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Time to Prune the Tree, Part 2: The Need to Reassess the Federal Fraud Laws

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Abstract

Fraud laws are now ubiquitous in the U.S. criminal code. The redundancies inherent in current fraud law create the risk that a person can be charged with multiple offenses and can be sentenced to consecutive terms of imprisonment if convicted of them, even though that person committed only one crime. A related difficulty is the problem of identifying whether there is but one fraudulent act or, alternatively, there are multiple instances of fraud. Congress should repeal redundant fraud laws and, if necessary, consider revising the mail and wire fraud acts. That would eliminate the risk of oversentencing without preventing the Department of Justice from protecting the public. It would also indicate that Congress is taking seriously the task of addressing the problem of overcriminalization.

It has been said that you can't be too rich, you can't have too many friends, and you can't be too thin. Today, it also seems that you can't have too many federal fraud statutes. Congress has enacted plenty of them[2] even though the two basic fraud statutes—the acts criminalizing mail fraud and wire fraud[3]—would cover every crime that the federal government should bother to prosecute.

Such repetition would be merely a cute quip if it appeared in a prime-time TV show—"Hi, I'm Larry. This is my brother Darryl, and this is my other brother Darryl."[4]—but it creates problems when multiple examples of the same offense are scattered across the U.S. Code. The foremost problem that repetition creates is the risk that a person can be charged with multiple offenses and be sentenced to consecutive terms of imprisonment if convicted of them, even though he committed only one crime. A related problem is

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Key Points

- The principal federal fraud laws, the mail and wire fraud statutes, should be sufficiently broad to reach any fraud of concern to the federal government.
- Today, "fraud offenses are…the most widely and variously codified…reflecting a protean and proliferating range of meanings."
- There are now so many iterations of fraud that it can be difficult to know exactly what behavior triggers criminal liability, even for people with scrupulous morals.
- The existence of multiple fraud statutes offers prosecutors the opportunity to engage in charge stacking and can multiply the number of convictions for what is really only one misleading statement.
- Congress should stop reflexively passing new fraud statutes every time a novel fraud is committed.
- Redundant criminal laws create a number of moral hazards that degrade the fairness of the criminal process by overarming prosecutors against defendants.
- Congress should repeal redundant fraud laws and revise the mail and wire fraud acts.

identifying whether there is one fraudulent act or, alternatively, there are multiple instances of fraud.[5]

There is a way to address the problem: Repeal the superfluous laws and, if necessary, revise the mail and wire fraud acts. That would eliminate the risk of oversentencing without preventing the Department of Justice from protecting the public. It would also indicate that Congress is taking the problem of overcriminalization seriously.

The History of the Law of Fraud

Greece has left the world a rich legacy. It has given us logic, democracy, the Parthenon, the Olympic Games, the gyro and souvlaki, along with Plato, Aristotle, King Leonidas I, Homer, Alexander the Great, Melina Mercouri, and Hegestratos—the man who committed the world's first known fraud.

In 300 B.C., Hegestratos, a Greek merchant, insured a corn shipment, all the while intending to sell the corn and sink his ship, leading his insurer to think the corn was lost at sea and allowing Hegestratos to double his money.[6] As the ***Moirai*** (in English, the Fates) would have it, Hegestratos drowned before the deed was done, but not before giving fraud law a colorful start.[7] Unfortunately, not all heed the lesson of Hegestratos's demise, and we have perhaps ever-increasing, certainly ever more expensive incarnations of his scheme with us today.[8]

To keep the imagery going, what is the Aristotelian "essence" of fraud? Is it a single course of conduct that simultaneously involves the transfer (or loss) of property and that perplexing term, deceit?[9] Or is it something else? The historical sources on which contemporary judges would draw do not offer a clear and precise definition. In some accounts, Judeo–Christian ethics contains a variety of theories explaining fraud.

The Bible, for example, describes at least three forms: (1) "wronging another in the selling or buying of property"; (2) a lie that is "tantamount to larceny"; and (3) a category of more "particular prohibitions on fraud against strangers, widows and orphans, and slaves."[10] The common law embraced all three concepts in a single rule of fraud conceptualized as an offense against property.[11] The elements of Anglo–American common-law fraud were five: "(1) a false representation of a material present or past fact (2) which causes the victim (3) to pass title to (4) his property to the wrongdoer, (5) who (a) knows his representation to be false and (b) intends thereby to defraud the victim."[12] Deceit leading to the loss of property seems to be the common denominator in those understandings of fraud, but the matter may not be as clear as one would like for the criminal law.

The federal law governing fraud traces its lineage to the mail fraud act. Congress seems to have adopted that common-law framework in drafting its general fraud statute in the 1870s. Congressmen thought the mail fraud statute was necessary "to prevent the frauds which are mostly gotten up in the large cities...by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country" of property and money in particular.[13] As long as the one general prohibition is sufficiently clear, as Sir William Blackstone observed of the common-law rule, legislators can and should "judiciously avoid laying down any minute rules as to what shall, or shall not, constitute fraud."[14]

The Mail and Wire Fraud Laws

There were only nine felonies at common law, and fraud was not among them.[15] Fraud did not come along until later, and when it did, there was only one such crime.[16] Since then, to quote Bob Dylan, "things have changed."[17]

The principal federal fraud laws today are the mail and wire fraud statutes.[18] The federal mail fraud statute, Section 1341 of Title 18, provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to

> the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Supplementing the mail fraud statute is Section 1342, which provides as follows:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both.

The federal wire fraud statute, Section 1343 of Title 18, parallels the mail fraud law:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Also relevant is Section 1346 of Title 18, which states that "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[19]

Those statutes should be sufficiently broad to reach any fraud of concern to the federal government. People commit fraud to gain something, usually money (or something equally valuable), but perhaps occasionally to gain a benefit or advantage that the government can bestow, such as a government construction contract. Whatever that McGuffin may be, a con artist will need to communicate his plan to someone else through the mail, over the telephone, or via the Internet—in other words, by using the communicative mechanisms of interstate commerce at which the mail and wire fraud statutes are aimed.[20] All large-scale deals involve some use of one or more of those services to communicate an offer, complete a form, schedule a meeting, transmit the relevant documents, or wire the funds.

Use one of those communications networks for the purpose of executing a fraudulent scheme, and you have committed a federal offense. The federal mail and wire fraud statutes reach all frauds in which the use of the mails or wire communications is part of the execution of the fraud.[21] Use of the mails need not be "an essential element" of the scheme as long as it is "incident to an essential part of the scheme" or "a step in the plot."[22] Once that occurs, fraud becomes not just a state-law crime, but a federal offense, and the responsible parties can be charged under Section 1341, Section 1343, or both.

Of course, that is not where the code ends.

The Law of Fraud Today

Today, "fraud offenses [are] among the most frequently charged, but they are also the most widely and variously codified…reflecting a protean and proliferating range of meanings."[23] The mail and wire fraud statutes are not the only fraud laws on the

books. There also are the bank fraud,[24] bankruptcy fraud,[25] computer fraud,[26] food fraud,[27] health care fraud,[28] marriage fraud,[29] securities fraud,[30] and tax fraud statutes,[31] to name but a few.

Professor Ellen Podgor, a white-collar crime scholar who has tried to count all of the federal fraud laws, has observed that at the turn of the 21st century, "the terms 'fraud,' 'fraudulent,' 'fraudulently,' or 'defraud' appear[ed] within the text of a total of ninety-two substantive statutes in title 18 of the United States Code" alone.[32] By another count, there then existed "exactly three hundred and twenty-five provisions that prescribe criminal penalties for fraud."[33] There are now so many iterations of fraud that it can be difficult to know exactly what behavior triggers criminal liability, even for people with scrupulous morals.

At least one group, however, can find advantage in that dilemma. As Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit has stated, "a ubiquitous criminal law becomes a loaded gun in the hands of any malevolent prosecutor or aspiring tyrant."[34]

Multiplicity Problems: How Many Frauds Can Stem from One Act or Transaction?

The large number of fraud statutes offers prosecutors the opportunity to engage in charge stacking. Consider the following hypothetical.

High school seniors complete online a portion of college applications, and the online forms are transmitted to the colleges identified by the students. Suppose College A receives 100 online application components from 100 seniors, but only 20 of them complete the admissions process by obtaining teacher recommendations and paying the application fee. The question is: Did the school receive 100 applications or only 20? The answer is important because third parties, such as *U.S. News & World Report* or *The Princeton Review,* rely on acceptance rates in ranking colleges, high school seniors use those rankings in deciding where to apply for admission and to enroll, and—as a hypothetical—12 banks use college rankings in making loan decisions by offering a reduced interest rate to schools in the top 10 percent of a third party's rankings.

Suppose College A admits ten of the twenty students. Using the number of *incomplete* applications, the admissions officer reports online that the college had an acceptance rate of 10 percent for the class entering in 2020 rather than 50 percent if the number of *completed* applications were used as the denominator. Suppose also that the 10 percent bumps the school up in the college ranking system, that the step-up attracts 150 new applications, that all 150 seniors are accepted, and that all of them receive an interest-rate discount for attending a college in the top 10 percent in the rankings.

Now assume for argument's sake that using the number of incomplete applications as the denominator constitutes fraud. The question is: Was one crime committed or more than one, and if the latter, how many were committed?

Part of the difficulty in answering that question is deciding exactly what the "unit of prosecution" for that fraud should be.[35] The issue deals with the application of the definition of an offense to a particular act or transaction. For example, if a bank robber takes 100 $20 bills, has he committed one bank robbery or 100? Here, the admissions officer made only one statement, but 150 students relied on it, as did 12 banks. So was there one fraud because there was only one misleading statement, or were there 162 of them?

The problem only worsens when there are multiple statutes at issue. If the prosecutor can bring charges under the mail and wire fraud laws, the number of charges at least doubles to 324. If you include the bank fraud statute, the number of charges increases again by at least 12 ((the number of affected banks), resulting in 336, but could treble if each student's application is treated as a separate fraud, resulting in 486 charges. If the fraud also amounts to a major fraud against the United States, under the theory that the federal government is the ultimate guarantor of the banks' stability, the number of possible charges could be 648. If the prosecutor also charges College A on a *respondeat superior* basis (a theory that renders the institution for which an employee works liable for the crimes of its employee[36]), the number doubles again to 1,296. And if the prosecutor charges the two university officials in the chain of command above the admissions officer (the college chancellor and its president)—by now, the point is obvious. With a possible sentence of 20 years' imprisonment for each fraud conviction, the admissions officer could potentially end up serving the rest of his life in prison for his one misleading statement.[37]

The above hypothetical shows that the existence of multiple fraud statutes can multiply the number

of convictions for what is really only one misleading statement. What purpose does that serve? As argued elsewhere:

> Piling on punishment after punishment distorts society's judgment regarding the seriousness of a crime. If five years' imprisonment is the maximum penalty that should be imposed on someone who commits fraud, the number of fraud statutes he violated should be immaterial. Under today's double jeopardy law, however, it is not. Counting statutory violations independently also allows a prosecutor to throw the book at someone in an effort to coerce a guilty plea. Such a tactic is not unconstitutional, but it is hardly desirable behavior that society wants to encourage in a legal system ostensibly committed to guaranteeing every defendant a fair trial—especially when that threat leads an innocent person to plead guilty to avoid long-term imprisonment. And there is no effective control over a prosecutor's decision.[38]

Congress should stop reflexively passing new fraud statutes every time a novel fraud is committed. Most new proposals resemble the hypothetical posed by Stetson University School of Law Professor Ellen Podgor: Do we need a separate "Beanie Baby" fraud statute to address the surprisingly voluminous number of frauds related to the miniature plush dolls?[39] That anyone would have to ask the question suggests that fraud law is now asked "to do too much work."[40]

Conclusion

The federal code contains "redundant, superfluous, and unnecessary" criminal laws.[41] They create a number of moral hazards that degrade the fairness of the criminal process by overarming prosecutors against defendants.[42]

Only Congress has the constitutional authority to enact the necessary reform. Article I vests "[a]ll legislative Powers" in Congress, including the power to repeal statutes.[43] Congress should repeal redundant fraud laws,[44] and, if necessary, revise the mail and wire fraud acts. That would eliminate the risk of oversentencing without preventing the Department of Justice from protecting the public and would also indicate that Congress is taking seriously the task of addressing the problem of overcriminalization.

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Endnotes

1. For Part One, see Paul Larkin *and* John-Michael Seibler, *Time to Prune the Tree: The Need to Repeal Unnecessary Criminal Laws*, Heritage Foundation legal Memorandum No. 173 (Feb. 25, 2016), http://www.heritage.org/research/reports/2016/02/time-to-prune-the-tree-the-need-to-repeal-unnecessary-criminal-laws (arguing that "the federal criminal code is long overdue for a 'spring cleaning.'").
2. *See infra* notes 18–34 and accompanying text.
3. *See* 18 U.S.C. § 1341 (2012) (mail fraud) and § 1343 (wire fraud). The statutes are quoted below.
4. *"Clip from Second Episode of Newhart"* (2009), https://www.youtube.com/watch?v=L9EKqQWPjyo.
5. There is an additional problem—namely, that the average person cannot readily understand what those laws prohibit—but the culprit there is not just Congress. The Supreme Court has its fingerprints on that problem too, so it deserves its own share of the blame. That problem deserves its own separate treatment, so this Legal Memorandum will not discuss it further.
6. Andrew Beattie, *The Pioneers of Financial Fraud*, Investopedia, http://www.investopedia.com/articles/financial-theory/09/history-of-fraud.asp (last accessed Feb. 9, 2016). Allegations of the same type of fraud still occur. Greg Kocher, *Feds Want to Seize 1,400 Acres in Nicholas County in Alleged Crop-Insurance Fraud Case*, Lexington Herald Leader (Feb. 13, 2016), http://www.kentucky.com/news/state/article60246961.html. Some things don't change.
7. Of course, if you include misleading statements made to gain an advantage or avoid a loss as fraud, which the Justice Department often does, the first such occurrence predates Hegestratos' fraud by a country mile. *See Genesis* 1:8-9 ("Cain said to his brother Abel, Let us go out to the field,' And when they were in the field, Cain rose up against his brother Abel and killed him. Then the Lord said to Cain, 'Where is your brother Abel? He said, 'I do not know. Am I my brother's keeper?'"). The federal false statement statutes deserve their own treatment. For purposes of fraud, the points discussed below are the same whether Hegestratos or Cain birthed the crime.
8. Fraud schemes only proliferate in design. *See, e.g.*, Kugler v. Romain, 58 N.J. 522, 543 (1972) ("The fertility of man's invention in devising new schemes of fraud is so great, that the courts have always declined to define it…reserving to themselves the liberty to deal with it under whatever form it may present itself."). "The only boundaries are those that limit human knavery," and accordingly, "[m]odern tools and methods have extended the limits of fraud into new territory." Assoc. of Certified Fraud Examiners, The Fraud Trial 6 (2003).
9. The question of how to regulate fraud has always troubled lawmakers, in part because of their inability to craft a coherent understanding of what that term means. *See, e.g.*, Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. Rev. 1971 (2006). This has led to many rules so "open-textured" that their "application to particular cases is indeterminate." *Id.* at 1973 n.4 (citing H.L.A. Hart, The Concept of Law 128 (2d ed. 1994)); *see also* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup. Ct. Rev. 345, 373–78.
10. *Fraud*, in Principles of Jewish Law 498–99 (Menachem Elon ed., 1974); *see also* Quran VII, 85–93; LXXXIII, 1–3.
11. William Blackstone counted fraud, in speaking particularly on the subject of forgery, among the "principal infringements of the rights of property." 4 William Blackstone, Commentaries *247. The fraudster is one "who seeks to accomplish indirectly, by deception, what would not be permitted directly: separating another from his property in the absence of full voluntariness," *i.e.*, "to take" property "without violating the basic prohibition against theft." Buell, *supra* note 9, at 1973. *See also* Comment, *Legislative Revision of Property Crimes in Indiana*, 39 Ind. L.J. 827, 827–30 (1964) (describing the 1963 unification of certain property offenses that included "obtaining property by fraudulent means," which had previously been "prohibited by numerous statutory provisions covering such specific conduct as the fraudulent obtaining of any written instrument or signature, the fraudulent dealing with certain negotiable instruments, fraud on hotelkeepers, fraudulent disposal of mortgaged swine, sheep or cattle, fraudulent solicitation of charity, fraudulent conversion of personal property held under a conditional sale contract, the use of spurious coins in vending machines, and the fraudulent procurement of tourist camp accommodations. These provisions also contained significant variations in penalties based, in large part, upon insignificant artificial distinctions." *Id.* at 829.). When the U.S. Supreme Court was first asked to construe the meaning of the phrase "any scheme or artifice to defraud" in 1896, it "held that the phrase is to be interpreted broadly insofar as property rights are concerned, but did not indicate that the statute had a more extensive reach." McNally v. United States, 483 U.S. 350, 356 (1987). The Court has stuck to that rationale since then. *See, e.g.*, Cleveland v. United States, 531 U.S. 12, 15 (2000) ("We conclude that permits or licenses of this order do not qualify as 'property' within § 1341's compass. It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim."
12. *See* 2 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 8.7, at 382–83 (1986).
13. McNally v. United States, 483 U.S. 350, 356 (1987) (quoting 43 Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Representative Farnsworth)). *See generally* Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 St. Thomas L. Rev. 557 (1997).
14. 3 Blackstone, *supra* note 11, *425.
15. The common-law felonies were treason, murder, manslaughter, rape, robbery, sodomy, burglary, larceny, and arson. Stuart P. Green, 13 Ways to Steal a Bicycle: Theft Law in the Information Age 10, 280 n.3 (2012) (hereafter Green, 13 Ways). The only mention of fraud in the first federal criminal statute appeared in the prohibition against counterfeit of "any public security of the United States," requiring an "intention to defraud any person, knowing the same to be false, altered, forged or counterfeited." *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790).
16. *See* LaFave & Scott, *supra* note 12, § 8.7, at 382–83.
17. Bob Dylan, *"Things Have Changed"* (2000), https://www.youtube.com/watch?v=L9EKqQWPjyo.

18. *See* Dep't of Justice, United States Attorney's Manual § 901 (hereafter USAM). "The mail and wire fraud statutes are essentially the same, except for the medium associated with the offense—the mail in the case of mail fraud and wire communication in the case of wire fraud." Charles Doyle, Cong. Research Serv., R41930, Mail and Wire Fraud: A Brief Overview of Federal Criminal Law 2 (2011), available at: https://www.fas.org/sgp/crs/misc/R41930.pdf. Congressional statements also undermine the need for two statutes instead of one. *See* H. Rept. 82-388, at 1 (1951) ("The general object of the bill is to amend the Criminal Code...making it a Federal criminal offense to use wire or radio communications as instrumentalities for perpetrating frauds upon the public. In principal it is not dissimilar to the post fraud statute (18 U.S.C. 1341)."); S. Rept. 82-44, at 14 (1951) ("This section...is intended merely to establish for radio a parallel provision now in the law for fraud by mail, so that fraud conducted or intended to be conducted by radio shall be amenable to the same penalties now provided for fraud by means of the mails"); H. Rept. 82-1750, at 22 (1952).
19. As explained below, that elaboration is virtually useless to the average person as a standard of prohibited conduct and has caused more harm than good.
20. *See*, *e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (requiring a nexus between some constitutional power to legislate, usually found in the Commerce Clause of article 1, § 8, cl. 3, and the subject of criminal legislation).
21. *See* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 647 (2008); Schmuck v. United States, 489 U.S. 705, 710–11 (1989); United States v. Maze, 414 U.S. 395 (1974); Parr v. United States, 363 U.S. 370 (1960); Pereira v. United States, 347 U.S. 1, 8, 12–13 (1954); Kann v. United States, 323 U.S. 88, 95 (1944).
22. *Schmuck*, 489 U.S. 705, 710–11.
23. Stuart P. Green, Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime 151 (2006) (hereafter Green, Lying, Cheating, and Stealing) (arguing that it can be "virtually impossible to distinguish between different offences in terms of their seriousness, and even to know whether and when one [has] committed a crime."); Stuart P. Green & Matthew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, 75 L. & Contemp. Probs. 33, 57 (2012) (arguing that if "legally significant distinctions between fraud and non-fraud...can be discerned only through abstract philosophical reasoning, it is reasonable to wonder whether the public will lend these distinctions the moral weight required for the law to be effective and legitimate." *Id.* at 34.).
24. 18 U.S.C. § 1344.
25. 18 U.S.C. § 157.
26. 18 U.S.C. § 1030.
27. Renée Johnson, Cong. Research Serv., Food Fraud and "Economically Motivated Adulteration" of Food and Food Ingredients, R43358 (2014).
28. 18 U.S.C. § 1347.
29. 8 U.S.C. § 1325(c) and 18 U.S.C. § 1546(a); *see* USAM § 1948 ("Marriage fraud has been prosecuted, inter alia, under 8 U.S.C. § 1325 and 18 U.S.C. § 1546(a).... The Supreme Court has ruled that the validity of their marriage under state law is immaterial to the issue of whether they defrauded INS." *Id.*) (internal citations omitted). The last century saw enough "new marriage fraud doctrines" "in various areas of the law" that "marriage is [now] being asked to do too much work." Kerry Abrams, *Marriage Fraud*, 100 Cal. L. Rev. 1 (2012).
30. 15 U.S.C. §§ 77x, 78ff.
31. 26 U.S.C. § 7201.
32. Ellen S. Podgor, *Criminal Fraud*, 48 Am. U. L. Rev. 729, 740 (1999). "This number is exclusive of the references found in chapter titles, forfeiture provisions, court rules, definition sections, and the Sentencing Guidelines appended to title 18." *Id.* at 741.
33. Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 Buff. Crim. L. Rev. 249, 289 (1998). This counted "the relevant entries appearing in United States Sentencing Commission, Preliminary Report to the Congress: Statutory Penalties Project Description and Compilations of Federal Criminal Offenses (Nov. 1, 1989). Where a single statute contained multiple and differing prohibitions, the Commission counted each one separately." *Id.* at n.121. *See*, [also], John G. Malcolm, Testimony before Over-criminalization Task Force of the H. Comm. on the Judiciary, *Defining the Problem and Scope of Over-criminalization and Over-federalization* (June 14, 2013) (noting that "[m]any federal laws are duplicative of other federal laws. For example, given the ubiquitous use of the mail and telecommunications facilities, the federal mail and wire fraud statutes can be used by federal prosecutors to reach almost any fraud scheme one could imagine, including many garden-variety schemes that could easily be handled by state authorities. Nonetheless, despite the existence of these two broad statutes, there are dozens of other federal fraud laws focused on different regulatory fields." *Id.*).
34. Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of Criminal Law" 43, 44 (Timothy Lynch ed., 2009).
35. One fraudulent scheme may be considered as one offense or as several separate offenses. The decision on how to count offenses, known as the "unit of prosecution," may entail a difference of many years in potential maximum sentences. *See*, *e.g.*, United States v. Lemons, 941 F.2d 309 (5th Cir. 1991); Steven M. Biskupic, *Fine Tuning the Bank Fraud Statute: A Prosecutor's Perspective*, 82 Marq. L. Rev. 381, 387 (1999) (comparing multiple cases determining the unit of prosecution for bank or loan fraud; whether an indictment is "multiplicitous —that is, it divided a single offense into multiple counts and penalties." *Id.*).

36. *See, e.g.*, United States v. Park, 421 U.S. 658 (1975) (company president can be held liable for presence of rodent droppings at a company warehouse); Andrew Weissmann, Richard Ziegler, Luke McLoughlin & Joseph McFadden, Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior, U.S. Chamber Inst. for Legal Reform (Oct. 2008), http://www.instituteforlegalreform.com/uploads/sites/1/WeissmannPaper.pdf.
37. That possibility brings to mind this joke: "JUDGE: You committed 50 frauds. I sentence you to 20 years' imprisonment for each crime. DEFENDANT: Your honor, I can't serve 1,000 years in prison. JUDGE: Well, do the best you can."
38. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J. L. & Pub. Pol'y 715, 735 (2013). *See also* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157 (2014).
39. Ellen S. Podgor, *Do We Need a "Beanie Baby" Fraud Statute?*, 49 Am. U. L. Rev. 1031, 1032 (2000).
40. *See* Abrams, *supra* note 29.
41. Edwin Meese III, *Testimony before the House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security, Principles for Revising the Criminal Code* (Dec. 13, 2011), http://www.heritage.org/research/testimony/2011/12/principles-for-revising-the-criminal-code.
42. *See* Kozinski & Tsyetlin, *supra* note 34.
43. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. *See* Clinton v. City of New York, 524 U.S. 417 (1998); District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953) ("The repeal of laws is as much a legislative function as their enactment." *Id.* at 113–14.); United States v. Hudson, 11 U.S. 32, 34 (1812). ("[A]ll exercise of criminal jurisdiction in common law cases we are of opinion is not within [the Court's] implied powers."); *see also* U.S. Const. art. I, § 7; INS v. Chadha, 462 U.S. 919 (1983).
44. Two bills in particular that Congress introduced in 2015 suggest that legislative resources are already being spent on figuring out how to clean up the federal criminal code. They are the Regulatory Reporting Act of 2015, H.R. 4003, 114th Cong. (2015), and the Clean Up the Code Act of 2015, H.R. 4023, 114th Cong. (2015).