it conceded that materiality was a mixed question of law and fact.<sup>19</sup> Ultimately, the Court held that materiality, as a mixed question of law and fact, must be determined by the jury.<sup>20</sup>

The decision is noteworthy in several respects. As an initial matter, the unanimous Court sided with the Ninth Circuit,<sup>21</sup> overruling precedent in every other circuit regarding how to treat materiality in a § 1001 prosecution.<sup>22</sup> While not much principle may have underlay

---

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

*Id.*

17. *Sinclair*, 279 U.S. at 298-99.

18. In its brief, the government stated:

The holding of *Winship* has no direct application in this case; the question presented here does not concern the degree of proof that the government must meet with regard to a particular factual question in a criminal proceeding. Instead, it concerns whether the issue of materiality is one of law for decision by the court, or one of fact for decision by the jury.

Petitioner's Brief, *United States v. Gaudin*, No. 94-514, 1995 WL 71510, at \*32 (U.S. Feb. 21, 1995).

19. It didn't take long for the government to encounter problems. On the very first question, Justice O'Connor asked: "[I]t would make sense to say it was a mixed question of law and fact, wouldn't it?" The government conceded this point, greatly impacting the Court's decision. See Oral Argument Transcript, *United States v. Gaudin*, No. 94-514, 1995 WL 243457, at \*4 (U.S. Apr. 17, 1995). As Chief Justice Rehnquist noted in his concurring opinion: "But the Government's concessions have made this case a much easier one than it might otherwise have been." *United States v. Gaudin*, 115 S. Ct. 2310, 2320 (1995) (Rehnquist, C.J., concurring).

20. *Gaudin*, 115 S. Ct. at 2314, 2319.

21. The Ninth Circuit initially reversed the trial court, holding materiality was for the jury to decide. *United States v. Gaudin*, 997 F.2d 1267 (9th Cir. 1993), *aff'd*, 28 F.3d 943 (9th Cir. 1994) (en banc), *aff'd*, 115 S. Ct. 2310 (1995).

22. See 28 F.3d 943, 955 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting). As Judge Kozinski noted:

Every other circuit to have considered whether materiality under 18 U.S.C. § 1001 is a question of fact or a question of law—which means every circuit except the Federal—has held that it's a question of law.

... What more can one possibly say except that the maverick spirit is alive and well here in the West?

*Id.* As support, Judge Kozinski cited *United States v. Daily*, 921 F.2d 994, 1004 (10th Cir. 1990), *cert. denied*, 502 U.S. 952 (1991); *United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States v. Brantley*, 786 F.2d 1322, 1327 & n.2 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986); *United States v. Chandler*, 752 F.2d 1148, 1150-51 (6th Cir. 1985); *Nilson Van & Storage Co. v. Marsh*, 755 F.2d 362, 367 (4th Cir. 1985); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985); *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984); *United States v. Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), *cert. denied*, 469 U.S. 828 (1984); *United States v. Hausmann*, 711 F.2d 615, 616-17 (5th Cir. 1983); *United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1980); *United States v. Bernard*, 384 F.2d 915, 916 (2d Cir. 1967).

the long-standing rule,<sup>23</sup> the practice of judges determining materiality issues in analogous situations dated back to nineteenth-century England,<sup>24</sup> and was followed by nearly every court in the United States.<sup>25</sup> Thus, the Court in *Gaudin* took a bold step by going against the weight of authority. Despite its reversal of settled precedent, the Court in *Gaudin* made the proper decision in enforcing the criminal defendant's constitutionally protected right to a jury trial.

Perhaps more important, however, is what the Court left unanswered in its opinion. The Court's decision seemed simple: Because materiality is an element of a § 1001 prosecution, and because materiality is a mixed question of law and fact, the issue goes to the jury.<sup>26</sup> Section 1001, however, is just one of numerous criminal false statement statutes with a materiality requirement;<sup>27</sup> the *Gaudin* opinion is silent, however, on the breadth of its holding.<sup>28</sup>

---

23. See *infra* notes 53-68 and accompanying text.

24. See, e.g., *Regina v. Gibbon*, 169 Eng. Rep. 1324, 1326 (1861) (holding that materiality in a perjury case is for the court to decide); *Regina v. Southwood*, 175 Eng. Rep. 762, 762 (1858) (same); *Regina v. Overton*, 174 Eng. Rep. 676, 677 (1842) (same); *King v. Nicholl*, 109 Eng. Rep. 695, 696 (1830) (reaching same result implicitly, with court making materiality determination); *Rex v. Dunston*, 171 Eng. Rep. 960, 961 (1824) (same as *Nicholl*).

25. See *Sinclair v. United States*, 279 U.S. 263, 298-99 (1929) (citing *Carroll v. United States*, 16 F.2d 951 (2d Cir. 1927); *United States v. Singleton*, 54 F. 488 (S.D. Ala. 1892); *Cothran v. State*, 39 Miss. 541 (Miss. 1860)).

26. *United States v. Gaudin*, 115 S. Ct. 2310, 2314 (1995).

27. As Judge Kozinski of the Ninth Circuit en banc panel noted in his dissent:

We have a substantial body of case law holding that materiality is a question of law under a variety of statutes. Thus judges, not juries, decide the materiality of false statements in tax returns. Ditto for false statements to grand juries; for false statements in applications for payments in federally-approved plans for medical assistance; and for perjury. . . . The disruption [of adopting the majority's view] is greater still. I've only mentioned five statutes—ones where our circuit has already held who decides materiality. But the majority's theory easily covers all statutes that contain a similar materiality requirement. How many other criminal statutes punish those who make material false statements to a government agency? My research discloses forty-three that have explicit materiality requirements and another fifty-four where such a requirement is probably implied.

*United States v. Gaudin*, 28 F.3d 943, 957-60 (9th Cir. 1994) (en banc) (citations omitted), *aff'd*, 115 S. Ct. 2310 (1995); see also *infra* notes 73-103 and accompanying text.

28. Whether the holding applied to other statutes with materiality requirements was not the only question left unanswered by the Court's opinion. In fact, another unanswered question even raised a comment in Chief Justice Rehnquist's concurrence. Separate from the dispute as to whether materiality was an element to be determined by the jury or a question of law to be determined by the judge, a dispute also exists as to whether a materiality requirement is actually present in every prosecution under 18 U.S.C. § 1001. Every circuit except the Second Circuit holds that the materiality requirement, which is expressly stated in the first of three clauses that describe various acts proscribed by the statute, should be read into the remaining two. Compare *United States v. Corsino*, 812 F.2d 26, 30 (1st Cir. 1987) ("While materiality is not an explicit requirement of the second, false statements, clause of § 1001, courts have inferred a judge-made limitation of materiality in order to exclude trifles from its coverage." (quoting *United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th

Consequently, several questions remain. Is the holding limited to materiality in a § 1001 offense, or does the jury requirement extend to the bevy of false statement statutes with a materiality requirement? Looking beyond materiality, what does *Gaudin* say about mixed questions of law and fact in general? One disturbing possibility is that a legislature might react to *Gaudin* by drafting a false statement statute in which it expressly labels the materiality element as a question of law for the court to decide. Would a court be bound to defer to such a legislative label, or should the court, relying on its own definition of a mixed question of law and fact, strike down the statute as unconstitutionally circumventing the jury requirement?

This Note attempts to answer the questions posed above. Part I will provide an historical background to § 1001, detailing the settled practice of characterizing materiality in analogous contexts, such as perjury proceedings, as a question of law for the judge to decide. This part argues that the Court's decision in *Gaudin*, which reversed the settled practice, was constitutionally correct due to the importance of the Fifth and Sixth Amendment rights to have a jury make all factual determinations beyond a reasonable doubt.

Part II will then analyze the likely breadth of *Gaudin*. Part II asserts that *Gaudin* should be read as requiring not only that materiality be determined by the jury in § 1001 prosecutions, but that the jury also determine the question of materiality in all similar false statement statutes.

Part III of this Note contends that in *Gaudin* the Court made clear that *all* mixed questions of law and fact *must* go to the jury. Therefore, this interpretation would preclude a legislature from attempting to circumvent *Gaudin*'s mandate by drafting a statute in which it explicitly defined materiality as a question of law for the court to decide. Part III argues that courts should recognize that regardless of the legislature's labelling, materiality is an inherently mixed question of law and fact,<sup>29</sup> and as such it must go to the jury. This Note concludes that *Gaudin* requires that materiality in all false statement statutes must be determined by a jury, as is the case for all mixed questions of law and fact. A more narrow interpretation of *Gaudin* could vitiate a criminal defendant's constitutional guarantee to have the jury determine fac-

---

Cir. 1980))) with *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984) ("It is settled in this Circuit that materiality is not an element of the offense of making a false statement in violation of § 1001."). The Court's opinion failed to address this circuit split, leading Chief Justice Rehnquist to recognize the conflict: "The Court does not resolve that conflict; rather, it merely assumes that materiality is, in fact, an element of the false statement clause of § 1001." *Gaudin*, 115 S. Ct. at 2320-21 (Rehnquist, C.J., concurring).

29. See discussion *infra* part III.A.



tual elements and the protections provided by the Fifth and Sixth Amendments.<sup>30</sup>

# I. THE PRECEDENT TREATING MATERIALITY AS A QUESTION OF LAW

The Court's decision in *Gaudin* would not have been surprising were it not so contrary to precedent. As this part details, in the context of § 1001 and analogous false statement statutes, such as perjury, the practice historically has been to have the judge determine materiality. This part demonstrates that courts offered no justification for this practice, and thus no reason warranted the courts' plain infringement upon the criminal defendant's Fifth and Sixth Amendment rights.<sup>31</sup> The Court in *Gaudin*, therefore, made the correct decision to safeguard the criminal defendant's constitutional right to have a jury determine all factual elements beyond a reasonable doubt.

## A. An Historical Look at § 1001

Several cases have detailed § 1001's historical background, including the Supreme Court's decisions in *United States v. Gilliland*<sup>32</sup> and *United States v. Bramblett*.<sup>33</sup> As the Court in *Bramblett* recalled, § 1001 evolved from an 1863 statute created to prevent frauds upon the government. The statute made it a criminal offense for

any person in the land or naval forces of the United States . . . [to] make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . . .<sup>34</sup>

30. See Alschuler & Deiss, *supra* note 8, at 869-75. While the reasonable doubt aspect of the Fifth Amendment generally is thought of as favoring individual liberty by presuming innocence, see John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J., 1325, 1346 (1979), others contend that the burden of proof has been established to counteract the jury's potential for favoring the prosecution. See Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1306-07 (1977).

31. Nor is there justification to continue the practice in other false statement statutes with similar materiality requirements. Thus, *Gaudin* should be read as mandating a change in all of these statutes, as is discussed in part II.

32. 312 U.S. 86 (1941).

33. 348 U.S. 503 (1955), *overruled by* *Hubbard v. United States*, 115 S. Ct. 1754 (1995). The Court in *Hubbard* held that § 1001 does not extend to false statements made in judicial proceedings. 115 S. Ct. at 1757-61, 1765.

34. *Bramblett*, 348 U.S. at 504-05 (alterations in original) (quoting An Act to prevent and punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863)).

The *Bramblett* Court noted the statute's breadth in the types of false statements covered and the definition of false statements.<sup>35</sup>

The statute's scope was extended several times from 1863 to 1934,<sup>36</sup> and was further expanded in 1934 to include as punishable conduct, "false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' In this, there was no restriction to cases involving pecuniary or property loss to the government."<sup>37</sup>

Congress revised the statute again in 1948, predominantly resulting in the statute's present form.<sup>38</sup> The 1948 amendment resulted in only minor semantic changes<sup>39</sup> to the 1934 statute, and the *Bramblett* Court held that the 1948 revision was not intended to work any substantive change.<sup>40</sup>

Thus, the purpose behind § 1001, like the other statutes criminalizing false statements, is to deter people from deceiving the government. As Judge Kozinski noted in his dissent to the Ninth Circuit's en banc decision in *Gaudin*,<sup>41</sup> these statutes either expressly or implicitly aim to punish only those deceptions that are material to the government investigation or function.<sup>42</sup>

---

35. *Bramblett*, 348 U.S. at 504-05.

36. *Id.* at 505-06 & n.2 (citing an 1874 change that included "every person," not just military personnel, and further codifications that extended the statute to cover corporations in which the United States held stock, and false statements made to cheat, swindle, or defraud the government, including obtaining a false claim).

37. *United States v. Gilliland*, 312 U.S. 86, 93 (1941) (quoting The Act of June 18, 1934, ch. 587, 48 Stat. 996); *see also* *Hubbard v. United States*, 115 S. Ct. 1754, 1757-61, 1765 (1995) (overruling *Bramblett* upon finding that § 1001 does not extend to statements made in judicial proceedings).

38. *See* Act of June 25, 1948, ch. 645, 62 Stat. 683 (1949). The false claims provision became § 287 of Title 18, retaining its prior form without significant change. Section 1001 is the "false statements" section. *See United States v. Bramblett*, 348 U.S. 503, 508 (1955). The only substantive change enacted since then was the 1994 amendment, which substituted "fined under this title" for "fined not more than \$10,000." *See Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, 108 Stat. 1796, 2147.

39. *See Bramblett*, 348 U.S. at 508 (noting the deletion of the reference to corporations, and the transposition of the "in any matter" clause to the beginning of the section).

40. *Id.*

41. *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), *aff'd*, 115 S. Ct. 2310 (1995).

42. *See Gaudin*, 28 F.3d at 961 (Kozinski, J., dissenting). Although in the context of the statutes in which courts have read in the materiality requirement, arguably courts might have been slower to do so had they thought it would have been viewed as adding an element that would be required to be proven to the jury.

B. *The Practice of Treating Materiality As a Question of Law*

The practice of having judges determine materiality appears to have been deeply rooted.<sup>43</sup> The various courts adopting this settled practice, however, did not provide explanations for treating materiality as a question of law.<sup>44</sup> Thus, the Court's decision in *Gaudin* seems to contradict the long-standing trend. The decision was proper, however, because despite precedent, it protected the constitutionally guaranteed Fifth Amendment right of due process<sup>45</sup> and the Sixth Amendment right "[i]n all criminal prosecutions" to a trial by "an impartial jury."<sup>46</sup>

In the 1929 case *Sinclair v. United States*,<sup>47</sup> the Supreme Court confirmed that materiality would be determined by the judge in prosecutions for making false statements to the government, a precedent that survived almost seventy years, until *Gaudin*.<sup>48</sup> Although *Sinclair* concerned a provision of Title 2 that subjects an individual to criminal

---

43. See, e.g., *Sinclair v. United States*, 279 U.S. 263, 298-99 (1929) (stating that it is settled that the determination of relevancy is question of law).

44. See *id.*

45. See U.S. Const. amend. V.

46. See *id.* amend. VI.

47. 279 U.S. 263 (1929).

48. *Id.* at 283. In *Gaudin*, however, Justice Scalia claimed *Sinclair*'s holding actually had been whittled away by previous decisions, and the Court in *Gaudin* was prepared to strike the final blow. "Other reasoning in *Sinclair*, not yet repudiated, we repudiate now." *United States v. Gaudin*, 115 S. Ct. 2310, 2318 (1995). Justice Scalia referred to *Deutch v. United States*, 367 U.S. 456, 471-72 (1961) (reversing a 2 U.S.C. § 192 conviction because government failed to prove pertinence of the questions), and to other cases overruling the decisions upon which *Sinclair* rested. See *Gaudin*, 115 S. Ct. at 2318. Justice Scalia mischaracterized *Deutch*, however. In *Deutch*, the Court held that the prosecution had failed to sufficiently prove pertinency, and that this violated the Due Process Clause of the Fifth Amendment because the defendant was not aware of the pertinency at the time of the questioning. *Deutch*, 367 U.S. at 467-68. Further, the failure to prove pertinency at trial was problematic because pertinency was implicitly an element in the standard of criminality. *Id.* at 468. The Court in *Deutch* did not, however, hold that pertinency must be proven to a jury because of the constitutional requirement that a jury must find all factual elements beyond a reasonable doubt and because pertinency is a factual (or at least partially factual) element.

Justice Scalia also pointed out changes in the law in cases upon which *Sinclair* relied. He noted that *ICC v. Brimson*, 154 U.S. 447, 489 (1894), which held that no right to a jury trial attaches to criminal contempt proceedings, was overruled by *Bloom v. Illinois*, 391 U.S. 194, 198-200 (1968) (holding criminal contempts are subject to the jury trial provision of the Constitution). Further, *Horning v. District of Columbia*, 254 U.S. 135 (1920), which held that at most it would be harmless error for a trial judge to order the jury to convict, should be considered an "unfortunate anomaly" when one considers other contrary holdings such as *Quercia v. United States*, 289 U.S. 466, 468-69, 472 (1933) (reversing a conviction because the judge impermissibly commented on the evidence and told the jury he believed the defendant lied), and *Bihn v. United States*, 328 U.S. 633, 637-39 (1946) (reversing conviction because the judge impermissibly instructed the jury to place on the defendant the burden of proving her innocence). See *Gaudin*, 115 S. Ct. at 2318.

Considering how uniformly the various circuit courts had followed *Sinclair*, however, the *Sinclair* holding apparently was still viable up until the *Gaudin* decision.

contempt of Congress for refusal to answer a question relevant to a congressional inquiry,<sup>49</sup> the government's argument in *Sinclair* expressly linked the pertinency requirement to materiality requirements in other false statement statutes, such as perjury.<sup>50</sup> The government in *Sinclair* contended that materiality in false statement prosecutions was for the court to decide.<sup>51</sup> Writing for the *Sinclair* Court, Justice Butler agreed, likening the question of pertinency to questions

concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. *Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. . . .*

. . . It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury.<sup>52</sup>

Thus, the Court considered the proposition settled and obvious.

While the precedent upon which the *Sinclair* Court relied may have been easy to determine, the same cannot be said for the rationale underlying the rule that relevancy is a question of law. Justice Butler stated that the reasons were known, but those reasons do not appear in the supporting materials upon which the *Sinclair* Court relied. Stripping away the numerous layers of history reveals that no meaningful reason lies at the foundation. Thus, the rule appears to have ossified for no particular reason outside stare decisis.

---

49. *Sinclair*, 279 U.S. at 284-85 (citing 2 U.S.C. § 192). 2 U.S.C. § 192 provides: Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, *refuses to answer any question pertinent to the question under inquiry*, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2 U.S.C. § 192 (1994) (emphasis added).

50. For purposes of this Note, materiality, as it is used in 18 U.S.C. § 1001, is considered analogous to the relevancy requirement, as it is referred to by the Court in *Sinclair*, or pertinency, as stated in 2 U.S.C. § 192. *See, e.g., Gaudin*, 115 S. Ct. at 2318 (comparing "materiality" under 18 U.S.C. § 1001 and "pertinency" under 2 U.S.C. § 192). The Court in *Gaudin* stated: "The two questions are similar . . . . [T]ying [*Sinclair*] even closer to the present [case] was our dictum that pertinency 'is not essentially different from . . . materiality of false testimony . . . .' " *Id.* (quoting *Sinclair v. United States*, 279 U.S. 263, 273 (1929)).

51. *Sinclair v. United States*, 279 U.S. 263, 283-84 (1929) (argument for the United States). The government argued:

Almost all perjury statutes make the materiality of the alleged false testimony a substantive part of the offense. The courts have held without exception in a great many cases that the question of the materiality of the alleged false testimony is one of law for the court, and that it is error for the court to submit the question to the jury.

*Id.*

52. *Id.* at 298-99 (emphasis added).

For example, the *Sinclair* Court cited three cases supporting the proposition that materiality was a matter of law, but none of those opinions reveals reasons behind the rule.<sup>53</sup> Similarly, the treatises upon which the *Sinclair* Court relied do not reveal the rationale behind the practice.<sup>54</sup>

Other early federal cases were clear on the rule, holding that materiality is for the court to decide, but they offered no American case law as support or merely relied on English cases as their precedent.<sup>55</sup> Unfortunately, those cases also did not examine the reasons behind the long-standing rule.

The practice of having courts determine materiality also appeared unanimously settled by the state courts that considered the issue during the nineteenth century.<sup>56</sup> In New York, for example, *Power v. Price*<sup>57</sup> was clear in its holding,<sup>58</sup> but like its federal counterparts

---

53. *Id.* at 298 (citing *Carroll v. United States*, 16 F.2d 951 (2d Cir. 1927); *United States v. Singleton*, 54 F. 488 (S.D. Ala. 1892); *Cothran v. State*, 39 Miss. 541 (Miss. 1860)).

54. *Id.* (citing 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 49 (13th ed. 1876); 5 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* §§ 2549, 2550 (2d ed. 1923)).

55. *See* *United States v. Singleton*, 54 F. 488, 489-90 (S.D. Ala. 1892) (offering no case law in support of the holding); *United States v. Bedgood*, 49 F. 54, 60 (S.D. Ala. 1891) (same); *United States v. Landsberg*, 23 F. 585, 586-87 (C.C.S.D.N.Y. 1882) (citing *Regina v. Mullany*, 169 Eng. Rep. 1528 (1865) and *Regina v. Gibbon*, 169 Eng. Rep. 1324 (1861)).

The earliest federal case cited in the government's brief in *Gaudin* was *United States v. Cowing*, 25 F. Cas. 680, 681 (C.C.D.C. 1835) (No. 14,880), where the court decided the question of materiality itself, but the prosecution argued that materiality should be decided by the jury. The government's brief in *Gaudin* characterized *Cowing* as a case where the court did not reach the issue of who determines materiality. *See* Petitioner's Brief, *United States v. Gaudin*, No. 94-514, 1995 WL 71510, at \*20 n.12 (U.S. Feb. 21, 1995). The *Cowing* court, however, implicitly determined materiality itself. "The Court . . . was of opinion that the indictment was insufficient in not averring the materiality of the facts upon which the perjury was assigned; and in not stating facts which would show their materiality." *Cowing*, 25 F.Cas. at 681. The court seems to have operated independently, deciding whether enough information justified a conclusion that the facts were material.

56. *See* Petitioner's Brief, *United States v. Gaudin*, No. 94-514, 1995 WL 71510, at \*18-\*19 & n.11 (U.S. Feb. 21, 1995) (citing *Power v. Price*, 16 Wend. 450 (N.Y. 1836) as the earliest of the state cases).

57. 16 Wend. 450 (N.Y. 1836).

58. The case was a 15-7 decision, with a vigorous dissent. The majority opinion held that when a person commits perjury at a trial, it is obviously material and the burden of proof shifts to the defendant to prove the absence of materiality. "It was, therefore, incumbent on the defendant to prove that the words spoken by him related to an immaterial fact, not an issue in the cause before the justice . . ." *Id.* at 454. As to materiality:

[T]he court was clearly right in instructing the jury that the testimony given on the former trial was proved to be material. The court, in this part of its charge, did not take from the jury the decision of any matter of fact which was proper for their cognizance: it merely decided a question of law, arising upon the proof of facts as to which there was no dispute or contrariety of testimony.

failed to provide justification for its holding.<sup>59</sup> Louisiana was the only state that characterized materiality as a question of fact, but even Louisiana had adopted the majority view by 1903.<sup>60</sup>

Treatises other than those cited by the *Sinclair* Court were similarly unrevealing.<sup>61</sup> Francis Wharton's treatise provides valuable insight into the situation. In one edition, Wharton's treatise expressly concludes that materiality is for the court to decide,<sup>62</sup> relying on a line of English and American cases:

[T]he weight of authority is that it would be error to leave the question to the jury without definite instruction from the court. And the proper course is for the court, assuming all the evidence to be true, to determine whether the particular article of evidence is or is not material. Any dispute as to the truth of facts, however, must go to the jury.<sup>63</sup>

---

*Id.* at 456.

Senator Edwards dissented on both points, contending not only is the burden on the plaintiff to prove materiality, but that materiality needs to be determined by the jury:

Is the question of materiality a subject for the court or for the jury? The principle is recognized and maintained, in the several decisions of the Supreme Court to which I have referred, that it is necessary for the plaintiff to prove the materiality of the testimony in the justice's court . . . . If it is a matter of testimony, a fact the plaintiff is bound to prove, and so important that he cannot maintain his action without proving it, who are to weigh the testimony and determine whether the fact is proved? Is it not addressed to the jury?—and are not they to deliberate upon it, and to be satisfied whether it proves this fact that the testimony was material, and as they shall satisfy themselves, from their own deliberations, find their verdict? Could they conscientiously discharge the duty their oath imposes upon them, by relying upon the opinion of the court upon a matter of fact?—a matter of fact which appears to constitute the gist of the action, without the proving of which no recovery could be had. If the court can take from the jury the right to determine whether a fact so important is proved, they can take from the parties the whole benefit of a jury . . . .

*Id.* at 457-59.

59. See *id.* at 456; see also *infra* notes 60-66.

60. Compare *State v. Spencer*, 12 So. 135, 138 (La. 1892) (holding that materiality is a mixed question of law and fact to be determined by the jury) with *State v. Brown*, 35 So. 501, 502 (La. 1903) (concluding to the contrary, that generally materiality is a question of law for the court to decide, but not explicitly mentioning *Spencer* or holding the state is adopting a new rule).

61. See *infra* notes 62-66 and accompanying text.

62. These early treatises dealt with materiality in the context of perjury, which is an analogous situation to the modern false statement statutes such as 18 U.S.C. § 1001.

63. 2 Francis Wharton, *Wharton's Criminal Law* § 1550 (12th ed. 1932). Wharton cited six cases in support of this proposition, the first two of which were English, *Regina v. Mullany* and *Regina v. Southwood*, and are discussed *infra* note 68. The other four cases are relatively clear in their holdings. See *State v. Lewis*, 10 Kan. 157, 160 (1872) ("The point made on the instructions is that the court left with the jury the materiality of the alleged false testimony, when he should have decided it himself, and instructed the jury that it was or was not material. That on a trial for perjury, the question of the materiality of the alleged false testimony is one of law for the court, and not one of fact for the jury, is, as a general rule, true. Whether it ever be other-

Wharton's treatise did not cite a reason for this practice, but one of the four American cases upon which it relied shed a small ray of light on the subject: "And the rule of law applies emphatically to evidence given before a justice of the peace, where what is material and what is irrelevant is often mingled in admirable confusion."<sup>64</sup> Apparently, the determination was believed by at least one court to be too difficult for the jury to make, and thus became a question of law by default.

In a later edition, however, Wharton's treatise moved toward the view of materiality as a mixed question of law and fact, which was advanced by the Supreme Court in *Gaudin*:

Ordinarily the materiality of testimony is a question of law for determination by the court in which the defendant is tried for perjury. If, however, the facts are in dispute so that the materiality cannot be determined until the facts are first decided, the question of materiality is determined by the jury.<sup>65</sup>

The key difference, however, is that Wharton's treatise viewed materiality as ordinarily a question of law, whereas the Supreme Court in *Gaudin* implied that materiality is inherently a mixed question of law and fact. Further, even when there was a factual determination to be made, the nineteenth-century state cases appear to indicate that the judge gave specific jury instructions as to the materiality issue.<sup>66</sup>

---

wise we care not to inquire . . . ."; *Commonwealth v. Parker*, 56 Mass. (2 Cush.) 212, 221 (1848) (evaluating the evidence itself, court concluded it was material); *Steinman v. McWilliams*, 6 Pa. 170, 177 (1847) ("[T]he materiality of the testimony, or the parts of it alleged to be false, in a trial of this kind, is a matter of law, which ought to be decided by the court, and not left to the jury."); *Washington v. State*, 5 S.W. 119, 119-20 (Tex. Ct. App. 1887) (holding materiality is a question of law for the court).

64. *Steinman*, 6 Pa. at 177.

65. 3 Francis Wharton, *Wharton's Criminal Law and Procedure* § 1310 (Ronald A. Anderson ed., 1957) (citations omitted).

66. In *Coleman v. State*, 118 P. 594 (Okla. Crim. App. 1911), for example, which was cited in *Wharton's Criminal Law and Procedure* § 1310 (1957), the defendant was convicted of perjury and appealed on various grounds, including the trial court's mistake of having the jury determine materiality. The court said "that as a general rule the materiality of testimony is a question of law for the court, but cases may arise where this materiality depends upon disputed facts, and then becomes a mixed question of law and fact, to be submitted to the jury under proper instructions." *Coleman*, 118 P. at 601. The court offered two possible answers to defendant's appeal.

We can well see the justice of this rule as applied to the facts of the case now before us. Here the materiality of this testimony depended upon the testimony of other witnesses, which, if true, would make this testimony material. We therefore think that it was proper for the trial court to submit to the jury upon the entire testimony in the case the question of the materiality of this testimony.

*Id.* The court's other explanation was that the error was harmless, thus barring defendant's appeal. *Id.*

The *Coleman* court cited two cases in support of its belief that the jury may decide materiality in certain circumstances, *Young v. People*, 24 N.E. 1070 (Ill. 1890), and *Washington v. State*, 5 S.W. 119 (Tex. Ct. App. 1887). *Washington v. State*, however, cited by Wharton, *see supra* note 63, clearly considered materiality a question of law for the court to decide. That opinion gets a little confusing, however, because it then

The English treatises were similarly firm as to who decides materiality but similarly unenlightening as to the reason.<sup>67</sup> The English cases from the nineteenth Century, some of which formed the basis of the early American cases, explicitly acknowledge the existence of a materiality requirement, which must be decided by the judge.<sup>68</sup> They are not, however, illuminating on the reasons behind the materiality requirement.<sup>69</sup>

---

says that materiality could "be so mingled with the facts that the court should submit it, with proper instructions upon the law, to the jury." 5 S.W. at 120. But after citing a treatise and two other cases, the opinion delivers an express statement that materiality is for the judge to decide, not the jury. *Id.* Apparently, the judge determines materiality based upon a jury's factual findings in those circumstances.

The court in *State v. Stilwell*, 221 P. 174 (Or. 1923), also cited by Wharton, appeared to determine materiality itself. "Upon a prosecution for perjury, the materiality of the alleged false testimony may be shown by introducing all or so much of the pleadings in the action as show the issues, together with the proof of such facts as tend to show the testimony to be on a material issue." *Id.* at 182. The court went on to state that it must be proven beyond a reasonable doubt that the defendant testified and that his testimony was wilfully false. As for materiality, it must be established by evidence, not presumed. *Id.* While this decision may go to the jury, it appears that it is under judicial instructions that are tantamount to the court's determining materiality. The *Stilwell* court held that it is the court's duty to instruct the jury as to what constitutes material testimony. *Id.*

67. See, e.g., Rt. Hon. Lord Hailsham, 11(1) Halsbury's Laws of England, ¶ 302 (4th ed. 1990) ("The question whether a statement which forms the subject of proceedings for perjury was material is a question of law to be determined by the trial court."); see also C. H. S. Fifoot, 4 Stephen's Commentaries on the Laws of England 139 (G.C. Cheshire & Sir John Miles eds., 19th ed. 1928) ("The materiality of the statement is a question of law for the judge . . .").

68. See, e.g., *Regina v. Mullany*, 169 Eng. Rep. 1528, 1529 (1865) (holding that materiality determination is for the judge to decide); *Regina v. Southwood*, 175 Eng. Rep. 762, 762 (1858) (same); *Regina v. Overton*, 174 Eng. Rep. 676, 677 (1842) (same); *King v. Nicholl*, 109 Eng. Rep. 695, 696 (1830) (reaching same result implicitly, with court making materiality determination); *Rex v. Dunston*, 171 Eng. Rep. 960, 961 (1824) (same as *Nicholl*).

The lone exception to the settled proposition is *Regina v. Lavey*, 175 Eng. Rep. 448 (1850) in which Lord Campbell instructed the jury to "consider whether the present defendant swore falsely, and whether she did so wilfully and corruptly, and whether what she so falsely swore was material, for that is a question I leave to you." *Id.* at 450 (emphasis added). The assertion in *Lavey* was short-lived, however, being expressly reversed in *Regina v. Gibbon*, 169 Eng. Rep. 1324, 1326 (1861). *Lavey* appears to be an anomaly, running counter to the vast number of cases holding materiality is for the court to decide.

69. See *Regina v. Gibbon*, 169 Eng. Rep. 1324, 1326 (1861); *Regina v. Southwood*, 175 Eng. Rep. 762, 762 (1858); *Regina v. Overton*, 174 Eng. Rep. 676, 677 (1842); *King v. Nicholl*, 109 Eng. Rep. 695, 696 (1830); *Rex v. Dunston*, 171 Eng. Rep. 960, 961 (1824).

In *Regina v. Courtney*, 7 Cox Crim. L. Cas. 111 (Ct. Crim. App. 1856), the judges chose not to follow the contrary holding in *Regina v. Lavey*, 175 Eng. Rep. 448, 450 (1850), which held that materiality must be determined by the jury, but the court in *Regina v. Courtney* struggled for a justification. Judge Monahan decided the case on another issue, stating: "[I]t is not absolutely necessary to decide that [the materiality issue] one way or the other in this case," although he ultimately stated his preference for having the court determine materiality, without offering a reason. *Id.* at 118. *Lavey*'s unusual holding was expressly struck down in *Gibbon*, 169 Eng. Rep. at 1326.



While it appears the practice of allowing materiality determinations by the judge was uniform, with certain recognized exceptions, the Court in *Gaudin* viewed the authority as divided.<sup>70</sup> Contrary to Justice Scalia's opinion, however, a great deal of historical uniformity supports the view that the practice was settled.<sup>71</sup> Despite the error in

---

While the defense tried to use *Lavey* as precedent, the court in *Gibbon* explicitly overruled it. Stated Judge Channel: "I never could understand that case. . . ." *Id.* Believing that the only plausible explanation for the *Lavey* court's holding was the jury needed to determine another matter pertaining to the defendant's plea, the *Gibbon* court concluded: "That point having been ascertained, the question of materiality was no longer for the jury." *Id.*

70. See *United States v. Gaudin*, 115 S. Ct. 2310, 2316-18 (1995). Notably, however, Justice Scalia, the author of *Gaudin*, seemed to consider the matter settled when he authored *Kungys v. United States*, 485 U.S. 759 (1988), and that the established practice mandated that the judge decide materiality. In *Kungys* the Court held that in a proceeding to revoke citizenship, the determination of whether concealments or misrepresentations made to the Immigration and Naturalization Service were material is to be made by the judge. *Id.* at 772. While *Kungys* involved a different statute than *Gaudin*, 8 U.S.C. § 1451(a), Justice Scalia's decision relied upon the Sixth Circuit's view in *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983), that materiality in the § 1001 context is determined by the court. The government in *Gaudin* understandably put a great deal of stock in *Kungys*, figuring that the Court would follow this relatively recent interpretation of § 1001: "As this Court recently reaffirmed in *Kungys*, materiality is a legal issue, and the court may therefore determine it in a prosecution under Section 1001 without depriving the defendant of his right to a trial by jury." Petitioner's Brief, *United States v. Gaudin*, No. 94-514, 1995 WL 71510, at \*11 (U.S. Feb. 21, 1995). What would seem like a conundrum for the Court, however, was resolved by Justice Scalia in six sentences. See *Gaudin*, 115 S. Ct. at 2319-20. Justice Scalia said the questions involved in *Kungys* were very different from the materiality determination in *Gaudin*. While Justice Scalia noted that *Kungys* had relied upon *Sinclair* and *Abadi*, it was not necessarily a problem to hold differently in the present case because the circumstances in *Kungys* did not raise Sixth Amendment concerns. Thus, *Kungys* was, to an extent, an example of the lesser being included in the greater, and while *Sinclair* and *Abadi* may have dictated a certain result in *Kungys*, the reverse would not have been true. Justice Scalia concluded his analysis by stating whatever support *Kungys* lent to the validity of *Sinclair* and *Abadi* "was obiter dicta, and may properly be disregarded." *Id.* at 2319-20.

71. Another aspect to these cases that generally has been uniform, although Justice Scalia noted an aberration, is the prosecution generally has been the party arguing in favor of the court determining materiality. It begs the question, however, as to which party, prosecution or defense, really stands to gain by having the court determine materiality? Ostensibly, the materiality requirement has been inserted into the statute to protect defendants from frivolous prosecutions. Further, it appears that having the jury make this determination hinders the prosecution, giving it one more item to prove beyond a reasonable doubt. Is it necessarily easier, however, for the prosecution to prove this to the jury as opposed to the judge? In *Gaudin*, as well as the bulk of the other cases, the government believed its interests would be better served by having materiality determined by the court as a matter of law, or at least that the interests of justice and our society would be best served. More to the point, *Gaudin* had been convicted and was trying to find any basis to attain a different result, which he succeeded in doing.

Cases to the contrary do exist, however, in which the prosecution actually has argued for the materiality determination to be made by the jury. See Petitioner's Brief, *United States v. Gaudin*, No. 94-514, 1995 WL 71510, at \*19-20 n.12 (U.S. Feb. 21, 1995) (noting that when faced with an inadequate indictment, the United States ar-

characterizing the historical approach as divided, the Court correctly viewed the precedent as contrary to the Constitution, justifying the Court's opinion.<sup>72</sup> The Supreme Court thus refused to bow to the weight of unreasoned authority in derogation of a criminal defendant's Fifth and Sixth Amendment rights.

## II. THE BREADTH OF *GAUDIN*

*Gaudin* is significant for more than its radical effect on § 1001. For example, *Gaudin* impacts dozens of other false statement statutes whose materiality requirements are similar if not identical to § 1001's. The *Gaudin* holding should be extended beyond dictating that materiality in § 1001 prosecutions must be determined by the jury beyond a reasonable doubt. Even the Ninth Circuit, which ruled materiality in § 1001 prosecutions must be determined by the jury, acknowledged that many other false statement statutes with similar materiality requirements exist, and that the court has decided the issue of materiality in numerous cases enforcing such statutes.<sup>73</sup>

Based upon the Supreme Court's reasoning in *Gaudin*, materiality in every false statement statute inevitably will be a mixed question, which therefore must go to the jury. Justice Scalia rejected the government's contention that materiality in a § 1001 prosecution really was a question of law:

Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?"; and (b) "what decision was the

---

gued that: "The materiality of the matter is a fact to be ascertained by the jury." (citing *United States v. Cowing*, 25 F. Cas. 680, 681 (C.C.D.C. 1835) (No. 14,880)); see also *United States v. Irwin*, 654 F.2d 671, 677 (10th Cir. 1981) (finding that the government successfully argued that court should have a jury make materiality determination); *Coleman v. State*, 118 P. 594 (Okla. Crim. App. 1911) (stating that defendant appealed his perjury conviction because the jury determined materiality).

Justice Scalia seemingly dismissed the government's citation to *Cowing* because it "places the Government itself in opposition to its position here," *Gaudin*, 115 S. Ct. at 2317. That conclusion misses the government's point that the practice is settled, regardless of a single argument a prosecutor made in 1835. A more thorough investigation of the cases and which party truly stands to gain by having the judge or jury make the materiality determination is beyond the scope of this Note.

72. See *Gaudin*, 115 S. Ct. at 2317-18. As the Court noted: "Since that proposition is contrary to the uniform general understanding (and we think the only understanding consistent with principle) that the Fifth and Sixth Amendments require conviction by a jury of *all* elements of the crime, we must reject those cases that have embraced it." *Id.* at 2318.

73. See, e.g., *United States v. Gaudin*, 28 F.3d 943, 957 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting) (noting the practice of a judge determining materiality for perjury under 18 U.S.C. § 1621; of false statements to grand juries under 18 U.S.C. § 1623; of false statements in tax returns under 26 U.S.C. § 7206; and of false statements in applications for payments in federally-approved plans for medical assistance under 42 U.S.C. § 1320a-7b), *aff'd*, 115 S. Ct. 2310 (1995); see also *infra* notes 75-76 and statutes cited therein (listing statutes with materiality requirements similar to § 1001).

agency trying to make?" . . . The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality . . . to these historical facts. What the Government apparently argues is that the Constitution requires only that (a) and (b) be determined by the jury, and that (c) may be determined by the judge. We see two difficulties with this. First, the application-of-legal-standard-to-fact sort of question posed by (c), commonly called a "mixed question of law and fact," has typically been resolved by juries. . . . The second difficulty with the Government's position is that it has absolutely no historical support.<sup>74</sup>

Thus, the Court has made clear that while a legal standard is involved, a statement's materiality inevitably will be a mixed question of law and fact. While the Court's analysis in *Gaudin* concerned 18 U.S.C. § 1001, the formula would be virtually the same for 18 U.S.C. § 1621, the general perjury statute, or 18 U.S.C. § 1623, which covers false statements to a grand jury, except that the second question in the above inquiry would be "(b) what decision was the judge/grand jury trying to make." The Supreme Court in *Gaudin* did not limit its holding or specify how materiality in § 1001 is distinguishable from the other false statement statutes with similar materiality requirements. Many other false statement statutes have express materiality requirements,<sup>75</sup> while other statutes imply such a requirement.<sup>76</sup> Based upon

---

74. *United States v. Gaudin*, 115 S. Ct. 2310, 2314-15 (1995) (citation omitted).

75. See *United States v. Gaudin*, 28 F.3d 943, 959-60 n.3 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting), *aff'd*, 115 S. Ct. 2310 (1995). Noting statutes with express materiality requirements likely to be affected if materiality in § 1001 is deemed a jury question, Judge Kozinski included:

7 U.S.C. § 13(a)(3) (felony to knowingly make statement that "was false or misleading with respect to any material fact" in report required by statute or futures association); 8 U.S.C. § 1160(b)(7) (penalizing knowing and willful false statement of material fact in application for status of special agricultural worker); 8 U.S.C. § 1225a(c)(6) (penalizing knowing and willful false statement of material fact in application for special status by virtue of entering U.S. before Jan. 1, 1982); 8 U.S.C. § 1325(a) (penalizing improper entry into U.S. by virtue of willful false statement of material fact); 10 U.S.C. § 931 (perjury in military proceeding); 18 U.S.C. § 152 (maximum five year sentence for knowing and fraudulent receipt of material amount of property with intent to defeat bankruptcy code); 18 U.S.C. § 542 (maximum prison term of two years for entry of goods by means of material false statement); 18 U.S.C. § 1919 (maximum one year prison term for false statement of material fact knowingly made to obtain unemployment compensation for federal service); 19 U.S.C. § 1629(f)(2) (maximum five year prison term for any person who knowingly and willfully covers up a material fact from customs official); 19 U.S.C. § 1919 (maximum two year prison term for knowingly making false statement of material fact with intent to influence tariff adjustment); 19 U.S.C. § 2316 (maximum one year prison term for knowingly making false statement of material fact when seeking relief from injury under section 2311); 19 U.S.C. § 2349 (maximum two year prison term for making false statement of material fact for purposes of obtaining relief from injury under Trade Act of 1974); 20 U.S.C. § 1097(b) (maximum one year prison term for knowingly and willfully concealing material information in connection with assignment of federally insured student loan); 20 U.S.C.

§ 4442(c)(1) (maximum one year prison term for knowingly making false statement of material fact in seeking cultural and art development grants); 22 U.S.C. § 618(a)(2) (maximum six month prison term for willfully making false statement of material fact in registering to distribute political propaganda); 22 U.S.C. § 2778(c) (maximum 10 year prison term for willfully making untrue statement of material fact in report required for control of arms exports and imports); 26 U.S.C. § 7206(1) (maximum three year prison term for willfully making false declaration as to material matter regarding income taxes when under penalty of perjury); 26 U.S.C. § 9012(d) (maximum five year prison term for knowingly and willfully making misrepresentation of material fact during examination of campaign's matching payment account); 29 U.S.C. § 439(b) (maximum one year prison term for person who knowingly makes false statement of material fact in report required under section 431); 29 U.S.C. § 461(d) (maximum one year prison term for knowing misrepresentation of material fact in report labor organization must file once it assumes trusteeship over subordinate organization); 31 U.S.C. § 5324(b)(2) (prohibiting material omission or misstatement of fact in report on monetary instruments transactions); 42 U.S.C. § 290cc-32 (maximum five year prison term for knowingly making false statement of material fact in sale to state for items or services funded by federal government under Medicare); 42 U.S.C. § 300d-20 (same); 42 U.S.C. § 300e-17(h) (maximum five year prison term for knowingly and willfully making false statement of material fact in an HMO's financial disclosure); 42 U.S.C. § 300w-8(1) (maximum five year prison term for knowingly and willfully making false statement of material fact in sale to state of items or services subsidized by federal government); 42 U.S.C. § 300x-56(b) (same); 42 U.S.C. § 300dd-9 (same—under formula grants to states for care of AIDS patients); 42 U.S.C. § 300ee-19(b) (same—under funds for AIDS prevention); 42 U.S.C. § 707(a)(1) (same—under funds for social security); 42 U.S.C. § 1320a-7b(a)(1) (maximum five year prison term for knowingly and willfully making false statement of material fact in application for payments in federally-approved plans for medical assistance); 42 U.S.C. § 1383a(a)(1) (maximum one year prison term for knowingly and willfully making false statement of material fact in application for Supplemental Security Income benefits); 42 U.S.C. § 1973i (penalizing knowingly false information for purpose of establishing eligibility to vote); 42 U.S.C. § 3795a (penalizing knowing and willful misstatement or concealment of material fact in any application or record required under chapter); 42 U.S.C. § 6928(d)(3) (maximum two year prison term for knowingly making false material statement in compliance documents); 42 U.S.C. § 6992d(b)(2) (maximum two year prison term for knowingly making false material statement in compliance documents); 42 U.S.C. § 7413(c)(2) (maximum two year prison term for knowingly making false material statement in documents required under chapter); 46 U.S.C. § 1171(b) (any person who, in application for financial aid under merchant marine act, willfully makes untrue statement of material fact is guilty of misdemeanor); 46 U.S.C. § 31306(d) (maximum five year prison sentence for knowingly making false statement of material fact in declaration of citizenship under Shipping Act); 46 U.S.C. App. § 839 (maximum five year prison term for knowingly making false statement of material fact to secure required approval of Secretary of Transportation); 49 U.S.C.App. § 1472 (maximum three year prison term for knowingly and willfully falsifying or concealing a material fact to obtain FAA certificate); 50 U.S.C. § 855 (maximum five year prison term for willfully making false statement of material fact in registration statement); 50 U.S.C.App. § 1193(h) (maximum two year prison term for knowingly furnishing information that is false or misleading in any material respect regarding renegotiation of airplane contracts).

76. See *id.* at 960 n.4 (Kozinski, J., dissenting). Listing statutes with implied materiality requirement, Judge Kozinski included:

7 U.S.C. § 614(b-3)(3) (penalizing those who make false statement in application for tax-payment warrant); 7 U.S.C. § 2028(d) (punishing those who obtain funds from a Puerto Rico block grant "by . . . false statement"); 7 U.S.C. § 6407(e) (barring "false or unwarranted statements" regarding fluid milk products); 12 U.S.C. § 1782(a)(3) (penalizing false statement in administration of insurance fund); 13 U.S.C. § 213 (penalties for perjury); 12 U.S.C. § 1847 (penalizing false entries in book, report, or statement of bank holding company); 15 U.S.C. § 50 (penalizing false statement to FTC); 15 U.S.C. § 645 (offenses and penalties for certain crimes related to commerce and trade); 15 U.S.C. § 714m (punishing knowingly false statement to Commodity Credit Corporation); 15 U.S.C. § 1825(a)(2)(B) (penalizing false statement in report required by Horse Protection Act); 16 U.S.C. § 831(b) (penalizing false statement to or on behalf of the Tennessee Valley Authority); 18 U.S.C. § 287 (penalizing false claims against U.S. government); 18 U.S.C. § 288 (penalizing false claims for postal losses); 18 U.S.C. § 289 (penalizing false claims for pensions); 18 U.S.C. § 924 (penalizing knowing false statement in information gun dealers must provide); 18 U.S.C. § 1011 (penalizing knowing false statement in sale of mortgage to federal land bank); 18 U.S.C. § 1012 (penalizing intentional false entry in book of Department of Housing and Urban Development); 18 U.S.C. § 1014 (penalizing false statement to influence federal loan or credit agency); 18 U.S.C. § 1015 (penalizing false statement in naturalization proceeding); 18 U.S.C. § 1018 (penalizing public official who knowingly falsifies official certificate or writing); 18 U.S.C. § 1020 (penalizing false statement regarding highway projects); 18 U.S.C. § 1026 (penalizing false statement regarding farm indebtedness for purpose of influencing Secretary of Agriculture); 18 U.S.C. § 1027 (penalizing false statement in documents required by ERISA); 18 U.S.C. § 1158 (penalizing false statement to secure Indian Arts & Crafts Board trademark); 18 U.S.C. § 1542 (penalizing willful and knowing false statement in passport application); 18 U.S.C. § 1546 (penalizing false statement in immigration documents); 18 U.S.C. § 1712 (penalizing falsification of postal returns to increase compensation); 18 U.S.C. § 1920 (penalizing false statement to obtain Federal employees' compensation); 18 U.S.C. § 2386 (penalizing willful false statement when registering certain organizations); 18 U.S.C. § 2388(a) (penalizing willful false statement with intent to interfere with armed forces during war); 18 U.S.C. § 2424 (penalizing knowing and willful false statement about alien procured or maintained for immoral purposes); 22 U.S.C. § 1980(g) (penalizing false statement in seeking compensation for loss or destruction of commercial fishing vessel or gear); 22 U.S.C. § 2197(n) (penalizing false statement regarding federal insurance of investment in foreign nations); 26 U.S.C. § 7232 (penalizing false statement regarding registration as manufacturer or dealer in gasoline); 29 U.S.C. § 666(g) (penalizing false statement in health and safety report required under this chapter); 30 U.S.C. § 820 (penalizing false statement in document required under subchapter governing mine safety and health); 30 U.S.C. § 941 (penalizing false statement or representation in seeking benefits under subchapter governing mine safety and health); 30 U.S.C. § 1232(d)(1) (penalizing false statement in report submitted with reclamation fee); 30 U.S.C. § 1268(g) (penalizing false statement in documents required by Federal program or Federal Lands program regarding surface mining); 31 U.S.C. § 5322 (penalizing willful violations of subchapter); 33 U.S.C. § 931 (penalizing false statement for purpose of obtaining workers' compensation benefit); 33 U.S.C. § 990(b) (penalizing false statement to corporation governing Saint Lawrence Seaway); 33 U.S.C. § 1319(c)(2) (penalizing knowing false statement in record required by chapter on navigation and navigable waters); 38 U.S.C. § 1987 (penalizing know-

the general terms of the Supreme Court's holding, not only does the opinion mandate that materiality in § 1001 prosecutions be determined by a jury, but that materiality in all false statement prosecutions similarly must be determined by a jury.<sup>77</sup>

The reasons for reaching this conclusion are relatively straightforward. First, the structure of the various statutes is nearly identical. The language of 18 U.S.C. § 1001<sup>78</sup> is nearly identical to that of 18 U.S.C. § 1621<sup>79</sup> and 18 U.S.C. § 1623,<sup>80</sup> to cite just two examples. All three statutes contain a materiality requirement, which Congress in-

---

ing false statement in application, waiver of premium, or claim for benefits, for National Service Life Insurance or U.S. Government life insurance); 40 U.S.C. § 883(b) (penalizing false statement to Pennsylvania Avenue Development Corp.); 42 U.S.C. § 408 (penalizing false statement to obtain social security benefits); 42 U.S.C. § 1761(o) (penalizing false statement in connection with summer food service programs for children at service institutions); 42 U.S.C. § 1973i(c) (penalizing knowing false information for purpose of establishing eligibility to vote); 42 U.S.C. § 3220 (penning [sic] false statement to obtain financial assistance or defraud Secretary of Department of Health and Human Services); 42 U.S.C. § 4912(c) (penalizing false statement in documents filed pursuant to chapter's noise control requirements); 43 U.S.C. § 1350(c) (penalizing knowing false statement in application required under subchapter on submerged public lands); 45 U.S.C. § 231(l)(a) (penalizing knowing false statement in report required by subchapter on Rail Road Retirement Accounts); 45 U.S.C. § 359(a) (penalizing knowing false statement to obtain unemployment insurance); 49 U.S.C. Appx. § 2216 (penalizing U.S. officials who knowingly make false statement regarding projects submitted for approval of Secretary of Transportation).

28 F.3d at 960 n.4 (Kozinski, J., dissenting).

77. See *id.* at 958-961 (Kozinski, J., dissenting). As Judge Kozinski stated:

The disruption is greater still. I've only mentioned five statutes—ones where our circuit has already held who decides materiality. But the majority's theory easily covers all statutes that contain a similar materiality requirement. How many other criminal statutes punish those who make material false statements to a government agency? My research discloses forty-three that have explicit materiality requirements and another fifty-four where such a requirement is probably implied. And, of course, other courts have already held that materiality in a number of these statutes should be decided by the judge, and will no doubt interpret the others consistent with their prevailing case law.

*Id.* (footnotes omitted).

Intuitively one may think that § 1001 is an all-encompassing statute that covers all other false statement statutes. This is not the case, however, because § 1001 is simply a residual statute to criminalize false statements not specifically enumerated in more specialized false statement statutes. See, e.g., *United States v. Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978) ("[T]he section need not 'swallow up' other federal statutes prohibiting the making of a specific kind of false representation. Instead, properly construed, the statute serves as a catch-all, reaching those false representations that might 'substantially impair the basic functions entrusted by law to [the particular] agency,' but which are not prohibited by other statutes. The legislative history reveals no evidence of an intent to pyramid punishment for offenses covered by another statute as well as by § 1001." (quoting *United States v. Bedore*, 455 F.2d 1109, 1110-11 (9th Cir. 1972))).

78. See *supra* note 3.

79. 18 U.S.C. § 1621, which covers perjury, provides in pertinent part:

Whoever—

tended to have equal force. The prosecutor must show the false statement in question under each statute was material.<sup>81</sup>

Second, the policy reason for having a materiality requirement does not vary from one false statement statute to the other. The requirement that false statements be material has historical roots tracing back at least to seventeenth-century England.<sup>82</sup> It arose because courts and

---

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury . . . .

*Id.* (1994).

80. 18 U.S.C. § 1623, which covers false declarations before grand jury or court, provides in pertinent part:

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined [not more than \$10,000] or imprisoned not more than five years, or both. . . .

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if —

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury.

*Id.* (1994).

81. The Court's mandate in *Gaudin* only applies if materiality is deemed to be an element of the crime charged. Some of the statutes likely to be affected may not have express materiality requirements, but a materiality requirement has been read into the statute, as is the case in two of the clauses in § 1001. *See, e.g., United States v. Wells*, 63 F.3d 745, 750 (8th Cir. 1995) ("Like 18 U.S.C. § 1001 . . . the statute at issue in this case, 18 U.S.C. § 1014, on its face does not limit its coverage to those false statements which are material. However, it has been well established that materiality of the statement is an element of a violation of 18 U.S.C. § 1014.").

82. *See, e.g., Kungys v. United States*, 485 U.S. 759 (1988). In a prosecution under 8 U.S.C. § 1451(a), to denaturalize an immigrant who allegedly had procured citizenship by concealing or misrepresenting a material fact, the Court analyzed the materiality requirement, stating:

The term "material" in § 1451(a) is not a hapax legomenon. Its use in the context of false statements to public officials goes back as far as Lord Coke, who defined the crime of perjury as follows:

legislatures did not want to punish de minimis false statements. The underlying reason to proscribe and prosecute only material false statements is logical.<sup>83</sup> The court's time should not be wasted with meaningless prosecutions, and society likely would reject a statute that criminalized any immaterial false statement as both overbroad and purposeless.<sup>84</sup>

Attempts to distinguish § 1001 from other false statement statutes have not proven convincing. The Ninth Circuit en banc panel in *Gaudin*<sup>85</sup> and the Tenth Circuit in *United States v. Daily*<sup>86</sup> specifically mentioned that while materiality should be determined by the jury in a § 1001 prosecution, it was considered a matter of law for the court to decide in other false statement prosecutions.<sup>87</sup> Those courts, however,

---

"Perjury is a crime committed, when a lawful oath is ministered by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely, and falsely in a matter material to the issue, or cause in question, by their own act, or by the subornation of others." 3 E. Coke, *Institutes* 164 (6th ed. 1680).

Blackstone used the same term, writing that in order to constitute "the crime of wilful and corrupt *perjury*" the false statement "must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid," it is not punishable. 4 W. Blackstone, *Commentaries* \*137. . . . Given these common-law antecedents, it is unsurprising that a number of federal statutes criminalizing false statements to public officials use the term "material."

*Id.* at 769.

83. Even in statutes where the materiality requirement either is not expressly stated or it appears only in one of several clauses of the statute, as is the case in § 1001, courts have read in materiality requirements to avoid illogical results.

Admittedly, [18 U.S.C.] § 542 does not on its face include the word "material." It does, however, require that the attempt to introduce imported merchandise into the United States be "by means of any false statement." . . . If the false statement is not material, it cannot be said that the attempt was made to import the merchandise "by means of" the statement.

*United States v. Rose*, 570 F.2d 1358, 1363 (9th Cir. 1978).

When the Sixth Circuit considered materiality under § 1001 in *United States v. Abadi*, 706 F.2d 178 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983), the court concluded it was not an element that must be determined by the jury, but "a judicially-imposed limitation to insure the reasonable application of the statute." *Id.* at 180 n.2. The Eleventh Circuit in *United States v. White*, 765 F.2d 1469 (11th Cir. 1985), also considering a conviction under § 1001, stated: "[T]he requirement of materiality has been read into the statute in order to exclude trivial falsifications from its coverage." *Id.* at 1472.

84. This is what Justice Scalia contended in *Harmelin v. Michigan*, 501 U.S. 957 (1991). When discussing criminal sentence proportionality, Justice Scalia wrote: Neither Congress nor any state legislature has ever set out with the objective of crafting a penalty that is 'disproportionate' . . . . This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are certain never to occur.

*Id.* at 985-86.

85. *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), *aff'd*, 115 S. Ct. 2310 (1995).

86. 921 F.2d 994 (10th Cir. 1990), *cert. denied*, 502 U.S. 952 (1991).

87. See *Gaudin*, 28 F.3d at 945; *Daily*, 921 F.2d at 1004.



failed to explain the distinction. The absence of any such explanation highlights the reason why the holding in *Gaudin* should be applied to other false statement statutes with similar materiality requirements.

In determining whether materiality is a factual element of a § 1001 prosecution, thereby triggering the *Winship* requirement that it be decided by a jury,<sup>88</sup> the majority in the Ninth Circuit's en banc *Gaudin* opinion explained that materiality obviously is a factual element:

Only if it can be said that there is no factual component to the determination of materiality and, thus, that it is a pure question of law, would the Sixth Amendment constraint not apply. However, if it is a mixed question of law and fact, then it must be submitted to the jury. It would not be faithful to the Sixth Amendment for the judge to decide the factual component of the element necessary to constitute the crime.<sup>89</sup>

In *Gaudin* the Ninth Circuit en banc panel cited *United States v. Valdez*<sup>90</sup> as the basis of its holding that materiality in a § 1001 offense is a factual element.<sup>91</sup> The Ninth Circuit further relied on *Valdez* for the proposition that § 1001 is the exception to the rule.

We recognize that most other circuits have held that the determination of materiality in criminal perjury and false statement statutes is a question of law for determination by the judge. In our circuit, we have held that the issue of materiality in most of these statutes is a question of law for the judge. The exception has been section 1001 cases, in which we have held that it is an element of the crime that must be determined by the jury. On the basis of *Valdez*, we reversed *Gaudin*'s convictions . . . because the district court removed the issue from the jury, instructing that the Government had established materiality as a matter of law.<sup>92</sup>

Neither the Ninth Circuit's en banc *Gaudin* decision nor the analysis in *Valdez*, however, explain how § 1001 is different than other false statement statutes with materiality requirements.

In *Valdez*, the Ninth Circuit did not engage in a thorough Sixth Amendment analysis regarding the materiality determination.<sup>93</sup> As to defendant's argument on this point, the court merely noted: "Appellants argue that the materiality issue should have been submitted to the jury. We agree, but conclude that the failure to do so was not

---

88. See *supra* note 16, discussing *Winship* requirement.

89. 28 F.3d at 949.

90. 594 F.2d 725 (9th Cir. 1979).

91. See *United States v. Gaudin*, 28 F.3d 943, 948 (9th Cir. 1994) (en banc), *aff'd*, 115 S. Ct. 2310 (1995).

92. *Id.* at 945 (citing *United States v. Valdez*, 594 F.2d 725, 728-29 (9th Cir. 1979)).

93. While the court discussed the Sixth Amendment as it pertained to the defendant, it did so in reference to defendant's contention that his right to compulsory process has been violated when a material witness was permitted to leave the compulsory process jurisdiction of the court. See *Valdez*, 594 F.2d at 728.

reversible error."<sup>94</sup> The Ninth Circuit in *Valdez* did not have occasion to consider materiality in the § 1001 context as compared to other false statement statutes, and its brief statement did not give the Ninth Circuit en banc panel a great deal of guidance in *Gaudin*.

The Tenth Circuit's analysis in *Daily* also highlights the incongruity of treating § 1001 differently than other false statement statutes with materiality requirements. The *Daily* court concluded that materiality is an essential element of a § 1001 prosecution, referring to its prior holding that materiality "like other essential elements, must ordinarily be submitted on proper instructions for determinations by the jury."<sup>95</sup> After noting that most other federal circuit courts hold to the contrary, the *Daily* court noted that in the context of other false statement statutes, such as perjury before a grand jury under 18 U.S.C. § 1623, the general perjury statute under 18 U.S.C. § 1621, and falsification of a tax return under 26 U.S.C. § 7206(1), the matter is considered a question of law.<sup>96</sup>

The Tenth Circuit, as had the Ninth Circuit, failed to state a reason for the divergent treatment of these false statement statutes, and the cases upon which it relied similarly were silent.<sup>97</sup> The various courts have thus drawn a baffling and arbitrary line, with § 1001 on one side and all other false statement statutes on the other.

In advocating the constitutional importance of jury determinations of all elements of a criminal prosecution, the Ninth Circuit en banc panel in *Gaudin* hinted that treating materiality as a matter of law in other false statement statutes was difficult to justify. After noting that "[i]t would seem that a factual inquiry would nearly always be necessary to determine what makes a difference to the decisionmaking body,"<sup>98</sup> the Ninth Circuit en banc panel specifically considered materiality in perjury prosecutions. The court acknowledged a valid distinction between determining relevancy when admitting evidence, which is clearly for the judge to decide, and materiality. The Ninth Circuit went on to state, however, that "[e]ven in perjury cases, it is difficult to say there is no factual component,"<sup>99</sup> suggesting that it

---

94. *Id.* at 729.

95. *United States v. Daily*, 921 F.2d 994, 1004 (10th Cir. 1990), *cert. denied*, 502 U.S. 952 (1991). The *Daily* court struggled with its conclusion that materiality in § 1001 should be treated as an element of law, but felt constrained to do so because of the Supreme Court's recent holding in *Kungys*. *Id.* at 1004-05. Regardless of the Tenth Circuit's view regarding § 1001, it still maintained the practice of treating materiality in other false statement statutes as a question of law. *Id.* at 1004.

96. *Id.* (citations omitted).

97. *See United States v. Vap*, 852 F.2d 1249, 1252-53 (10th Cir. 1988) (discussing prosecution under 18 U.S.C. § 1623 for false statements to a grand jury); *United States v. Masters*, 484 F.2d 1251, 1254 (10th Cir. 1973) (discussing prosecution for perjury under 18 U.S.C. § 1621).

98. *United States v. Gaudin*, 28 F.3d 943, 948 (9th Cir. 1994) (en banc), *aff'd*, 115 S. Ct. 2310 (1995).

99. *Id.*

would "be more faithful to Sixth Amendment requirements to instruct the jury that the statement in question was admissible evidence in the former trial and leave the question to the jury as to whether it could have tended to influence the prior jury."<sup>100</sup>

Thus, the Ninth Circuit en banc panel in *Gaudin* was at a loss to explain how § 1001 differed from other false statement statutes with materiality requirements. The Ninth Circuit seemed to conclude that materiality in all false statements must go to the jury, stating: "[I]t seems to be courting constitutional error to withdraw the materiality question from the jury in other perjury and false statement cases because of the difficulty in concluding that there is no factual component for jury determination."<sup>101</sup> Yet the Ninth Circuit rendered a more limited decision, holding only that materiality in the § 1001 context was a factual element for the jury to decide,<sup>102</sup> but reserving the issue of materiality in other contexts.

Thus, the Supreme Court's holding in *Gaudin*, absent any limitations or distinctions, will apply to the various other false statement statutes with materiality requirements.<sup>103</sup> While the Supreme Court has employed such silent strategies before,<sup>104</sup> the Supreme Court's

---

100. *Id.*

101. *Id.* at 949.

102. *Id.* at 952.

103. Apparently, other courts have read *Gaudin* and reached the same conclusion. See, e.g., *United States v. Nash*, 64 F.3d 504, 507-08 (9th Cir. 1995) (reviewing conviction under 18 U.S.C. § 1014 for submitting false tax returns to bank, and holding that materiality requirement, in the wake of *Gaudin*, must be determined by jury). The Ninth Circuit stated: "*Gaudin*'s reasoning appears to admit of no exception that would suggest that materiality under § 1014 is nonetheless a question of law." *Id.* at 508; see also *United States v. Wells*, 63 F.3d 745 (8th Cir. 1995). In *Wells*, also a prosecution under § 1014, the Eighth Circuit stated:

Because the statute requires proof of the materiality of a false statement, materiality is an element of § 1014. *Gaudin*, therefore, dictates that we vacate the defendants' convictions on both counts . . . . The trial court's determination of materiality as a matter of law denied the defendants' constitutional right to have a jury determine each and every element of a charged crime, including the materiality of a false statement charged under § 1014 and under the § 371 charge of a conspiracy to violate § 1014.

*Id.* at 751; *United States v. Keys*, No. 93-50281, 1995 WL 574226, at \*5 (9th Cir. July 28, 1994) (applying *Gaudin* to prosecution for false statements to grand jury under 18 U.S.C. § 1623); *United States v. Pearson*, 897 F. Supp. 1147, 1150 (C.D. Ill. Aug. 30, 1995) (same).

The Supreme Court seemingly has also taken an expansive view of its decision in *Gaudin*, by virtue of its recent grant of certiorari in two cases, vacating the judgments and remanding to the respective circuit courts of appeal to consider in light of *Gaudin*. See *United States v. Kapoor*, No. 93 CR. 1978 (CSH), 1994 WL 174019 (S.D.N.Y. May 4, 1994), *aff'd*, 54 F.3d 765 (2d Cir. 1995), *judgment vacated by* 116 S. Ct. 43 (1995); see also *Porat v. United States*, 115 S. Ct. 2604 (1995) (remanding to Third Circuit regarding conviction for false statements before a grand jury under 18 U.S.C. § 1623); *United States v. Porat*, 17 F.3d 660 (3d Cir. 1994).

104. See, e.g., *McNally v. United States*, 483 U.S. 350, 359-61 (1987) (limiting the scope of 18 U.S.C. § 1341, the mail fraud statute, to prosecutions for deprivation of actual property only). Prior to *McNally*, the statute had been read expansively, al-

opinion in *Gaudin* nonetheless should be read as having a similar effect on other false statement statutes. If facing a case dealing with another false statement statute in the future, the Court may find a means of distinguishing that statute and issuing a holding different from the one in *Gaudin*. In light of *Gaudin*, however, a presumption that all materiality questions must go to the jury seems warranted.

Based upon the broad language of the Supreme Court's holding,<sup>105</sup> *Gaudin* should extend to prosecutions under all false statement statutes with materiality requirements. In *Gaudin*, the Supreme Court was concerned about the importance of the Due Process rights of the Fifth Amendment and the Sixth Amendment's assurance to afford criminal defendants "a speedy and public trial, by an impartial jury."<sup>106</sup> Those constitutional concerns not only impact courts by mandating the *Gaudin* holding, but require that criminal defendants be protected from legislative attempts to circumvent these rights as well. The next part examines the broader issue of mixed questions of law and fact and the need to protect the *Gaudin* rationale against legislative circumvention.

### III. PROTECTING THE JURY RIGHT FROM LEGISLATIVE TAMPERING

*Gaudin*, breaking from a settled but unjustified practice, established that materiality in a § 1001 prosecution is a mixed question of law and fact that must be determined by the jury.<sup>107</sup> This Note argues that materiality in other false statement statutes should be addressed in the same way.<sup>108</sup> The question then arises if, in the wake of *Gaudin*, Congress could circumvent the Supreme Court's mandate by redrafting § 1001 and removing materiality from the jury by expressly defining it as a question of law.

---

lowing conviction for fraud perpetrated against property or for deprivation of intangible rights, such as the right to legitimate government. *See id.* at 365-66 (Stevens, J., dissenting). While reversing a trend, the Court's opinion in *McNally* left unstated how expansively the holding should be read.

105. *See United States v. Gaudin*, 115 S. Ct. 2310, 2314-15 (1995).

106. U.S. Const. amend. VI; *see Gaudin*, 115 S. Ct. at 2313-15. One cause for the contention that the Court was taking such a firm stance on the constitutional right to a jury determination and to have all factual elements determined beyond a reasonable doubt is the Court's analysis in *Gaudin*. The Court long has abided by the maxim that it does not rush into constitutional analysis if it is not necessary. *See In re Snyder*, 472 U.S. 634, 642 (1985) (stating constitutional issues are avoided when resolution of a constitutional issue is not necessary for disposition of the case). If, for example, the government in *Gaudin* merely had misread Congress's intent behind 18 U.S.C. § 1001, the Court's opinion would have discussed legislative history and other factors explaining what Congress really intended. Instead, the Court jumped right into the constitutional analysis, explaining how the government's view violated *Gaudin*'s constitutional rights. *See Gaudin*, 115 S. Ct. at 2313-14 (first point of Court's opinion addresses Fifth and Sixth Amendment requirements).

107. *Gaudin*, 115 S. Ct. at 2314, 2319-20.

108. *See supra* part II; *see also* cases cited *supra* note 103.

If Congress or a state legislature attempted to do this, with either § 1001 or another of the false statement statutes, such an action would be unconstitutional.<sup>109</sup> Materiality will always have two components: The jury must find facts and apply legal principles to them,<sup>110</sup> thereby making it a mixed question of law and fact.<sup>111</sup> Regardless of how a legislature labels materiality, it cannot alter what materiality truly is. Because it necessarily has a factual component, materiality must be determined by the jury in order to maintain the Fifth and Sixth Amendment guarantees, as mandated by the Supreme Court in *Gaudin*.

#### A. Recognizing a Definition of Mixed Questions of Law and Fact

Grandly stating that materiality must be determined by the jury because it is a mixed question of law and fact, without more, can result in circular reasoning that is without substance. The basis for this characterization requires further explanation. The Supreme Court in *Gaudin* offered a concise analysis, noting that mixed questions of law and fact are "the application-of-legal-standard-to-fact sort of question[s]," which "typically [are] resolved by juries."<sup>112</sup> The Court in *Gaudin* followed the definition upon which the Court has relied in a variety of other contexts.

In *TSC Industries v. Northway, Inc.*,<sup>113</sup> a case involving securities fraud, the Court defined mixed questions of law and fact as "the application of a legal standard to a particular set of facts."<sup>114</sup> In *Pullman-Standard v. Swint*,<sup>115</sup> a case involving alleged discrimination violating Title VII of the Civil Rights Act of 1964, the Court considered the standard of review regarding a district court's findings of fact. Discussing mixed questions of law and fact, Justice White defined them as "questions in which the historical facts are admitted or established,

---

109. See, e.g., *Sasnett v. Department of Corrections*, 891 F. Supp. 1305, 1315-16 (W.D. Wis. 1995) (upholding, among other things, constitutionality of the Religious Freedom of Restoration Act, but noting that the term "Restoration" actually was an incorrect characterization, because "'Congress writes laws but cannot—it does not and cannot overrule the Supreme Court's interpretation of the Constitution and thus it is unable to 'restore' a prior interpretation of the First Amendment.'" (quoting H.R. Rep. No. 88, 103rd Cong., 1st Sess. 15 n.3 (1993)); see also *I.N.S. v. Chadha*, 462 U.S. 919, 956-59 (1983) (holding that section of Immigration and Nationality Act that authorized a one-House veto was unconstitutional because it violated the constitutional requirement that legislative actions be passed by a majority of both Houses of Congress). As Chief Justice Burger noted, writing for the Court in *Chadha*: "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.* at 944.

110. *United States v. Gaudin*, 115 S. Ct. 2310, 2314 (1995).

111. *Id.*

112. *Id.* at 2314.

113. 426 U.S. 438 (1976).

114. *Id.* at 450.

115. 456 U.S. 273 (1982).

the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard."<sup>116</sup>

The Court also has considered mixed questions of law and fact in habeas corpus cases,<sup>117</sup> examining how mixed questions of law and fact implicate constitutional concerns. In *Brown v. Allen*,<sup>118</sup> Justice Frankfurter's separate opinion<sup>119</sup> defines mixed questions of law and fact as situations "[w]here the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts . . . [that require a] blend of facts and their legal values."<sup>120</sup> Thus, a mixed question of law and fact in constitutional cases can be defined as the "application of constitutional principles to the facts."<sup>121</sup>

Some commentators have criticized the concept of mixed questions of law and fact,<sup>122</sup> contending that such an issue truly is a question of law, but to justify the jury making the determination it must be characterized as having some factual element.<sup>123</sup> Others, in addition to noting that juries and judges do not have completely separate roles,<sup>124</sup>

---

116. *Id.* at 289 n.19.

117. The focus in habeas corpus cases regarding mixed questions of law and fact often is whether the appellate judge can review de novo or under the "clearly erroneous" standard. *See, e.g., Wright v. West*, 505 U.S. 277, 288-91 (1992) (noting that mixed constitutional questions are reviewed de novo). These cases shed light upon a definition of mixed questions of law and fact. Further, they demonstrate the care with which the Court has guarded review of mixed questions of law and fact when constitutional concerns are implicated. *Id.*

118. 344 U.S. 443 (1953).

119. *Id.* at 488 (opinion of Frankfurter, J.).

120. *Id.* at 507.

121. *Id.* More generally, as the Court later noted in *Townsend v. Sain*, 372 U.S. 293 (1963), *rev'd on other grounds*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), "mixed questions of fact and law . . . require the application of a legal standard to the historical-fact determinations." 372 U.S. at 309 n.6. The Eleventh Circuit in *Grizzell v. Wainwright*, 692 F.2d 722, 725 (11th Cir. 1982), also a habeas corpus case, stated: "From decisions in areas involving other types of constitutional errors, it appears that the existence of constitutional harmless error is a mixed question of law and fact because it requires 'the application of constitutional principles to the facts as found.'" (quoting *Brown v. Allen*, 344 U.S. 443, 507 (opinion of Frankfurter, J.)).

122. *See, e.g., Francis H. Bohlen, Mixed Questions of Law and Fact*, 72 U. Pa. L. Rev. 111, 112-15 (1924) (noting the shortcomings of the term "mixed questions of law and fact" because it is not unique to those types of questions to have the jury determine facts acting under the court's directions to follow broad principles of law; "Every question which is left to the jury is to be determined in the same way.").

123. Bohlen, *supra* note 122, at 114. For a thorough discussion of the evolution of special verdicts, see Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 Yale L.J. 575 (1923).

124. *See James B. Thayer, A Preliminary Treatise on Evidence at the Common Law* 185 (1898) [hereinafter *Treatise on Evidence*].

Courts pass upon a vast number of questions of fact that do not get on the record, or form any part of the issue. Courts existed before juries; juries came in to perform only their own special office; and the courts have always continued to retain a multitude of functions which they exercised before ever juries were heard of, in ascertaining whether disputed things be true. In other words, there is not, and never was, any such thing in jury trials as an

have proposed definitions that arguably would put a finding of materiality within the province of the court.<sup>125</sup>

Nevertheless, the Supreme Court has defined materiality as a mixed question of law and fact,<sup>126</sup> and thus has enumerated standards by which various mixed questions of law and fact can be identified. The Supreme Court in *Gaudin* had no difficulty identifying materiality as a mixed question of law and fact. The determination entailed the finding of fact and subsequent application of legal principles, thereby triggering the jury requirement.<sup>127</sup> Thus, under the Supreme Court's analysis, regardless of what a legislature were to label materiality, the essential commingling of legal principle and fact renders it a mixed question of law and fact that must be determined by the jury.<sup>128</sup>

---

allotting of all questions of fact to the jury. The jury simply decides some questions of fact . . . [T]he allotment to the jury of matters of fact, even in the strict sense of fact which is in issue, is not exact. The judges have always answered a multitude of questions of ultimate fact, of facts which form part of the issue.

*Id.* at 185, 202; see also 9 John H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* § 2549, at 500 (3d ed. 1940); Thayer, *Law and Fact*, *supra* note 8, at 169-70 (concluding that mixed questions of law and fact do not require the jury to make a different type of decision, but the difference between factual determination and mixed questions of law and fact is one of degree because the jury has an exact legal standard or principle to follow as opposed to a more general one); Alschuler & Deiss, *supra* note 8, at 903-11 (noting American history under which juries were allowed to decide both issues of law and fact and evolution to modern-day practice of having juries determine only facts).

125. See Thayer, *Law and Fact*, *supra* note 8, at 153. Attempting to draw the line between the two categories, Thayer posited that questions of law are defined as those with "a rule or standard which it is the duty of a judicial tribunal to apply and enforce." *Id.* As the government contended in *Gaudin*, the determination is not one that varies from case to case depending upon what facts the jury finds, but it revolves around a consistent judicial determination of what activities fall under a governmental agency's jurisdiction. See *infra* note 128 and accompanying text.

126. See *United States v. Gaudin*, 115 S. Ct. 2310, 2314-15 (1995); see also *Wright v. West*, 505 U.S. 277, 288-91 (1992) (recognizing that mixed questions of law and fact require the application of legal principles to factual findings); *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) (same). But see George C. Christie, *An Essay on Discretion*, 1986 Duke L.J. 747, 772 & n.117 ("Identifying mixed questions of law and fact is a source of much judicial disagreement."). Christie points to several Supreme Court cases with seemingly incongruous results. *Id.* (discussing, for example, *Maggio v. Fulford*, 462 U.S. 111 (1983)).

127. *Gaudin*, 115 S. Ct. at 2314-15. As the Court stated:

[T]he Government surely does not mean to concede that the jury must pass upon all elements that contain some factual component, for that test is amply met here. . . . The ultimate question . . . "whether the statement was material to the decision," requires applying the legal standard of materiality . . . to these historical facts. . . . [T]he application-of-legal-standard-to-fact sort of question . . . commonly called a "mixed question of law and fact," has typically been resolved by juries.

*Id.* at 2314 (emphasis added).

128. The concern that courts will not be able to regularly identify mixed questions of law and fact in the face of other characterizations is assuaged by the *Gaudin* opinion. The government in *Gaudin* argued that materiality in this context should be deemed a purely legal question, likening it to jurisdiction. See Reply Brief for the

### B. Confronting the Concern of Legislative Tampering

Nonetheless, in the wake of *Gaudin*, Congress could draft a false statement statute that lists materiality as an element, but also expressly states that materiality in this context is a question of law. The hypothetical may not be that outlandish, considering that legislatures have altered criminal statutes to remove long-standing elements from the prosecution's burden of proof and relabeled them affirmative defenses that must be proven by the defendant. In fact, in his concurring opinion to *Gaudin*, Chief Justice Rehnquist recognized the power that legislatures have to draft statutes, noting that the Court's holding in *Gaudin* in no way "stands as a barrier to legislatures that wish to define—or that have defined—the elements of their criminal laws in such a way as to remove issues such as materiality from the jury's consideration."<sup>129</sup>

---

United States, *United States v. Gaudin*, No. 94-514, 1995 WL 170217, at \*6-8 (U.S. Apr. 10, 1995); Oral Argument Transcript, *United States v. Gaudin*, No. 94-514, 1995 WL 243257, at \*5-6, \*8-9 (U.S. Apr. 17, 1995). The government's contention was that materiality in a § 1001 prosecution should be considered a question of law because it did not involve a factual determination. Oral Argument Transcript, *United States v. Gaudin*, No. 94-514, 1995 WL 243257, at \*6 (U.S. Apr. 17, 1995). Determining whether a false statement had the potential for misleading a government agency depended upon that agency's duties, or put another way, its jurisdiction. Thus, a judge would be qualified to determine what that agency's duties are, and thus whether a given false statement had the potential for misleading that agency. There were no facts to be found in order to determine materiality. *Id.* at \*22.

The Court appeared to agree with the government's characterization. *See id.* at \*32-33. As Justice Breyer noted: "Yes, but you see judges are not only experts on court proceedings [to determine materiality of perjury]. They're also experts on how regulatory programs work, how statute books work, how when you understand—that's a fairly close analogy." *Id.* at \*33. The Court ultimately decided materiality had a factual and legal component, thereby making it a mixed question of law and fact. The Court's ability to rely on its definition and reach its decision in *Gaudin* bolsters the contention that courts are able to identify mixed questions of law and fact.

129. *United States v. Gaudin*, 115 S. Ct. 2310, 2321 (1995) (Rehnquist, C.J., concurring). Chief Justice Rehnquist:

We have noted that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." Within broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal offense. Federal and State legislatures may reallocate burdens of proof by labeling elements as affirmative defenses, or they may convert elements into "sentencing factor[s]" for consideration by the sentencing court. The Court today does not resolve what role materiality plays under § 1001.

*Id.* (Rehnquist, C.J., concurring) (alterations in original) (quoting *Staples v. United States*, 114 S.Ct. 1793, 1796 (1994) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)) (citations omitted)).

The Ninth Circuit majority opinion in the *Gaudin* en banc decision also noted the power possessed by legislatures:

When a statute expressly provides for materiality as an element of the crime, it can hardly be said that it is not an element. If, in construing the intent of Congress, the courts determine that materiality was intended by Congress to be an element of the crime, a similar result would seem apparent.



*In re Winship*<sup>130</sup> stated that due process requires all factual elements in criminal prosecutions be proven beyond a reasonable doubt.<sup>131</sup> The Supreme Court later considered how *Winship* should be applied in the context of legislative power to draft statutes, holding in *Mullaney v. Wilbur*<sup>132</sup> that legislatures were not free to define crimes as they pleased, thereby unconstitutionally shifting burdens of proof to criminal defendants.<sup>133</sup> In *Mullaney*, Maine required that a homicide defendant prove by a preponderance of the evidence that he killed in a sudden heat of passion based on adequate provocation.<sup>134</sup> The Court in *Mullaney* held that the prosecution was required under *Winship* "to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."<sup>135</sup> Justice Powell's opinion in *Mullaney* discussed *Winship*'s holding and the fear that state legislatures could manipulate its mandate: "[A] State could undermine many of the interests that [*Winship*] sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment."<sup>136</sup>

---

United States v. Gaudin, 28 F.3d 943, 948 (9th Cir. 1994) (en banc) (citation omitted), *aff'd*, 115 S. Ct. 2310 (1995). In recognizing legislative power to define statutory offenses, the next logical step arguably is legislative power to define elements as questions of law or questions of fact.

130. 397 U.S. 358 (1970).

131. "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

The Court's express holding was not particularly revolutionary, however, because seemingly no dispute had existed regarding that standard as it pertained to adult criminal defendants. The dispute in *Winship* arose as to whether the defendant, who was a minor, deserved the same constitutional protection as an adult. Thus, *Winship* can be read narrowly, as merely extending the reasonable doubt standard to minor criminal defendants. The problem with that reading, however, is that it is open to arbitrary results, inviting legislatures to draft criminal statutes that are more general, forcing defendants to prove as affirmative defenses what previously had been elements of the crime. The alternative is a procedural reading of *Winship*, which would mandate that all factual elements of the crime—elements being defined by normative or historical standards and not by what legislatures chose to label as elements—must be proven beyond a reasonable doubt. See Jeffries & Stephan, *supra* note 30, at 1328-31.

132. 421 U.S. 684 (1975).

133. *Id.* at 698.

134. *Id.* at 686-87.

135. *Id.* at 704. Maine law punished as murder the unlawful killing of a human being with "malice aforethought." *Id.* at 686 n.3 (citing Me. Rev. Stat. Ann. tit. 17, § 2651 (West 1964)). Thus, the defendant essentially was forced to offer proof to reduce a charge of intentional homicide to manslaughter, running contrary to the notion that the burden of proof lies with the prosecution. See *Mullaney*, 421 U.S. at 689 n.9, 700-01; see also Jeffries & Stephan, *supra* note 30, at 1338.

136. *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

The *Mullaney* reading of *Winship* was altered, however, in *Patterson v. New York*.<sup>137</sup> The Court in *Patterson* analyzed a New York statute that was similar to Maine's in *Mullaney*. The *Patterson* Court, however, reached the opposite result, holding that a conviction under New York law that placed the burden on the defendant to prove emotional disturbance was constitutional.<sup>138</sup>

Thus, *Patterson* allows legislatures to define the elements of a crime and dictate what the prosecution must prove, even if it strains at constitutional standards. Unlike *Mullaney*'s holding, which functionally considered whether the fact in question truly seemed to be an element of the offense regardless of what the legislature attempted to label it, the *Patterson* approach was satisfied to defer to the legislature. Under *Patterson*, the prosecution only has to prove the elements of the criminal offense, as defined by the legislature.

Courts must not, however, stand by and permit legislative relabeling to emasculate the *Gaudin* holding. First, a constitutional concern is present. Legislatures are empowered to draft statutes and determine the elements of crimes,<sup>139</sup> but once a statute is drafted, the Fifth and Sixth Amendment protections are triggered when a defendant is prosecuted. Just as a legislature cannot bypass the Fifth and Sixth Amendment protections by drafting a criminal statute that expressly eliminated the defendant's right to a jury trial,<sup>140</sup> a legislature may not

---

137. 432 U.S. 197 (1977).

138. *Patterson*, 432 U.S. at 211, 215-16. The Court's distinction has been characterized as relatively technical. Maine's law specified malice as an essential element of murder, with malice denoting both mens rea and the absence of sudden heat of passion. Because malice and heat of passion were connected, if the state forced the defendant to prove heat of passion, it was implicitly relieving the state of its burden to prove malice. In *Patterson*, however, the statute did not contain the term "malice," and because the law did not formally identify the absence of extreme emotional disturbance in its definition of murder, *Winship* was inapposite. See Jeffries & Stephan, *supra* note 30, at 1342.

The author of *Mullaney*, Justice Powell, dissented in *Patterson*, stating:

But a substantial difference in punishment alone is not enough. It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof. . . .

....

The *Winship/Mullaney* test identifies those factors of such importance, historically, in determining punishment and stigma that the Constitution forbids shifting to the defendant the burden of persuasion when such a factor is at issue. *Winship* and *Mullaney* specify only the procedure that is required when a State elects to use such a factor as part of its substantive criminal law. They do not say that the State must elect to use it.

*Patterson*, 432 U.S. at 226-28.

139. See U.S. Const. art. I. Although the Constitution speaks directly to Congress, its mandate most likely extends to state legislatures by virtue of the Fourteenth Amendment. See *Mullaney*, 421 U.S. at 698-704.

140. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968) (holding that right to jury trial also applies to state proceedings). The right to trial by jury only applies to

label materiality as a question of law, for it would have a substantially similar effect.

A less direct constitutional concern is that permitting legislatures not only to eliminate an element, but to reserve it for consideration by the court, would invite harmful results. As *Mullaney* and *Patterson* indicate, allowing legislatures to tinker with statutes and remove what are normally considered elements of a crime can lead to some uncomfortable results. The discomfort stems from the perception that a legislature is able to shift the burden of proof from the prosecution to the criminal defendant by forcing the defendant to prove as an "affirmative defense" something that looks very much like what the prosecution should be required to prove as an "element." While the Supreme Court has held it to be constitutional, legislative tinkering with statutes invokes the concern that the Fifth and Sixth Amendment protections are being circumvented.<sup>141</sup> To allow legislatures to go even further and tinker with how elements are labeled and handled by courts, however, invites constitutional disaster.<sup>142</sup>

If a legislature is faced with the option of eliminating the element entirely or incorporating the element, thereby complying with constitutional constraints, the system's built-in protections will work effectively. Various safeguards underlie the legislative process, leading society to be confident that nothing irrational will emanate from our legislature.<sup>143</sup> In the false statement context, legislatures would be un-

---

serious crimes, however, and although the right does not apply to petty offenses, the penalty in *Duncan*, two years in prison, was considered by the Court to be a serious crime. *Id.* at 159-62.

141. Commentators have wrestled with the two opinions, some considering the *Mullaney/Patterson* decisions as requiring a purely procedural reading of *Winship*. See Underwood, *supra* note 30, at 1305, 1317-20. Others feel substantive justice can be adequately protected through other means, such as societal and historical norms as to what elements a crime should contain, see *Patterson*, 432 U.S. at 226-27 (Powell, J., dissenting), or by requiring proof beyond a reasonable doubt of the elements necessary to impose the punishment proposed. See Jeffries & Stephan, *supra* note 30, at 1365.

142. Thus, while we might allow the system to be potentially weakened in a given respect, we cannot allow the system to be doubly weakened. By analogy, juries may contain as few as six members, see *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (holding that six is the absolute minimum size of a jury for the defendant to be afforded constitutional protection); *Williams v. Florida*, 399 U.S. 78, 102-03 (1970) (holding a 12-member jury is not constitutionally required), or nonunanimous jury verdicts may be acceptable, see *Apodaca v. Oregon*, 406 U.S. 404, 406, 411 (1972) (holding that nonunanimous verdicts may be constitutional). It is impermissible, however, to simultaneously allow nonunanimous jury verdicts with juries comprised of six members. See *Burch v. Louisiana*, 441 U.S. 130, 139 (1979) (holding conviction by a nonunanimous six-member jury deprives defendant of his constitutional right to trial by jury).

143. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 985-86 (1991) ("Neither Congress nor any state legislature has ever set out with the objective of crafting a penalty that is 'disproportionate'. . . . This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are certain never to

likely to react to *Gaudin* by drafting statutes without a materiality requirement at all. The legislature is unlikely to take this step because such a statute would give the government the power to prosecute meaningless or trivial lies, in contravention of accepted societal norms.<sup>144</sup> Also, such a practice would clog court dockets with trivial matters, wasting taxpayer money.

A general faith in the legislature, however, cannot comprise the system's only safeguard. Legislatures that wish to include materiality as an element of a false statement prosecution must accept the Supreme Court's characterization of materiality as a mixed question of law and fact. To allow the legislature to label elements as questions of law for the court will impermissibly bypass the Fifth and Sixth Amendment protections by linguistic sleight of hand.<sup>145</sup>

As Justice Scalia noted in *Gaudin*, mixed questions of law and fact are to be determined by juries.<sup>146</sup> For our jury system and the protections it affords to have continued integrity,<sup>147</sup> these questions must

---

occur.") There are crimes without elements of intent, such as statutory rape, and even absent what is an essential element to virtually all other crimes, the result is accepted by society and viewed as just.

144. See cases cited *supra* note 83 (discussing rationale for materiality requirement).

145. Generally, it is not feared that legislatures will go too far, because at some point society will not tolerate it. See *supra* notes 143-44 and accompanying text. However, this general faith in the democratic system should come with reservations. Even adopting Justice Scalia's view in *Harmelin*, situations may arise where society as a whole becomes concerned enough about a particular problem to endorse legislative action that sacrifices significant constitutional rights. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 219 (1944) (upholding the conviction of a Japanese American for remaining in San Leandro, California, thereby violating Civilian Exclusion Order No. 34, which ordered all persons of Japanese ancestry to be excluded from that "military area"). Americans in general may have supported the idea that, due to panic after the attack on Pearl Harbor, Japanese Americans should be detained in internment camps. Majority acceptance aside, however, these Japanese American citizens had their constitutional rights violated. While the judiciary may not be able to safeguard all rights, because the scope of those rights may inherently be linked to societal norms at a given time, the point remains that reliance on the legislature and society to do "the right thing" is an imperfect safeguard on constitutional protection. That is one of the reasons for having an appointed, nonrepresentative federal judiciary that need not concern itself with the electorate's whims when making decisions.

146. See *United States v. Gaudin*, 115 S. Ct. 2310, 2314 (1995) (citing J. Thayer, A Preliminary Treatise on Evidence at Common Law, 194, 249-50 (1898)).

147. Highlighting the importance of juries to our criminal system, Justice Clark in *Irvin v. Dowd*, 366 U.S. 717 (1961), discussed how the right to a jury trial is embedded in our judicial system:

England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, every State has constitutionally provided trial by jury. In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing vio-

continue to go to juries, regardless of legislative attempts at contrary results.

#### CONCLUSION

For a short, unheralded decision, *Gaudin* was a case of great significance. The Court's holding that materiality in 18 U.S.C. § 1001 prosecutions must be determined by the jury ran counter not only to almost every circuit's precedent regarding § 1001, but also contrary to courts' handling of the materiality determination in other false statement contexts. The Supreme Court based its holding in *Gaudin* on the fundamental significance of the constitutional guarantees that criminal defendants will receive due process and a jury trial, as provided for in the Fifth and Sixth Amendments. Consequently, the *Gaudin* holding cannot be limited to its factual context, but must be extended to other false statement statutes with similar materiality requirements.

The implications of the Supreme Court's holding in *Gaudin* extend far beyond false statement prosecutions, however, and impact mixed questions of law and fact generally. Because of the importance of a criminal defendant's right to trial by jury, whenever legal issues are inextricably entangled with factual determinations, the entire issue must be submitted to the jury. Legislatures may not circumvent this constitutional guarantee by means of an arbitrary characterization of an element as merely legal, requiring only a determination by a court. The Court's holding in *Gaudin* and the protections it safeguards extend not only to judicial interpretations, but also to legislative meddling that otherwise would circumvent a court's protective role.

---

lates even the minimal standards of due process. . . . In the ultimate analysis, only the jury can strip a man of his liberty or his life.  
*Id.* at 721-22 (citations omitted).

