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## Criminal Fraud

Ellen S. Podgor

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# Criminal Fraud

**Keywords**

Criminal Fraud, Fraud, Federal Criminal Law, Fraud Statutes, Monetary Threshold

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ARTICLES

CRIMINAL FRAUD

ELLEN S. PODGOR\*

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\* Professor of Law, *Georgia State University College of Law*; Visiting Scholar, *Yale Law School*, Fall 1998; L.L.M., 1989, *Temple University School of Law*; M.B.A., 1987, *University of Chicago*; J.D., 1976, *Indiana University School of Law at Indianapolis*; B.S., 1973, *Syracuse University*; co-author of JEROLD H. ISRAEL, ELLEN S. PODGOR & PAUL D. BORMAN, *WHITE COLLAR CRIME: LAW AND PRACTICE* (1996) and ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* (1997). The author wishes to thank Professor Peter Henning, Professor Jerold Israel, Professor Dan Kahan, Dean Eliezer Lederman, and the participants in a faculty workshop at *Quinnipiac College School of Law* for their helpful comments on a draft of this Article. The author thanks Anthony Volkodav for his research assistance. The author also thanks *Georgia State University College of Law* for its financial assistance during the writing of this Article.

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## INTRODUCTION

The focus of many white collar criminal offenses<sup>1</sup> is fraud. Yet, fraud is not a crime with prescribed elements. In the federal system, there is no indictment or conviction for fraud.<sup>2</sup> Rather, as in English law, the term “fraud” is a “concept”<sup>3</sup> at the core of a variety of criminal statutes.<sup>4</sup>

Although fraud is not a crime in itself, fraud is an integral aspect of several criminal statutes.<sup>5</sup> For example, one finds generic statutes such as mail fraud<sup>6</sup> and conspiracy to defraud<sup>7</sup> being applied to an

1. An array of definitions have been given to describe white collar crime. *See generally* David T. Johnson & Richard A. Leo, *The Yale White-Collar Crime Project: A Review and Critique*, 18 L. & SOC’Y INQUIRY 63, 65-69 (1993) (reviewing various definitions of white collar crime). Edwin Sutherland originally coined the term “white collar crime” in a speech given to the American Sociological Society. *See* Edwin H. Sutherland, *White-Collar Criminality*, Annual Presidential Address Before the American Sociological Society (Dec. 27, 1939), *reprinted in* 5 AM. SOC. REV. 1, 2 (1940) (explaining that traditional conceptions and explanations of crime neglected the criminal behavior of professional, “white-collar” individuals).

2. A state, however, may have a statute exclusively labeled “fraud.” *See* N.M. STAT. ANN. § 30-16-6 (Michie 1978) (stating that the intentional misappropriation or taking from another of something of value through fraudulent practices constitutes fraud in a criminal sense).

3. *See* ANTHONY ARLIDGE ET AL., *ARLIDGE & PARRY ON FRAUD* 33 (2d ed. 1996) (introducing a section entitled “The Concept of Fraud,” which considers the types of dishonest conduct that may amount to criminal fraud).

4. Despite the lack of a single, unified crime of fraud, statutes exist that specify the ramifications of a fraud conviction. *See, e.g.*, 5 U.S.C. § 8902(a) (1994) (mandating the automatic debarment of a healthcare provider convicted of a criminal offense involving fraud); 29 U.S.C. § 1111 (1994) (prohibiting those convicted of fraud from holding any position in an employee benefit plan, or any position as a consultant to an employee benefit plan, or any position with decision-making control and/or custody over money and property of an employee benefit plan).

5. Fraud is not limited to the criminal context. For example, one finds references to fraud in contract and tort law. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 526-528, 530, 538 (1976) (addressing various types of misrepresentations and whether or not a finding of fraud is appropriate); RESTATEMENT (SECOND) OF CONTRACTS §§ 159-162 (1979) (defining misrepresentation, concealment, assertions by non-disclosure, and fraudulent misrepresentations). The *Restatement of Restitution* states:

- (1) “Fraud” in the Restatement of this Subject, unless accompanied by qualifying words, means
- (a) misrepresentation known to be such, except as stated in Subsection (3), or
  - (b) concealment, or
  - (c) non-disclosure, where it is not privileged, by any person intending or expecting thereby to cause a mistake by another to exist or to continue, in order to induce the latter to enter into or refrain from entering into a transaction.

RESTATEMENT OF RESTITUTION § 8 (1937); *see also* Frank J. Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer*, 20 CAMPBELL L. REV. 1, 1 (1997) (noting that fraud has characteristics of both tort and contract).

6. *See* 18 U.S.C. § 1341 (1994) (prohibiting the use of the post office or interstate carrier for the execution of a scheme or artifice to defraud).

7. *See id.* § 371 (criminalizing conspiracy by two or more persons to defraud the United

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ever-increasing spectrum of fraudulent conduct.<sup>8</sup> In contrast, other fraud statutes, such as computer fraud<sup>9</sup> and bank fraud,<sup>10</sup> present limited applications that permit their use only with specified conduct. In recent years, criminal fraud statutes have multiplied, offering new laws that often match legislative or executive priorities.<sup>11</sup>

The “concept” of fraud also appears in varying roles within criminal statutes. In addition to fraud being conduct subject to punishment,<sup>12</sup> fraud can also present itself as the level of mens rea required for certain criminal activity.<sup>13</sup> For example, some fraud statutes use the term “fraudulently”<sup>14</sup> to describe the intent required of the actor. A statute may also use “obtains by fraud” to describe

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States or one of its agencies).

8. See Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 408 (1959) (observing that the terms “conspiracy” and “defraud” have taken on very broad and unspecific meanings); Peter Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 438 (1995) (explaining the expansive nature of the mail fraud statute).

9. See 18 U.S.C. § 1030 (1994 & Supp. 1997) (proscribing conduct that involves intentionally accessing a computer, without authorization, to obtain confidential information such as government classified information or financial records).

10. See 18 U.S.C. § 1344 (1994) (prohibiting the use of false pretenses to defraud or obtain moneys or funds from a financial institution).

11. See, e.g., 18 U.S.C. § 1030 (1994 & Supp. 1997) (prohibiting individuals from obtaining restricted information through unauthorized access to computers); *id.* § 1347 (providing criminal penalties for one who defrauds any health care benefit program). These statutes were adopted when Congress and federal policymakers claimed that existing enforcement tools were inadequate to fight increasingly sophisticated schemes of fraud and abuse. See H.R. REP. NO. 104-747, pt. 1, at 1 (1996) (summarizing the estimated \$100 billion problem of health care fraud); H.R. REP. NO. 98-894, at 8-9 (1984) (emphasizing the need for legislation that addresses computer fraud given the computer’s increasing prevalence in society). Claiming that there is an increase in fraud, however, is not new. See EMLIN MCCLAIN, 1 TREATISE ON THE CRIMINAL LAW 669 (1897) (“If it seems that frauds are multiplying, a full explanation of any such appearance is to be found in the tendency toward a vast increase of the business that is done on faith and credit . . .”).

12. For example, frauds using the wire, radio, or television may be subject to prosecution under the crime labeled wire fraud. See 18 U.S.C. § 1343 (1994) (providing for a fine or imprisonment of up to five years for fraud by wire, radio or television, and up to 30 years imprisonment or a fine of \$1,000,000 if such fraud affects a financial institution).

13. It can be argued that some statutes use fraud in describing both the conduct and the mens rea. See *id.* § 1341 (limiting punishment under the “Frauds and Swindles” section of the mail fraud chapter to those who act with the intent to defraud). In addition to being the essence of the offense or the mens rea of a crime, fraud can also play a tangential role in a criminal statute. For example, some statutes speak of a “fraudulent statement” as one of several routes for imposing criminal liability. The primary false statements statute prohibits one from making “any materially false, fictitious, or fraudulent statement or representation . . .” 18 U.S.C. § 1001 (1994 & Supp. 1997). Other statutes, including 26 U.S.C. § 9012(d), impose criminal liability for “fraudulent evidence.” See 26 U.S.C. § 9012(d) (1994) (making unlawful the act of knowingly and willfully providing false information to the Federal Election Commission).

14. For example, one who “fraudulently alters, defaces . . . any of the coins coined at the mints of the United States” faces fines or imprisonment. See 18 U.S.C. § 331 (1994). Similarly, the section of title 18 dealing with the impersonation of American National Red Cross members provides for a fine or imprisonment for anyone who pretends to be a Red Cross agent in a fraudulent effort to collect or receive donations. See *id.* § 917.

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both the method of conduct, as well as the mental element.<sup>15</sup> Other statutes use the term “defraud”<sup>16</sup> or require an “intent to defraud.”<sup>17</sup> Finally, some provisions speak in terms of a “scheme or artifice to defraud.”<sup>18</sup>

In addition to the legislature, executive priorities also present a clear voice in the development of fraud.<sup>19</sup> The expansion of enforcement in the areas of health care fraud and financial institution fraud has been in large part an executive function.<sup>20</sup> One finds prosecutorial influence in legislation,<sup>21</sup> as well as in the extensive use of particular statutes to meet Justice Department priorities.<sup>22</sup> In addition to merely using fraud statutes as a tool for

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15. See, e.g., *id.* § 666. This section of title 18 concerning federally funded programs and theft or bribery therein criminalizes, in certain specified circumstances, the conduct of one who “embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner, or intentionally misapplies, property . . . .” *Id.*

16. See *id.* § 1013 (criminalizing the act of deceiving or defrauding a person or organization by misrepresenting the character of a farm loan bond or debenture issued by the Federal Government).

17. The section of title 18 pertaining to the impersonation of 4-H Club members or agents provides for the punishment, by fine or imprisonment, of anyone who “falsely and with the intent to defraud” pretends to be an agent of the 4-H Clubs. See *id.* § 916; see also *id.* § 1022 (providing that whoever makes or delivers articles to be used in the military or naval service with the intention of defrauding the United States shall be fined or imprisoned for up to ten years).

18. See, e.g., 18 U.S.C. § 157 (1994) (prohibiting persons from filing a petition under title 11 in order to further a fraudulent scheme); *id.* § 1341 (criminalizing mailing in furtherance of a “scheme or artifice to defraud”).

19. External factors, such as the media, can also have an impact on the development of the law. See Sara Sun Beale, *What’s Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 49-51 (1997) (explaining that the news and entertainment media’s coverage of crime influences viewers to perceive crime as an important topic and that crime should, therefore, be addressed by those maintaining or running for elected office).

20. Attorney General Janet Reno has made health care fraud prosecution the Justice Department’s second priority, following only violent crime. See Barton Carter et al., Note, *Health Care Fraud*, 34 AM. CRIM. L. REV. 713, 714 (1997) (citing Pam Belluck, *In Crackdown on Health Care Fraud, U.S. Focuses on Training Hospitals and Clinics*, N.Y. TIMES, Dec. 12, 1995, at A32). The FBI’s investigations into white collar offenses, such as health care fraud and financial institution fraud, also affect the law’s development. See *FBI’S White Collar Crime Program Expanding Rapidly*, 8 Corp. Crime Rep. (Am. Communications & Publ’g Co.) 4, 4 (Oct. 17, 1994). Some argue that the federal role should be “limited to cases beyond the reach of most local prosecutors and which pose the greatest risk to society, like those involving large criminal organizations and those with substantial interstate or foreign elements.” Joe D. Whitley, *White Collar Crime: A Real Priority*, LEGAL TIMES, Sept. 27, 1993, at 19.

21. In discussing “Medicare and Medicaid fraud and abuse, and the Department of Justice’s health care fraud enforcement program,” Gerald Stern, Special Counsel for Health Care Fraud at the Department of Justice, stated that Congress could aid anti-fraud enforcement efforts by passing a general health care fraud statute. Prosecutors would then no longer have to use mail fraud, wire fraud, money laundering, and other statutes for health care fraud cases. See *Keeping Fraudulent Providers Out of Medicare and Medicaid: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations, House Comm. on Government Reform and Oversight*, 104th Cong. 50 (1995) (statement of Gerald Stern, Special Counsel for Health Care Fraud, U.S. Department of Justice).

22. See Charles Pereyra-Suarez & Carole A. Klove, *Ring Around the White Collar: Defending*

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prosecuting criminality, prosecutors have also generated new theories of fraud.<sup>23</sup>

As one might suspect, the legislature and executive are not the sole sources framing the “concept” of fraud. Judicial interpretation also affects the amount of flexibility offered under a fraud statute.<sup>24</sup> For example, the “scheme or artifice to defraud” element of generic fraud statutes, such as mail fraud, has expanded and contracted throughout the years.<sup>25</sup> In some instances courts have allowed a fraud statute to reach a new type of criminality unanticipated by Congress.<sup>26</sup> Recent judicial rejection of prosecutors’ attempts to use novel theories of prosecution, however, has aptly placed limits on the government’s ability to bring additional activities under the definition of criminal fraud.<sup>27</sup>

This Article commences with a discussion of the “concept” of

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*Fraud and Abuse*, 18 WHITTIER L. REV. 31, 31 (1996) (noting that, in response to the Justice Department’s top priority of preventing fraud and abuse in the health care industry, the U.S. Attorney’s Office in Los Angeles is enforcing several federal fraud statutes including those involving the Medicare and Medicaid programs, false statements to the government, mail fraud and wire fraud laws, and other statutory provisions).

23. See, e.g., *United States v. D’Amato*, 39 F.3d 1249, 1255 (2d Cir. 1994) (vacating a conviction and dismissing an indictment where prosecutors alleged that the defendant had used mailings as part of a scheme to defraud a corporation, its officers, directors, and shareholders of the right to control corporate funds).

24. See Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 9 (1997) (stating that Congress implicitly delegates lawmaking power to the judiciary when it uses ambiguous terms such as “fraud,” “thing of value,” and “enterprise” in federal criminal statutes).

25. See John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the “Evolution” of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 4-7 (1983) (reviewing cases demonstrating the evolution of the mail fraud statute; the expansion of embezzlement to include misappropriation of partnership assets; the inclusion of computer fraud and other privacy invasions in fraud statutes; and the judiciary’s disregard of the elements of criminal larceny in fraudulent misrepresentation cases); see also Henning, *supra* note 8, at 438-39 (pointing out that courts impose few restrictions on their application of the “scheme and artifice to defraud element”); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 160-61 (1994) (discussing the courts’ broad interpretation of the “scheme to defraud” element of the mail fraud statute); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 226-29 (1992) (providing a brief history of the mail fraud statute’s “scheme to defraud” element); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 789-90 (1980) (introducing the discussion of the different trends in judicial interpretation of the mail fraud statute); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 151 (1990) (noting the “floating definition of ‘a scheme to defraud’”).

26. See, e.g., *Carpenter v. United States*, 484 U.S. 19, 28 (1987) (allowing intangible property as a scheme to defraud for the purposes of mail fraud).

27. See, e.g., *United States v. McNally*, 483 U.S. 350, 356 (1987) (stating that “[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of citizenry to good government”); *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996) (stating that “fraud statutes do not cover all behavior which strays from the ideal”); *D’Amato*, 39 F.3d at 1261-62 (rejecting the use of the “false pretenses theory” for an alleged excessive attorney fee); see also, e.g., Dean Starkman, *Fraud-Conviction Reversals Imply Overzealous Use of Broad Laws*, WALL ST. J., July 2, 1997, at B7 (discussing whether reversals of mail and wire fraud convictions indicate that the prosecution has gone too far in its use of these broad laws).

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fraud, noting possible parameters of the term.<sup>28</sup> The term “fraud” and the manifestations of this term in the federal code are outlined.<sup>29</sup> Although fraud’s appearance within the Model Penal Code is examined,<sup>30</sup> this Article focuses on federal criminal fraud. It does not debate where the appropriate division should be with respect to state and federal criminality. This Article is further limited to criminal fraud, omitting the use of the term in the civil context. Additionally, it only considers instances where fraud serves as the conduct of an offense, as opposed to being a mens rea used within a statute.

This Article describes the spectrum of fraud offenses. The emphasis placed on the object of the fraud offense determines where on the spectrum the offense lies. As used throughout this Article, the term “object” refers to the legislative reference within the fraud statute to the type of conduct criminalized.<sup>31</sup> At one extreme are generic fraud statutes, encompassing a wide range of fraudulent conduct.<sup>32</sup> At the opposite extreme are statutes that specifically limit the object of the offense to a narrow range of fraudulent conduct.<sup>33</sup> Placement on this spectrum can be a function of legislative language, judicial interpretation, and prosecutorial application.

Various methods for limiting fraud statutes are noted.<sup>34</sup> The general object of the offense can be restricted,<sup>35</sup> as can the specific terms within the statute.<sup>36</sup> Additionally, the manner in which the statute expresses the fraud element can limit the offense.<sup>37</sup> For example, statutes using the term “scheme to defraud” tend to offer a more pervasive application.<sup>38</sup> Finally, fraud statutes can be restricted by providing a high monetary threshold that makes the offense

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28. See *infra* Part I.A (defining criminal fraud).

29. See *infra* Part I.B (highlighting three approaches to fraud that can offer possible definitions to the term).

30. See *infra* Part I.C (noting the limited appearance of fraud in the Model Penal Code).

31. See, e.g., 18 U.S.C. § 1341 (1994) (criminalizing mail fraud); *id.* § 1343 (criminalizing wire fraud); *id.* § 1344 (criminalizing bank fraud).

32. See *infra* Part II.A (discussing fraud statutes that employ generic language; namely conspiracy to defraud, mail fraud and wire fraud).

33. See *infra* Part II.B (reviewing specific fraud statutes including bankruptcy fraud, health care fraud, marriage fraud, and bank fraud, which employ specific language and objects).

34. See *infra* Part III (explaining that limiting the object of the offense, the definition of fraud, or the monetary amount to which the statute applies are three methods by which the legislature can set the parameters of a fraud statute).

35. See *infra* text accompanying notes 221-25 (arguing that the best way to curtail broad application of fraud statutes is to provide an object with specificity).

36. See *infra* notes 226-32 and accompanying text (arguing that fraud statutes can be narrowed by explicitly defining the object encompassed by the statute).

37. See *infra* Part III.B (positing that fraud statutes can be limited by concisely defining the word “fraud”).

38. See *infra* notes 233-36 and accompanying text (discussing the use of the term “scheme or artifice to defraud” in fraud statutes).

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applicable only to limited conduct.<sup>39</sup> This Article expresses the view that generic fraud statutes exude ambiguity and promote prosecutorial indiscretions.<sup>40</sup> In contrast, specific fraud statutes offer constraints while still allowing appropriate government prosecutions. Requiring the legislature to criminalize new frauds profits prosecutors who have seen novel theories of fraud destroyed in the appellate process.<sup>41</sup> Specific legislation offers defendants and society appropriate notice.<sup>42</sup> Specific criminal legislation is especially important in light of the appearance of fraud in both criminal and civil spheres. The development of specific fraud applications does not, however, preclude the consolidation of these fraud statutes to offset the proliferation of federal offenses.

This Article does not call for increased criminalization to encompass more fraudulent conduct. Rather, it calls for specificity within the criminal code. Additional statutes may be warranted, but the conduct subject to prosecution need not be extended. Many overlapping statutes can be discarded.<sup>43</sup>

In some instances, the generic fraud statutes are relics<sup>44</sup> that have evolved to a point where judicial interpretation<sup>45</sup> and executive prerogative usurp the legislative function. In contrast, specific fraud statutes, although fraught with some ambiguity, offer tighter restraints which conform more closely with the initial legislative purpose of the statute. By updating and modernizing the legislative

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39. See *infra* notes 243-56 and accompanying text (explaining how statutes with high monetary thresholds are subject to a less expansive reading by the courts).

40. See *infra* notes 257-64 and accompanying text (concluding that, due to the amorphous nature of the “concept of fraud” and generic fraud statutes, federal criminal fraud laws are ripe for reform).

41. See, e.g., *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996) (reversing mail fraud convictions and noting that, “fraud statutes do not cover all behavior which strays from the ideal”); *United States v. D’Amato*, 39 F.3d 1249, 1262 (2d Cir. 1994) (rejecting use of a “false pretenses theory” for an alleged excessive attorney fee); see also Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 560 (1998) (noting that recent judicial decisions have defined the boundaries of the mail fraud statute by overturning convictions won by prosecutors who utilized novel theories of mail fraud); Starkman, *supra* note 27, at B7 (discussing prosecutors’ broad application of fraud laws and courts’ subsequent reversals of convictions).

42. See *Lambert v. California*, 355 U.S. 225, 229-30 (1957) (holding that, in light of the due process requirement of notice, citizens who are wholly unaware of a duty to act should not suffer criminal sanctions for their mere failure to perform that affirmative act).

43. See Kathleen F. Brickey, *Federal Criminal Code Reform: Hidden Costs, Illusory Benefits*, 2 BUFF. CRIM. L. REV. 161, 161 n.1 (1998) (stating that the United States Code consists of many redundant provisions proscribing the same or similar conduct).

44. See Podgor, *supra* note 25, at 225 (noting that mail fraud was one section in the 1872 recodification of the Postal Act).

45. Professor Dan M. Kahan states that “federal criminal law consists of a muscular corpus of judge-made doctrine stretched out over a skeletal statutory frame.” Kahan, *supra* note 24, at 6-7.

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statutes, the legislature can assume the role of “supremacy” in its legislative function.<sup>46</sup>

## I. FRAUD AS A CONCEPT

### A. *Defining Criminal Fraud*

Fraud is not a new legal development. Haim Cohn notes that in biblical times fraud, although a civil concept, was “regarded as eminently criminal in character.”<sup>47</sup> At early common law criminal fraud was limited to acts that defrauded the public.<sup>48</sup> Fraud between two private individuals, which might have no effect on the “public as a whole,” was left for civil actions.<sup>49</sup>

Today, fraud between private parties often serves as the conduct criminally prosecuted under federal law. Federal jurisdiction usually is provided by the Commerce Clause,<sup>50</sup> although the postal<sup>51</sup> or taxing

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46. This author argues that there is no need to discard a “legislative supremacy view” as “fiction.” *But see id.* at 11 (suggesting that it is unclear whether or not courts have the doctrinal resources to convert the “legislative supremacy view” from “fiction” into reality). This author argues in response to Professor Kahan that if the courts fail to limit generic statutes significantly, then the legislature needs to take the initiative of repealing these statutes. *See infra* notes 218-20 and accompanying text (emphasizing the indispensable role that the legislature must play in setting the parameters of the fraud statutes). Generic statutes should be replaced with specific fraud statutes. *See infra* Part III (noting three approaches that the legislature might employ to limit fraud statutes, consisting of limiting the object of the offense, the definition of fraud, and the applicable monetary threshold). Further, in light of recent judicial reversals of fraud convictions, allowing fraud to remain descriptively as a “gap filler” does not equate with judicial efficiency. *See infra* note 183 and accompanying text (describing judicial restraints on prosecutorial extensions of the mail fraud statute).

47. *See* Haim Cohn, *Fraud*, in *PRINCIPLES OF JEWISH LAW* 498 (Menachem Elon ed., 1974) (“[T]he same responsibility attaches for wronging the poor and needy, converting property, and not restoring pledges, as for murder, robbery, and adultery (Ezek. 18:10-13), and for all those misdeeds the same capital punishment is threatened.”). Cohn asserted that the offense of fraud pertained to “wronging another in the selling or buying of property,” *see id.*, and that, “[f]raud has also been held as tantamount to larceny.” *Id.* at 499 (citation omitted). Cohn also noted the Bible’s description of specific frauds such as “particular prohibitions on fraud against strangers (Ex. 22:20), widows and orphans (Ex. 22:21), and slaves (Deut. 23:17).” *Id.*

48. *See* J.W. CECIL TURNER, *KENNY’S OUTLINES OF CRIMINAL LAW* 275 (1952) (describing fraud “[p]ractised upon the public”). Fraud which constituted “a physical interference with the property itself, against the will of its owner,” however, was also regarded as felonious. *See id.*

49. *See id.* (describing the common law treatment of fraud “[p]ractised upon the individual”); *see also* CLARK & MARSHALL, *A TREATISE ON THE LAW OF CRIMES* § 12.30 (Marian Quinn Barnes ed., 7th ed. 1967) (distinguishing indictable frauds affecting the public at large from private frauds); LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* 451-54 (5th ed. 1993) (providing a historical discussion of the distinction between public and private fraud).

50. *See* U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . [t]o regulate commerce . . . .”); *see also* *Perez v. United States*, 402 U.S. 146, 146-47 (1971) (holding that Title II of the Consumer Credit Protection Act is a permissible exercise of Congress’ Commerce Clause powers).

51. *See* U.S. CONST. art. I, § 8, cl. 7 (providing Congress the power “[t]o establish post offices”). The mail fraud statute, prior to its recent amendment, was premised on postal powers. *See* Act of June 8, 1872, ch. 335, § 304, 17 Stat. 283, 323, *superseded by* Act of June 25,

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powers<sup>52</sup> have also been sources of federal criminal jurisdiction.<sup>53</sup> Oftentimes a federal medium, such as interstate wires or the Postal Service, serves merely as the hook providing jurisdiction for federal prosecution of the criminality.<sup>54</sup>

To a large extent United States law on fraud mirrors English law.<sup>55</sup> The “classic definition” of fraud in English law focuses on “deceit” or “secrecy.”<sup>56</sup> In United States federal criminal law the term is often synonymously used with the term “deceit.”<sup>57</sup> Deception is also the focus of civil fraud in the United States.<sup>58</sup>

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1948, ch. 645, 62 Stat. 763 (codified as amended at 18 U.S.C. § 1341 (1994)).

52. See U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power “[t]o lay and collect taxes”); *id.* amend. XVI (giving Congress the power to levy taxes on income); see also 26 U.S.C. § 7201 (1994) (criminalizing tax evasion).

53. See NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW 16 (2d ed. 1993) (examining the different bases for federal jurisdiction).

54. See Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1149-50 (1997) (stating that the mailing element of mail fraud establishes the constitutional derivation of Congress’ authority to regulate the mails). Federal jurisdiction under the Commerce Clause seldom impedes the prosecution of a criminal matter. See, e.g., *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1997) (noting that cellular telephones, cellular phone cloning tools and software, and cellphone ID numbers are “instrumentalities of interstate commerce”). *But see United States v. Lopez*, 514 U.S. 549, 559 (1995) (determining that the Gun-Free School Zone Act of 1990 went beyond Congress’ authority under the Commerce Clause).

55. See MCCLAIN, *supra* note 11, at 669-70 (comparing fraud in English statutes and statutes in the United States); ARLIDGE ET AL., *supra* note 3, at 33 (discussing how English law defines fraud).

56. See ARLIDGE ET AL., *supra* note 3, at 33 (citing 2 JAMES FITZJAMES STEPHEN, HISTORY OF CRIMINAL LAW 121-22). Arlidge recites the classic definition of fraud in English law:

I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words “fraud” or “intent to defraud” or “fraudulently” occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy.

*Id.* (citing 2 STEPHEN, *supra*, at 121-22 (1973)).

57. See 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 16.08 (4th ed. 1992) (characterizing fraud as a deceit). This practice and instruction book explains that:

“Fraud” is an intentional or deliberate misrepresentation of the truth for the purpose of inducing another, in reliance on it, to part with a thing of value or to surrender a legal right. Fraud, then, is a deceit which, whether perpetrated by words, conduct, or silence, is designed to cause another to act upon it to his or her legal injury.

*Id.*; see also *Curley v. United States*, 130 F. 1, 7 (1st Cir. 1904) (“The words ‘defraud’ and ‘deceive,’ as defined by lexicographers, are nearly synonymous. ‘Defraud—to deprive of right, either by procuring something by deception or artifice, or by appropriating something wrongfully; to defeat or frustrate wrongfully.’ ‘Deceive—to mislead by false appearance or statement; to frustrate or disappoint.’”). Deceit is also used with fraud in the Model Rules of Professional Conduct: “‘Fraud’ or ‘Fraudulent’ denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.” MODEL RULES OF PROFESSIONAL CONDUCT Terminology, at 13 (1983).

58. See *supra* note 5 (discussing fraud outside of the criminal context such as contracts and tort law); see also Milton D. Green, *Fraud, Undue Influence and Mental Incompetency*, 43 COLUM. L. REV. 176, 179 (1943) (“The core of the idea of fraud in the discreet sense is deception, *i.e.*, mistake for which the other party is knowingly responsible.”).

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Fraud, however, is not an easily defined term.<sup>59</sup> The definition may change depending upon the statute in which the word appears.<sup>60</sup> For example, in the crime of conspiracy to “defraud the United States,”<sup>61</sup> “defraud” is uniquely defined to include a dishonest obstruction of a government agency.<sup>62</sup>

The definition can also be reflective of particular precedent in a jurisdiction. In some cases the definition of fraud may not be limited to fraud methodology, but may also include the harm or consequences of the fraudulent conduct. For example, some courts explicitly state that merely having a “scheme to deceive” is not the same as a “scheme to defraud.”<sup>63</sup> A “contemplated harm to the victim is necessary” for a “scheme to defraud.”<sup>64</sup>

Prosecutors have employed different theories of fraud in criminal cases under the same fraud statute.<sup>65</sup> The lack of consistency in

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59. In discussing fraud in the context of contracts and wills, Milton D. Green has noted: Fraud, like many familiar concepts, is one which seems to have a perfectly obvious meaning until we try to define it. The man in the street knows what fraud is, precisely as he knows what justice is. The lawyer blithely speaks of this or that conduct as fraudulent. So do the courts. In much of the judicial discussion of fraud it is assumed as self-evident that the reader knows what fraud is, so why bother to define it? However, when in the actual decision of a case it becomes necessary to frame a definition of fraud the courts encounter difficulty. Sometimes they meet it by saying that fraud is so various in its manifestations that it would be fruitless to attempt a definition, and that each case must be determined as it arises according to its own circumstances. Following the same tack, some text-writers have also refused to attempt the formulation of a definition. Others, of more venturesome disposition, have constructed definitions, although there is not complete agreement among them. The American Law Institute has defined fraud in its Restatement of Contracts, and again in its Restatement of Restitution.

Green, *supra* note 58, at 177-78 (footnotes omitted). One finds references in legal literature to “legal,” “constructive,” “positive,” and “actual” fraud. *See id.* at 179.

60. *See, e.g.*, COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASSOCIATION, SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS § 3.01B, at 71 (1991) (noting that a broader definition may be attributed to the term “defraud” when used in the context of the federal conspiracy statute). “The word ‘defraud’ is not limited to its ordinary meaning of cheating the government out of money or property. ‘Defraud’ also means impairing, obstructing or defeating the lawful function of any government agency or department by dishonest means.” *Id.*

61. *See* 18 U.S.C. § 371 (1994).

62. *See* Goldstein, *supra* note 8, at 426-27 (recognizing that the statute is broad enough to embody any conspiracy “for the purpose of impairing, obstructing or defeating the lawful function of any” government department) (citing *Haas v. Henkel*, 216 U.S. 462, 479-80 (1910)).

63. *See* *United States v. D’Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (stating that to have a scheme to defraud one needs “deceit coupled with a contemplated harm to the victim”); *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (holding that misrepresentations amounting only to deceit are insufficient to sustain a charge of mail or wire fraud); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180-81 (2d Cir. 1970) (stating that an intent to deceive, without more, fails to constitute “fraudulent intent,” a critical element in a “scheme to defraud”); *see also* Ellen S. Podgor, *Mail Fraud: Limiting the Limitless*, CHAMPION, Dec. 1994, at 4 (discussing how the courts have limited what can constitute as a “scheme to defraud”).

64. *Starr*, 816 F.2d at 98 (maintaining that to find a “scheme to defraud . . . the deceit must be coupled with a contemplated harm to the victim”).

65. For example, in *D’Amato*, prosecutors unsuccessfully used both “the right to control

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defining fraud is not limited to issues of conduct, but also can be seen when the term is used to describe the mens rea. Differing definitions may appear when the term used is “fraudulent,”<sup>66</sup> “intent to defraud,”<sup>67</sup> or “scheme or artifice to defraud.”<sup>68</sup>

Although judges differ on whether a narrow or broad application should be given to a fraud statute, there appears to be an acceptance of an “I know it when I see it”<sup>69</sup> approach. Judge Holmes of the Fifth Circuit stated that “the law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity.”<sup>70</sup> Another court noted that “[t]he aspect of the scheme to ‘defraud’ is measured by [a] nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.”<sup>71</sup> In

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theory” and a “false pretenses theory” for the alleged mail fraud charges. *See* 39 F.3d at 1257-62. In *D’Amato*, the government alleged a “right to control theory,” claiming that “D’Amato committed mail fraud by structuring his billings to conceal from those in control of corporate funds the nature of his relationship with Unisys and the fact that his actual services involved lobbying his brother, a United States Senator and member of the Senate Appropriations Committee.” *Id.* at 1252. The government also alleged a “false pretenses theory” claiming that “D’Amato committed mail fraud by contracting with Unisys to provide written reports on Senate proceedings while never intending to provide those reports.” *Id.* Similarly, in *Siddiqi v. United States*, 98 F.3d 1427 (2d Cir. 1996), the Second Circuit rejected the prosecutor’s use of shifting theories of guilt in an alleged Medicare billing fraud case. *See id.* at 1438. The court stated: “We find the ointment’s fly in the failure of the government to settle upon a single theory of guilt and, then, at this final stage, in seizing upon a theory that is inadequate as a matter of law.” *Id.*

66. *See* 1 DEVITT ET AL., *supra* note 57, § 16.08 (“A statement, claim or document is ‘fraudulent’ if it was falsely made, or made with reckless indifference as to its truth or falsity, and made or caused to be made with an intent to deceive.”).

67. The term “intent to defraud” has been defined as “act[ing] knowingly and with the intention and the purpose to deceive or to cheat,” and “is accompanied, ordinarily, by a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or a purpose to cause some loss to some person.” 1 *id.* § 16.07.

68. When defining the term in the context of mail, wire, and bank fraud, it is stated that, “[t]he phrase [‘any scheme or artifice to defraud’] [‘any scheme or artifice . . . for obtaining money or property’] means any deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another or by which someone intends to deprive another of something of value.” 2 *id.* § 40.13 (alterations in original). In the context of securities fraud, the definition of the term “device, scheme, or artifice to defraud” is:

A “device” is an invention, a contrivance, or the result of some plan or design.

A “scheme” is a design or a plan formed to accomplish some purpose.

An “artifice” is an ingenious contrivance or plan of some kind.

There is nothing about the terms “device,” “scheme,” or “artifice” which in themselves imply anything fraudulent. The terms are plain English words that are neutral.

A “device, scheme, or artifice to defraud” as used in these instructions, however, means the forming of some invention, contrivance, plan, or design to trick or to deceive in order to obtain money or something of value.

2 *id.* § 52.13.

69. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (coining the phrase “I know it when I see it” in the context of hard-core pornography).

70. *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir. 1941).

71. *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958).

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contrast to these broad definitions, Circuit Judge Edmondson, writing in the case of *United States v. Brown*,<sup>72</sup> aptly noted that “the fraud statutes do not cover all behavior which strays from the ideal; Congress has not yet criminalized all sharp conduct, manipulative acts, or unethical transactions.”<sup>73</sup>

The different definitions of criminal fraud emphasize the importance of determining the boundaries of the term.<sup>74</sup> Ascertaining the scope of criminal fraud will not only serve as a separating point between criminal and civil fraud, but will also provide the parameters for determining whether criminal fraud is treated consistently in the federal criminal law.

### *B. Federal Criminal Law*

The scope of fraud is problematic in that there is no specific group of statutes designated in the federal code as fraud statutes and no consistent definition to create the boundaries of what is encompassed within the term. Three contexts are explored here to discern the possible limits of the term “fraud.” The first approach uses specific terms often associated with fraud to provide a listing of fraud offenses. The second examines the use of the term in statistical reporting methods. Finally, the third approach considers the designation of offenses pursuant to the Federal Sentencing Guidelines. Each of these approaches to defining the term fraud is replete with deficiencies.

#### *1. Terms of art*

The terms “fraud,” “fraudulent,” “fraudulently,” or “defraud” appear within the text of a total of ninety-two substantive statutes in title 18 of the United States Code. In some cases more than one of

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72. 79 F.3d 1550 (11th Cir. 1996).

73. *Id.* at 1562 (holding that defendants’ conduct did not fall within the federal fraud statutes). The court in *Brown* stated:

Looking at the evidence in this case, our worry is that the criminal fraud statutes were used to convict four people simply for charging high prices—all allegations of misconduct in this case involved the price customers paid for their homes, not the physical qualities of these homes. The government tries to draw a distinction; they say these men were convicted for deceptions about these high prices. For us, at least in the context of home sales and of the openness of the Florida real estate market, this distinction is a distinction without meaning.

*Id.*

74. *See, e.g., United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) (discussing whether a fiduciary breach is a criminal fraud). The court in *Bloom* stated “if ‘not every breach’ is criminal fraud where is the line drawn? Its location cannot be found by parsing § 1341 or § 1346 of the mail fraud statute, a profound difficulty in criminal prosecution.” *Id.*

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these terms appear in the same statute.<sup>75</sup> 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.

Obviously, measuring fraud statutes by the use of these four terms does not comport with accuracy. Using “fraud,” “fraudulent,” “fraudulently,” or “defraud” to identify the criminal fraud statutes fails to account for statutes that contain attributes of criminal fraud, but fail to employ one of these terms of art within the language of the statute.<sup>76</sup> Additionally, criminal fraud is not limited to title 18 of the criminal code. One finds criminal fraud-related statutes throughout the United States Code.<sup>77</sup>

Discerning the list of fraud statutes from the United States Code in part depends upon how one defines the boundaries of fraud. An endless list of questions develops in this process. For example, should a violation of the false statement statute be considered criminal fraud?<sup>78</sup> Should fraud encompass offenses involving

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75. *See, e.g.*, 18 U.S.C. § 1347 (1994 & Supp. 1997) (illustrating how the health care fraud statute uses the terms “defraud” and “fraudulent”). The use of more than one of these terms in a criminal statute is not exclusive to title 18. *See* 7 U.S.C. § 6(o) (1994) (using the terms “fraud” and “device, scheme, or artifice to defraud” to describe “fraud and misrepresentation by commodities trading advisors and commodity pool operators”). In some cases, none of these words appears in the statute, but one of the terms is used in the chapter title. The 92 substantive provisions used here are exclusive of the offenses under chapter 47, “Fraud and False Statements,” which fail to include actual reference to “fraud,” “fraudulent,” “fraudulently,” or “defraud” within the text of the statute. *See* 18 U.S.C. § 1019 (1994) (establishing penalties for consular officers who knowingly make false certifications).

76. For example, 18 U.S.C. § 912 provides:

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. § 912 (1994). In some cases the statute itself does not use one of these four fraud terms, but is located under chapter 47, which is titled “Fraud and False Statements.” *See id.* § 1007 (“Whoever, for the purpose of influencing in any way the action of the Federal Deposit Insurance Corporation, knowingly makes or invites reliance on a false, forged, or counterfeit statement, document, or thing shall be fined . . . or imprisoned . . . , or both.”). Statutes with attributes of fraud, but failing to employ one of these four terms can also be found outside of title 18. *See, e.g.*, 26 U.S.C. § 7201 (1994) (setting a criminal penalty for an “attempt to evade or defeat tax”). In *United States v. Helmsley*, the court noted that “[s]ection 7201 of the Internal Revenue Code, [is] the ‘capstone’ of the comprehensive statutory scheme prohibiting and punishing federal tax fraud . . . .” 941 F.2d 71, 99 (2d Cir. 1991). Section 7201 of title 26, does not, however, include one of these four fraud-related terms. *See* 26 U.S.C. § 7201.

77. *See, e.g.*, 2 U.S.C. § 441h (1994) (barring federal candidates or their employees and agents from fraudulently misrepresenting themselves); 7 U.S.C. § 6(o) (1994) (prohibiting “fraud and misrepresentation by commodity trading advisors, commodity pool operators, and associated persons”); 8 U.S.C. § 1324c (1994 & Supp. 1997) (establishing penalties for engaging in document fraud of citizenship, naturalization, and expatriation papers).

78. A Department of Justice manual discusses the false statements statute, 18 U.S.C. § 1001 (1994 & Supp. 1997), under the topic of “Fraud Against the Government.” *See* U.S. DEP’T OF

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counterfeiting and forgery?<sup>79</sup> Does fraud include some offenses related to official corruption, and, if so, will it include bribery offenses?<sup>80</sup> Will we reach a point of saying that most crimes not involving assaultive behavior, include an element of fraudulent conduct?

## 2. *Statistical reporting*

Statistical reporting provides a second possible approach to defining fraud. In reporting federal judicial workload statistics for criminal cases<sup>81</sup> and criminal defendants<sup>82</sup> by major offenses, one of the specified categories is fraud. Here one finds that fraud does not include larceny and theft, embezzlement, or forgery and counterfeiting.<sup>83</sup> Federal judicial workload statistics also do not include bribery, which is listed within the category of miscellaneous

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JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-42.100 (1997) [hereinafter U.S. Attorney's Manual].

79. Counterfeiting and forgery are not considered fraud for purposes of statistical reporting. *See infra* text accompanying note 83 (mentioning that counterfeiting and forgery offenses were excluded from the Department of Justice's judicial workload statistics for criminal cases). Counterfeiting and forgery are, however, included under Part F of the sentencing guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (1998); *see also infra* note 96 and accompanying text. Examining a statute in the counterfeiting and forgery section of title 18 provides argument for classifying the crime a "fraud" crime. Section 472 of title 18, "Uttering counterfeit obligations or securities," provides:

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than fifteen years, or both.

18 U.S.C. § 472 (1994).

While chapter 25 of title 18 is designated as "Counterfeiting and Forgery," chapter 47 is titled "Fraud and False Statements" and chapter 63 is named "Mail Fraud." The titles, however, do not necessarily encompass the crimes included therein. For example, one finds the health care fraud statute, 18 U.S.C. § 1347 (1994 & Supp. 1997), and the bank fraud statute, 18 U.S.C. § 1344 (1994), under the general category of mail fraud. The disorganization of the Code is highlighted when noting that computer fraud, 18 U.S.C. § 1030 (1994 & Supp. 1997), and major fraud, 18 U.S.C. § 1031 (1994), are found within chapter 47, "Fraud and False Statements," while wire fraud, *id.* § 1343, is found within chapter 63, "Mail Fraud." This classification system can perhaps be explained in that health care fraud, bank fraud, and wire fraud offenses were modeled after the mail fraud statute, whereas computer fraud and major fraud bear little resemblance to mail fraud.

80. Although 18 U.S.C. § 666 (1994) can be considered essentially a bribery or theft statute, it has also been referred to as the "program fraud statute." *See* *United States v. LaHue*, 998 F. Supp. 1182, 1184-85 (D. Kan. 1998) (equating program fraud to defrauding the U.S. Government).

81. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 52-54 (1993) (providing a table of "Criminal Cases Commenced by Major Offenses").

82. *See id.* at 55-57 (displaying a table of "Criminal Defendants Commenced by Major Offense").

83. *See id.* at 53, 56.

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general offenses.<sup>84</sup>

The reporting of federal judicial workload statistics includes several subcategories under fraud. For example, false claims and statements are considered within the fraud category.<sup>85</sup> Income tax fraud is also included as a subcategory of fraud.<sup>86</sup> The federal judicial workload statistics do not limit fraud to statutes found in title 18 of the United States Code.<sup>87</sup>

The United States Department of Justice, however, does not designate fraud using the same criteria used in the judicial workload statistics.<sup>88</sup> Fraud statistics here exclude tax offenses which are reported under “[p]ublic-order, other offenses.”<sup>89</sup> Fraud is one of several subcategories under the category of fraudulent offenses, which is a subcategory of property offenses.<sup>90</sup> Like the federal judicial workload statistics, however, these fraud statistics do not include counterfeiting and forgery.<sup>91</sup>

### 3. *Sentencing guidelines*

The sentencing guidelines offer a new approach to the “concept” of fraud.<sup>92</sup> The guidelines categorize offenses into groups for

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84. *See id.* at 54, 57.

85. *See id.* at 53, 56.

86. *See id.*

87. *See id.* The subcategories under fraud are: “income tax, lending institution, postal, veterans and allotments, securities and exchange, social security, false personation, nationality laws, passport fraud, false claims and statements, and other.” *Id.* These same categories were used under fraud in prior reports of the Administrative Office of the U.S. Courts. *See* 1990 ADMINISTRATIVE OFF. OF THE U.S. CTS. ANN. REP. 196, 198 (providing a table of offenses committed by criminal defendants).

88. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 634 (1996). The United States Department of Justice defines fraud in judicial workload situations as follows:

[U]nlawfully depriving a person of his or her property or legal rights through intentional misrepresentation of fact or deceit other than forgery or counterfeiting. Includes violations of statutes pertaining to lending and credit institutions, the Postal Service, interstate wire, radio, television, computer, creditcard [sic], veterans benefits, allotments, bankruptcy, marketing agreements, commodity credit, the Securities and Exchange Commission, railroad retirement, unemployment, Social Security, false personation, citizenship, passports, conspiracy, and claims and statements, excluding tax fraud. The category excludes fraud involving tax violations that are shown in a separate category under “Public-order, other offenses.”

*Id.*

89. *See id.*

90. *See id.* at 436, 438 (providing various tables of offenses investigated by federal authorities).

91. *See id.* at 634.

92. *See* Brickley, *supra* note 43, at 166 n.24 (citing Robert H. Joost, *Viewing the Sentencing Guidelines as a Product of the Federal Criminal Code Effort*, 7 FED. SENTENCING REP. 118, 120 (1994)). In describing the “sentencing guidelines, policy statements, and commentary,” Robert H. Joost states: “[T]hey are, in my opinion, a Federal Criminal Code, albeit limited in scope. They fit the definition of a code of law, and they impact many aspects of federal criminal law.” *Id.* at 119 (quoting Joost, *supra*).

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purposes of sentencing. For example, separate parts exist for “Offenses Involving Drugs,”<sup>93</sup> “Offenses Involving Antitrust,”<sup>94</sup> and “Offenses Involving Taxation.”<sup>95</sup>

Part F of the sentencing guidelines is designated “Fraud and Deceit.” The two sections included within Part F are: 2F1.1 (“Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States”) and 2F1.2 (“Insider Trading”).<sup>96</sup> The commentary to these two sections references the statutory provisions covered under 2F1.1 and 2F1.2 and notes that an appendix contains additional statutory provisions.<sup>97</sup> In examining this statutory appendix, one finds 195 statutory references to section 2F1.1 and four statutory references to 2F1.2.<sup>98</sup> In several instances a statute uses one of these two guidelines in conjunction with another designated guideline.<sup>99</sup> The statutory reference provides some flexibility in determining the appropriate guideline to be used for sentencing a defendant.<sup>100</sup>

Using Part F to capture the concept of fraud distinguishes fraud from offenses involving “theft, embezzlement, receipt of stolen property, and property destruction.”<sup>101</sup> Thus, sentencing for a violation of the computer fraud statute may in some instances require

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93. U.S. SENTENCING GUIDELINES MANUAL § 2D (1998) (title in all capitals in original).

94. *Id.* § 2R (title in all capitals in original).

95. *Id.* § 2T (title in all capitals in original).

96. *Id.* §§ 2F.1, 2F.2 (titles in all capitals in original). Throughout the sentencing guidelines, there are references to the monetary table found within guideline 2F1.1. For example, guideline § 2B5.3 (“Criminal Infringement of Copyright or Trademark”) states that “[i]f the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).” *Id.* § 2B5.3.

97. *See id.* § 2F1.1 cmt. In *Stinson v. United States*, the Court held “that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” 508 U.S. 36, 38 (1993).

98. *See* U.S. SENTENCING GUIDELINES MANUAL app. a.

99. The introduction to appendix A notes that “[i]f more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the nature of the offense conduct charged in the count of which the defendant was convicted.” *Id.* app. a, intro.

100. *See id.* (“If, in an atypical case, the guideline section, indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. (See § 1B1.2).”).

101. *See id.* §§ 2F; 2B1.1 intro. (stating that Part B addresses only the basic forms of property offenses and does not include fraud). However, a consolidated theft, property destruction, and fraud guideline may alleviate the issue of viewing fraud as a distinct offense under Part F. *See The Economic Crime Package*, 64 Crim. L. Rep. (BNA) 191 (Dec. 9, 1998) (describing the proposed amendments to the sentencing guidelines which would consolidate theft, fraud, and property destruction guidelines). Questions can also arise as to whether it is appropriate to use a fraud or bribery guideline. *See, e.g., United States v. Starks*, 157 F.3d 833, 841-42 (11th Cir. 1998) (finding that the district court erred in using the fraud guideline as opposed to the guideline for bribery of a public official).

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a fraud guideline,<sup>102</sup> in other instances fall under a theft guideline,<sup>103</sup> and in some cases require the application of an espionage guideline.<sup>104</sup> This appears warranted in instances where the computer fraud truly involves espionage activity. The designation of a misappropriation of a trade secret as theft, as opposed to fraud, may be somewhat more controversial.<sup>105</sup>

Using the term fraud as applied in the sentencing guidelines does not, however, offer an accurate structure for examining the concept of fraud.<sup>106</sup> Many of the classic fraud offenses are omitted from Part F (“Offenses Involving Fraud and Deceit”). For example, Part F does not include conspiracies to defraud the government,<sup>107</sup> fraud involving deprivations of intangible rights to honest services by public officials,<sup>108</sup> tax fraud,<sup>109</sup> or marriage fraud to evade immigration law.<sup>110</sup>

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102. Violations of 18 U.S.C. § 1030(a)(4) and 18 U.S.C. § 1030(a)(6) (computer fraud) generally require the application of sentencing guideline 2F1.1. *See* U.S. SENTENCING GUIDELINES MANUAL app. a, § 2F1.1.

103. A violation of 18 U.S.C. § 1030(a)(2) generally requires the application of sentencing guideline 2B1.1 (larceny, embezzlement and other forms of theft). *See id.*, app. a, § 2B1.1.

104. A violation of 18 U.S.C. § 1030(a)(1) generally requires the application of sentencing guideline 2M3.2 (“Gathering National Defense Information”). *See id.* app. a, § 2M3.2.

105. The theft guideline 2B1.1 specifically provides for a two-level increase when the offense involves the “misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent.” *See id.* § 2B1.1(b)(7). In *Carpenter v. United States*, 484 U.S. 19 (1987), the Court found that intangible property such as confidential business information would be property under the mail fraud statute. *See id.* at 28. Mail fraud, however, is sentenced under the fraud provisions of guideline 2F1.1 unless the fraud involves the deprivation of the intangible right of honest services. *See* U.S. SENTENCING GUIDELINES MANUAL app. a, § 2F1.1. In the latter instance, sentencing is pursuant to guideline 2C1.7. *See id.* app. a, § 2C1.7.

106. Offenses involving what is classically considered fraud activity, however, may be grouped together for purposes of sentencing. *See* U.S. SENTENCING GUIDELINES MANUAL § 3D1.2(d) (“All counts involving substantially the same harm shall be grouped together into a single group.”).

107. “Conspiracy to Defraud by Interference with Government Functions,” prosecuted pursuant to 18 U.S.C. § 371 falls under guideline 2C1.7. *See id.* app. a, § 2C1.7.

108. Sentences for mail, wire, and bank frauds involving a deprivation of the intangible right to honest services would generally fall under guideline 2C1.7. *See id.* app. a, § 2C1.7.

109. Tax evasion, 26 U.S.C. § 7201 (1994), and fraud and false tax statements, *id.* § 7206, require the application of guideline 2T1.1 (“Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents”). *See* U.S. SENTENCING GUIDELINES MANUAL app. a, § 2T1.1. In some instances, violations of the fraud and false tax statements statute, 26 U.S.C. § 7206, guideline 2S1.3 (“Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports”) applies. *See* U.S. SENTENCING GUIDELINES MANUAL app. a, § 2S1.3. Some tax statutes do, however, use the fraud guideline for sentencing purposes. *See id.* app. a (stating that 26 U.S.C. § 7208, “Offenses relating to stamps,” requires the application of guideline § 2F1.1).

110. Marriage fraud, 8 U.S.C. § 1325(c) (1994 & Supp. 1997), is sentenced under guideline 2L2.1 (“Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law”) or 2L2.2 (“Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade

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Some fraud-related offenses are completely omitted from the guidelines.<sup>111</sup>

Examining the concept of fraud in the federal system cannot be accomplished simply by referencing fraud-related offenses in the United States Code because fraud does not always operate as a discrete entity. Fraud also exists as part of offenses that provide increased criminality for multiple conduct. For example, fraud offenses, such as mail fraud, wire fraud, and bank fraud, all serve as predicate offenses for a Racketeer Influenced and Corrupt Organization (“RICO”) Act charge.<sup>112</sup> Certain fraud offenses can also constitute “specified unlawful activity” for the purposes of a money laundering charge.<sup>113</sup>

### C. Model Penal Code

Despite the pervasiveness of the term “fraud” in today’s federal criminal statutes, its appearance in the American Law Institute’s Model Penal Code is limited. Although the Model Penal Code is not a federal code,<sup>114</sup> its treatment of the concept of fraud offers some guidance. There is no general fraud statute within the Model Penal Code, nor are there mail or wire fraud provisions. Further, the criminal conspiracy section of the Model Penal Code is limited to conspiracies to commit crimes, as opposed to conspiracies to *defraud* the government.<sup>115</sup> The term “fraud” surfaces mainly in Article 224, the “Forgery and Fraudulent Practices” section of the Model Penal Code.<sup>116</sup> Here one finds specific fraud-related statutes, as opposed to generic provisions. For example, one finds the term “fraud,”

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Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport”). See U.S. SENTENCING GUIDELINES MANUAL app. a, §§ 2L2.1, 2L2.2.

111. There is no statutory reference to 2 U.S.C. § 441(h) (1994), the penalty provisions of 2 U.S.C. § 437(g), which criminalizes the fraudulent misrepresentation of campaign authority. See U.S. SENTENCING GUIDELINES MANUAL app. a. Also omitted is the recently added bankruptcy fraud statute, 18 U.S.C. § 157 (1994). U.S. SENTENCING GUIDELINES MANUAL app. a. See *id.* Appendix A of the sentencing guidelines does provide that “[f]or those offenses not listed in this index, the most analogous guideline is to be applied.” *Id.* intro.

112. See 18 U.S.C. § 1961 (1994).

113. See *id.* § 1956. In *United States v. Rutgard*, 108 F.3d 1041 (9th Cir. 1997), the prosecution unsuccessfully attempted to prove that an ophthalmologist’s entire practice was based on fraud, using “three contexts”: “before the jury to prove the § 1957 monetary transaction counts; before the jury to sustain the criminal forfeiture; and before the court at sentencing to establish loss.” See *id.* at 1058.

114. See Brickey, *supra* note 43, at 168 (“[F]ederal criminal law is not (and never has been) the tidy mix of homicide, theft, and burglary found in state criminal codes.”).

115. See MODEL PENAL CODE § 5.03 (1980) (criminalizing concerted efforts on the part of two or more persons to commit a crime, while making no mention of the government as the target of the conspiracy).

116. See *id.* § 224.

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“fraudulent” or “defraud” used in statutes of “Forgery,”<sup>117</sup> “Simulating Objects of Antiquity, Rarity, Etc.,”<sup>118</sup> “Fraudulent Destruction, Removal or Concealment of Recordable Instruments,”<sup>119</sup> “Defrauding Secured Creditors,”<sup>120</sup> and “Fraud in Insolvency.”<sup>121</sup> Other sections which appear under the category of “Forgery and Fraudulent Practices,” although not directly using the term “fraud,” imply fraudulent conduct by the specific conduct proscribed by the statute.<sup>122</sup> The fraud statutes of the Model Penal Code, however, have specific objects of the offenses, as opposed to unlimited generic fraudulent conduct.<sup>123</sup> Specificity, however, does not always provide sufficient definition for interpreting the legislation.<sup>124</sup>

## II. FRAUD AS THE OBJECT OF THE OFFENSE

Fraud is the common denominator found in all fraud offenses. Each statute, however, has a different object upon which the fraud is predicated.<sup>125</sup> If one examines existing federal fraud statutes from the perspective of the subject matter of the fraud, the statutes can be placed on a spectrum demonstrating the varying levels of emphasis placed on this object of the fraud.

At one end of the spectrum, one finds what can be labeled generic fraud statutes. Here the focus of the statute is almost exclusively on the fraud and not on the object of the offense. For example, the

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117. *See id.* § 224.1.

118. *See id.* § 224.2 (stating that it is a misdemeanor knowingly to make an object appear valuable because of antiquity, rarity, source, or authorship when it is not in fact valuable).

119. *See id.* § 224.3 (stating that it is a crime to destroy, remove, or conceal any writing for which the law provides public recording).

120. *See id.* § 224.10 (making it a crime to conceal, remove, or destroy property subject to a security interest).

121. *See id.* § 224.11 (criminalizing the act of destroying, removing, or concealing one’s own property for the purpose of obstructing the claim of any creditor).

122. *See, e.g., id.* § 224.6 (“Credit Cards”); *id.* § 224.7 (“Deceptive Business Practices”); *id.* § 223.3 (“Theft by Deception”).

123. Even the “Deceptive Business Practices” statute is limited to seven specific types of deceptive conduct. *See id.* § 224.7. For example, one will be engaged in a deceptive business practice and will be subject to criminal prosecution if, “in the course of business he uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity.” *See id.* § 224.7(1).

124. Specificity can result in increased complexity that can impede understanding a statute. George P. Fletcher noted that “[i]t is almost as though the drafters wanted the Model Penal Code to resemble a panoply of tax regulations. Criminal codes are not written for erudite specialists. They should be written so that average people and average lawyers and judges can understand their terms.” George P. Fletcher, *Dogmas of the Model Penal Code*, 2 *BUFF. CRIM. L. REV.* 3, 9 (1998).

125. For example, in the Model Penal Code there are specific criminal offenses for committing fraud in the course of running a business, using the credit card of another, and committing forgery. *See, e.g., MODEL PENAL CODE* § 224.2 (“Simulating Objects of Antiquity, Rarity, Etc.”); *id.* § 224.6 (“Credit Cards”); *id.* § 224.7 (“Deceptive Business Practices”).

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mails (or the interstate carrier) provide a necessary jurisdictional hook for employing the mail fraud statute, but offer no other significantly meaningful aspect to the offense.<sup>126</sup> A vast array of fraudulent conduct can be prosecuted under the mail fraud statute. The emphasis of the crime of mail fraud is the fraudulent conduct as opposed to the mailing.<sup>127</sup>

In contrast, one finds at the opposite end of the spectrum specific fraud statutes, that narrowly focus on the object of the fraud. Although fraud is required for prosecution of bankruptcy fraud, the conduct that may be prosecuted is constrained by the specific object of the statute, namely, bankruptcy matters.<sup>128</sup> Although the method of fraud and the harm caused may be universal, the subject matter of the fraud limits the boundaries of the conduct encompassed by the statute. Specificity can be influenced by context, limitations on the transactions, and limitations on the victims the statute seeks to protect.

Statutory interpretation, however, has not remained constant. Statutes that were enacted with a specific focus have in some cases developed broadly, allowing prosecutors increased accessibility in prosecuting new frauds.<sup>129</sup> Thus, although statutes may be categorized as generic or specific, it must be remembered that the fluid nature of fraud, coupled with judicial interpretation, may move a statute from being specifically focused to being generically applied.<sup>130</sup> Placement on the spectrum can be a function of generic or specific language employed by the legislature in drafting the statute.<sup>131</sup> It can also result from judicial interpretation that emphasizes either the fraud component or, alternatively, the object

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126. See George D. Brown, *Should Federalism Shield Corruption—Mail Fraud, State Law, and Post-Lopez Analysis*, 82 CORNELL L. REV. 225, 254 (1997) (explaining that federal prosecutors often charge alleged offenders with the crime of mail fraud, as a means of prosecuting what would otherwise be a state criminal offense, despite the fact that the use of the mails is merely incident to a larger fraudulent enterprise).

127. See *id.* (“A small tail—a relatively insignificant mailing that is somehow related to a broader range of actions—can wag a very large dog.”). One can argue that the Supreme Court in *McNally v. United States*, 483 U.S. 350 (1987), limited the object by requiring a deprivation of “money or property.” See *id.* at 360. Congress, however, in reaction to this decision, added section 1346 to title 18, which allows the prosecution for mail fraud beyond deprivation of money or property by defining “scheme or artifice to defraud” to include “a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346 (1994); see also *infra* notes 161-82 and accompanying text.

128. See *infra* note 191 (outlining the bankruptcy statute).

129. See *infra* notes 157-64 and accompanying text (describing the development of the mail fraud statute from a specific to a generic fraud statute).

130. See, e.g., *id.* (discussing the development of the mail fraud statute from a specific to a generic fraud statute).

131. See *infra* Parts II.A-B (discussing the different approaches of generic and specific fraud statutes).

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of the fraud.<sup>132</sup>

Fraud statutes are selected here to demonstrate the varying levels of emphasis that can be placed upon the object of the fraud. From these examples, varying methods that can be used to restrict generic fraud statutes become apparent. This Article argues the necessity of focusing on the object of the offense, as opposed to the fraud component.

### A. *Generic Fraud Statutes*

#### 1. *Conspiracy to defraud*

Conspiracy offenses exist throughout the United States Code.<sup>133</sup> The general conspiracy statute<sup>134</sup> criminalizes conspiracies to commit any offense against the United States and also criminalizes conspiracies to defraud the United States.<sup>135</sup> Unlike a conspiracy to commit any offense against the United States, a conspiracy to defraud does not require agreement to violate a specific statute.<sup>136</sup>

Judge Learned Hand aptly described the federal conspiracy statute as “that darling of the modern prosecutor’s nursery.”<sup>137</sup> Conspiracy to defraud is perhaps the broadest of the fraud offenses.<sup>138</sup> The breadth

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132. *See id.*

133. *See, e.g.*, 18 U.S.C. § 241 (1994 & Supp. 1997) (governing conspiracy against rights); 18 U.S.C. § 224 (1994) (criminalizing the act of conspiring to influence a sporting contest through bribery).

134. *See* 18 U.S.C. § 371 (1994). This statute, “Conspiracy to commit offense or to defraud United States,” provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

*Id.*

135. *See id.* A conspiracy to defraud the United States and conspiracy to commit any offense against the United States, although encompassed within the same statute, are two separate prohibitions. *See* *United States v. Ashley*, 905 F. Supp. 1146, 1153 (E.D.N.Y. 1995) (noting that section 371 criminalizes two different types of conspiracies).

136. *See* *United States v. Terranova*, 7 F. Supp. 989, 990 (N.D. Cal. 1934) (stating that, in order to constitute conspiracy to defraud the United States, “it is not necessary that the conspiracy should have been to commit an act in violation of a criminal statute”). Conspiracy to commit a specific offense also does not require “that the United States or an agency thereof was an intended victim of the conspiracy.” *United States v. Falcone*, 960 F.2d 988, 990 (11th Cir. 1992).

137. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

138. *See* Goldstein, *supra* note 8, at 408 (“In combination, ‘conspiracy’ and ‘defraud’ have assumed such broad and imprecise proportions as to trench not only on the act requirement but also on the standards of fair trial and on constitutional prohibitions against vagueness and double jeopardy.”).

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of the conspiracy statute is in part a function of the lack of specific definition for the term “defraud the United States.”<sup>139</sup> As Professor Abraham Goldstein noted: “The phrase has had no fixed meaning.”<sup>140</sup>

Enacted in 1867, the initial conspiracy statute<sup>141</sup> was one section of an act focused on internal revenue.<sup>142</sup> In *United States v. Hirsch*,<sup>143</sup> the Supreme Court authorized an expansive reading of the statute to include conspiracies unrelated to the revenue laws.<sup>144</sup> In *Haas v. Henkel*,<sup>145</sup> the Court stated that “[t]he statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government.”<sup>146</sup> The Court also held that “it is not essential to charge or prove an actual financial or property loss . . . .”<sup>147</sup>

There are, however, some limitations to the statute. For example, theft by violence, burglary, and robbery are not considered to be fraud for purposes of the conspiracy to defraud statute.<sup>148</sup> Also,

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139. See *id.* at 417 (noting that “defraud the United States” has not had a “fixed meaning”); Steven D. Gordon, *The Liability of Colleges and Universities for Fraud, Waste, and Abuse in Federally Funded Grants and Projects*, 75 EDUC. L. REP. (West) 13, 19 (Aug. 1992) (“The concept of defrauding the United States has become so elastic over the years that it can potentially encompass any conduct which a court views as ‘collusive and dishonest’ if some federal rule or regulation was violated in the process.”).

140. Goldstein, *supra* note 8, at 417.

141. See Act of March 2, 1867, ch. 169, § 30, 14 Stat. 468, 484 (codified as amended at 18 U.S.C. § 371 (1994)) (prohibiting conspiracy to defraud the United States “in any matter or for any purpose”); see also *Tanner v. United States*, 483 U.S. 107, 128 (1987) (“Section 371 is the descendant of and bears a strong resemblance to conspiracy laws that have been in the federal statute books since 1867.”).

142. The Act was titled “An Act to amend existing Laws relating to Internal Revenue, and for other Purposes.” Act of March 2, 1867, ch. 169, 14 Stat. 471 (codified as amended in scattered sections of U.S.C.); see Goldstein, *supra* note 8, at 418 (explaining that the conspiracy provision in the law was initially aimed at conspiracies either to commit offenses against the internal revenue or to defraud the United States of internal revenue).

143. 100 U.S. 33 (1879).

144. In *Hirsch* the Court stated:

Since, then, the section does not mention the revenue or the revenue laws, but in terms includes every form of conspiracy against the United States, and every form of conspiracy to defraud them, it is difficult to see how the crimes it defines, and which are punishable under it, can be said to arise under the revenue laws.

*Id.* at 35.

145. 216 U.S. 462 (1910) (involving a scheme to obtain secret government information regarding the market price of certain commodities and to use that information for purposes of speculation).

146. *Id.* at 479.

147. *Id.* at 480.

148. In *Hammerschmidt v. United States*, 265 U.S. 182 (1924), the Court stated:

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicanery, or the overreaching of those charged

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section 371's language "the United States or any agency thereof"<sup>149</sup> is not synonymous with "anyone receiving federal financial assistance and supervision."<sup>150</sup> In *Tanner v. United States*,<sup>151</sup> the Court emphasized the necessity that the United States be the "target" of the fraud.<sup>152</sup> One, however, who uses "innocent individuals and businesses to reach and defraud the United States is not for that reason beyond the scope of § 371."<sup>153</sup>

The pervasiveness of the offense of "conspiracy to defraud" is a function of a fraud object that offers few restraints.<sup>154</sup> Lack of a clear definition of "defraud" permits prosecutions of a wide array of conduct.<sup>155</sup> The amorphous definition of "defraud" translates into making conspiracy to defraud a generic statute.<sup>156</sup>

## 2. *Mail fraud*

The mail fraud statute<sup>157</sup> also portrays an extreme on the spectrum,

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with carrying out the governmental intention. It is true that words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicanery or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. One would not class robbery or burglary among frauds.

*Id.* at 188.

149. 18 U.S.C. § 371 (1994).

150. *Tanner v. United States*, 483 U.S. 107, 132 (1987), *on remand sub nom.* *United States v. Conover*, 845 F.2d 266, 267 (11th Cir. 1988) ("A conspiracy to defraud Seminole, a private corporation receiving financial assistance and minimal supervision from the United States Government is not itself a conspiracy 'to defraud the United States.'").

151. 483 U.S. 107 (1987).

152. *See id.* at 130 (noting that the conspiracies to defraud criminalized under section 371 are defined, in part, by the target of the conspiracy—the United States).

153. *Id.* at 129.

154. *See* Goldstein, *supra* note 8, at 408 (claiming that "conspiracy to defraud" has taken on a broad meaning).

155. *See, e.g., United States v. Lane*, 765 F.2d 1376, 1380 (9th Cir. 1985) ("Involvement in a scheme for financial quid pro quos in federally financed contracts or to receive unjust enrichment charges a violation of 18 U.S.C. § 371."); *United States v. Steinmetz*, 643 F. Supp. 537, 543 (M.D. Pa. 1986) (holding that conspiracies to defraud the Internal Revenue Service are indictable under section 371).

156. *See* Goldstein, *supra* note 8, at 441 ("All the evils against which the 'void for vagueness' doctrine is said to guard exist in 'conspiracy to defraud the United States' as interpreted by the Supreme Court."). It can be argued that specific language within a single statute could never encompass the array of possible conduct included in the current conspiracy to defraud statute. *See id.* at 441-48.

157. *See* 18 U.S.C. § 1341 (1994). Section 1341, the "Frauds and swindles" statute, provides:

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

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demonstrating an almost exclusive emphasis on the fraud as opposed to the object of the offense. When initially enacted in 1872, mail fraud was not a generic fraud statute.<sup>158</sup> The statute constituted merely one section within the Postal Act.<sup>159</sup> In its inception, the emphasis was on the “mailing” element of the statute, as opposed to the “scheme to defraud.”<sup>160</sup> Protection of the “post-office establishment of the United States” was the focus of the statute.<sup>161</sup>

Over time, mail fraud has become a generic fraud statute.<sup>162</sup> Both legislative modifications and subsequent judicial interpretations have resulted in expanding the scope of fraud and diminishing the mailing element of the statute.<sup>163</sup> Where the object of the offense, the mailing, was initially emphasized, the development of the statute has resulted in the fraud element consuming the statute.<sup>164</sup>

Two examples of statutory modifications to mail fraud emphasize the legislative expansion of the fraud aspect of the statute. In 1988, Congress enacted a statute defining the term “scheme or artifice to defraud” to allow prosecutions premised upon a deprivation of the “intangible right of honest services.”<sup>165</sup> In 1994, Congress again modified the statute, inserting the language “or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by a private or commercial interstate carrier.”<sup>166</sup> This latter amendment permits prosecutions of mail fraud absent a post office mailing.<sup>167</sup>

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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 five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

*Id.*

158. See Podgor, *supra* note 25, at 225 (noting that in 1872, mail fraud was defined as “a scheme of artifice” to defraud U.S. postal institutions).

159. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323, *superseded by* Act of June 25, 1948, ch. 645, 62 Stat. 763 (codified as amended at 18 U.S.C. § 1341 (1994)).

160. See Rakoff, *supra* note 25, at 784 (explaining that under the 1872 law, punishment was based less on the degree of fraud and more on the degree of misuse of the mails).

161. See Moohr, *supra* note 54, at 1150-52 (describing how the Supreme Court reduced the substantive element of the mailing requirement early in the statute’s history).

162. See Henning, *supra* note 8, at 438 (explaining that use of the mail fraud statute has shifted away from the statute’s original purpose of protecting against misuse of the mails).

163. See *infra* note 167 and accompanying text (noting that a defendant can be prosecuted for mail fraud without mailing anything through the U.S. Postal Service).

164. See Henning, *supra* note 8, at 439.

165. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (1994)).

166. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (codified at 18 U.S.C. § 1341 (1994)).

167. 18 U.S.C. § 1341 (1994) (expanding the scope of the law to apply not only to fraud

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Increasing the breadth of fraud while de-emphasizing the requirement of a mailing is also a product of judicial interpretation. For example, the breadth of fraud covered by the mail fraud statute was expanded when the Supreme Court in *Carpenter v. United States*<sup>168</sup> permitted prosecutions of mail fraud premised upon intangible property.<sup>169</sup> The Court, likewise, in *Pereira v. United States*,<sup>170</sup> limited the importance of the statute's mailing aspect by stating that the mailing did not have to be an essential part of the scheme to defraud.<sup>171</sup> Routine mailings,<sup>172</sup> "innocent mailings,"<sup>173</sup> and mailings that are "counterproductive"<sup>174</sup> to the scheme to defraud are allowed to be used as the basis for the mailing element of a mail fraud prosecution. The mails are a mere jurisdictional hook which permits the prosecution of fraudulent schemes.<sup>175</sup> The diminished role of the mailing is highlighted by the fact that a postal mailing is no longer required when the delivery is via an interstate carrier.<sup>176</sup>

An incredible array of schemes have been prosecuted under the mail fraud statute.<sup>177</sup> One finds, for example, "divorce mill" fraud,<sup>178</sup>

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involving the U.S. Postal Service, but to private carriers as well); *see also* Henning, *supra* note 8, at 439 (noting that the mail fraud statute no longer punishes only the use of the U.S. Postal Service to execute a fraudulent scheme, but also private methods of delivery through interstate carriers).

168. 484 U.S. 19 (1987).

169. *See id.* at 25 (expanding the definition of "property" to include intangible property in a case involving alleged confidential business information).

170. 347 U.S. 1 (1954).

171. *See id.* at 8 ("It is not necessary that the scheme contemplate the use of the mails as an essential element."). It is sufficient if use of the mails is "incident to an essential part of the scheme." *See id.*

172. *See Carpenter*, 484 U.S. at 28 (rejecting the argument that using a routine mailing to "execute the scheme at issue" did not satisfy the mail and wire fraud statutes).

173. *See United States v. Draiman*, 784 F.2d 248, 251 (7th Cir. 1986) (commenting that as long as the defendant knew that mailings were to be used in furtherance of a fraudulent scheme, it does not matter that the mailings were done in the ordinary course of business).

174. *See Schmuck v. United States*, 489 U.S. 705, 715 (1989) ("The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud.").

175. *See generally* Moohr, *supra* note 25, at 162 (describing the mailing as a "jurisdictional factor" that allows great leeway for prosecutors); Podgor, *supra* note 25, at 229 (claiming that the mailing itself is merely the "jurisdictional object" that allows prosecution under the mail fraud statute). *But cf.* Henning, *supra* note 8, at 437 (commenting on the "malleability" of the mail fraud statute in that prosecutors can bring indictments under it without worrying about "jurisdictional restrictions").

176. *See* 18 U.S.C. § 1341 (1994) (affirming that mail fraud includes any fraudulent or attempted fraudulent scheme that utilizes either private or commercial delivery services).

177. *See* Podgor, *supra* note 25, at 226-29 (describing the evolution of the phrase "scheme to defraud" in 18 U.S.C. § 1341 to now encompass a plethora of possible schemes that might be prosecuted under the statute).

178. *See United States v. Edwards*, 458 F.2d 875, 879 (5th Cir. 1972) (affirming the lower court's finding that defendants were guilty of mail fraud if it was found that their promise to mail valid divorce papers for a fee was a scheme to defraud).

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insurance fraud,<sup>179</sup> securities fraud,<sup>180</sup> and franchise fraud.<sup>181</sup> Few restrictions have been placed on what will be subject to prosecution under this statute.<sup>182</sup> Restraints have been implemented, however, where prosecutors have attempted to use novel approaches in presenting their mail fraud case.<sup>183</sup> Despite some judicial restraint placed upon the development of the fraud aspect of the mail fraud statute, in modern days it has lived up to Justice Burger's sentiment that mail fraud should be the "stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil."<sup>184</sup>

### 3. *Wire fraud*

The wire fraud statute,<sup>185</sup> enacted in 1952,<sup>186</sup> operates parallel to mail fraud.<sup>187</sup> Like mail fraud, the use of the wires allows an enormous breadth of conduct to be included within its realm. In contrast to mail fraud, however, wire fraud did not develop from a specific fraud statute into one with a generic application. Wire fraud

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179. *See* *United States v. Cavalier*, 17 F.3d 90, 91 (5th Cir. 1994) (involving a prosecution for mail fraud where defendant used the mail to deliver an alleged false insurance claim).

180. *See* *Carpenter v. United States*, 484 U.S. 19, 25-28 (1987) (concerning a conviction under the mail and wire statutes for alleged insider use of a *Wall Street Journal* investment advice column, co-authored by one of the defendants, to gain an advantage in the stock market).

181. *See* *United States v. Serlin*, 538 F.2d 737, 749 (7th Cir. 1976) (affirming the conviction of defendants for mail fraud which arose out of the sale of merchandise franchises).

182. *See* *Fasulo v. United States*, 272 U.S. 620, 629 (1926) (holding that a scheme to defraud does not include threats of murder or bodily harm); *see also* Podgor, *supra* note 41, at 560 (looking at the recent judicial decisions that have restricted prosecution under the mail fraud statute).

183. *See, e.g.*, *United States v. Frost*, 125 F.3d 346, 354-55 (6th Cir. 1997) (contending that an alleged scheme to defraud the government of contracts was insufficient for mail fraud); *United States v. Cochran*, 109 F.3d 660, 669 (10th Cir. 1997) (finding insufficient evidence to satisfy the elements of mail fraud where a bond underwriter had no duty to, and in fact did not, disclose to an issuer that the underwriter received a commission); *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996) (ruling that an alleged exaggeration of market prices is not a sufficient scheme to defraud); *see also* Podgor, *supra* note 41, at 560 (noting recent judicial decisions where mail fraud convictions have been reversed).

184. *United States v. Maze*, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting).

185. "Fraud by wire, radio, or television," 18 U.S.C. § 1343 (1994), states:

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 five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

*Id.*

186. Communication Act Amendments of 1952, ch. 879, § 18(a), 66 Stat. 711, 722 (codified as amended at 18 U.S.C. § 1343 (1994)).

187. *See* *United States v. Fermin Castillo*, 829 F.2d 1194, 1198 (1st Cir. 1987) ("[I]n general, case law construing § 1341 is instructive for purposes of § 1343.").

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from its inception has been generic.

The judiciary has offered few restrictions to the interstate wire aspect of the wire fraud statute.<sup>188</sup> The jurisdictional base used for prosecution under this offense, the wires, is a mere jurisdictional hook required for federal prosecution.<sup>189</sup> Like mail fraud, wire fraud appears on the extreme end of the spectrum with the focus of the statute being the fraud and the object of the offense having an insignificant role in the criminality.

### *B. Specific Fraud Statutes*

Wire fraud is not the only statute modeled after the mail fraud statute.<sup>190</sup> While wire fraud is premised on a neutral object which allows for the prosecution of an array of conduct, other statutes modeled after the mail fraud statute reference a subject which serves to narrow their application. For example, bankruptcy fraud requires the bankruptcy context for application of the statute<sup>191</sup> and health

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188. See *Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988). In *Ayres*, the Fifth Circuit stated that, “[a]lthough this circuit never has faced an indictment or complaint alleging federal wire-fraud on the basis of telephone calls made within a single state, our rulings consistently have presumed that purely intrastate communication would be beyond the statute’s reach.” *Id.* Wire fraud was found not to be an acceptable charge where the alleged scheme to defraud was a deprivation of a foreign government of its taxes. See *United States v. Boots*, 80 F.3d 580, 586 (1st Cir. 1996) (reasoning that section 1343 would not apply to defendants because the alleged scheme involved defrauding a foreign government). *But see United States v. Trapilo*, 130 F.3d 547, 553 (2d Cir. 1997) (maintaining that the mere fact that a scheme consisted of defrauding a foreign government of taxes did not make defendants exempt from wire fraud charges). Courts have also restricted wire fraud where the prosecution failed to prove the elements of the offense. See *United States v. Beckner*, 134 F.3d 714, 719 (5th Cir. 1998) (determining that there was insufficient evidence of aiding and abetting a client’s alleged criminal intent to defraud).

189. See *United States v. Bryant*, 766 F.2d 370, 374 (8th Cir. 1985) (“[A]ccused need not know or foresee that the communication was interstate.”). *But see United States v. Bentz*, 21 F.3d 37, 41 (3d Cir. 1994) (noting that the government provided insufficient evidence that the defendant should reasonably have foreseen the use of the wires).

190. Some courts have noted that although there are similarities between the mail and wire fraud statutes and newer fraud statutes, differences may still exist. For example, courts have distinguished the bank fraud statute and the major fraud statute from the mail and wire fraud statutes in their use of the term “execute.” See *United States v. Wiehl*, 904 F. Supp. 81, 87-88 (N.D.N.Y. 1995) (holding that the major fraud statute punishes “each execution of a scheme to defraud the government,” and not individual acts contained in each execution).

191. See 18 U.S.C. § 157 (1994). Section 157 provides:

A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so—

- (1) files a petition under title 11;
- (2) files a document in a proceeding under title 11; or
- (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.

*Id.* Bankruptcy fraud has also been prosecuted under 18 U.S.C. § 152, a statute which does not

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care fraud requires a “health care benefit program.”<sup>192</sup> These statutes are more limited than mail and wire fraud because the nature of the object serves to constrain the conduct which can be prosecuted. Both bankruptcy fraud and health care fraud, however, include the language of a “scheme or artifice to defraud” within the statute.<sup>193</sup>

Other fraud statutes may offer a specific object while having little resemblance to the mail fraud statute. For example, section 10(b) of the Securities Act of 1934<sup>194</sup> and its accompanying Rule 10b-5<sup>195</sup> have been a common statutory basis for the prosecution of securities fraud.<sup>196</sup> Likewise, the marriage fraud statute does not contain the

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use the phrase “scheme or artifice to defraud.” *See* *United States v. Spencer*, 129 F.3d 246, 249 (2d Cir. 1997) (affirming a bankruptcy fraud conviction based on defendant’s scheme to launder money from a bankrupt airline); *United States v. McIntosh*, 124 F.3d 1330, 1334 (10th Cir. 1997) (premising bankruptcy fraud on concealment pursuant to section 152(7), which punishes anyone who conceals property, both knowingly and fraudulently, with the intent to circumvent the provisions of the bankruptcy code).

192. *See* 18 U.S.C. § 1347 (1994 & Supp. 1997). Section 1347 provides:

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

- (1) to defraud any health care benefit program; or
- (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

*Id.*

193. Both bankruptcy fraud under 18 U.S.C. § 157, and health care fraud under 18 U.S.C. § 1347, refer to a “scheme or artifice to defraud.” Limiting bankruptcy fraud to matters under title 11 and health care fraud to a “health care benefit program” restricts the subject matter that can be prosecuted under these statutes.

194. Securities and Exchange Act of 1934, ch. 404, § 10(b), 48 Stat. 881, 891 (codified as amended at 15 U.S.C. § 78j(b) (1994)). Section 78j(b) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

....

- (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b) (1994). Willful violations of section 10(b) of the Securities Act of 1934 and Rule 10b-5 are subject to criminal prosecution. *See id.* § 78(ff)(a) (making violators of the Securities Act subject to criminal prosecution). Recently, in *United States v. O’Hagan*, 521 U.S. 642 (1997), the Court permitted criminal liability under section 10(b) to be predicated upon a misappropriation theory. *See id.* at 653-59. The extent to which this will expand the object of the offense remains to be seen.

195. *See* 17 C.F.R. § 240.10b-5 (1998) (making it unlawful to engage in fraud “in connection with the purchase or sale of any security”).

196. Generic fraud statutes such as mail fraud have also been used in the prosecution of

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“scheme or artifice to defraud” language of mail fraud but provides an object of the fraud that limits the conduct subject to prosecution.<sup>197</sup>

### 1. *Bank fraud*

Although the bank fraud statute<sup>198</sup> was modeled after the mail fraud statute, the legislature did not adopt the language of the mail fraud statute in its “entirety.”<sup>199</sup> Where mail and wire fraud are “directed at the instrumentalities of fraud,” bank fraud “penalize[s] the victimization” of a specific object.<sup>200</sup> The “bank fraud statute was expressly ‘designed to provide an effective vehicle for the prosecution of frauds in which the victims are financial institutions that are federally created, controlled or insured.’”<sup>201</sup> Unlike mail and wire fraud, the bank fraud statute is focused against a specific type of fraud.<sup>202</sup> Bank fraud has been found inapplicable “where money is merely withdrawn legally from a federally insured bank by a victim and where the bank itself is in no way victimized.”<sup>203</sup>

The necessity for a “financial institution”<sup>204</sup> to be the victim serves a

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securities fraud. *See* *Carpenter v. United States*, 484 U.S. 19, 28 (1987) (finding defendants guilty of violating both the Securities Exchange Act and the mail and wire fraud statutes because the alleged scheme at issue, although concerning the stock market, was carried out through the use of the mails).

197. *See infra* notes 210-17 and accompanying text (detailing the different aspects of the marriage fraud statute and comparing its language to the mail fraud statute).

198. The bank fraud statute provides:

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344 (1994).

199. *See* *United States v. Monostra*, 125 F.3d 183, 187 (3d Cir. 1997) (explaining the differences between the bank fraud and mail fraud statutes).

200. *See id.* Additionally, with respect to mail and wire fraud, some courts have found that “[n]othing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived.” *United States v. Christopher*, 142 F.3d 46, 54 (1st Cir. 1998).

201. *Monostra*, 125 F.3d at 187 (quoting S. REP. NO. 98-225, at 377 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3515, 3517). “The two subsections of the statute express this in different terms: § 1344(1) prohibits schemes ‘to defraud a financial institution,’ while § 1344(2) prohibits schemes to obtain money or property ‘owned by, or under the custody or control of, a financial institution.’” *See id.* at 187.

202. In *United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988), the Second Circuit cited the House Judiciary Committee’s deliberations when crafting the bank fraud statute, referring particularly to congressional concerns about courts’ expansive interpretations of wire and mail fraud statutes. *See id.* at 906. The court used this legislative history to rule against a broad judicial interpretation of the bank fraud statute. *See id.*

203. *See id.* at 904.

204. Although the defendant does not need to know of the federally insured status, it is

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limiting function that differentiates bank fraud from generic statutes such as the mail and wire fraud statutes.<sup>205</sup> Some courts have also distinguished the bank fraud statute's use of the term "executes" preceding the phrase "scheme or artifice" from the language used in the mail and wire fraud statutes, by finding "that the bank fraud statute imposes punishment only once for each execution of the scheme while mail and wire fraud statutes punish each act in furtherance of a scheme."<sup>206</sup> Although the bank fraud statute allows for prosecutions involving "check kiting,"<sup>207</sup> the necessity for the financial institution to be the victim of the fraud<sup>208</sup> creates a boundary which precludes prosecutors from using the statute against an unlimited array of frauds.<sup>209</sup>

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necessary for the government to prove "the federally-insured status of the affected institution." See *United States v. Key*, 76 F.3d 350, 353 (11th Cir. 1996).

205. Although the term "financial institution" limits the scope of the statute, the term is broadly defined to cover many types of institutions. See KATHLEEN F. BRICKEY, 2 CORPORATE CRIMINAL LIABILITY: A TREATISE ON THE CRIMINAL LIABILITY OF CORPORATIONS, THEIR OFFICERS AND AGENTS § 8A:19 (2d ed. 1992 & Supp. 1997) (listing nine types of financial institutions covered by section 1344, including small business investment companies and branches of foreign banks). From the perspective of a bank official, therefore, the statute might seem overly broad. When contrasted with statutes such as mail fraud, which seldom offer restrictions on the subject matter that can be prosecuted under the statute, the limitation in the bank fraud statute to financial institutions makes the statute specific to one subject matter.

206. See David J. Elbaz et al., Note, *Financial Institution Fraud*, 34 AM. CRIM. L. REV. 665, 677 (1997) (distinguishing the bank fraud statute from the mail and wire fraud statutes and contending that "multiplicitous indictments" may cause defendants to be punished twice for the same offense); see also Brian P. Perry, Note, "Execution" of a Scheme to Defraud, *An Indictment of the Bank Fraud Statute*: *United States v. Lemon*, 941 F.2d 309 (5th Cir. 1991), 61 U. CIN. L. REV. 745, 748 (1992) ("[The *Lemon* court] has greatly limited prosecutors' ability to 'pile-on' charges in bank fraud cases."). But see *United States v. Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994) (delineating each separate check as an individual, fraudulent scheme against a bank); *United States v. Poliak*, 823 F.2d 371, 372 (9th Cir. 1987) (allowing each execution of a scheme to defraud to be considered a separate act under the bank fraud statute).

207. See *United States v. Pless*, 79 F.3d 1217, 1218 (D.C. Cir. 1996) (affirming the district court's ruling that the owner of a sign manufacturing business was guilty of a "classic check kite" in violation of the bank fraud statute, 18 U.S.C. § 1344 (1994), when he cross-deposited checks in two banks to hide his overdrafts). Check kiting, however, was found to be beyond the false statement statute of 18 U.S.C. § 1014. See *Williams v. United States*, 458 U.S. 279, 290 (1982) (asserting that the legislative history does not support a holding that the false statement statute was intended to cover bad checks, and therefore was not applicable in the present check-kiting case).

208. See T. Christopher McLaughlin et al., Note, *Financial Institution Fraud*, 35 AM. CRIM. L. REV. 789, 797 (1998) (stating that the final element of section 1344 specifies that only financial institutions with federal insurance may be victims under the statute). This limitation, however, does not preclude prosecutions against bank officers who "defraud the institutions they serve." See *United States v. Saks*, 964 F.2d 1514, 1518 (5th Cir. 1992) (stating that bank officers with the power to bind the bank can defraud the bank, thus meeting the requirement that the statute is only applicable if a financial institution is the victim). Courts have also found that schemes to defraud that "expose[] a bank to a risk of loss [are] sufficient to satisfy section 1344." See *United States v. 105,800 Shares of Common Stock of Firstrock Bancorp, Inc.*, 830 F. Supp. 1101, 1129 (N.D. Ill. 1993).

209. See, e.g., *United States v. Blackmon*, 839 F.2d 900, 904 (2d Cir. 1988) (reversing the lower court where the bank's customers and not the bank were the victims of the fraud).

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## 2. *Marriage fraud*

Specific fraud statutes do not always resemble the mail fraud statute. For example, a specific provision in an immigration statute criminalizes marriage fraud.<sup>210</sup> This provision does not require proof of a “scheme or artifice to defraud.” In addition to limiting the object of the fraud to “marriage fraud,” the provision also limits the context of the fraud to “evading any provision of the immigration laws.”<sup>211</sup>

The Marriage Fraud Act, passed in 1986, was claimed to be “Congress’ response to the growing problem of sham marriages.”<sup>212</sup> The specific legislation allows for prosecution without reliance upon generic statutes, such as the false statement statute<sup>213</sup> and the mail fraud statute<sup>214</sup> or reliance on conspiracy to defraud.<sup>215</sup> Criminalization of marriage fraud may be subject to criticism as an “inappropriate . . . method of deterring United States citizens or permanent residents from entering into marriages with aliens to facilitate the alien’s authorized admission into the United States.”<sup>216</sup> Specific marriage fraud legislation demonstrates that the legislature has reflected on the issue of marriage fraud and chosen to criminalize the activity.<sup>217</sup> Absent this specific legislation, prosecutors

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210. See 8 U.S.C. § 1325(c) (1994 & Supp. 1997). Section 1325(c), “Improper entry by alien,” provides: “Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than \$250,000, or both.” *Id.*

211. See *id.*

212. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.); Karen L. Rae, Comment, *Alienating Sham Marriages for Tougher Immigration Penalties: Congress Enacts The Marriage Fraud Act*, 15 PEPP. L. REV. 181, 204 (1988).

213. See *Johl v. United States*, 370 F.2d 174, 175 (9th Cir. 1967) (upholding a conviction for marriage fraud under the code section prohibiting false statements to the Immigration and Naturalization Service, 18 U.S.C. § 1001 (1964)). Prosecutors have charged defendants with both a violation of the false statement statute, 18 U.S.C. § 1001 (1994 & Supp. 1997), and marriage fraud, 18 U.S.C. § 1325(c) (1994 & Supp. 1997). See *United States v. Dedhia*, 134 F.3d 802, 805 (6th Cir. 1998).

214. See *United States v. Olatunji*, 872 F.2d 1161, 1168 (3d Cir. 1989) (finding legally sufficient an indictment alleging that the defendant married for the purpose of obtaining student aid, and thereby made false representations to the government in violation of the mail fraud statute).

215. See *Lutwak v. United States*, 344 U.S. 604, 615-20 (1953). In *Lutwak*, the dissent questioned whether a crime had been committed, stating that “[m]arriages of convenience are not uncommon and it cannot be that we would hold it a fraud for one who has contracted a marriage not forbidden by law to represent himself as wedded, even if there were grounds for annulment or divorce and proceedings to that end were contemplated.” *Id.* at 621 (Jackson, J., dissenting).

216. Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 673 (1997).

217. See Rae, *supra* note 212, at 183 (discussing the Subcommittee on Immigration and Refugee Policy report that urged Congress to enact tough, prophylactic measures to combat marriage fraud, and Congress’ response a year later with the Immigration Marriage Fraud

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would be left to apply generic fraud statutes to conduct that some might believe should not be the subject of criminal law. Specific legislation also provides explicit notice of what will be considered criminal conduct.

### III. LIMITING FRAUD STATUTES

Various approaches can be used to limit a fraud statute. The three methods outlined here demonstrate that the legislature can play a crucial and necessary role in setting the boundaries of a fraud statute. Limitations on the object of the offense,<sup>218</sup> more precise definitions of fraud,<sup>219</sup> and the imposition of monetary thresholds<sup>220</sup> can offer both the public and prosecutors certainty in law. Explicit legislation designed to curtail fraudulent conduct will make novel theories of prosecution unnecessary and minimize appellate reversals.

#### A. *Limiting the Object of the Fraud*

Generic statutes can best be limited by offering an object with specificity. As previously noted, mail and wire fraud permit prosecution of an endless array of frauds.<sup>221</sup> In contrast, bankruptcy fraud, health care fraud, marriage fraud, and bank fraud provide explicit subject matters and oftentimes specific victims, foreclosing prosecution of conduct falling outside the specific guidelines provided by the legislature.<sup>222</sup> Although, the level of specificity of a statute may be determined in part by the subject matter being criminalized, existing statutes that have specificity provide models for legislative drafting.

Although most fraud statutes provide specificity, prosecutors commonly use generic statutes, such as mail and wire fraud.<sup>223</sup> Precluding the use of generic statutes when conduct can be prosecuted by a specific statute can provide limitations. Limiting fraud statutes, however, cannot be left to the judiciary. Courts seldom curtail prosecutorial decision-making by restricting the use of

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Amendments of 1986).

218. See *infra* Part III.A (discussing some of the ways to limit the object of the fraud).

219. See *infra* Part III.B (combining the strategies of limiting the object of the fraud and limiting the definition of fraud to narrow the scope of a fraud statute).

220. See *infra* Part III.C.

221. See *supra* Parts II.A.2-3 (describing cases dealing with the application of general mail and wire fraud statutes to other forms of fraudulent acts).

222. See *supra* notes 191-217 and accompanying text (discussing other fraud statutes that are more limited in scope and application).

223. See Podgor, *supra* note 25, at 264 (explaining that mail fraud is the "most commonly used predicate act to a RICO charge").

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a generic statute when a more specific statute also applies.<sup>224</sup> The judiciary has also been relatively lax in recognizing the rule of lenity, the vagueness doctrine, and federalism concerns.<sup>225</sup>

Explicitly defining the object encompassed by a statute also provides limits. For example, Congress, in passing a fraud statute to criminalize conduct connected with access devices,<sup>226</sup> provided a definition of the term “access device.”<sup>227</sup> Despite the definition provided by the legislature, courts still needed to resolve whether the device that was the subject of the prosecution was within the terms of the statute.<sup>228</sup> On occasion courts dismissed an indictment or reversed a conviction where prosecutors used the statute beyond the legislative language.<sup>229</sup> In some cases, courts saw it within their

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224. See *United States v. Armijo*, 834 F.2d 132, 136 (8th Cir. 1987) (stating that as a matter of prosecutorial discretion the government may prosecute any act under more than one statute). But see *United States v. Henderson*, 386 F. Supp. 1048, 1053 (S.D.N.Y. 1974) (“There is . . . no need to use the mail fraud statute as a ‘stopgap device’ until ‘particularized legislation’ is enacted ‘to deal directly with the evil,’ for Congress has enacted legislation that affords adequate protection of the public interest [in this case] in the collection of income taxes.”); Ellen S. Podgor, *Tax Fraud-Mail Fraud: Synonymous, Cumulative or Diverse?*, 57 U. CIN. L. REV. 903, 933 (1988) (arguing against the use of mail fraud for tax violations); see also U.S. Attorney’s Manual, *supra* note 78, § 6-4.210 (containing prosecutorial guidelines restricting the use of mail fraud for tax violations).

225. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 99 SUP. CT. REV. 345, 346 (1994) (describing the Court’s failure to honor the rule of lenity in a case); Gregory A. Loken & Lisa R. Bambino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 177-78 (1993) (discussing the failure to use the rule of lenity in a case).

226. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2087 (codified as amended at 18 U.S.C. § 1029 (1994 & Supp. 1997)) (criminalizing fraud and related activities in connection with access devices).

227. See 18 U.S.C. § 1029(e) (1) (1994 & Supp. 1997).

[T]he term “access device” means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument) . . . .

*Id.*

228. See, e.g., *United States v. Dabbs*, 134 F.3d 1071, 1072 (11th Cir. 1998) (determining that a merchant account number is an “access device”); *United States v. Nguyen*, 81 F.3d 912, 914 (9th Cir. 1996) (holding that a blank credit card is an “access device”). In *United States v. Lee*, 815 F.2d 971 (4th Cir. 1987), the defendant argued on appeal that 18 U.S.C. § 1029 was “unconstitutionally vague because its ‘prohibitions are not clearly defined.’” *Id.* at 973. The Fourth Circuit rejected this argument, finding that “[a]lthough the language of the statute anticipates new forms of ‘access devices,’ it offers both adequate warning to defendants like Lee that their conduct is unlawful and adequate guidance to judges and juries.” *Id.* at 974.

229. See, e.g., *United States v. Morris*, 81 F.3d 131, 134 (11th Cir. 1996) (finding that a “tumbling cellular telephone” was not within the scope of the statute prior to the 1994 amendment); *United States v. Brady*, 13 F.3d 334, 338-39 (10th Cir. 1993) (concluding that “altered cellular telephones used for purposes of free riding on the cellular telephone system—are not ‘access devices’ within the meaning of § 1029”). But see *United States v. Ashe*, 47 F.3d 770, 772 (6th Cir. 1995) (finding a tumbling cellular telephone to be within the scope of section 1029).

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province to extend a statute to cover a new type of access device.<sup>230</sup> The legislature, however, later amended the statute to criminalize some of the alleged criminal activity previously omitted by the statute.<sup>231</sup> Specific legislative action allows courts to focus on the object of the offense as opposed to making a judgment on the “wrongfulness” of the fraud.<sup>232</sup>

### *B. Limiting the Definition of Fraud*

Fraud statutes can also be limited by the definition offered to the term fraud. The term “scheme or artifice to defraud” can be found throughout the United States Code.<sup>233</sup> It is a term which can serve to expand the conduct subject to prosecution under a statute.<sup>234</sup> This is particularly true as a result of the legislative definition which provides that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”<sup>235</sup> A limitation is offered, however, where the object of the offense is narrowly provided.<sup>236</sup> Likewise, when a fraud statute

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230. See *United States v. Brewer*, 835 F.2d 550, 553 (5th Cir. 1987) (holding that the language of the statute provided notice that misuse of long distance access codes is a criminal act under the statute). In *Brewer*, the Fifth Circuit stated:

Although its legislative history suggests that the primary focus of section 1029 was to fill cracks in the criminal law targeted at credit card abuse, we are persuaded that Brewer’s conduct is reached by a practical reading of the statute. Both the Senate and House Reports on the statute state that the definition of “access device” was intended to be “broad enough to encompass technological advances.”

*Id.* at 553.

231. Congress amended the statute in 1994 to address tumbling cellular phones. See Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 206(a)(2), 108 Stat. 4289, 4291 (1994) (codified as amended at 18 U.S.C. § 1029(a)(8) (1994 & Supp. 1997)); see also *Morris*, 81 F.3d at 133 (stating that “Congress amended the statute to address specifically tumbling cellular phones” under section 1029).

232. See, e.g., *Brewer*, 835 F.2d at 553 (stating that the language of section 1029 provides notice that misuse of a long distance access code is a crime). The Fifth Circuit noted: “[T]he requirement that statutes give fair notice cannot be used as a shield by one who is already bent on serious wrongdoing.’ At the very least, Brewer must have known that hacking out long distance access codes to obtain free long distance service was ‘wrong.’” *Id.* (footnotes omitted).

233. Fraud statutes that use the term “scheme or artifice to defraud” are not limited to title 18 of the United States Code. See, e.g., 7 U.S.C. § 6(o) (1994) (prohibiting “[f]raud and misrepresentation by commodity trading advisors, commodity pool operators, and associated persons”); 15 U.S.C. § 77q (1994) (“Fraudulent interstate transactions”); 42 U.S.C. § 3220 (1994) (assessing “[p]enalties” for “false statements, embezzlement, misapplication of funds, false book entries, schemes to defraud, and speculation”).

234. See, e.g., 18 U.S.C. § 1341 (1994) (using the term the “scheme or artifice to defraud” in the mail fraud context).

235. See, e.g., *id.* § 1346 (defining language to include a person’s right to “honest services”).

236. See, e.g., *id.* § 1344 (limiting the “scheme or artifice . . . to defraud” by the object in the bank fraud statute); 18 U.S.C. § 1347 (1994 & Supp. 1997) (limiting the “scheme or artifice . . . to defraud” by the object in the health fraud statute).

In contrast, where several objects are offered as media for prosecution, the “scheme or artifice to defraud” language can have a broader reach. See, e.g., 18 U.S.C. § 2314 (1994) (proscribing “[t]ransportation of stolen goods, securities, moneys, fraudulent State tax stamps,

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specifically limits the fraud application by not using the term “scheme or artifice to defraud,” a generic medium can be curtailed.

The computer fraud statute<sup>237</sup> is an example of a fraud statute where the legislature did not use the term “scheme or artifice to defraud.” Computers, like wires and the mails, could easily provide a generic object that would permit an array of conduct to be prosecuted under the statute. The legislature, however, in drafting the computer fraud statute offered restrictive language which resulted in clear boundaries as to the conduct covered by the statute.<sup>238</sup> In drafting the computer fraud statute, the legislature used seven specific applications of fraud.<sup>239</sup> The statute criminalizes activity

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or articles used in counterfeiting”).

237. *See* 18 U.S.C. § 1030(a) (1994 & Supp. 1997).

238. *See id.* The statute does, however, provide for attempts in addition to the actual completed conduct. *See id.* § 1030(b) (authorizing penalties of fines and imprisonment for attempted fraudulent activities under the statute).

239. *See* 18 U.S.C. § 1030(a). This section provides:

(a) Whoever—

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer if the conduct involved an interstate or foreign communication;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period;

(5) (A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without

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such as browsing in a government computer and the interstate trafficking of passwords.<sup>240</sup> The statute does not authorize the prosecution of any fraudulent activity that merely uses the computer.<sup>241</sup> By explicitly outlining the types of fraudulent conduct that can be prosecuted as computer fraud, prosecutors are prevented from broadening the scope of the statute to encompass any type of fraudulent conduct that merely happens to involve the use of a computer.<sup>242</sup>

### C. Limiting the Monetary Threshold

Fraud statutes can also be limited by the monetary threshold specified in the statute. The extent to which a statute will be limited by its object may in some instances be a subject of judicial controversy. For example, the major fraud statute,<sup>243</sup> a relatively new statute,<sup>244</sup> offers generic language which would appear to permit

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authorization, to a protected computer;

(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage;

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if—

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States;

(7) with intent to extort from any person, firm, association, educational institution, financial institution, government entity, or other legal entity, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to cause damage to a protected computer;

shall be punished as provided in subsection (c) of this section.

*Id.*

240. *See id.* § 1030(a)(3); *id.* § 1030(a)(5)(B); ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 237-40 (2d ed. 1997) (examining the seven types of computer activities prohibited by 18 U.S.C. § 1030(a)).

241. The statute has the potential to become a generic statute by the use of the word “protected computer,” which is defined to include “a computer which is used in interstate or foreign commerce or communication.” *See id.* § 1030(e)(2)(B). The term as used in 18 U.S.C. § 1030(a)(4) requires that one “accesses a protected computer without authorization, or exceeds authorized access.” *Id.*

242. *See id.* § 1030(a). Prosecutors have used other statutes, such as wire fraud, for the prosecution of computer crimes. *See* Glenn D. Baker, *Trespassers Will Be Prosecuted: Computer Crime in the 1990s*, 12 *COMPUTER/L.J.* 61, 79-91 (1993) (discussing other federal statutes used to prosecute computer-related crimes); Eli Lederman, *Criminal Liability for Breach of Confidential Commercial Information*, 38 *EMORY L.J.* 921, 967-77 (1989) (stating that many states have enacted statutes protecting confidential commercial information which have been used for the prosecution of computer crimes).

243. *See* 18 U.S.C. § 1031 (1994) (outlining what constitutes major fraud in the United States).

244. *See* Major Fraud Act of 1988, Pub. L. No. 100-700, § 2(a), 102 Stat. 4631, 4631 (codified at 18 U.S.C. § 1031(a) (1994)). Enacted in 1988, the Major Fraud Act is “[p]lattered generally after the federal bank fraud statute.” *See* Major Scott W. MacKay, *Major Fraud Against the United*

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prosecution of a wide range of criminal conduct.<sup>245</sup> The statute focuses on major procurement fraud against the United States.<sup>246</sup> In reality, the high monetary threshold required to invoke the statute makes it less likely to be subject to the criticism suggested by this Article.<sup>247</sup>

The extent to which the major fraud statute will become more pervasive may rest on how courts compute the dollar threshold needed for application of the major fraud statute.<sup>248</sup> A generic application could result if a court interprets the \$1,000,000 jurisdictional amount required by the statute to be met “so long as the prime contract, a subcontract, a supply agreement, or any constituent part of such contract is valued at one million or more.”<sup>249</sup> In contrast, the object of the fraud is more limited when a court finds that “the value of the contract is determined by looking to the specific contract upon which the fraud is based.”<sup>250</sup>

A statute with a low monetary threshold may offer a more

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*States*, ARMY LAW., Sept. 1992, at 9.

245. See MacKay, *supra* note 244, at 8-9 (“Section 1031 is as broad and flexible as the federal mail and wire fraud statutes, but it does not require the Government to prove that an accused used the mail or a telecommunication system to effect a fraud.”).

246. See *Brooks v. United States*, 111 F.3d 365, 368 (4th Cir. 1997) (concluding that 18 U.S.C. § 1031(a) is applicable to any contractor involved with the United States as long as any part of the agreement has a value of at least \$1,000,000 or more).

247. See 18 U.S.C. § 1031(a) (defining the jurisdictional amount for prosecution as \$1,000,000).

248. See *Brooks*, 111 F.3d at 369 (recognizing that its conclusion that the statute is applicable as long as any part of the contract is valued at \$1,000,000 is in direct contrast with dictum by the Second Circuit regarding a similar case); *United States v. Nadi*, 996 F.2d 548, 551 (2d Cir. 1993) (holding that the jurisdictional amount of the major fraud statute is satisfied only if the specific contract is valued at \$1,000,000).

Courts have also differed on whether the major fraud statute punishes each execution of a scheme to defraud or individual acts in furtherance of a scheme to defraud. Compare *United States v. Sain*, 141 F.3d 463, 473 (3d Cir. 1998) (holding that, like the bank fraud statute, the major fraud statute punishes each “knowing ‘execution’ of the fraudulent scheme and not simply devising the fraudulent scheme itself”), and *United States v. Wiehl*, 904 F. Supp. 81, 88 (N.D.N.Y. 1995) (stating that the statute “punishes each execution of a scheme to defraud”), with *United States v. Frequency Elecs.*, 862 F. Supp. 834, 839 (E.D.N.Y. 1994) (concluding that the word “execute” includes the acts in furtherance of the scheme to defraud).

249. *Brooks*, 111 F.3d at 368-69. Determining what is included within a monetary jurisdictional amount is not limited to fraud statutes with high monetary thresholds. This issue has also arisen where the jurisdictional amount is relatively low. In *United States v. Draves*, 103 F.3d 1328 (7th Cir. 1997), the Seventh Circuit reviewed whether 15 U.S.C. § 1644 (1994), a statute which “punishes the knowing use of a fraudulently obtained credit card to acquire ‘money, goods, services, or anything else of value which within any one-year period has a value aggregating \$1,000 or more,’” should include sales tax in meeting the dollar threshold required for criminal culpability. See *id.* at 1332. The court found that “aggregate value,” as used in section 1644(a), indeed did include sales tax. See *id.*

250. *Nadi*, 996 F.2d at 551. *Nadi* held that the “value of the specific contract or subcontract to which the fraud is connected is controlling and not the value of related contracts or subcontracts.” *Id.* at 552. The court in *Nadi* noted that an “opposite view would subject subcontractors to liability under the Major Fraud Act no matter how insignificant the value of their subcontracts.” See *id.*

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expansive reading. For example, the program fraud statute,<sup>251</sup> enacted in 1984, applies “when governmental or other entities receive more than ten thousand dollars in federal benefits within one year.”<sup>252</sup> The statute has been applied to a wide array of fraudulent conduct.<sup>253</sup> The judiciary has been left to place limits on a generic application where prosecutors have exceeded the limits of the statute.<sup>254</sup> Despite the judicial limits placed on 18 U.S.C. § 666, this relatively new statute adds a new dimension to the federalizing of “program fraud” occurring on the state level.<sup>255</sup>

The three limitations outlined here serve to place boundaries on

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251. See 18 U.S.C. § 666 (1994). Although section 666 can be considered essentially a bribery or theft statute and outside the purview of this Article, it has also been referred to as the “program fraud statute.” See *United States v. LaHue*, 998 F. Supp. 1182, 1184-85 (D. Kan. 1998). The statute provides in pertinent part:

- (a) Whoever, if the circumstance described in subsection (b) of this section exists—
- (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
- (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
- (i) is valued at \$5,000 or more, and
- (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or
- (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more; or
- (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more; . . .

18 U.S.C. § 666.

252. See George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 248 (1998) (discussing the scope and case development of section 666).

253. See *Salinas v. United States*, 522 U.S. 52, 57 (1997) (concluding that 18 U.S.C. § 666 applies in all cases in which the agency or organization involved receives federal funding).

254. See *LaHue*, 998 F. Supp. at 1188 (“Section 666’s legislative history reveals that although Congress intended the term *Federal program* to be construed broadly, Congress did not aim section 666 at organizations that merely receive federal ‘benefits’ after such benefits have reached their intended beneficiary.”); see also *United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) (“The scope of § 666, however, is not limitless; the statute clearly indicates that only those contractual relationships constituting some form of ‘Federal assistance’ fall within the scope of the statute.”).

255. See Brown, *supra* note 252, at 313 (“The courts are dealing with a broadly drafted law that Congress enacted to deal with a relatively narrow set of problems. The text can enable this law to become a form of general federal anti-corruption statute in any jurisdiction that receives more than \$10,000 in federal assistance.”); see also Daniel N. Rosenstein, Note, *Section 666: The Beast in the Federal Criminal Arsenal*, 39 CATH. U. L. REV. 673, 674 (1990) (“[I]n eliminating the problems caused by the narrow boundaries of earlier statutes, Congress enacted a general federal criminal statute of potentially limitless scope and effect.”).

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fraud statutes. By providing a specific object of the offense, specific definitions within a statute, limitations of what will be considered fraud, and a reflective monetary threshold, fraud becomes a known quality within a statute. Absent these restrictions, the contours of what will be considered fraud are left to gut reactions of individuals who may be motivated by their own personal disgust with the alleged conduct.<sup>256</sup>

#### CONCLUSION

The amorphous nature of the “concept” of fraud, coupled with its haphazard disbursement throughout the laws, makes it prime for a consistent methodology. There has been substantial discussion of federal criminal law reform.<sup>257</sup> This is particularly meaningful in light of fraud being both a civil and criminal concept. The charging discretion afforded prosecutors becomes especially pronounced when examining the “blurring”<sup>258</sup> between what will be considered civil fraud and what will be prosecuted as criminal fraud.

Although consistency is promoted, a single fraud statute may be more cumbersome than beneficial. The vast circumstances to which fraud applies necessitate an array of different provisions. Some consistency in the statutory construction could enhance the interpretative process. Consolidation, deletion of redundant statutes, and the writing of specific provisions would heighten the prosecution of criminal fraud. Most important, however, is the need for limitations on generic fraud statutes. A “dynamic”<sup>259</sup> approach to interpreting fraud statutes is unwarranted where criminality is not obvious and prosecutorial discretion has exceeded the text,

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256. See *United States v. Goodman*, 984 F.2d 235, 240 (8th Cir. 1993). In *Goodman*, the Eighth Circuit asserted that, “[w]ithout some objective evidence demonstrating a scheme to defraud, all promotional schemes to make money, even if ‘sleazy’ or ‘shrewd’ would be subject to prosecution on the mere whim of the prosecutor. More is required under our criminal law.” *Id.*

257. See, e.g., Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 201 (1997) (discussing whether a new federal criminal code is possible); Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 268 (1997) (providing ten suggestions on how to reform the federal criminal code). Professor Kathleen Brickey noted that “[t]he proposed criminal code [recommended by the Brown Commission] would, for the first time, codify all federal felonies in a single title of the United States Code.” Brickey, *supra* note 43, at 162.

258. See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1876-77 (1992) (discussing the distinctions between civil and criminal laws); see also Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1871 (1992) (discussing a “middle ground” in punitive civil jurisprudence).

259. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) (stating that statutes should be interpreted in light of current societal, political, and legal contexts).

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“legislative expectation,” and the natural “evolution of the statute.”<sup>260</sup>

Although some may believe that certain generic fraud statutes need to be left as “stopgap device[s]” until the legislature has the opportunity to pass “particularized legislation,”<sup>261</sup> such a view transfers the decision-making authority to the executive.<sup>262</sup> The judiciary in reviewing the executive decisions involving generic statutes has found some of the “novel theories” of prosecutors to be beyond the scope of the legislation.<sup>263</sup> The fact that fraud lacks a clear definition makes this process uniquely troublesome. Technological advances should not be used as an excuse to authorize executive and judicial legislating. Likewise, executive efficiency does not warrant discarding a view of “legislative supremacy.”<sup>264</sup>

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260. *See id.* at 1483.

261. *See* *United States v. Maze*, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting) (describing the mail fraud statute as an effective method of prosecuting new frauds that Congress has not yet addressed).

262. *But cf.* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 469 (1996) (arguing “that the law would be better if the delegated lawmaking authority that courts now exercise were instead wielded by the Department of Justice”).

263. *See, e.g.*, *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996) (rejecting the prosecutorial theory because “fraud statutes do not cover all behavior which strays from the ideal”); *United States v. D’Amato*, 39 F.3d 1249, 1262 (2d Cir. 1994) (rejecting the use of “false pretenses theory” for an allegedly excessive attorney fee); *see also, e.g.*, Starkman, *supra* note 27, at B7 (suggesting that recent reversals of mail and wire and fraud cases demonstrate that the government has gone beyond legislative intent).

264. *But see* Kahan, *supra* note 24, at 5 (finding a “legislative supremacy view” as “fiction”).