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Time to Prune the Tree, Part 3: The Need to Reassess the Federal False Statements Laws

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Abstract

False statement laws are now ubiquitous in the U.S. criminal code. The redundancies inherent in today's false statement laws create 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 made only one false statement and therefore truly committed only one crime. A related difficulty is the problem of identifying whether there is but one false statement or there are multiple instances of false statements. Congress should repeal redundant false statement laws and, if necessary, consider revising the general False Statements Act. 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.

Which number is larger, (1) the number of "tall tales" told monthly by fishermen, used-car salesmen, Santa Claus impersonators, and stand-up comedians[2] or (2) the number of federal statutes making it a crime to tell a fib? You might reflexively choose number 1, and you might be right, but there is no guarantee. The reason is that over the past century-plus, Congress has enacted dozens of separate laws making it a crime to utter a "false statement" even though the general false statements statute covers any untruth of any remotely legitimate concern to the federal government.[3]

The ubiquity of false statement laws creates the risk that a person can be charged with multiple offenses and, if convicted, sentenced to consecutive terms of imprisonment for what, in reality, was a single false statement. A separate problem involves the risk that unwitting

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Key Points

- The general federal false statements law should be sufficiently broad to reach nearly any false statement of concern to the federal government.
- There are now so many iterations of false statements that it can be difficult to know exactly what behavior triggers criminal liability.
- The existence of multiple false statements statutes can multiply the number of convictions for what is really only one misleading statement.
- Congress should stop reflexively passing new false statements statutes every time a novel false statement is committed.
- Prosecutors often bring false statements charges when there is insufficient evidence to support a conviction for underlying criminal misconduct.
- 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 false statements laws and, if necessary, revise the general false statement statute.

people will be ensnared by the false statements laws, as was marine biologist Nancy Black. As explained below, Black received a false statements charge as a "thank you" for voluntarily providing an edited video of noisemaking on a whale-watching tour to federal investigators.

There is a way to address this problem: Repeal superfluous false statement laws and revise the False Statements Act (18 U.S.C. § 1001) to restore the original intent behind the law. Instead of enacting new false statement laws, Congress could express its policy determinations that some false statements are more serious than others by directing the U.S. Sentencing Commission to grade the severity of false statements to help district court judges decide an appropriate punishment under the general False Statements Act in a manner similar to what Congress has done for false statements that involve an act of terrorism.[4] That approach would reduce the risks of overcriminalization and oversentencing without preventing the Department of Justice from protecting against the harms of false statements. Such reforms would also indicate that Congress is taking the problem of overcriminalization seriously.

The History of the Law of False Statements

False or deceptive statements have existed since man walked in Eden.[5] Everyone has succumbed at one time or another ("The dog ate my homework, really."). People rationally "detest falsehood"[6] but would not anticipate or desire that every white lie, whopper, or old wives tale should be treated as a crime. We generally expect that some people (think the ones on Capitol Hill, Pennsylvania Avenue, or Madison Avenue) will occasionally (regularly?) stretch the truth (utter bald-faced lies?[7]), and we ordinarily require that some harm result from a lie. Lying to a coworker about your weight generally harms no one, but lying to the NASA technician fitting you for a space suit might. Context matters.

So it was at English common law. Only lies that were made as part of a scheme to obtain another person's property and that "by some material device or token 'against which common prudence and caution could not guard'" were considered criminal.[8] The common law treated "mere verbal representations" as "insufficient to constitute common law cheats."[9] Buyer beware, it seems, was the prevailing rule of thumb. The expectation was that people could and should avoid the average, everyday swindle by exercising common sense and due diligence.

That doctrine changed over time as more complex commercial relations arose.[10] In 1757, Parliament expanded the scope of criminal liability for lies far more broadly than the common-law doctrine in order to punish anyone "who knowingly and designedly, by false pretence" obtains "from any person... money, goods, wares, or merchandizes, with intent to cheat or defraud any person."[11] That statute created the "modern" and farther-reaching criminal prohibition of taking property from another by false pretense. The late Pennsylvania law Professor Arthur R. Pearce observed that English courts applied the statute only rarely and did not give it full effect until 30 years after its enactment.[12] Yet every American jurisdiction followed that development over time.[13] The Pennsylvania legislature called the offense "cheating by fraudulent pretenses";[14] Texas dubbed it "swindling";[15] Rhode Island, "cheats";[16] and Illinois, "the confidence game."[17]

Congress first made it a crime to obtain property by lying in 1863 when it passed the False Claims Act.[18] The act was designed to combat unscrupulous contractors who had defrauded the Union Army during the Civil War, when suppliers and purchasing agents frequently sold faulty and inaccurate counts of guns, livestock, and other provisions.[19] President Lincoln had urged Congress to create "[a]n Act to prevent and punish Frauds upon the Government of the United States" in order to prohibit the filing of "false, fictitious, or fraudulent" monetary claims against the government.[20] Congress responded with the False Statements Act.[21]

That act gave Honest Abe a new tool with which to punish procurement fraud, although it covered much the same conduct as the long-standing common-law prohibition against fraud.[22] This new act appears to have been novel only insofar as it specifically identified the government as the party being protected from deceptive schemes designed to loot the Treasury for financial benefit.[23]

The concept was largely unchanged until the New Deal's outburst of regulatory programs and new agencies,[24] when requirements for the self-reporting of information to the government increased with expansive government programs. When individuals gave inaccurate information about their market transactions to the U.S. government, it bedeviled the Administration's efforts to command and control the

economy.[25] In 1933, Congress enacted the National Industrial Recovery Act (NIRA) as a measure to fix the Great Depression through extensive economic regulations.[26] The law authorized then-President Franklin Roosevelt to exercise broad legislative authority over petroleum markets, including the power to prohibit any production or transportation of oil "in excess of" then-existing state quotas,[27] which Congress had made into a federal crime.[28] "Hot oil" was the term used to describe any oil produced, transported, or sold unlawfully outside of regulated channels.[29] In Texas, the governor had to impose martial law to end the oil rush.[30]

President Roosevelt delegated to the Secretary of the Interior the rulemaking powers over hot oil that Congress had vested in him.[31] The Secretary promptly issued regulations requiring every petroleum producer, purchaser, shipper, and refiner to file monthly statements under oath with the Department of the Interior's Division of Investigations concerning virtually all aspects of their profession related to oil—and Congress had amended the federal false statement law to make it a crime to lie.[32] By requiring that increased regulatory filings must be made under oath concerning virtually every facet of oil production, transportation, and sales, federal law enforcement officers could investigate anyone who lied in informational filings as a means of policing the tightly regulated markets.[33]

Congress had passed a false statement law written to reach beyond "cases where pecuniary or property loss to the government had been caused" to provide prosecutors a tool for "reaching a large number of cases" where individuals were seeking profit outside of regulated channels.[34] To combat false reporting in other administrative arenas, Congress in 1933 began adding to the general Civil War–era statute various specialized false statement laws tailored to specific regulatory schemes.[35] Congress also broadened the false statements statute to cover all government agencies and dropped the requirement of proof in a false statement prosecution that a defendant had some specific intent to defraud.[36] Instead, the statute required a specific intent to make a fraudulent or false statement.[37] Congress also removed the requirement that the falsification be made to obtain some material benefit.[38] Although those changes have broadened the scope of conduct that the general false statements prohibition could cover (maybe Santa Claus impersonators were starting to sweat by now), the statute has faced and survived legal challenges arguing that the law is so open-textured and unintelligible that the average person cannot comprehend all of the conduct it proscribes.[39]

The General False Statement Statute

Today, the general federal false statement statute (18 U.S.C. § 1001(a)) provides as follows:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

Generally, courts require proof of five elements to sustain a conviction under the Act: (1) the defendant made a statement; (2) the statement was false; (3) the statement was made knowingly and willfully; (4) the statement was material; and (5) the statement was within the jurisdiction of a government department or agency.[40] At first blush, a reader might find those elements straightforward, but the statute raises a host of questions regarding its breadth. Some federal courts have attempted to construe the statute narrowly to avoid patently unreasonable or unforeseeable outcomes;[41] others have muddied the waters of what each element may require.

For starters, a false statement may be communicated orally or in writing.[42] It also may be made verbally or silently[43] or, depending on the circumstances, by omission.[44] Second, it is not clear that a statement must be literally false rather than true but misleading.[45] Most federal courts require a false statement to be false.[46] That means a conviction for a false statement could not be based on a factually

true answer to an ambiguous question even if the responder was attempting to mislead the government.[47] A minority of courts disagree, however, holding that if a defendant "falsified, concealed, or covered up" unlawful acts with a statement that was true in fact but intended to mislead, that too may be a federal crime.[48] The Supreme Court of the United States has not settled the issue,[49] with one exception: In the case of a statements statute related to loan and credit applications, there must be some type of factual assertion made in order to have a statement that can be labeled false.[50]

Third, what of "knowingly and willfully"? The Supreme Court has said that the intent requirement applies to the element of falsity: A defendant need not know that his false statements were being made to a federal department or agency.[51] Fourth, how "material" must a false statement be to warrant federal criminal liability? Would you go to Leavenworth for lying to your neighbor about your weight when, unbeknownst to you, he works for the Department of the Interior or NASA? It might depend. To sustain a conviction, a false statement must possess the "natural tendency to influence or [be] capable of influencing, the decision of the decision making body to which it is addressed."[52] It is irrelevant whether a government official is or is not misled by the false statement.[53] If there is a chance that a false statement could influence the federal government, then it is material even if the statement does not ultimately influence any government decision.[54]

Finally, what does it mean to make a statement that is "within the jurisdiction" of the federal government? The Supreme Court has held that a false statement does not have to be made with actual knowledge that the statement is made to or falls under the jurisdiction of the federal government for it to be a crime.[55] All that is required is that the statement concerns a situation in which an agency "has the power to exercise authority in a particular situation."[56] One defendant's false statement in a loan application to a local bank for a loan insured under the provisions of the National Housing Act was considered "a matter within the jurisdiction of an agency of the United States."[57] A corporate officer of an oil distribution company was convicted under 18 U.S.C. § 1001 for falsely certifying shipments of fuel oil to be "stripper crude oil."[58]

Ultimately, the government could plausibly exercise jurisdiction over any statement that relates to an "official, authorized function" of a government agency.[59] Today, the federal government exercises regulatory authority over everything from refrigerators, televisions, showerheads, and lightbulbs in your home[60] to robbery of your home.[61] Giving each element a broad interpretation, it is difficult to discern the limits of liability for false statements just under the general act.[62] One would think, therefore, that the statute should be broad enough to reach any fib or whopper that the federal government could have a good reason to prosecute.[63] But the code does not end there.

The Law of False Statements Today

While the general false statements statute is the tool that is most commonly used to prosecute lies, it is far from the only one.[64] As of 1998, there were 215 federal statutes pertaining to false statements.[65] These additional statutes criminalize nuanced conduct relating to providing false statements to specific government departments or about specific topics already covered by the general false statement statute. There are dozens of specific statutes penalizing false statements that regard fluid milk products;[66] any reports or records required under the Protection of Horses Act;[67] the Tennessee Valley Authority;[68] government trademarks "used or devised by the Indian Arts and Crafts Board";[69] the loss or destruction of commercial fishing vessels or "any equipment or appurtenance which is necessary for the carrying out of fishing operations by a fishing vessel";[70] health care benefit plans;[71] Medicare-funded mental health services;[72] health maintenance organizations' financial disclosures;[73] "any compromise, adjustment, or cancellation of any farm indebtedness";[74] passport applications;[75] immigration documents;[76] and federally insured student loans,[77] to name just a few.[78]

These statutes are scattered across multiple sections of the federal code, making it hard to find them.[79] They are also used with widely varying frequency. For instance, there are no reported prosecutions under Section 831t(b) of Chapter 16 of the U.S. Code, which criminalizes false statements made to or on behalf of the Tennessee Valley Authority.[80] The same can be said for the statute criminalizing false statements to secure an Indian Arts and Crafts Board trademark.[81] On the other hand, there have been over 1,000 reported cases under Section 1546 of Chapter 18, penalizing false statements in immigration documents.[82] When a false statement is made in an immigration document,

however, it is almost certainly a matter within the jurisdiction of the federal government (specifically, the United States Citizenship and Immigration Services component of the Department of Homeland Security), which seems to meet the elements of the general false statements statute.[83]

How Many Types of False Statements Stem from One Act?

Redundancy in the federal criminal code opens the door to multiplicity problems. For example, if someone lies on an immigration form, has he made a false statement under Section 1546 related to immigration documents or the general false statements statute, Section 1001, or both?[84] (A separate issue, addressed elsewhere, is whether he also has committed fraud.[85]) If the person lies eight times on one immigration document, does that equal one violation of the immigration-related statute because there was one document or eight because there were eight separate lies?[86] Because each false statement on an official immigration document may be punished by 10 years, the difference may be one of 70 or more years behind bars.[87] If you add punishment under the general false statement statute, the result is up to another 40 years in prison.[88] If you add fraud or conspiracy to commit fraud, if the person communicates falsehoods through mail or wire communications and seeks out some material benefit (perhaps U.S. residence),[89] that could carry an additional 20-year prison sentence.[90] Any deal that a prosecutor would be willing to offer might start to look very good, no matter how immaterial or obviously incredible the underlying false statement was.

A related problem that involves overlapping statutes is that an individual could be prosecuted under both, although he or she gave only one false statement.[91] In determining whether charges subject a defendant to double jeopardy, the inquiry, adopted in *Blockburger v. United States*, is "whether each provision requires proof of a fact which the other does not."[92] It is not enough that the same conduct underlies the multiple counts; the statutory elements of the offense must be the same in each federal law for the *Blockburger* test to preclude a second prosecution.[93] Congress has been able to avoid the problem by proliferating false statements statutes with just one unique element: fluid milk products, sunken fishing vessels, the Tennessee Valley Authority...the list goes on.

Consider false statements related to health care, for instance. While the general act covers any false statement within the jurisdiction of the government, the health care statute (18 U.S.C. § 1035) covers "any matter involving a health care benefit program."[94] Congress passed Section 1035 after urging that the "Department of Justice (DOJ) needs stronger and more direct statutory authority to deter fraud and abuse against public and private health care plans."[95] Due to the difference in the jurisdictional element, courts have routinely concluded that charging a defendant under both statutes for the same act does not violate double jeopardy.[96] This is the case even though false statements related to health care benefit programs would seem to fall within the government's jurisdiction under Section 1001, given the federal government's claim to tremendous regulatory authority over health care.[97]

False Statements Statutes: For When Other Charges Just Won't Stick?

False statements statutes may also be used when the Justice Department is unable to substantiate alternate allegations.[98] An investigation may start out, for example, based on allegations of insider trading, securities fraud, or breach of fiduciary duties.[99] Those offenses often involve complex subject matter, costly and complex investigations and discovery, and they may be far more difficult to prove in a trial than the accusation that someone made a false statement.[100] The false statement not only is simpler to get across to a jury ("Jurors, the defendant lied"), but also may involve a subject matter that is entirely disconnected from the alleged misconduct that underlies the investigation.[101] If evidence of original allegations never pans out, the prosecution might salvage the investigation and get some return on their investment of time and resources by trapping defendants in a lie and charging them with making a false statement.[102]

On the one hand, this tactic may be helpful to "simplify courtroom narratives"; on the other, however, it can lead to overzealous prosecution.[103] As Supreme Court Justice Ruth Bader Ginsburg put it, under the false statement statutes, "the prospect remains that an overzealous prosecutor or investigator—aware that a person has committed some suspicious acts, but unable to make a criminal case—will create a crime by surprising the suspect, asking about those acts, and receiving a false

denial."[104] Although the problem is not new,[105] recent history provides several examples of false statement prosecutions in the wake of an investigation for other misconduct.

Consider Nancy Black's brush with Section 1001.[106] Fascinated with killer whales since childhood, Nancy became a professional marine science researcher in Monterey Bay and ran whale-watching boat trips.[107] On one of those trips in 2005, the boat captain whistled at an approaching killer whale to attract the animal to stay nearby. Upon finding out about the incident sometime later, Nancy rebuked the captain, informing him that his behavior was "unprofessional."[108] After the captain's then-wife asked government officials whether whistling at a whale violated the Marine Mammal Protection Act of 1972 or any other federal law, a National Oceanic and Atmospheric Administration official contacted Nancy asking for videotape of the events.[109] Nancy handed over video showing the whistling but did not inform the investigator that the tape was edited to exclude portions of the video that showed other crew members allegedly asking passengers to make more noise.[110] For that, Nancy was charged with impeding an investigation into the whistling and lying to the government.[111] She asks, "I wasn't charged with anything about the dealings with the humpback. So why would they charge me with lying about it? It makes no sense."[112]

It is not "altogether uncommon"[113] for prosecutors to use false statements law to throw the book at a defendant, to stand in for other allegations for which sufficient evidence cannot be mustered, or in the rare case to prosecute people like Nancy for doing what she thought was right—even though she was not under any formal investigation at the time she handed over the videotape.[114] Moreover, contrary to the understanding of false pretense offenses at common law and in the Civil War era, Nancy's videotape was not offered to the government to defraud it of money or other property.

False statements are felonies that undoubtedly can be serious in their own right, but they have become so open-textured and ubiquitous in the federal criminal code as to, in the words of Justice Ginsburg, "arm[] Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt."[115] That power should be restrained by repealing excess laws and returning to the common-law understanding of false pretense crimes as deprivations of property, not any lie or affirmative act that prosecutors, with no warning before the fact, can fashion into a violation of one of the dozens of false statements statutes.

Conclusion

Do we really need a separate false statement statute to address statements made to the Tennessee Valley Authority or to secure an Indian Arts and Crafts Board trademark? The lack of prosecutions under the relevant statutes makes clear that we do not. Yet these statutes linger on the books, contributing to overcriminalization and excessive punishments.[116] Only Congress has the constitutional authority to enact the necessary reform.[117]

Congress should stop reflexively passing new false statements statutes every time a novel false statement is uttered; repeal some of the over 150[118] superfluous false statements statutes;[119] and, if necessary, revise the general false statements statute. That would reduce the risk of overprosecution without preventing the Department of Justice from protecting the public. It would also indicate that Congress is taking the problem of overcriminalization seriously.

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Endnotes

1. For Part One, *see* Paul Larkin & 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://bit.ly/2el9bpQ (arguing that "the federal criminal code is long overdue for a 'spring cleaning.'"). For Part Two, *see* Paul Larkin & John-Michael Seibler, *Time to Prune the Tree, Part 2: The Need to Reassess the Federal Fraud Laws*, Heritage Foundation Legal Memorandum No. 185 (Oct. 19, 2016), http://bit.ly/2ebgbMb.
2. We exclude elected officials from the above list because it is unfair to compare professionals with amateurs. For an example of a whopper told by someone well practiced in the art, see Paul Larkin, Jr., *Essay: Philemon, Marbury, and the Passive-Aggressive Assertion of Legal Authority*, 29 BYU J. Pub. L. 241, 260–62 (2014) ("Consider the repeated statements that President Obama made before and after passage of the Patient Protection and Affordable Care Act that the law would cause no one to lose insurance coverage.... Yet, as insured parties began to lose their health care plans in 2012 and 2013, it became undeniable that the President's assurances, to be polite, were fibs. The public likely shares that conclusion, even if most people believe that it is an impolitic point to make out loud. In fact, after dissembling at first even President Obama eventually admitted—in what was surely the understatement of 2013—that Obamacare has not worked out precisely in the manner that he repeatedly assured the public it would. In President Obama's own words, '[t]here is no doubt that the way I put that forward unequivocally ended up not being accurate.' The response from most of the public likely was, 'Tell me something I don't know.'") (footnotes omitted).
3. To date, Congress has enacted as many as or more than 159 statutes "pertaining to false statements." *See* Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 45, 61–62 (1998). The general false statement statute is 18 U.S.C. § 1001 (2012).
4. *See* 18 U.S.C. § 1001(a)(3) (false statements in general are punishable by up to five years imprisonment, whereas a false statement related to terrorism is punishable by up to eight).
5. It took only until the third chapter of Genesis for the "Father of Lies" to make his first appearance and bring about the Fall of Man through a cleverly deceitful tongue. *See Genesis* 3:1–5.
6. *Psalm* 119:163.
7. *See supra* note 2.
8. Arthur R. Pearce, *Theft by False Pretenses*, 101 U. Penn. L. Rev. 967, 969 (1953) (quoting 1 Hawkins, Pleas of the Crown 343–44 (6th ed. 1777), and 2 Edward Hyde East, Pleas of the Crown 817 (1806), both concerning cases at common law).
9. Pearce, *supra* note 8, at 971.
10. Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 Hastings L.J. 157, 160 (2001) (describing the development of fraud, false pretense, and false statements doctrines at common law).
11. 30 Geo. II, c. 24 (1757).
12. Pearce, *supra* note 8, at 969–71.
13. *Id.* at 968 n.6.
14. *Id.* at n.1 (citing Pa. Stat. Ann. tit. 18, § 4836 (Purdon 1945)).
15. *Id.* (citing King v. State, 152 Tex. Cr. 255, 258 (1948)).
16. *Id.* (citing State v. McMahon, 49 RI. 107, 140 Atl. 359 (1928)).
17. *See* Comment, *Recent Cases: Criminal Law. Obtaining Property by False Pretenses. Confidence Game*, 47 U. Chi. L. Rev. 724, 725 (1940) (citing Ill. Rev. Stat. c. 38, § 256 (1939)).
18. *See* Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. *See generally* Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, Okla. Bar J. (2005), *available at* http://www.okbar.org/members/BarJournal/archive2005/Aprarchive05/obj7612fal.aspx (discussing the origins and subsequent history of the law); William J. Schwartz, Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 Colum. L. Rev. 316, 317 (1977) (same).
19. Stuart P. Green, Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime 162 (2006) (hereafter Green, Lying, Cheating, and Stealing).
20. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.
21. By the early 1900s, several states also enacted fraud statutes to address false statements. *See* Note, *Innocent Misrepresentations*, 37 Yale L.J. 1141, 1149 (1928).
22. *See* 2 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law § 8.7, at 382–83 (1986). 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." *Id.* In hindsight, it is difficult to see how signing a purchase order providing for the delivery of 100 rifles with the intent of providing only 80 faulty rifles would not amount to common-law fraud.
23. *See* United States v. Cohn, 270 U.S. 339, 346 (1926) (describing the statutory requirement of fraud against the Treasury); Green, Lying, Cheating, and Stealing, *supra* note 19, at 162; *see also* Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. Marshall L. Rev. 111, 126 (2009) (noting that after *United States v. Cohn*, "cheating the government out of property or money" was the government's concern); *but see* United States v. Gilliland, 312 U.S. 86, 92–94 (1941) (claiming that the

federal prohibition of false statements was not restricted to cases involving pecuniary loss to the government). The Act also allowed private individuals to bring a *qui tam* action—in which a person sues on behalf of the United States—to recover damages from suppliers perpetrating fraud in order to encourage whistleblowing. *See* Act of Mar. 2, 1863, ch. 67, § 6, 12 Stat. 696.

24. Green, Lying, Cheating, and Stealing, *supra* note 19, at 162.
25. *Id.* at 162–63. *See also* Schwartz, *supra* note 18, at 317 (noting legislative history concerning "hot oil.")
26. 48 Stat. 195 (1933).
27. Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935).
28. *See id.* at 414 (discussing § 9(c) of the NIRA, stating that any violation of executive orders issued under the NIRA was punishable by a fine of up to $1,000, imprisonment for up to six months, or both); *Gilliland*, 312 U.S. at 87 (concerning eight counts of false statements related to hot oil).
29. 293 U.S. at 418.
30. *Hot Oil*, Texas State Hist. Assoc. (June 15, 2010), https://tshaonline.org/handbook/online/articles/doh04 ("To evade the state proration laws and the federal regulation of interstate oil transportation imposed under the National Recovery Act, many independent producers resorted to trickery to increase their output. Their methods included tapping underground pipes or reservoirs, loading trucks by moonlight, disguising oil trucks as moving vans, piping oil to moonshine refineries, and using dummy refineries that shipped oil labeled as gasoline. One producer kept at the top of a derrick a lookout who shut off the illegal flow whenever investigators approached; another built a concrete blockhouse over his controls; several provided guns and cash for private guards delegated to deal with state agents, or cheerfully paid $1,000 fines that represented only a fraction of a day's profit.").
31. *Panama Ref. Co.*, 293 U.S. at 406–07.
32. *Id.* at 408. The false statement law in 1934 under which false reports were criminalized specifically made "it a crime knowingly and willfully to 'make or cause to be made any false or fraudulent statements or representations,' or to 'make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement of entry in any matter within the jurisdiction of any department or agency of the United States.'" *Gilliland*, 312 U.S. at 87–90. Thomas Connally, a U.S. Senator from Texas, repackaged the regulations into the Hot Oil Act of 1935 to "protect" interstate commerce from "contraband oil." *See Connally Hot Oil Act of 1935*, Tex. State Hist. Assoc. (Updated June 12, 2010), https://tshaonline.org/handbook/online/articles/mlc03.
33. *See Gilliland*, 312 U.S. at 93 (stating that in the statute at hand, "there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.").
34. *Id.* at 94–95.
35. Green, Lying, Cheating, and Stealing, *supra* note 19, at 163.
36. *See* Morrison, *supra* note 23, at 127 (noting that then-Secretary of the Interior Harold Ickes "sent Congress another draft that protected all government agencies and did not require the government to prove specific intent to defraud. The law then covered statements made in 'any matter within the jurisdiction of any department or agency of the United States.'").
37. *See id.*; Peter W. Morgan, *The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 Nw. U. L. Rev. 177, 205 (1992). The 1934 false statements act was also significant in that Congress severed "the historical link with the false claims portion of the statute." Hubbard v. United States, 514 U.S. 695, 706 (1995).
38. *Hubbard*, 514 U.S. at 706 ("[The 1934 Act] can be viewed as stripping away the financial fraud requirement while not disturbing the pre-existing breadth the statute had enjoyed from its association with the false claims statute.").
39. *See* United States v. Yermian, 468 U.S. 63, 76 (1984) (Rehnquist, J., dissenting) (in a five-to-four decision, Justice William Rehnquist's dissent would have struck down the false statements statute as unconstitutionally vague).
40. With only slight variations across the federal courts. *See* Morrison, *supra* note 23, at 113–14; United States v. Jiang, 476 F.3d 1026, 1029 (9th Cir. 2007); United States v. Robison, 505 F.3d 1208, 1226 (11th Cir. 2007); United States v. Pickett, 209 F. Supp. 2d 84, 87 (D.C. Cir. 2002) (citing United States v. Crop Growers Corp., 954 F. Supp. 335, 349 (D.C. Cir. 1997)); United States v. Kosth, 257 F.3d 712, 718 (7th Cir. 2001).
41. *See* United States v. Levin, 133 F. Supp. 88, 90 (D. Colo. 1953) (arguing that if the statute were construed broadly, "the results would be far-reaching. The age-old conception of the crime of perjury would be gone. Any person who failed to tell the truth to the myriad of government investigators and representatives about the matter, regardless of how trivial, whether civil or criminal, which was within the jurisdiction of a department or agency of the United States, would be guilty of a crime punishable with greater severity than that of perjury.... It is inconceivable that Congress had any such intent when this portion of the statute was enacted.").
42. *See* United States v. Beacon Brass, 344 U.S. 43, 46 (1952); United States v. Massey, 550 F.2d 300 (5th Cir. 1977) (interpreting the Supreme Court's *Beacon Brass* decision to claim that "The United States Supreme Court has already recognized that there is no distinction between oral and written statements under the statute."); United States v. Clifford, 409 F. Supp. 1070, 1074 (E.D.N.Y. 1976) (noting that "the word 'statement' as it appears in the statute has been interpreted to include oral statements not under oath.").
43. "Silence may be falsity when it misleads, particularly if there is a duty to speak." United States v. Mattox, 689 F.2d 531, 533 (5th Cir. 1982) (holding that an omission of required information on a Labor Department form was a false statement under 18 U.S.C. §§ 1001 and 1920).

44. "If there are facts that should be reported, leaving a blank belies the certification that the information therein is 'true and correct.'" *Id.*; United States v. Irwin, 654 F.2d 671, 676 (10th Cir. 1981) (upholding a conviction under Section 1001 for submitting a federal grant application with missing, required information because "leaving a blank is equivalent to an answer of 'none' or a statement that there are no facts required to be reported.").
45. For starters, it would be reasonable to assume that the government cannot convict a defendant for making a false statement if the individual genuinely believes the statement at issue to be true. *See* Morrison *supra* note 23, at 117 ("As of yet, no case exists where the government has charged, much less convicted, a defendant who believed her statement to be true." *Id.*). *But see* United States v. Gahagan, 881 F.2d 1380, 1381 (6th Cir. 1989) (defendant was indicted for concealing ownership of a 1974 Jaguar in failing to disclose the fact of ownership to a probation officer, in violation of 18 U.S.C. § 1001. Defendant was convicted and sentenced to serve one year in prison without parole, although he had sold and transferred title to the car prior to his conversation with the probation officer).
46. *See, e.g.*, United States v. Vesaas, 586 F.2d 101, 104 (8th Cir. 1978) (citing Bronston v. United States, 409 U.S. 352 (1973); United States v. Lozano, 511 F.2d 1, 5 (7th Cir.) (1975); United States v. Steinhilber, 484 F.2d 386, 390 (8th Cir. 1973); United States v. Diogo, 320 F.2d 898, 907 (2d Cir. 1963)) (holding that a statement, although misleading, was literally true and therefore not a false statement).
47. *See Diogo*, 320 F.2d at 905 (2d Cir. 1963).
48. *See* United States v. Stephenson, 895 F.2d 867, 873 (2d Cir. 1990) (affirming a conviction under 18 U.S.C. § 1001 of making a false statement to a government official where the defendant reported that he had been offered a bribe, which was literally true, but only because the defendant himself solicited the bribe).
49. *See* Morrison, *supra* note 23, at 114.
50. *See* Williams v. United States, 458 U.S. 279, 280 (1982) (applying the rule of lenity to determine that a defendant's check-kiting scheme would not support a false statement conviction because "technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" *Id.* at 284.).
51. *Yermian*, 468 U.S. at 69 (stating "there is no basis for requiring proof that the defendant had actual knowledge of federal agency jurisdiction."). In that case, the defendant's "sole defense was that he did not know that the false statement was within the jurisdiction of a federal agency; he thought he was lying only to his private employer." Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 Yale L.J. 1561, 1570 (1994). As Justice Rehnquist notes in his dissenting opinion, this view "extend[s] the scope of the statute even to reach, for example, false statements privately made to a neighbor if the neighbor then uses those statements in connection with his work for a federal agency." *Yermian*, 468 U.S. at 82.
52. United States v. Gaudin, 515 U.S. 506, 509 (1995) (citing Kungys v. United States, 485 U.S. 759, 770 (1988)).
53. *See* Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. Crim. L. & Criminology 529, 547 (2011).
54. *Id.* "The standard for establishing materiality is quite low," in part because of the loose meaning that various courts have read into the materiality requirement. Morrison, *supra* note 23, at 119. Courts have reasoned "that a statement is material if it was 'predictably capable' of affecting a decision; had a 'natural and probable effect' of interfering with government decisionmaking; had a 'propensity' to influence; 'might have' influenced a government function; had the 'potential' to influence; and 'could have' affected a decision." *Id.* at 119, nn. 47–52 (citing United States v. Turner, 551 F.3d 657, 663 (7th Cir. 2009); United States v. Silva, 119 F. App'x 892, 894 (9th Cir. 2004) (stating "the question of materiality should be submitted to the trier of fact to determine whether the statement 'has the propensity to influence agency action.'") (citation omitted); United States v. Alemany Rivera, 781 F.2d 229, 234 (1st Cir. 1985); United States v. Richey, 279 F. App'x 779, 781 (11th Cir. 2008)).
55. *See Yermian*, 468 U.S. at 66–67, 68–69.
56. United States v. Oren, 893 F.2d 1057, 1064 (9th Cir. 1990) (quoting United States v. Rodgers, 466 U.S. 475, 479 (1984)). As another Ninth Circuit Court of Appeals decision claims, "[f]or this 'jurisdiction' element to be satisfied, there is no requirement that the false statement be made directly to the federal agency. It is, however, necessary under section 1001 that 'the false statement involve a matter within federal agency jurisdiction at the time it was made.'" United States v. Green, 745 F.2d 1205, 1210 (1984).
57. United States v. Mellon, 96 F.2d 462, 463 (2d Cir. 1938).
58. United States v. Wolf, 645 F.2d 23, 24-25 (10th Cir. 1981). Ultimately, the government could plausibly exercise jurisdiction over any statement that relates to an "official, authorized function" of a government agency.
59. *See Id.*; United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972) ("[V]irtually any false statement, sworn or unsworn, written or oral, made to a government employee could be penalized as a felony.").
60. Katie Tubb, Nicolas D. Loris & Paul J. Larkin, Jr., *The Energy Efficiency Free Market Act: A Step Toward Real Energy Efficiency*, Heritage Foundation Backgrounder No. 3144 (Aug. 17, 2016), http://bit.ly/2c05Vl2.
61. Taylor v. United States, 136 S.Ct. 2074 (June 20, 2016) (holding that the federal government has jurisdiction over a home robbery because it targeted a federally regulated thing, in this case marijuana).
62. A defendant who falsely maintains his innocence of a state crime to a federal investigator can be charged with making false statements and be subject to a federal felony prosecution. *See, e.g.*, United States v. Tabor, 788 F.2d 714, 716 (11th Cir. 1986), *abrogated by* Brogan v. United States, 522 U.S. 398 (1998) (Tabor was convicted under § 1001 for denying a violation of state law governing notary publics to an IRS agent.

The conviction was reversed on appeal based on the "Exculpatory No" Doctrine, but that doctrine has since been repudiated, so a defendant in Tabor's situation would seemingly be convicted under similar circumstances today). The Exculpatory No Doctrine provided that a statement that would otherwise violate Section 1001 was exempt from prosecution "if it conveys false information in a situation in which a truthful reply would have incriminated the interrogee" and was limited to simple words of denial. Scott D. Pomfret, Note, *A Tempered "Yes" to the "Exculpatory No"*, 96 Mich. L. Rev. 754, 755–56 (1997). The Supreme Court rejected the doctrine in *Brogan*. *Brogan*, 522 U.S. at 404, 415–418.

63. "While Congress has enacted numerous specific statutes to deal with particular types of fraud against the government, enforcement efforts rely principally on five rather general statutes: 18 U.S.C. §§ 287 (false claims), 371 (conspiracy), 1001 (false statements), 1341 (mail fraud) and 1343 (wire fraud)." The general false statements statute is the only false statements statute listed that the Department of Justice "principally" invokes. Dep't of Justice, United States Attorney's Manual § 901 (hereafter USAM § 901).
64. The Department of Justice in the mid-1970s counted 159 statutes pertaining to false statements made to government officials. *See* Gainer, *supra* note 3, at 61–62.
65. *Id.*
66. 7 U.S.C. § 6407(e).
67. 15 U.S.C. § 1825(a)(2)(B).
68. 16 U.S.C. § 831t(b).
69. 18 U.S.C. § 1158.
70. 22 U.S.C. §§ 1980(a)–(g).
71. 18 U.S.C. § 1035.
72. 42 U.S.C. § 290cc-32.
73. 42 U.S.C. § 300e-17(h).
74. 18 U.S.C. § 1026.
75. 18 U.S.C. § 1542.
76. 18 U.S.C. § 1546.
77. 20 U.S.C. § 1097(b).
78. There are also a number of obscure federal laws providing for civil enforcement actions for false statements made within the jurisdiction of a federal agency. Consider, for example, Tyce Walters, Note, *Regulatory Lies and Section 6(c)(2): The Promise and Pitfalls of the CFTC's New False Statement Authority*, 32 Yale L. & Pol'y Rev. 335 (2013) ("Among the many changes wrought by Dodd–Frank was the grant of a significant but little-noticed power to the Commodity Futures Trading Commission (CFTC) to bring civil enforcement actions against those who make false representations to the Agency.") (citing 7 U.S.C. § 9(2) (2012)).
79. *See supra* notes 66–77.
80. 16 U.S.C. § 831t(b); the Citing References on the Westlaw online legal research database reveal zero cases involving a criminal prosecution under this statute.
81. 18 U.S.C. § 1158.
82. The Citing References on the Westlaw online legal research database reveal approximately 1,000 cases in federal court as of August 15, 2016, that involve 18 U.S.C. § 1546, dating back to its enactment in 1996.
83. Congress has amended the immigration statute several times. At the time of the 1996 amendment, *The New York Times* reported an "atmosphere of crisis" in Washington over "the 'flood' of immigration," which helps to explain Congress's belief that the later-enacted, particularized statute should be amended rather than repealed. Richard Rayner, *What Immigration Crisis?*, N.Y. Times (Jan. 7, 1996), http://www.nytimes.com/1996/01/07/magazine/what-immigration-crisis.html?_r=0 (noting that "all Washington has been grandstanding on the issue. Dozens of immigration-related bills were introduced last term.").
84. The answer seems to be both. For a recent example, *see* United States v. Svihel, No. 15CR19024DSDLIB, 2016 WL 1212364, at *3 (D. Minn. Feb. 25, 2016) ("The Superseding Indictment also charged Defendant Svihel and Defendant Farm with eight counts of false swearing in an immigration matter, in violation of 18 U.S.C. § 1546(a); and eight counts of false statements, in violation of 18 U.S.C. §§ 1001.").
85. *See id.*; Larkin & Seibler, *Time to Prune the Tree, Part 2: The Need to Reassess the Federal Fraud Laws*, *supra* note 1. The general mail fraud and wire fraud statutes, 18 U.S.C. § 1341 and 18 U.S.C. § 1343, also punish any fraudulent scheme that makes use of the mail and wire communications systems, and similar problems of multiplicity appear in the fraud context.
86. This decision of how to count offenses is known as the "unit of prosecution." *See* United States v. Lemons, 941 F.2d 309 (5th Cir. 1991) (discussing the doctrine and multiplicity in relation to fraud); Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 Penn St. L. Rev. 1107, nn. 44, 46, 58 (2005) (citing cases dealing with the unit of prosecution in false statements prosecutions and generally discussing indictments with multiple counts for multiple lies).
87. 18 U.S.C. § 1546(a).

88. 18 U.S.C. §1001(a)(3). What consequences do these practices of overcriminalization create? 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 [a false statement], the number of [false statement] 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." 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).
89. *See* 18 U.S.C. § 1349 (carrying the same penalty as mail fraud or wire fraud).
90. *See* 18 U.S.C. §§ 1341, 1343.
91. The Double Jeopardy Clause of the U.S. Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Supreme Court has explained that this clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Grady v. Corbin, 495 U.S. 508, 515 (1990) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).
92. 284 U.S. 299, 304 (1932).
93. *See*, *e.g.*, United States v. Chacko, 169 F.3d 140, 146 (2d Cir.1999) ("It is not determinative whether the same conduct underlies the counts; rather, it is critical whether the 'offense'—in the legal sense, as defined by Congress—complained of in one count is the same as that charged in another.").
94. *Compare* 18 U.S.C. § 1001 *with* 18 U.S.C. § 1035.
95. H.R. Rep. 104-747, at 2 (1996) (finding of Rep. Clinger).
96. *See* United States v. Dose, No. CR04-4082 MWB, 2005 WL 1806414, at *11 (N.D. Iowa July 28, 2005) (finding that "a person could violate § 1035 in connection with the delivery of health care services under a private health care benefit program and not concurrently violate § 1001" and vice versa); United States v. Hinman, No. CR04-4082-MWB, 2005 WL 958395, at *18 (N.D. Iowa Apr. 22, 2005) (arguing that one can violate section 1035 and not section 1001 and vice versa); United States v. Sachakov, 812 F. Supp. 2d 198, 209 (E.D.N.Y. 2011) (same).
97. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012) (illustrating the scope of federal regulatory authority over health care); *but see* Steven Harrison et al., *Health Care Fraud*, 52 Am. Crim. L. Rev. 1223, 1275 (2015) ("Under § 1001, the defendant must have made a false statement 'in any matter within the jurisdiction of any department or agency of the United States' to face prosecution. Because courts have broadly interpreted this element in the context of health care fraud, a statement made to an intermediary of the government, *such as a private insurance company*, can often count as a violation of this provision.") (emphasis added).
98. *See* Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 Cal. L. Rev. 1515, 1535–36 (2009) (explaining that "it is in white collar cases, where the underlying misconduct can be tricky to prove in court, that deception is typically charged as a freestanding crime. It can be difficult, for example, to prove accounting fraud beyond a reasonable doubt, and focusing on criminal deception makes a more straightforward appeal to the jury.... § 1001 often provides prosecutors with substitute offenses."); United States v. Bush, 503 F.2d 813, 814–19 (5th Cir. 1974) (charges arising from IRS agent questioning without accompanying tax charges); United States v. Stark, 131 F. Supp. 190, 207 (D. Md. 1955) (§ 1001 indictment for denying accusations of bribery).
99. *See* Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. Corp. L. 361, 410–12, 421 (2008). Obstruction of justice is another example of that practice. *See*, *e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696, 706–08 (2005) (reversing obstruction of justice conviction following accounting fraud investigation).
100. *See* Hurt, *supra* note 99, at 410–11; Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 Loy. L.A. L. Rev. 1, 13–14 n.32 (2013) (identifying challenges in conducting corporate criminal investigations).
101. Hurt, *supra* note 99, at 410–11; Griffin, *supra* note 98, at 1516 ("Although in some cases organic and proxy false statement charges merely supplement the underlying crimes, in others, there is no stand-alone offense, and false statements supply the only prosecutable crime."); Todd S. Kurihara & Kenneth T. Whang, *False Statements and False Claims*, 44 Am. Crim. L. Rev. 491, 493 (2007) (arguing that "prosecutors use § 1001 most often because they can enforce it either alone or in tandem with more specific statutes, such as § 287.18 Also, it is used frequently because of the comparative malleability of its elements.").
102. *See* Kevin McGill, *Plea to Lesser Charge Means No Prison for Ex-BP Engineer in Spill Probe; Lawyer Rips DOJ*, U.S. News (Nov. 6, 2015), http://www.usnews.com/news/us/articles/2015/11/06/ex-bp-engineer-pleads-guilty-in-gulf-oil-spill-probe (former BP engineer pleaded guilty to "intentionally causing damage without authorization to a protected computer" after being accused of obstructing an investigation—which carries a 20 year maximum prison sentence—into the Gulf of Mexico oil spill by deleting text messages with a friend who was a BP contractor).
103. Griffin, *supra* note 98, at 1535; *see also* Schwartz, *supra* note 18, at 325–26 ("Moreover, in a criminal context, section 1001 may invite investigatorial and prosecutorial overreaching. Since agents may often expect a suspect to respond falsely to their questions, the statute is a powerful instrument with which to trap a potential defendant. Investigators need only informally approach the suspect and elicit a false reply and they are assured of a conviction with a harsh penalty even if they are unable to prove the underlying substantive crime.").

104. *Brogan*, 522 U.S. at 416. *See also* David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 Fordham Urb. L.J. 509, 515–16, 531–32 (1999) (discussing the role of prosecutors' discretion in the context of false statements).

105. *See* Note, *Obscene Harpies and Foul Buzzards? The F.B.I.'s Use Of Section 1001 In Criminal Investigations,* 78 Yale L.J. 156, 170 (1968) (arguing that the general false statements statute "was not designed to address the problem of false statements made to a government investigator during the investigation of a crime. Use of the statute in such situations creates problems that are too serious.").

106. Consider also the case against Martha Stewart, who was investigated for, but never charged with, insider trading in 2001, because prosecutors did not feel they had enough evidence. *See* Charles Gasparino & Jerry Markon, *Martha Stewart Is Given Notice Of Possible Charges by the SEC*, Wall St. J. (Oct. 22, 2002), http://www.wsj.com/articles/SB1035231314576107071; Tom Petruno, *Insider Trading, Tough to Prove, Isn't Part of Stewart Criminal Case*, L.A. Times (June 5, 2003), http://articles.latimes.com/2003/jun/05/business/fi-insider5. However, the S.E.C. did file a separate civil complaint against Steward for insider trading, which the parties later settled. *Martha Stewart and Peter Bacanovic Settle SEC's Insider Trading Charges*, S.E.C. (Aug. 7, 2006), *available at* https://www.sec.gov/news/press/2006/2006-134.htm. Stewart was charged with and later convicted of "conspiracy, obstruction of an agency proceeding, and making false statements to government officials." United States v. Stewart, 305 F. Supp. 2d 368, 371 (S.D.N.Y. 2004); Indictment, United States v. Martha Stewart, No. 03717 (S.D.N.Y. June 4, 2003), available at http://news.findlaw.com/cnn/docs/mstewart/usmspb10504sind.html. While Stewart was also criminally charged with securities fraud, the trial court judge granted a judgment of acquittal due to insufficiency of the evidence. U.S. v. Stewart (Stewart I), 305 F. Supp. 2d 368, 378 (S.D.N.Y. 2004).

107. John R. Emshwiller & Gary Fields, *For Feds, "Lying" Is a Handy Charge*, Wall St. J. (Apr. 9, 1012), http://www.wsj.com/articles/SB10001424052702303299604577328102223038294.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* This unforeseeable application of the false statement law runs afoul of another elementary rule of constitutional law that the government must provide the public fair notice of what conduct is met with criminal sanction, so the average person may act lawfully without a lawyer's supervision. *See* Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, 65 Rutgers L. Rev. Commentaries 1, 3–4 (2014).

113. *Brogan*, 522 U.S. at 410 (Ginsburg, J., concurring) (citing cases that illustrate the potential for abuse of false statements laws).

114. *See* Emshwiller & Fields, *supra* note 107; *Gaudin*, 28 F.3d at 944 (The government contended that Gaudin misled the Federal Housing Authority by using "strawbuyers" to obtain houses for himself with FHA loans. Gaudin was not charged with fraud; instead, he was charged with making false statements on FHA forms); *Tabor*, 788 F.2d at 716; *see also* Hurt, *supra* note 99, at 410–11; *Levin*, 133 F. Supp. at 90 (stating that "inquiry might be made of any citizen concerning criminal cases of a minor nature, or even of civil matters of little consequence, and if he wil[l]fully falsified his statements, it would be a violation of this statute.").

115. *Brogan*, 522 U.S. at 409 (Ginsburg, J., concurring).

116. *See* Gainer, *supra* note 3, at 59.

117. Article I vests "[a]ll legislative Powers" in Congress, including the power to repeal statutes. 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* U.S. Const. art. I, § 7; INS v. Chadha, 462 U.S. 919 (1983). 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).

118. *See* Gainer, *supra* note 3, at 62.

119. The federal code contains an excess of "redundant, superfluous, and unnecessary" criminal laws. 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. They create a number of moral hazards that degrade the fairness of the criminal process by overarming prosecutors against defendants. *See* 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).