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# Statutory Interpretation and the Federalization of Criminal Law

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# SUPREME COURT REVIEW

## FOREWORD: STATUTORY INTERPRETATION AND THE FEDERALIZATION OF CRIMINAL LAW

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*A wiser course than judicial legislation, I submit, is simply to adopt a literal, reasonable construction of the text that Congress drafted.*[1]

One of the striking features of the criminal law is the accelerating "federalization" of prosecutions. The federal code has over 3,000 provisions that permit the United States to pursue criminal charges,[2] and these statutes in large measure duplicate crimes that the states can prosecute.[3] Chief Justice Rehnquist has warned that the burgeoning federal criminal caseload may soon overwhelm the federal judicial system.[4] Yet, the Supreme Court's overall docket is shrinking, even with the crush of criminal prosecutions purportedly overwhelming the lower federal courts. In the 1994 Term, the Court heard 40% fewer

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1 United States v. Aguilar, 115 S. Ct. 2357, 2367 (1995) (Stevens, J., dissenting).

2 *See* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980 & n.10 (1995) (estimating that after the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat 1796, "there are now more than 3,000 federal crimes.") [hereinafter *New Principles*].

3 *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1162 (1995) ("Many federal criminal statutes overlap with or merely duplicate state law prohibitions unrelated to any substantial federal interest.").

4 *See* Hon. William H. Rehnquist, *1993 Year-End Report on the Judiciary* 4-5, reprinted in THE THIRD BRANCH (Administrative Office of the U.S. Courts), Jan. 1994, at 1, 3; *see also* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, *in* THE FEDERAL ROLE IN CRIMINAL LAW: THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 39, 45 (Jan. 1996) (between 1980 and 1992, federal criminal cases increased from 27,968 to 47,472, a 70% change) [hereinafter *Federalizing Crime*].

cases than it had a decade earlier.[5]

As the Supreme Court's docket decreases and the number of criminal prosecutions increases, it is natural that the Court should devote greater attention to the federal law of crimes. In the 1994 Term, the Court considered six cases involving the construction of federal criminal statutes, including two unrelated cases that involved the same provision.[6] The most widely noticed case of the Term was *United States v. Lopez*,[7] a criminal prosecution in which the defendant challenged the constitutionality of the Gun Free School Zones Act.[8] Despite being the most widely noted case this term, *Lopez* is likely to have the least impact of the six on federal criminal prosecutions. *Lopez*'s conclusion that the statute at issue was not a valid exercise of Congress's power under the Commerce Clause drew widespread attention because it marked the first time the Court overturned a provision on Commerce Clause grounds in almost sixty years.[9] Despite the

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[5] Ernest Gellhorn, *Supreme Court Docket Skirts Critical Issues*, NAT'L L.J., Dec. 5, 1994, at A21 (Court began 1995 Term "with the lowest number of scheduled arguments in decades, after deciding 40% fewer cases last year than it did in 1984."). The increase in the caseload of lower courts can be traced, at least in part, to the expanding number of appeals related to sentencing issues under the Federal Sentencing Guidelines. *See* Beale, *New Principles*, *supra* note 2, at 987 (changes in federal sentencing procedures "have a substantial effect on the workload of the courts of appeals since criminal appeals now account for approximately one-fourth of the appellate caseload.").

[6] United States v. Aguilar, 115 S. Ct. 2357 (1995) (18 U.S.C. § 1503 (influencing or injuring officer or jury generally); 18 U.S.C. § 2232(c) (destruction or removal of property to prevent seizure — notice of certain electronic surveillance)); United States v. Gaudin, 115 S. Ct. 2310 (1995) (18 U.S.C. § 1001 (false statements)); Hubbard v. United States, 115 S. Ct. 1754 (1995) (18 U.S.C. § 1001); United States v. Lopez, 115 S. Ct. 1624 (1995) (18 U.S.C. § 922(q), (Gun Free School Zones Act)); United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) (18 U.S.C. § 2252 (distribution of child pornography); United States v. Shabani, 115 S. Ct. 382 (1994) (21 U.S.C. § 846 (drug conspiracy)). Another opinion involving a federal prosecution was United States v. Robertson, 115 S. Ct. 1732 (1995) (per curiam), in which the Court overturned a lower court decision finding that the government had not proven the required interstate commerce element under RICO (18 U.S.C. §§ 1961 et seq.). That decision did not consider the terms of the statute, but only whether the government had proven the interstate commerce element.

[7] 115 S. Ct. 1624 (1995). The Court's announcement of *Lopez* was the subject of front-page reporting in newspapers across the country, demonstrating a broader impact on the general public's perception than most decisions. *See, e.g.*, Jan Crawford Greenberg, *Court Moves to Rein in Federal Control*, CHI. TRIB., Apr. 27, 1995, at 1; Eric Hanson, *Court Rejects Gun Ban Near Schools*, HOUSTON CHRONICLE, Apr. 27, 1995, at A1; James M. Broder, *Supreme Court Rejects Federal School Gun Ban*, L.A. TIMES, Apr. 27, 1995, at A1. In legal academic circles, the *Michigan Law Review* and *Texas Law Review* published extensive analyses of the decision less than a year after the Court issued the opinion. *See* Symposium, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995), Symposium, 74 TEX. L. REV. 695 (1996).

[8] 18 U.S.C. Section 922(q)(1)(A) (1988 Supp. V).

[9] *Lopez*, 115 S. Ct. at 1634 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."). The last time the Court overturned a statute for falling outside the Com-

broad constitutional ramifications that the decision may have in other areas, the effect of *Lopez* on federal criminal law is likely to be minimal.[10] The Court noted that Congress failed to include a jurisdictional element that might have saved the statute,[11] a mistake Congress is unlikely to make again, at least for criminal statutes.[12]

More likely to have an impact on federal prosecutions are the Court's statutory interpretation pronouncements in the 1994 Term. Indeed, the Court's opinions construing criminal provisions have occasionally included an explicit message to Congress that it must rewrite a provision to achieve a particular result.[13] The 1994 Term showed the Court grappling with the demands of a growing body of law fueled by the increasing federalization of criminal law. The Court's consideration of a variety of federal criminal provisions reflects a continuing struggle to adopt a consistent approach to reviewing criminal provisions that both respects Congress's power to enact criminal laws and avoids judicial second-guessing as to what the legislature should have written.

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merce Clause was Carter v. Carter Coal Co., 298 U.S. 238 (1936). Professor Regan notes that "*Lopez* is an occasion to pause and take stock. The Court caught the nation's attention—and presumably Congress' . . . ." Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH L. REV. 554 (1995).

10 The lower courts have upheld convictions after *Lopez* for violations of 18 U.S.C. § 922(*o*) (1994), which makes it "unlawful for any person to transfer or possess a machine gun," as a regulation of the channels of interstate commerce, although the provision does not require proof of an effect on interstate commerce. *See* United States v. Kirk, 70 F.3d 791, 796 (5th Cir. 1995); United States v. Wilks, 58 F.3d 1518, 1521 (10th Cir. 1995).

11 *Lopez*, 115 S. Ct. at 1631. *See* United States v. Flaherty, 76 F.3d 967, 974 (8th Cir. 1996) (upholding prosecution for arson, which requires proof of interstate commerce element, because the "*Lopez* decision did not address the amount of evidence required to prove an explicit jurisdictional element of an offense and does not control this case."); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 697 (1995) ("It is unclear whether a jurisdictional element alone or a jurisdictional element combined with more explicit congressional findings will resurrect the constitutionality of the Gun Free School Zones Act. There is no doubt, however, that omission of a jurisdictional element was an important factor in the statute's demise.").

12 *Lopez* may be an effort to send a message to Congress that the expansion of federal criminal jurisdiction should be a considered response to important social problems rather than a knee-jerk political reaction to the latest media horror story. Professor Brickey notes that Congress enacted a carjacking statute, 18 U.S.C. § 2119 (Supp. V 1993), in response to a particularly egregious incident in the Maryland suburbs of Washington, D.C. that garnered significant attention on Capitol Hill. Brickey, *supra* note 3, at 1162 n.154.

13 *See* Ratzlaf v. United States, 114 S. Ct. 655, 662 (1994) (interpreting the currency structuring statute's wilfulness element narrowly and noting that "[h]ad Congress wished to dispense with the requirement, it could have furnished the appropriate instruction."); *id.* at 670 (Blackmun, J., dissenting) ("Now Congress must try again to fill a hole it rightly felt it had filled before."); McNally v. United States, 483 U.S. 350, 360 (1987) (interpreting the mail fraud statute narrowly and noting that "[i]f Congress desires to go further, it must speak more clearly than it has.").

In *United States v. X-Citement Video, Inc.*,[14] the Court stretched the limits of statutory interpretation to reach a decision that ignored both legislative history and the rules of grammar in applying the intent element of the child pornography statute to one of the attendant circumstances of the crime. The Court obfuscated the legislative history and resorted to linguistic subterfuge to rewrite the provision the way the Court believed it should have been written. Although the Court treated the child pornography statute as similar to any other criminal provision, it ignored the important free speech concerns that made the government's attempt to regulate an area that may involve protected speech subject to closer scrutiny.

By approaching the question as merely an exercise in statutory construction that was not controlled by the overriding constitutional concerns, *X-Citement Video* signals to lower courts that they may disregard or stretch the language of statutes to reach desired results. A consequence of treating the statutory language as something to be ignored may be greater imprecision by the legislature, since the courts will not respect the language anyway, and inconsistent results among different circuit courts and between states. Regardless of the Court's opposition to federalizing certain crimes traditionally handled exclusively at the state and local level, the nature of the legislative process should not determine whether a statute receives more—or less—respect from the courts.

While the statutory interpretation in *X-Citement Video* is open to question, the Court also responded to the increased federalization of criminal law by addressing some of its own interpretive shortcomings in overruling two long-standing but ill-considered precedents. In *Hubbard v. United States*,[15] the Court restricted the scope of the false statement statute by overturning a prior decision on the meaning of "department."[16] In *United States v. Gaudin*,[17] the Court reconfigured the scope of the Fifth and Sixth Amendments on what issues must be submitted to a jury by overruling a 1929 precedent that had long been considered the final word on the division of power between judge and jury to determine the materiality of a false statement.[18]

Reversing two precedents in the same term is striking.[19] More

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14 115 S. Ct. 464 (1994).

15 115 S. Ct. 1754 (1995).

16 United States v. Bramblett, 348 U.S. 503 (1955).

17 115 S. Ct. 2310 (1995).

18 Sinclair v. United States, 279 U.S. 263 (1929).

19 In the ten terms from 1984 through 1993, the Court explicitly overruled controlling precedents in seven cases. *See* United States v. Dixon, 509 U.S. 688, 704 (1993) (rejecting the "same elements" test in double jeopardy cases, overruling Grady v. Corbin, 495 U.S. 508 (1990)); Payne v. Tennessee, 501 U.S. 808 (1991) (allowing victim testimony at crimi-

important, *Gaudin* may be a sign that the Court will adopt an expansive constitutional approach to determining what the prosection must prove to a jury in order to secure a conviction, rather than simply defer to the legislature's definition of the crime. The majority opinion held that "the Fifth and Sixth Amendments require conviction by a jury on *all* elements of the crime," an understanding of "the core meaning of the constitutional guarantees [that] is unambiguous."[20] But the scope of this "core meaning" is not entirely apparent. Is the legislature's power to define a crime constrained by the requirement that factual issues must be decided only by the jury and not the court? Moreover, does the Due Process Clause, in combination with the Jury Trial Right, guarantee a defendant the right to place *every* factual issue that relates to proof of the elements of the crime before the jury? If so, does this constitutional combination then mean that all facts related to proving the defendant's guilt beyond a reasonable doubt must be decided ultimately by the jury? If the constitutional rights go that far, then a question arises about the extent to which the trial judge must pass evidentiary issues to the jury in order that the proper factfinder render the verdict.

It is questionable whether the Court intended *Gaudin* to serve as the harbinger of a radical restructuring of the power of the trial judge. Yet, the opinion signals a potentially expansive role for the Court in deciding traditional criminal law issues under the aegis of determining the scope of a defendant's Fifth and Sixth Amendment rights. Under *Gaudin*'s reasoning, a court may be required to delineate what elements a crime *must* incorporate to protect the defendant's Jury Trial Right. Such an approach would inject federal courts into the construction of both statutory and common law crimes in the guise of deciding the constitutional question of what a jury must decide.

While *Lopez* garnered the greatest attention, the 1994 Term may herald the Court's broader involvement in fashioning criminal law at

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nal sentencing hearings, overruling Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1988)); California v. Acevedo, 500 U.S. 565, 579 (1991) (allowing police to search closed containers in automobiles when they have probable cause, overruling Arkansas v. Sanders, 442 U.S. 753 (1979)); Arizona v. Fulminante, 499 U.S. 279, 308 (1991) (coerced confessions are subject to harmless-error analysis, overruling in part Chapman v. California, 386 U.S. 18 (1967)); Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990) (30-day time period for filing under 42 U.S.C. § 2000e-16(c) is subject to "equitable tolling," overruling Soriano v. United States, 352 U.S. 270 (1957)); Solorio v. United States, 483 U.S. 435 (1987) (jurisdiction of a court-martial does not depend on the "service connection" of the offense charged, overruling O'Callahan v. Parker, 395 U.S. 258 (1969)); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (rejecting the "traditional government function" test for defining areas of state regulation, overruling National League of Cities v. Usery, 426 U.S. 833 (1976)).

20 *Gaudin*, 115 S. Ct. at 2318 (1995) (emphasis in original).

both the state and federal levels. The point is not just the increasing federalization of criminal law, but possibly its further "constitutionalization" as well.

## I. *X-CITEMENT VIDEO*: A PERIPATETIC "KNOWINGLY"

The individual defendant in *X-Citement Video* sold to an undercover police officer forty-nine video tapes that depicted an underage performer engaging in sexually explicit conduct. The government indicted the defendant for conspiracy and for violating the Protection of Children Against Sexual Exploitation Act of 1977.[21] The prosecution demonstrated at trial that the seller knew that the performer was a minor at the time the tapes were made.[22] Despite that evidence, the United States Court of Appeals for the Ninth Circuit reversed the conviction on the ground that the provision was facially unconstitutional because it did not require the government to prove the defendant's knowledge of the performer's age when shipping the visual depiction.[23]

The relevant language of 18 U.S.C. § 2252(a)(1), under which the government charged the defendant, is:

> (a) Any person who—
>
> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct.

Similarly, § 2252(a)(2) covers any person who "knowingly receives, or distributes" any visual depiction if it has been transported or shipped in interstate or foreign commerce. On its face, the statute appears to impose strict liability with regard to the age of the performer, what is known as an "attendant circumstance" of the crime,[24] if the defendant knew that the visual depiction was shipped or distributed. A broad criminal provision that appeared to ignore First Amendment concerns arising from governmental regulation of potentially protected speech led the Ninth Circuit to consider the facial validity of the provision's imposition of strict liability.

The critical issue before the Supreme Court was whether the stat-

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21 18 U.S.C. § 2252 (1994).

22 *X-Citement Video*, 115 S. Ct. at 466.

23 982 F.2d 1285, 1291 (9th Cir. 1992), *rev'd*, 115 S. Ct. 464 (1994).

24 *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, § 9.10[D][3] (2d ed. 1995) ("In order for any offense to occur, certain circumstances—usually called "attendant circumstances"—must be present when the actor performs the prohibited conduct and/or causes the prohibited result that constitutes the social harm of the offense. . . . An attendant circumstance, however, may be an element of an offense.").

ute's *mens rea* element of "knowingly" applied to the depiction "of a minor engaging in sexually explicit conduct"[25] or just to the shipment or distribution of the items.[26] In a seven to two decision reversing the Ninth Circuit, with Justices Scalia and Thomas dissenting, the Court began its analysis by admitting that "[t]he most natural grammatical reading, adopted by the Ninth Circuit, suggests that the term 'knowingly' modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduces."[27] One might assume that would be the end of the matter under the usual canon of statutory interpretation that the "plain meaning" of a statute controls. The Court then asserted, however, that this apparent reading of the statute did not control the analysis, for two reasons. First, according to the Court, simply following the statute's grammatical structure would create "anomalies" in the scope of the statute. Second, the straightforward reading would conflict with the presumption that "some form of scienter is to be implied in a criminal statute even if not expressed," thereby avoiding consideration of the constitutional question addressed by the Ninth Circuit.[28] Neither of these arguments, however, is convincing without reference to the First Amendment concern.

The Court noted that the straightforward reading of the statute could lead to the conviction of a druggist returning a roll of film, a new resident of an apartment receiving a package addressed to the prior resident, or a Federal Express courier delivering a box, if any of these items contained depictions of a minor engaged in sexually explicit acts. Yet, these draconian examples assume that the innocent bystander knows that the package contains a "visual depiction." There is no doubt that one must know that a visual depiction is involved to be liable under the statute, so an anomalous defendant, such as the courier or new apartment resident, could assert a viable defense based on a lack of the requisite *mens rea.*

After creating a proverbial "straw man" as a justification for ignoring the plain meaning, the Court turned its attention to the second rationale for moving beyond the statutory language to determine its scope. The Court relied on three cases, *Morissette v. United States,*[29] *Liparota v. United States,*[30] and *Staples v. United States,*[31] as creating a "presumption in favor of a scienter requirement [that] should apply

25 18 U.S.C. § 2252(a)(1)(A) (1994).
26 *X-Citement Video,* 115 S. Ct. at 467.
27 *Id.*
28 *Id.*
29 342 U.S. 246 (1952).
30 471 U.S. 419 (1985).
31 114 S. Ct. 1793 (1994).

to each of the statutory elements which criminalize otherwise innocent conduct."[32] The Court asserted that this principle of statutory analysis permitted it to ignore the language of the statute because now the "plain language reading of § 2252 is not so plain."[33] The language never changed, but the Court's reading of its prior precedents allowed it to reject a clear understanding of the statute's structure in favor of a principle of judicial authority that allowed the Court to read into the provision what it believed the legislature should have written.

The problem with the Court's reliance on these cases is that none of them stand for quite so broad an understanding of judicial power to reconfigure statutes. The Court has never held as a general proposition that proof of *mens rea* is a constitutional requirement, so it cannot merely assert that a provision must include proof of intent in order to convict the defendant.[34] Moreover, in *Morissette* and *Liparota*, the Court interpreted the statutory *mens rea* requirement to apply to the underlying criminal acts in ways consistent with the grammatical structure of the law, while *Staples* attached an intent requirement to an element of the crime on which the statute was silent.[35] It is one thing to apply a specific *mens rea* to each element of the crime when a statute's language supports that result; it is an entirely different matter to do so to reach a result contrary to the "most natural grammatical reading."[36] As Justice Scalia noted in his dissent, "Today's opinion converts the rule of interpretation into a rule of law, contradicting the plain import of what Congress has specifically prescribed regarding criminal intent."[37]

What the Court never explained was how Congress should have written the statute to achieve the result that the "most natural gram-

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[32] *X-Citement Video*, 115 S. Ct. at 469.

[33] *Id.* at 468.

[34] *See* United States v. Balint, 258 U.S. 250, 252 (1922) (many statutes that dispense with a *mens rea* element "are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se.").

[35] *See X-Citement Video*, 115 S.Ct. at 473 (Scalia, J., dissenting) ("There is no way in which any of these cases, or all of them in combination, can be read to stand for the sweeping proposition that 'the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct.'"); Jeffrey P. Kaplan & Georgia M. Green, *Grammar and Inferences of Rationality in Interpreting the Child Pornography Statute*, 73 WASH. U. L.Q. 1223, 1233 (1995) ("the statutory language at issue in *X-Citement Video*, unlike that in *Morissette* and *Liparota*, does not grammatically allow a reading which applied a mens rea requirement to the key element in the case.").

[36] *See X-Citement Video*, 115 S. Ct. at 474 (Scalia, J., dissenting) ("If what the statute says must be ignored, one would think we might settle at least for what the statute was meant to say; but alas, we are told, what the statute says prevents this.").

[37] *Id.* at 473 (Scalia, J., dissenting).

matical reading" suggests.[38] *X-Citement Video* expanded the Court's power to rewrite statutes through the assertion of the authority to transpose the *mens rea* of a crime to apply to any element, not solely on the ground that this best reflects congressional intent, but that this properly interprets the statutory language. The Court asserted that the child pornography provision "is more akin to the common law offenses against the 'state, person, property, or public morals' . . . that presume a scienter requirement in the absence of express contrary intent."[39] Once the Court invoked this vague requirement, it apparently shifted the burden to the legislature to justify the language it adopted through some additional statement, not necessarily in the statute itself, that "we mean what we say."

One message of *X-Citement Video* is that a peripatetic intent element of a crime can move outside the boundaries of grammar. The Court reinforced that point when it noted that the legislative history "is a good deal less clear . . . that Congress intended that the [knowledge] requirement extend also to the age of the performers."[40] The lack of support in the legislative history for a particular reading normally cuts against reading the statute in contravention of its grammatical structure. *X-Citement Video,* however, supported its analysis by classifying the history of the statute as opaque.[41]

The strongest reason for adopting the expansive view of the intent element is one the Court treated only in a backhanded manner: "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts."[42] The visual depictions involved may be protected by the First Amendment, so prosecutions under the act must conform not only to the traditional constitutional criminal requirements, but further avoid the special problems related to regulation of protected speech. All strict liability provisions raise serious questions about the fairness of imposing substantial criminal liability on morally blameless actors. When the conduct subject to the statute involves speech that may be protected by the First Amendment, then there is an even stronger basis to read the statute in a manner protective of the rights of the potential individual

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[38] The grammatical structure of the provision separates out the attendant circumstance of the presence of a minor engaged in a sexually explicit act in the visual depiction from the intent element of the crime. *See* Kaplan & Green, *supra* note 35, at 1234 (the *if*-clause of § 2252(a) is outside the noun clause, and therefore the adverb knowingly does not modify the subordinate clause containing the element of use of a minor engaged in sexually explicit conduct).

[39] *X-Citement Video,* 115 S. Ct. at 469 (citing *Morissette*).

[40] *Id.* at 471.

[41] *Id.* at 470.

[42] *Id.* at 472.

defendant.

In *Smith v. California*,[43] the Court stated that an obscenity statute that did not require proof of intent for conviction would violate the First Amendment.[44] The source of the *mens rea* requirement is not a moral concern or the result of textual analysis, but the import of an overriding constitutional protection. Justice Scalia argued in his *X-Citement Video* dissent that the statute should be invalidated because "it establishes a severe deterrent, not narrowly tailored to its purposes, upon fully protected First Amendment activities."[45] Rather than consider the free speech protection as the authority for its expansive reading of the knowledge element, however, the Court asserted that its interpretation *avoided* the constitutional issue, citing nonconstitutional reasons for the decision.[46]

Relying on the oft-repeated maxim that courts should avoid constitutional questions whenever possible,[47] *X-Citement Video* broadened the judiciary's power to ignore the language of statutes when necessary to meet perceived threats of overbroad application of a statute that do not raise, at least explicitly, constitutional concerns. By not adopting a forthright analysis that acknowledged the substantial constitutional concerns suffusing the child pornography statute, the Court took an approach that will allow it to ignore plain language when a provision implicates nonconstitutional issues. Over thirty years ago, Professor Packer described the Court's confusing approach to imposing an intent requirement when interpreting a statute: "*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes."[48] *X-Citement Video*'s emphasis on avoiding the constitutional issue simply reflects the fact that Professor Packer's pithy summation of the Court's inadequate analysis still holds true.

*X-Citement Video* extended the pattern the Court traced through *Morissette, Liparota,* and, most importantly, *Staples*: the statutory language chosen by the legislature does not necessarily control the defi-

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43 361 U.S. 147 (1959).

44 *Id.* at 155.

45 *X-Citement Video*, 115 S. Ct. at 475 (Scalia, J., dissenting).

46 The Ninth Circuit majority opinion rested its decision on the constitutional issue, noting that "it comes closer to judicial rewriting of a statute to engraft onto it an element of the crime than it does to recognize an affirmative defense, of a type that often exists without being specified in the statute defining the crime." 982 F.2d at 1292. Circuit Judge Kozinski dissented in part on the ground that proof of recklessness would be sufficient, and that the provision should be interpreted to incorporate that *mens rea* requirement as a constitutional matter, not as a result of statutory interpretation. *Id.* at 1295 & n.6.

47 *X-Citement Video*, 115 S. Ct. at 472 ("It is therefore incumbent upon us to read the statute to eliminate those [constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress.").

48 Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107.

nition of the crime. *Staples* added an intent requirement that was not even hinted at in the provision, while *X-Citement Video* took the *mens rea* element and applied it throughout the statute. Limiting strict criminal liability for potentially innocent conduct is laudable, and perhaps is an interest worthy of constitutional protection under the Due Process Clause. Yet, the approach adopted in *X-Citement Video* ignores, rather than builds upon, the substantial constitutional concern arising from a provision that imposed broad liability for engaging in potentially protected speech.

With the drive in Congress to federalize broader areas of the criminal law, an opinion that seemingly ignores the language chosen by the legislature sends a message that the courts can accord minimal respect to the legislature's ability to formulate criminal statutes. Legislative drafting may become less efficient and even more imprecise than it already is after *X-Citement Video* if Congress believes the courts can mold the definition of the crime outside the strictures of grammar. Congress may respond to judicial tinkering by adopting ever more expansive criminal statutes to ensure that the remnant left after judicial review will retain a significant impact, only adding to the federalization of criminal law.

## II. *HUBBARD*: MISINTERPRETATION AND THE PROBLEM OF *STARE DECISIS*

Among the broadest criminal statutes in the federal code is 18 U.S.C. § 1001, which prohibits making a false, fictitious or fraudulent statement, or concealing of any material fact, "in any matter within the jurisdiction of any department or agency of the United States . . . ."[49] The government has used the statute in a wide variety of circumstances, including prosecutions for a false statement to obtain a birth certificate submitted for federal benefits[50] and for broadcasting false radio distress signals used by naval aircraft to investigate an emergency.[51] The provision has been used in high-profile criminal cases involving nationally known political figures who lied to Congress, such

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49 *See* United States v. Gafyczk, 847 F.2d 685, 690 (11th Cir. 1988) (false statement statute "is necessarily couched in very broad terms to encompass the variety of deceptive practices which ingenious individuals might perpetrate upon an increasingly complex government" (quoting United States v. Massey, 550 F.2d 300, 305 (5th Cir. 1977))). There are a number of more specific false statement provisions, limited to a specific federal agency, *see, e.g.*, 18 U.S.C. § 1542 (1994) (false statement in passport application), or area subject to pervasive government regulation. *See, e.g.*, 18 U.S.C. § 1014 (1994) (false statement to federally insured financial institution); 18 U.S.C. § 1027 (1994) (false statement in records required by ERISA).

50 *See* United States v. Montemayor, 712 F.2d 104, 107 (5th Cir. 1983).

51 *See* United States v. Blair, 886 F.2d 477, 479 (1st Cir. 1989).

as former Congressman Dan Rostenkowski[52] and former National Security Advisor John Poindexter,[53] and cases involving lesser luminaries who briefly gained infamy, such as Deborah Gore Dean, a former special assistant to the Secretary of Housing and Urban Development.[54]

The government charged all these defendants under § 1001 because the Supreme Court's decision in *United States v. Bramblett*[55] interpreted the term "department" in the statute to include the legislative and judicial branches, in addition to the executive branch. Bramblett himself was a Congressman who lied to the House Disbursing Office about the compensation of a clerk, and the Court, in upholding his conviction, stated that "Congress could not have intended to leave frauds such as this without penalty."[56]

*Bramblett*'s broad construction of the statute was not problematic for prosecutions involving false statement to Congress. Courts became concerned, however, about whether submissions and arguments made to a court in the course of litigation could be the basis for a later criminal prosecution. In response to this concern, the lower courts created the "judicial function" exception to § 1001, on the ground that "neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.'"[57] Under this analysis, the statute applied to false statements made to the judicial branch when they involved the "administrative" or "housekeeping" functions of the courts, but not when they were related to the traditional adversarial role of litigants and their counsel.[58]

In *Hubbard v. United States*,[59] the Supreme Court reviewed a decision by the United States Court of Appeals for the Sixth Circuit that rejected application of the judicial function exception in a bankruptcy case, a decision that conflicted with the position taken by every other

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52 *See* United States v. Rostenkowski, 68 F.3d 489 (D.C. Cir. 1995) (dismissing § 1001 counts alleging false statements to House Disbursing Office).

53 *See* United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992) (reviewing § 1001 convictions for numerous false statements to Congress regarding arms sales to Iran).

54 *See* United States v. Dean, 55 F.3d 640, 658 (D.C. Cir. 1995) (reversing § 1001 convictions after *Hubbard* based on false testimony to House Committee investigating HUD influence-peddling).

55 348 U.S. 503 (1955).

56 *Id.* at 509.

57 Morgan v. United States, 309 F.2d 234, 237 (D.C. Cir. 1962).

58 *Id.*; *see* United States v. Mayer, 775 F.2d 1387, 1392 (9th Cir. 1985) (per curiam) (submission of false letters to court for use in determining sentence fell within court's adjudicative function).

59 115 S. Ct. 1754 (1995).

circuit that had considered the question.[60] The government had charged the defendant with making false statements to the Bankruptcy Court in two unsworn affidavits concerning possession of assets and relevant records. In upholding the conviction over the defendant's argument that his statements were related to the court's adjudicative role, the Sixth Circuit expressed concern that the judicial function exception conflicted with *Bramblett*'s exhortation to read § 1001 broadly and said that the exception "does not rest on solid legal ground."[61] The Supreme Court, in an opinion by Justice Stevens, agreed with the Sixth Circuit's reasoning about the compatibility of the exception with the statutory language: "We think the text of § 1001 forecloses any argument that we should simply ratify the body of cases adopting the judicial function exception."[62] But the Court then took a different approach to the issue, questioning the application of the false statement statute to the judicial branch and asserting that "the clarity of [§ 1001] justifies a reconsideration of *Bramblett*."

The Court noted at the outset of its opinion that *Bramblett*'s expansive definition of "department" conflicted with the "[f]ar more common . . . use of 'department' to refer to a component of the Executive Branch."[63] The Court then criticized *Bramblett*'s analysis of the legislative history that purportedly supports its broad interpretation of "department." The Court found that *Bramblett*'s interpretation was "not completely implausible, [but was]. . . nevertheless unsound."[64] *Hubbard* rejected precedent because *Bramblett* did not give sufficient weight to the statutory definition and common use of "department" in the federal criminal code. To reach this conclusion, the Court relied on the primacy of the statutory language as controlling the interpretation of the scope of the statute: "a historical analysis normally provides less guidance to a statute's meaning than its final text . . . . Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress, particularly when the Legislature has specifically defined the controverted

60 16 F.3d 694 (6th Cir. 1994), *rev'd*, 115 S. Ct. 1754. *See id.* at 1757 n.2 (cataloguing decisions of other circuit courts of appeals adopting the judicial function exception).

61 16 F.3d at 701 (citing United States v. Poindexter, 951 F.2d 369, 387 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992)).

62 *Hubbard*, 115 S. Ct. at 1763.

63 *Id.* at 1757. An important consideration was the definition of a "department" and "agency" set forth 18 U.S.C. § 6, which provides that a "'department' means one of the executive departments" and an "'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest . . . ." 18 U.S.C. § 6 (1994).

64 *Hubbard*, 115 S. Ct. at 1761.

term."[65]

*Hubbard*'s reliance on the accepted meaning of the statutory terms is noticeably different from the textual exegesis the Court undertook in *X-Citement Video* to overcome the grammatical structure and inconclusive legislative history of the child pornography statute. Both decisions narrow the application of the statute, *Hubbard* by limiting what statements can be prosecuted and *X-Citement Video* by imposing a higher intent element for conviction. *X-Citement Video*'s concern with Congress's apparent adoption of strict liability, especially when the underlying conduct could involve protected speech, may explain why the Court was willing to alter the plain language of the statute. But, on its own terms, *X-Citement Video* did not identify its approach to statutory interpretation as being anything other than a straightforward analysis of the language and legislative history of the child pornography statute. *Hubbard*'s reliance on the clarity of § 1001 and the inconclusiveness of the legislative history stands in stark contrast to *X-Citement Video*'s willingness to look beyond the statute's language to protect other values.

The more subtle issue in *Hubbard*, which split the Court, was how to address the issue of *stare decisis*. The rationale stated in Justice Stevens' opinion for overturning *Bramblett* only drew support from two other Justices.[66] The plurality argued that the judicial function exception was the better interpretation of § 1001, and therefore "[o]verruling *Bramblett* would preserve the essence of this doctrine and would, to that extent, promote stability in the law."[67] Justice Stevens also concluded that overturning *Bramblett* would have little effect on any reliance interest in the Executive Branch because "we doubt that prosecutors have relied on § 1001 as an important means of deterring and punishing litigation-related misconduct."[68] The plurality termed the decision to overrule *Bramblett* "difficult," but opted to limit

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65 *Id.* at 1759, 1761.

66 *Id.* at 1756; *see id.* at 1765 (Scalia, J., joined by Kennedy, J., concurring); *id.* at 1766 (Rehnquist, C.J., joined by O'Connor and Souter, JJ., dissenting).

67 *Id.* at 1764. The plurality asserted that the unanimous adoption of the judicial function exception by the lower courts meant that it was a "'competing legal doctrin[e]' . . . that can lay a legitimate claim to respect as a settled body of law." *Id.* (citation omitted). Justice Scalia rejected the position that lower court decisions designed to avoid the effects of a Supreme Court precedent can ever qualify as an "intervening development," and that *Bramblett* should be overruled simply on the basis that it was wrongly decided. *Id.* at 1765-66 (Scalia, J., concurring). The dissent went further, arguing that the plurality's approach "tells courts of appeals that if they build up a body of case law contrary to ours, their case law will serve as a basis for overruling our precedent. It is difficult to imagine a more topsy-turvy doctrine than this . . . ." *Id.* at 1767 (Rehnquist, C.J., dissenting).

68 *Id.* at 1764.

"the coverage of § 1001 to the area plainly marked by its text . . . ."[69]

The immediate effect of *Hubbard*'s narrowing of the scope of federal prosecutions will be the dismissal of counts in indictments and the reversal of convictions for false statements to Congress and the judiciary that are currently on direct appeal.[70] Defendants who have already been convicted and exhausted their direct appeal can seek to have their convictions overturned by filing for either a writ of *habeas corpus*, if they are still in custody, or a writ of error *coram nobis* if they have completed their sentence.[71] Moreover, Congress will have to decide whether it wants to enact a broad false statements provision that will criminally sanction those who could have been prosecuted under *Bramblett* for lying to Congress. At present, the only basis for prosecuting false statements to the legislative branch are the narrower perjury and obstruction of justice statutes, which do not reach the variety of statements that § 1001 encompasses and which define offenses that are more difficult for the government to prove.[72]

*Hubbard* was an easy case, at least insofar as the Court could not ignore *Bramblett*'s failure to accord the term "department" its proper meaning, once the Sixth Circuit created the necessary circuit split to ripen the issue. As Justice Scalia noted in closing his concurrence, the time had come to uproot "this weed" in the precedents.[73] The more difficult question is how many more weeds are scattered among the Court's decisions interpreting other criminal provisions. Until the

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69 *Id.* at 1765.

70 *See* United States v. Levine, 1995 U.S. App. LEXIS 38551 at *5 (D.C. Cir. Dec. 4, 1995) (reversing § 1001 conviction for false statement to a congressional committee); United States v. Dulinawka, 1995 U.S. App. LEXIS 34283 at *8 (9th Cir. Nov. 1, 1995) (reversing § 1001 conviction for false statement to a federal magistrate judge); United States v. Rostenkowski, 68 F.3d 489 (D.C. Cir. 1995) (dismissing § 1001 count alleging false statements to congressional offices for receipt of funds); United States v. Dean, 55 F.3d 640, 658 (D.C. Cir. 1995) (reversing § 1001 convictions for false statements to congressional committee); *Case Against Ex-Congressman Is Narrowed*, N.Y. TIMES, Apr. 14, 1996, at 32 (dismissing false statement counts against former Rep. Joseph P. Kolter after *Hubbard*).

71 28 U.S.C. § 2255 (1994) (writ of *habeas corpus*); 28 U.S.C. § 1651(a) (1994) (All Writs Act); *see generally* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 462-63 (1995) (reviewing efforts of defendants to vacate convictions after Supreme Court decision narrowed the scope of the mail fraud statute involving intangible rights).

72 18 U.S.C. § 1621 (1994) (perjury); 18 U.S.C. § 1505 (1994) (obstruction of proceedings before Congress). Perjury can only be prosecuted with regard to statements made under oath, and the obstruction provision requires proof that the declarant acted "corruptly," which is a higher intent level than that provided for prosecutions under § 1001. In response to *Hubbard*, a bill was introduced in the House of Representatives proposing to amend § 1001 by striking "any department or agency" and substituting broad language covering false statements to any branch of the government. Government Accountability Act of 1995, H.R. 1678, 104th Cong., 1st Sess. (1995). As this issue went to press, the bill was languishing in committee.

73 *Hubbard*, 115 S. Ct. at 1766 (Scalia, J., concurring).

Sixth Circuit provoked the issue, the Court and Congress were content to let *Bramblett* stand, despite numerous chances for the Court to revisit the coverage of the statute.[74] Will the Court use *Hubbard*'s *stare decisis* analysis as a means to confront closer cases of statutory construction to determine that a prior precedent establishing the scope of a criminal provision should be overturned, altering a settled understanding of the law? Perhaps one day the Court will even revisit *X-Citement Video* to reassess the question of the clarity of the statutory language and the majority's interpretation of the legislative history.

If *Hubbard* is a signal that the Court is willing to overturn precedents that have expanded the scope of federal criminal prosecutions, then other areas prosecuted federally may be in for temporary destabilization. For example, federal prosecutors routinely use the Hobbs Act to prosecute corruption involving state and local officials as extortion "under color of official right."[75] Yet, the statute's origins are completely unrelated to the misuse of public office, and federal prosecutors did not begin to use the provision to combat official corruption until the early 1970s.[76] Justice Scalia has raised the question of whether the Hobbs Act can be interpreted to reach bribery and other forms of official corruption, given the legislative history of the statute and the use of the term "extortion."[77]

*Hubbard*'s analysis of the statutory language is unassailable, but the jettisoning of a clear, albeit misguided, precedent should make one pause to wonder whether the Court's treatment of the judicial function exception was a singular decision or the sign of a willingness

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74 *See, e.g.*, United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992); United States v. Holmes, 840 F. 2d 246 (4th Cir.), *cert. denied*, 488 U.S. 831 (1988); United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986).

75 18 U.S.C. § 1951 (1994). The statute defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or *under color of official right*." (Emphasis added.)

76 Congress adopted the Hobbs Act in 1946 to expand coverage of the Anti-Racketeering Act of 1934, 48 Stat. 979 (re-codified as 18 U.S.C. § 1951 (1994)), to include labor-related activity, in response to the Court's decision in United States v. Teamsters Local 807, 315 U.S. 521 (1942). "Nowhere in the legislative history of either statute is there any indication of congressional intent to reach corrupt demands for payment by local officials, or even a discussion of the problem." Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1175 (1977). One of the earliest cases to apply the Hobbs Act to a public official was United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972), *cert. denied sub nom.* Kropke v. United States, 409 U.S. 914 (1972). *See* Peter D. Hardy, Note, *The Emerging Role of the Quid Pro Quo Requirement in Public Corruption Prosecutions Under the Hobbs Act*, 28 U. MICH. J.L. REF. 409, 411 (1995).

77 *See* McCormick v. United States, 500 U.S. 257, 280 (1991) (Scalia, J., concurring) ("Before we are asked to go further down the road of making reasonable but textually unapparent distinctions in a federal 'payment for official action' statute . . . I think it well to bear in mind that the statute may not exist.").

to reconfigure the federal criminal law along much narrower lines. Such an approach may bring the Court into direct conflict with the legislative imperative to respond to widespread apprehension of growing lawlessness. The result of that conflict may again lead Congress to adopt sweeping provisions to overcome the judicial reluctance to uphold federalization of ever greater areas of criminal conduct.

## III. *GAUDIN*: ARE ALL "ELEMENTS" OF A CRIME "FACTUAL" IN NATURE?

### A. THE DEVELOPING RELATIONSHIP BETWEEN DUE PROCESS AND THE JURY TRIAL RIGHT

In 1970, the Supreme Court rearticulated in *In re Winship*[78] the basic precept for proving a criminal violation: "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."[79] *Winship* applies in state and federal proceedings, and any failure by the trial court to adhere to the constitutional mandate for the government's burden of proof is a "structural error" that undermines confidence in the outcome of the trial.[80]

A subtle, but quite important, shift in the constitutional analysis of the government's burden of proof occurred in *Sullivan v. Louisiana*,[81] a *habeas corpus* case challenging a faulty jury instruction that improperly defined "reasonable doubt." The Court previously had held the charge used in *Sullivan* unconstitutional under the Due Process Clause in *Cage v. Louisiana*.[82] The issue in *Sullivan* was whether giving the defective instruction was harmless error, permitting an affirmance of the conviction. The Court, in a unanimous opinion by Justice Scalia, began by noting that the Sixth Amendment Jury Trial

78 397 U.S. 358 (1970).

79 *Id.* at 364.

80 *See* Sullivan v. Louisiana, 508 U.S. 275, 281-282 (1993) (denial of jury verdict beyond a reasonable doubt "unquestionably qualifies as" error of the structural type).

81 508 U.S. 275 (1993).

82 498 U.S. 39 (1990) (per curiam). In a later case, Victor v. Nebraska, 114 S. Ct. 1239 (1994), the Court divided over two state model instructions defining reasonable doubt that were not significantly different from that disapproved in *Cage*, yet the Court upheld their use. *See* Paul C. Smith, Note, *The Process of Reasonable Doubt: A Proposed Instruction in Response to* Victor v. Nebraska, 41 WAYNE L. REV. 1811, 1827 (1995) ("Given the similarities between the Nebraska instruction and the *Cage* instruction, it may be assumed that both are close to the constitutional dividing line, with the former barely acceptable and the latter barely deficient.").

Right[83] "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"[84] The substance of what the jury must find is "prescribed by the Due Process Clause,"[85] and *Winship* imposed the burden on the government to prove those facts beyond a reasonable doubt. That analysis lead the Court to a seemingly innocuous conclusion: "It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated."[86]

Justice Scalia's point in *Sullivan* was that a violation of the Due Process protection afforded a defendant under *Winship* necessarily violated the defendant's Jury Trial Right because the jury, not the judge, must determine the essential facts beyond a reasonable doubt. And this conclusion, in turn, was critical to answering the question of whether the harmless error standard applied. Under the Supreme Court's doctrine, defects that are "structural" in nature are not subject to harmless error analysis because they undermine the reviewing court's confidence in the reliability of the jury's determination of guilt.[87] Violations of the Sixth Amendment often come closer than due process violations to affecting the integrity of the entire criminal adjudication.[88]

Justice Scalia's linkage in *Sullivan* of the constitutional protection of *Winship* with the Jury Trial Right meant that the *Winship* violation was not harmless because it abrogated the defendant's Jury Trial Right, not solely because of the violation of the Due Process Clause. After *Sullivan*, only the jury's determination of the essential facts beyond a reasonable doubt is sufficiently trustworthy to allow a reviewing court to uphold the verdict, even in the face of a constitutional error.

### B. *GAUDIN* AND THE EXPANDING JURY TRIAL RIGHT

In the wake of *Sullivan*'s new, supposedly "self-evident," con-

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[83] U.S. CONST. amend VI ("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 . . . .").

[84] *Sullivan*, 508 U.S. at 277.

[85] *Id.*

[86] *Id.* at 278.

[87] *See* Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991) (structural defects in the criminal trial are not subject to harmless error analysis); Rose v. Clark, 478 U.S. 570, 577-78 (1986) ("Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. . . and no criminal punishment may be regarded as fundamentally fair.").

[88] *See Fulminante*, 499 U.S. at 309-310 (among the constitutional errors not subject to harmless error analysis are Sixth Amendment rights to counsel, self-representation, and to an impartial judge).

joining of the two constitutional protections came the Court's analysis in *United States v. Gaudin*[89] of the relationship of the judge and jury in determining the sufficiency of the proof of a crime. The government charged Gaudin under § 1001 with making false statements to the Federal Housing Administration (FHA) in connection with mortgage loans that would be insured by the FHA. Lower courts had long interpreted § 1001 as requiring the government to prove that the false statements charged under the statute were "material," which means capable of influencing a decision.[90] At trial, the judge informed the jury that materiality was a question of law to be determined by the court, and "[y]ou are instructed that the statements charged in the indictment are material statements."[91] The United States Court of Appeals for the Ninth Circuit reversed the defendant's conviction on the ground that the jury, not the judge, was responsible for determining the materiality of the false statements in § 1001 prosecutions.[92] The Ninth Circuit's decision created a split in the circuits because every other court that had considered the question found that materiality was a question of law.[93]

The Supreme Court reached the constitutional question despite the fact that the statutory language does not include materiality as an element of the crime charged in the case. The government conceded in its brief, however, that it had to prove materiality beyond a reasonable doubt to convict the defendant. Based on that concession, the Court decided it could consider the defendant's Sixth Amendment argument. In a concurring opinion, Chief Justice Rehnquist noted

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89 115 S. Ct. 2310 (1995).

90 *See* Kungys v. United States, 485 U.S. 759, 770 (1988) (a "material" statement is one with "'a natural tendency to influence, or was capable of influencing, the decision of' the decision making body to which it was addressed"). The language of § 1001 refers to materiality in cases involving a defendant who "falsifies, conceals or covers up by any trick, scheme, or device a material fact," but only the Second Circuit has held that materiality is not an element of a false statement prosecution. *See* United States v. Bilzerian, 926 F.2d 1285, 1299 (2d Cir. 1991).

91 115 S. Ct. at 2313.

92 *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994). An important concern for the Ninth Circuit was the questionable materiality of the false statements. The court noted that a "persuasive factual argument could be made that there was a reasonable doubt as to whether the particular [false statements] . . . would have tended to influence the agency's decision." *Id.* at 950. While the circuit court's focus appears to be on the strength of the government's evidence, it used the constitutional analysis to avoid reaching the question of whether any rational trier of fact could have found the defendant guilty, the very high standard that defendants must show to have their convictions reversed on sufficiency grounds; most defendants fail to meet that standard.

93 *See id.* at 955 (Kozinski, J., dissenting) ("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 [citing cases].").

that "[w]hether 'materiality' is indeed an element of every offense under 18 U.S.C. § 1001 is not at all obvious from its text."[94]

The Supreme Court's holding in *Sinclair v. United States*[95] fostered what had become the prevailing practice of reserving materiality as a question of law for the trial court. In *Sinclair*, the Court held that the judge alone should determine "pertinency" in a prosecution for criminal contempt of Congress, involving a witness's refusal to answer a question, because that element is a pure question of law that does "not depend upon the probative value of evidence."[96] Taking the same approach as it had in *Hubbard* with respect to its prior precedent about the meaning of the statutory definition of "department" in § 1001, the Court in *Gaudin* rejected its earlier holding on the court's role in false statement prosecutions rather than confining the prior precedent or finding it otherwise distinguishable.[97]

The Court, in an opinion by Justice Scalia, resolved the issue of who should decide materiality through an apparently simple syllogism: "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality."[98] The Court found that the question of materiality was a mixed question of law and fact, and therefore "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue . . . includes application of the law to the facts."[99]

In response to the government's argument that historically the trial judge determined materiality in perjury prosecutions, the Court found that there was no consistent tradition reserving that function to the court, and that such an approach conflicted with the "unambiguous" core meaning of the Due Process and Jury Trial Right by which a

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94 *Gaudin*, 115 S. Ct. at 2320. Section 1001 states in pertinent part:

> 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 . . . .

18 U.S.C. § 1001 (1994) (Emphasis added). In *Gaudin*, the government charged the defendant with making a false statement, which does not include the materiality element that the concealment portion of the provision contains.

95 279 U.S. 263 (1929).

96 *Id.* at 298.

97 *Gaudin*, 115 S. Ct. at 2318 ("Other reasoning in *Sinclair*, not yet repudiated, we repudiate now.").

98 *Id.* at 2314.

99 *Id.* at 2315.

jury must determine "*all* elements of the crime."[100] Without *Sinclair* to support the judge's role in determining materiality, the Court's syllogism applied to require the jury to determine all elements of the crime.[101]

It is interesting to compare the necessity for rejecting *stare decisis* in *Hubbard* and *Gaudin*. *Bramblett*'s holding on the meaning of "department" required lower courts to engage in a strained statutory interpretation in order to apply the law properly, a matter of intellectual dishonesty the Court refused to condone in *Hubbard*. *Sinclair*'s apportioning of duties between judge and jury did not suffer because of statutory interpretation difficulties, but because the precedent conflicted with the recent analysis of the interrelationship between the Fifth and Sixth Amendments first identified in *Sullivan*. The major premise of Justice Scalia's syllogism in *Gaudin* is a restatement of the *Sullivan* analysis taken one step further to establish what a jury must decide in a case. *Sinclair* stood in the way of an expansive view of the defendant's combined Due Process and Jury Trial Rights, while *Bramblett* required judges to create an exception that was not present in the statutory language.

Although the *Sinclair* Court stated its holding on the role of the judge in determining an element of the crime in conclusory language that historical practice arguably did not support,[102] the irony is that *Gaudin* did not have to reach the constitutional issue. As Chief Justice Rehnquist noted in his concurrence, the government's concession that materiality was an element of the crime allowed the Court to move to the constitutional argument directly. The statutory language does not impose a materiality requirement in prosecutions for false statements, as opposed to those charging concealment of facts.[103] While *Hubbard* could not avoid confronting *Bramblett*'s flawed interpretation and maintain consistency in the interpretation of the statutory language, *Gaudin* leaped at the chance to repudiate *Sinclair* without pausing to consider whether that was necessary to decide the

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100 *Id.* at 2317-18 (emphasis in original).

101 *Id.* at 2319. Justice Scalia applied logic to undermine *Sinclair*'s viability:

> The sole prop for *Sinclair* [is] its reliance upon the unexamined proposition, never before endorsed by this Court, that materiality in perjury cases (which is analogous to pertinence in contempt cases) is a question of law for the judge. But just as there is nothing to support *Sinclair* except that proposition, there is, as we have seen, nothing to support that proposition except *Sinclair*. While this perfect circularity has a certain aesthetic appeal, it has no logic.

*Id.*

102 *But see* Jeffrey Saks, Note, United States v. Gaudin: *A Decision With Material Impact*, 64 FORDHAM L. REV. 1157, 1171 (1995) ("Contrary to Justice Scalia's opinion, however, a great deal of historical uniformity supports the view that the practice was settled.").

103 115 S. Ct. at 2320 (Rehnquist, C.J., concurring).

case.[104]

C. LIFE AFTER *GAUDIN*: PLAIN ERROR AND STATUTORY CONSTRUCTION

Although the Court found that failure to instruct the jury to determine the statement's materiality meant there was no true jury verdict, lower courts have had trouble determining whether a *Gaudin* error should result in reversing a conviction when the defendant never objected to reserving the materiality issue to the court. Under the Supreme Court's analysis of plain error in *United States v. Olano*,[105] before a reviewing court can overturn a conviction, a defendant who did not object at trial must show that the error was "clear and obvious" and that it affected substantial rights; even then, the reviewing court retains discretion to decide whether to reverse.[106] While a judge's failure to instruct the jury on its duty to find materiality is clear and obvious error after *Gaudin*, lower courts have split on whether to exercise the discretion to reverse granted them in *Olano*.

Some courts have held that when the defendant did not dispute the materiality of the statements at trial, or when proof of materiality was strong, then upholding the conviction did not result in any miscarriage of justice.[107] Other courts have taken a categorical approach,

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104 The Court has granted certiorari, at the government's request, to answer the question of whether materiality is an element of the offense of making a false statement to a financial institution under 18 U.S.C. § 1014, when the statutory language does not require proof of materiality. *See* United States v. Wells, 63 F.3d. 745, 750 (8th Cir. 1995), *cert. granted*, 116 S. Ct. 1540 (1996) ("we explicitly adopt the rule we have implicitly acknowledged before, that the 'materiality' of a false statement is an element of proving a violation of § 1014."). The issue in *Wells* is one of statutory interpretation, calling for the Court to determine whether Congress intended to make any false statement to a financial institution punishable.

While lower courts have generally required that the government prove the materiality of the statements, the rationale for reading that element into the statute is not clear. Some courts impose the materiality element based on concerns about prosecutorial discretion, that there be reasonable limits on the government's power to prosecute under the statute, *see, e.g.*, United States v. Beer, 518 F.2d 168, 170 (5th Cir. 1975) ("When dealing with a pervasive, all-encompassing statute, however, the courts must be extremely careful to insure that reasonable limits are observed."); United States v. Abadi, 706 F.2d 178, 180 & n.2 (6th Cir. 1983) (materiality element imposed for § 1001 prosecution because "we view the materiality requirement as a judicially-imposed limitation to insure the reasonable application of the statute."), while others found that Congress intended to require proof of materiality despite silence in the statutory language. *See, e.g.*, *Wells*, 63 F.3d at 751 ("Because the statute requires proof of the materiality of a false statement, materiality is an element of § 1014.").

105 113 S. Ct. 1770 (1993).

106 *Id.* at 1777-78.

107 *See* United States v. Randazzo, 80 F.3d 623, 632 (1st Cir. 1996) ("Although Randazzo's brief struggles imaginatively to find a doubt [about materiality] based on the amount of the misreported expenses in comparison with corporate income, the amount (between $45,000 and $60,000 each year) was not trivial or immaterial, even assuming

following the analysis of harmless error charted by the Supreme Court in *Sullivan*. After *Gaudin*, the jury must decide all mixed questions of law and fact, so these courts held that *any* violation of the defendant's Jury Trial Right required reversal because there was no jury verdict on one of the elements.[108] The Supreme Court's reliance on *Sullivan* in *Gaudin*, which took a strict approach to errors involving *Winship* issues, raises the question of whether any usurpation of the

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*dubitante* that amount matters in the case of a deliberate falsification."); United States v. McGuire, 79 F.3d 1396, 1405 (5th Cir. 1996) (exercising discretion to reverse conviction when "the record presents a serious factual question regarding the materiality of McGuire's statements."); United States v. Jobe, 77 F.3d 1461, 1476 (5th Cir. 1996) ("The evidence against him was overwhelming. Billie Mac has not challenged its sufficiency on appeal. Denying him the formality of a new trial does not effect a fundamental miscarriage of justice."); United States v. Ross, 77 F.3d 1525, 1540 (7th Cir. 1996) ("Here, the government presented evidence sufficient to convince any rational factfinder that the defendants' false statements were material. In fact, the issue of materiality was not even significantly disputed by the defendants at trial."); United States v. Allen, 76 F.3d 1348, 1368 (5th Cir. 1996) ("In each case, the evidence of materiality was overwhelming."); United States v. Nash, 76 F.3d 282, 285 (9th Cir. 1996) (We therefore have the discretion to correct the error . . . and feel compelled to exercise that discretion."); United States v. Howard, 1996 U.S. App. LEXIS 3711 at *6 (7th Cir. Feb. 15, 1996) ("At trial, Howard did not present any arguable factual question regarding the materiality of his false statements . . . . Thus the *Gaudin* error did not seriously affect the fairness, integrity, or public reputation of Howard's proceeding."); United States v. Parker, 73 F.3d 48, 52-53 (5th Cir. 1996) ("[T]he error did nothing to change the outcome of the case because under a correct application of the law, the verdict would have been guilty regardless."); United States v. Kramer, 73 F.3d 1067, 1075 (11th Cir. 1996) ("He does not assert he was truly harmed, we presume, because a review of the record shows conclusively that the district court properly determined—and we are unconvinced that a reasonable juror could have found otherwise—that Gilbert's lies had the capability of influencing the 1990 jury."); United States v. Keys, 67 F.3d 801, 811 (9th Cir. 1995) ("Because there was no serious factual question regarding the element on which the court, on defendant's invitation, did not instruct, the error could not seriously affect the fairness, integrity or public reputation of judicial proceedings.").

108 *See* United States v. DiRico, 78 F.3d. 732, 737 (1st Cir. 1996) ("[W]here a jury has not rendered a verdict that addresses every essential element of the charged offense, and therefore has not rendered a verdict on the crime charged, the question of whether the same verdict would have been rendered absent the constitutional error is meaningless."); United States v. Pettigrew, 77 F.3d. 1500, 1511 (5th Cir. 1996) ("The reasoning of *Sullivan* leads inescapably to the same conclusion in the present case. Because the element of materiality was withheld from the jury, the jury rendered no verdict as to that particular element of the offense. Thus, the harmless error analysis is similarly inapplicable."); United States v. Johnson, 71 F.3d. 139, 144 (4th Cir. 1995) ("To hold otherwise would be to engage in the type of speculation and hypothesizing censured by the Supreme Court in *Sullivan*. In sum, we hold harmless error review of the error presented in the case before us is unavailable."); United States v. Pearson, 897 F. Supp. 1147, 1149 (C.D. Ill. 1995) ("[T]he Government apparently ignores the fact that the United States Constitution grants the accused the right to have a jury render the requisite finding of guilt. How 'clear-cut' the materiality issue was is irrelevant!"). It seems that different understandings of the scope of *Gaudin* can occur in the same circuit, as witnessed by the Fifth Circuit's contrasting approaches in *Pettigrew*, on the one hand, and *McGuire*, *Jobe*, *Allen*, and *Parker* on the other.

jury's factfinding function can ever allow the conviction to withstand challenge.

*Gaudin*'s use of *Sullivan* as the principal precedent for requiring juries to decide mixed questions of law and fact may have far-reaching implications. By expanding the jury's power to decide issues, *Gaudin* will have an unsettling effect on convictions for violating other false statement statutes. As an initial matter, the courts must resolve the question of whether materiality is an element of the crime. Circuit Judge Kozinski pointed out in dissenting from the Ninth Circuit's decision in *Gaudin* that there are fifty-four federal statutes in which lower courts impose proof of materiality on the government even though the statutory language does not include that element.[109] Among the most important provisions with an imputed materiality element are those covering false statements made (1) to financial institutions;[110] (2) in immigration and naturalization matters;[111] and, (3) for claims to obtain benefits or payments from the government.[112]

*Gaudin*'s effect is unclear on the interpretation of other provisions that reserve to the judge the decision on an element of the crime. In *United States v. Amparo*,[113] the Ninth Circuit held that the determination of what constitutes a "crime of violence" is a question of law reserved to the court to decide. The provision in question required an enhanced sentence for any defendant who uses a firearm "in relation to any crime of violence," which the statute defines as a crime having "as an element the use . . . of physical force . . . or . . . that by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense."[114] The appellate court rejected the application of *Gaudin* because "whether possession of a sawed-off shotgun is a crime of violence is a matter of law once the jury has determined the factual predicate that the defendant possessed an unregistered sawed-off shotgun."[115] Similarly, the Second Circuit, in *United States v. Klausner*,[116] held that the materiality of statements in a prosecution for filing false or fraudulent tax returns "was purely a legal question" because the "false itemized deductions necessarily resulted in inaccurate amounts of taxes reported . . . [and] inevi-

109 28 F.3d at 959-60 & n.4 (Kozinski, J., dissenting). Judge Kozinski noted that there are 43 federal false statement statutes with express materiality requirements. *Id.* at 959 n.3.

110 18 U.S.C. § 1014 (1994).

111 18 U.S.C. §§ 1015, 1546 (1994).

112 *E.g.*, 18 U.S.C. § 287 (1994); 42 U.S.C. §§ 408 & 1761(*o*) (1994).

113 68 F.3d 1222, 1224 (9th Cir. 1995).

114 18 U.S.C. § 924(c)(3) (1994).

115 *Amparo*, 68 F.3d at 1226.

116 80 F.3d 55 (2d Cir. 1996).

tably made the returns false as to a material matter."[117]

Unless the question addressed in *Gaudin* can be separated from the effect of the Jury Trial Right on statutory construction, *Amparo* and *Klausner* are not easily reconciled with the Supreme Court's treatment of the materiality element in a § 1001 prosecution. *Gaudin* held that determining materiality requires "delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts . . . ."[118] What is not clear from *Gaudin* is whether an element of the crime that does not require "delicate assessments," but only mundane factual conclusions, can be reserved for decision by the court and not the jury, even if it is technically an element of the offense. The underlying question not answered in *Gaudin* is why materiality in a § 1001 prosecution was sufficiently important to require the jury to decide the issue, especially when the statutory language does not make materiality an element of the offense.

If *Gaudin*'s constitutional footings depend on the government's concession that materiality was an element of the statute, then its effect could be limited to those elements that a court determines must be decided by a jury. Other provisions that incorporate legal terms or elements with little factual content may be susceptible to the type of analysis adopted in *Amparo* and *Klausner*. But *Gaudin* may impose a broader requirement: only the jury may decide whether there is sufficient proof when the element requires resolution of *any* factual issue, no matter how innocuous in relation to the question of guilt or innocence. If the latter proposition is the correct reading of *Gaudin*, then the Second and Ninth Circuits are surely wrong to hold that the judge and not the jury should decide whether an act was a "crime of violence" or a statement on a tax return was "material" because each decision may entail a "delicate assessment" of the facts.

The statutory interpretation question can then lead to the constitutional issue of whether an element of a crime can *ever* be decided solely by the court as a matter of law, especially if it requires any factual determination. *Gaudin* will lurk in the background of every statutory interpretation case when the trial judge plays a role in deciding the existence of that element.

### D. THE ROLE OF COURTS AND LEGISLATURES AFTER *GAUDIN*

The question of what constitutes an "element" of an offense takes

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117 *Id.* at 61; *see id.* at 63 (Van Graafeiland, J., dissenting in part) ("I am constrained by the Supreme Court's holding in *United States v. Gaudin* to dissent from the affirmance of Klausner's conviction" on the tax charges).

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

on greater importance after *Gaudin*. Once the legislature designates proof of a particular fact as an element of the offense, under the Court's analysis of the Fifth and Sixth Amendment, the jury must decide the existence of that conduct. At this point, the broad major premise of Justice Scalia's syllogism in *Gaudin* takes on greater significance, and it is helpful to recall it: "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the *elements* of the crime with which he is charged . . . ."[119] The Court based that premise on *Winship*, which required the government prove all "*facts*" beyond a reasonable doubt.

In analyzing a statute in light of *Gaudin*, courts could interpret the constitutional rule to mean that all issues involving a factual determination are a component of the "elements" of a crime, and must be decided solely by the jury based on proof beyond a reasonable doubt. Understood in this manner, *Gaudin* injects a constitutional question into statutory construction by requiring courts to ascertain the factual components of the crime to ensure that only the jury, and not the judge, decides those elements. This constitutional aspect of statutory interpretation arises from the coupling of *Winship*'s Due Process protection with the expansive Jury Trial Right recognized in *Sullivan*.

Equating proof of "facts" under *Winship* with the determination of the "elements" of the crime in *Gaudin* raises two interesting questions: first, does *Gaudin* constrain the legislature's power to define the elements of a crime; and, second, does the decision restrict the trial court's power to make factual determinations that may affect the jury's consideration of the elements.

### 1. *Can the Legislature Define Elements of a Crime as Questions of Law?*

Although the Supreme Court proclaimed the *Winship* standard as a categorical protection, doubt remained as to the scope of the Due Process Clause *vis-a-vis* the legislature's power to define the elements of a crime, *i.e.*, the "fact[s] necessary to constitute the crime." In *Patterson v. New York*,[120] the Court upheld a New York statute that placed on a defendant, who sought to reduce a second degree murder charge to manslaughter, the burden of persuasion by a preponderance of the evidence that the actions resulted from an extreme mental or emotional disturbance. If the defendant proved the defense, then the jury could only find him guilty of the reduced charge of manslaughter.[121] The Court distinguished *Winship* in upholding the allo-

119 *Id.* (emphasis added.)
120 432 U.S. 197 (1977).
121 N.Y. PENAL LAW § 125.25 (McKinney 1985).

cation of the burden of persuasion to the defendant: "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required . . . ."[122]

Although the Court recognized that a statute can impose the burden of proof on defendants with regard to an affirmative defense, it also noted that there were limits to the legislature's power to define the prosecution's burden. The Court advised that any "shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause."[123] While *Patterson* identified a theoretical limitation on the legislature's prerogative to define a crime as it saw fit, the Court did not explain what facts were sufficiently important so that the Constitution imposed the entire burden of proof beyond a reasonable doubt on the government.

A decade after *Patterson*, in *Martin v. Ohio*,[124] the Court once again hinted at a limit imposed by the Due Process Clause in upholding a provision placing on the defendant in a murder prosecution the burden to show by a preponderance of the evidence that the killing was in self-defense. The Court contrasted the statutory scheme in question from one under which the jury could not even consider the defense evidence unless the defendant first demonstrated self-defense by a preponderance. While the Court accepted a statutory scheme that required the defendant to carry the burden of persuasion, it noted that an exclusionary rule preventing the defendant from introducing evidence that would negate an element of the crime "would be quite different."[125]

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122 *Patterson*, 432 U.S. 197 at 210. Much of *Patterson*'s analysis refuted an expansive view of the Court's decision two terms earlier in Mullaney v. Wilbur, 421 U.S. 684 (1975), which overturned on due process grounds a Maine statute that shifted the burden of proof to the defendant in a murder prosecution to show that he acted in the heat of passion due to a sudden provocation. The Court stated in a footnote:

> There is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting "the degree of criminal culpability" . . . . It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our criminal justice system . . . . The Court did not intend *Mullaney* to have such far-reaching effect.

*Patterson*, 432 U.S. at 214 n.15 (citations omitted).

123 *Id.* at 215.

124 480 U.S. 228 (1987).

125 *Id.* at 233. The dissent noted that "the Court significantly, and without explanation, extends the deference granted to state legislatures in this area. Today's decision could be read to say that virtually all state attempts to shift the burden of proof for affirmative defenses will be upheld, regardless of the relationship between the elements of the defense

Finally, in a case decided in the 1995 Term, *Cooper v. Oklahoma*,[126] the Court struck down a statute that shifted to a defendant the burden of proof on the question of competency to stand trial. The Court found that the defendant's constitutional right to trial and to assist in his defense were infringed by imposing on him the burden of proving competence by clear and convincing evidence.[127]

*Cooper* identified a limitation on the legislature's power to shift the burden of proof when the question involved a "fundamental constitutional right." Yet, neither *Cooper* nor *Martin* provide guidance as to what the Court meant in *Patterson* when it warned that the Due Process Clause limited the legislature's power to exclude or alter the burden of proof with respect to an element of the offense required for a conviction.[128] *Patterson* spoke of some vague limit on the legislature's power to shift the burden of proof to the defendant, but *Gaudin* may take that limitation further if all factual determinations adverse to the defendant must be made by the jury beyond a reasonable doubt.

The Jury Trial Right may prevent the legislature from designating part of a crime as a question of law to be determined by the court. For example, if an element of a federal crime involves proof of an effect on interstate commerce, could Congress after *Gaudin* reserve that issue for the judge? Whether a transaction implicates interstate commerce involves a factual component—*did it affect commerce*?—so *Gaudin* could bar giving exclusive power to resolve the question to the judge. Prior to *Gaudin*, there were proposals to reform the federal criminal law to eliminate the jurisdictional basis for the crime as an element of the offense. If jurisdiction entails resolution of any factual question, however, then *Gaudin* should bar that approach.[129]

Chief Justice Rehnquist's concurrence in *Gaudin* asserted that "[n]othing in the Court's decision 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."[130] Justice Scalia's majority opinion did not ad-

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and the elements of the crime." *Id.* at 240 (Powell, J., dissenting).

126 116 S. Ct. 1373 (1996).

127 *Id.* at 1384.

128 *See* 2 McCormick on Evidence § 348, at 597 (4th ed. 1992) ("Can the state create an affirmative defense simply by carefully excluding it from the elements of the offense? The answer to this question seems to be a qualified yes.").

129 Final Report of the National Commission on Reform of Federal Criminal Laws: A Proposed New Federal Crime Code (title 18, United States Code) (1971). *See* Saks, *supra* note 102, at 1183 ("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*.").

130 *Gaudin*, 115 S. Ct. at 2321 (Rehnquist, C.J., concurring).

dress the legislature's power to alter the role of judge and jury by amending the definition of a crime, so the Chief Justice's dictum may be an attempt to restrain lower court's from reading *Gaudin* expansively as restricting legislative prerogatives. Yet, the legislature's power to allocate, or reallocate, resolution of a factual issue to the trial judge is certainly questionable after *Gaudin.*

Justice Scalia's opinion noted the "impressive pedigree" of the defendant's right to be tried by a jury, and the jury's crucial role in making the "delicate assessments" that lead to the requisite factual conclusion of guilt or innocence.[131] Regardless of the Chief Justice's assertion, *Gaudin* cannot be read to give legislatures a free hand to designate any factual issue as one reserved exclusively to the trial judge. Just as *Patterson* observed that there must be some limit to the legislature's power to alter the definition of a crime, so too should *Gaudin* be understood as creating a barrier that constrains the legislature's authority to reserve factual issues to the trial judge merely by labeling them "questions of law."[132]

### 2. *The Thin Line Between Law and Facts*

*Gaudin*'s greatest effect may be on the trial judge's role in making factual determinations that affect the jury's conclusions about proof of the elements of the crime. Justice Scalia's opinion noted that the jury has no role in deciding "pure questions of law in a criminal case . . . [and] the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions."[133] When, however, a question involves any factual issue, then it must be given to the jury "not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."[134] The crucial issue raised by *Gaudin* is whether there are facts that affect proof of an element that the judge can decide, even if that decision could alter the jury's decision on guilt or innocence.

The trial judge's traditional role of deciding questions concerning the presentation of evidence to the jury is a likely target for *Gaudin*'s coupling of the Fifth and Sixth Amendments. In decisions on evidentiary questions, as Professors Mueller and Kirkpatrick point out, "some fact questions are resolved by judges even in jury cases . . . the factfinding mission can involve judges in taking testimony, resolv-

131 *Id.* at 2313, 2314 (Scalia, J., dissenting).

132 *See* Saks, *supra* note 102, at 1190 ("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.").

133 *Gaudin,* 115 S. Ct. at 2315.

134 *Id.* at 2316.

ing conflicts, and assessing credibility."[135] Beyond ruling on the admission of evidence under the applicable rules, the trial judge also must determine whether a defendant has met the burden of production to justify an instruction on an affirmative defense.[136] The trial judge can exclude a defense witness from testifying when the defendant failed to identify the witness in time[137] or to follow notice requirements for introducing a defense.[138]

This list is by no means exhaustive, but each example shows the judge making factual determinations that will affect the jury's decision whether the government has proved guilt beyond a reasonable doubt. The exclusion of witnesses or evidence based on a defendant's nontrial conduct, such as barring the introduction of evidence by a defendant as a sanction, could be especially troubling if courts interpret broadly *Gaudin*'s exhortation that only the jury may decide issues of fact that are integral to proof of the elements of the crime. If the defendant's Jury Trial Right includes the right to have the government prove all *facts* relevant to the crime beyond a reasonable doubt, then exclusion of such evidence should not be permitted.

Chief Justice Rehnquist argued for a narrow interpretation of *Gaudin*'s holding in his concurrence: "The Court properly acknowledges that other mixed questions of law and fact remain the proper domain of the trial court . . . ."[139] The areas not affected by *Gaudin*, according to the Chief Justice, were the admissibility of evidence, competency of the defendant, voluntariness of confessions, and the legality of searches. The Court's approach in *Gaudin*, however, was not to carve out a special area of jury competence on the materiality element, leaving untouched other mixed questions of fact and law. Justice Scalia's opinion did not address the issues the Chief Justice asserted were not affected by the Court's analysis of the Fifth and Sixth Amendment rights. Chief Justice Rehnquist's *ex ante* proclamation of *Gaudin*'s limited effect may signal his concern that the Court's conjoining of the Fifth and Sixth Amendment rights will have an impact beyond the jury's exclusive power to decide the statutorily de-

135 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.10, at 36 (1995); *see* 1 MCCORMICK ON EVIDENCE § 53, at 79 (4th ed. 1992) (on questions of admissibility of evidence, "Issues of fact are usually left to the jury, but there are strong reasons here for not doing so. If the special question of fact were submitted to the jury when objection was made, cumbersome and awkward problems about unanimity would be raised.").

136 *See* MUELLER & KIRKPATRICK, *supra* note 135, § 3.12, at 159 ("If the defendant does not produce sufficient evidence to enable a reasonable jury to find the facts constituting the defense, it is not submitted to the jury, and it effectively drops out of the case.").

137 *See* Taylor v. Illinois, 484 U.S. 400 (1988).

138 *See* Williams v. Florida, 399 U.S. 78 (1970).

139 *United States v. Gaudin*, 115 S. Ct. 2310, 2321 (1995) (Rehnquist, C.J., concurring).

fined elements of the crime.

The Supreme Court could limit *Gaudin*'s broad language by taking a strict approach to what constitutes an "element" of the offense and simply assert that evidentiary and trial-management decisions are "pure questions of law." Such an approach would confine *Gaudin* to the rare case in which the trial court interpreted the elements of the crime to involve a pure question of law. Yet, lower courts would be ill-advised to take that approach, given *Gaudin*'s expansive analysis requiring jury determination of mixed questions of law and fact. *Amparo* and *Klausner* suggest that courts may not have considered the full implications of *Gaudin*'s application of the Fifth and Sixth Amendment rights.

It is hard to read *Gaudin* as a narrow rule.[140] Justice Scalia's opinion did not take a circumspect approach to the question of the jury's role, and the Court chose to decide the constitutional issue by accepting without hesitation the government's concession that materiality was an element of the crime.[141] Moreover, *Gaudin* did not distinguish between the jury's role in determining factual questions and the requirement that criminal convictions "rest upon a jury determination that the defendant is guilty of *every element* of the crime with which he is charged, beyond a reasonable doubt."[142]

A broad reading of *Gaudin*, one restricting the judge's role in deciding evidentiary issues that affect the jury's factfinding role, may lead to an odd constitutional arrangement. The Supreme Court has interpreted the Confrontation Clause[143] quite narrowly, in large part making its protection coextensive with the rules of evidence.[144] Simi-

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140 *But see id.* at 2320 (Rehnquist, C.J., concurring) ("I write separately to point out that there are issues in this area of the law which, though similar to those decided in the Court's opinion, are not disposed of by the Court today.")

141 The Court will decide the question of whether materiality is an element of a false statement offense under 18 U.S.C. § 1014, covering false statements to financial institutions, when the statutory language does not require proof that the statement was material. *See* United States v. Wells, 63 F.3d 745 (1995), *cert. granted*, 116 S. Ct. 1540 (1996). The decision in *Wells* likely will control the analysis for the large number of other federal false statement provisions with imputed materiality elements.

142 *Gaudin*, 115 S. Ct. at 2313 (emphasis added).

143 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

144 *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 558 (1992) ("[T]he only function the Court currently ascribes to the [Confrontation] Clause is the promotion of accuracy in fact-finding, a goal which is the primary objective of evidentiary rules."); Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521 (1992) ("Although the bulk of hearsay doctrine remains in decisional or statutory form, the doctrine also has been 'constitutionalized.'"); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 558 (1988) ("The confrontation clause

larly, the Court has not taken an expansive approach to a defendant's right to present evidence under the Compulsory Process Clause.[145] *Gaudin*, however, could be read to constrain the judge's power to make evidentiary decisions that exclude the defendant's evidence from the jury because that ruling might affect the determination of guilt or innocence. That interpretation would give defendants a powerful weapon to challenge rulings excluding them from presenting evidence beyond that provided by the other trial-related constitutional protections. It would be interesting, to say the least, to see a judge's evidentiary ruling overturned for violating the Jury Trial Right when it would withstand scrutiny under the Confrontation and Compulsory Process Clauses.

Conventional wisdom is that "the 'beyond a reasonable doubt' standard applies to each *element* of the crime but not to each piece of evidence offered to prove an element."[146] *Gaudin* may blur the line between elements and facts through its combination of the Due Process protection established in *Winship* and the Jury Trial Right, to require that the jury decide all *factual* issues. Given the creativity of the criminal defense bar, one should not be surprised to see *Gaudin* cited in circumstances quite unlike those of the original case to challenge convictions based on the jury's failure to decide all factual issues.

## IV. CONCLUSION

The 1994 Term saw the Supreme Court engaging in statutory interpretation in *X-Citement Video* to avoid a constitutional issue, and applying the combined Fifth and Sixth Amendment Rights in *Gaudin* to overturn a conviction on constitutional grounds without considering the question of whether the statute even required the government to prove the element of materiality. *Hubbard* had to deal with a simple question involving the definition of a term made much more complicated because of the Court's earlier reading that ignored the obvious meaning of that term.

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is no longer a constitutional right protecting the accused, but essentially a minor adjunct to evidence law.").

145 *See* Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly."); Pennsylvania v. Ritchie, 480 U.S. 39, 55-56 (1987) (plurality opinion) ("This Court has had little occasion to discuss the contours of the Compulsory Process Clause. . . . Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.").

146 MUELLER & KIRKPATRICK, *supra* note 135, § 3.11, at 157-58.

The federalization of the criminal law is increasing the pressure on the Court to resolve questions of statutory interpretation. *Hubbard* faced the challenge of overturning a clear, if flawed, precedent that made adherence to the principle of *stare decisis* intellectually unsupportable. *X-Citement Video*'s analysis was questionable because it cloaked its conclusion in the language of statutory interpretation to avoid construing the statute in such a way as to impinge on an important constitutional protection, freedom of expression. In fact, the constitutional value could have framed the rule that an intent element should be read to require a showing of intent to use minors in sexually explicit depictions: the First Amendment imposes an independent requirement that the government prove *mens rea* as an element of the crime when protected speech may be involved in the violation.

The constitutional aspects of statutory interpretation can come to the forefront through *Gaudin*. That decision calls into question convictions in cases requiring proof of materiality, an issue decided traditionally by the judge, not the jury. Courts will have to review a wide variety of federal statutes that leave important factfinding to the judge to determine, first, whether *Gaudin* requires the jury to make the decision, and, second, whether any error on that issue mandates reversal of the conviction.

Beyond the direct effect of *Gaudin* on convictions, the Court's coupling of the Fifth and Sixth Amendments creates a new vehicle for defendants to challenge decisions made by the judge that affect the deliberations of the jury. Moreover, the power of legislatures to define the elements of a crime may be in for closer review in light of *Gaudin*'s requirement that only the jury may decide mixed questions of law and fact. The major premise of *Gaudin* is not necessarily limited to proof of the statutory elements of the crime, since *Winship* speaks of "facts" and *Gaudin* addresses the role of the jury as the factfinder making "delicate assessments." Therein lies a question about what *Gaudin* may become: will it be the new vehicle for challenging the power of the legislature to define a crime and the rulings of judges that affect the jury's determination of guilt?