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Citation: 109 Penn St. L. Rev. 1107 2004-2005

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Originally published as Michael L. Seigel & Christopher  
Slobogin, Prosecuting Martha: Federal Prosecutorial Power and  
the Need for a Law of Counts, 109 Penn St. L. Rev. 1107 (2005).

# Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts

Michael L. Seigel & Christopher Slobogin\*

## I. Introduction

As this article goes to press, Martha Stewart has just completed her five-month sentence in a West Virginia federal prison, imposed after her conviction on four counts of a five-count indictment. Stewart's case has spawned a cottage industry of commentary. Many have pointed out that the well-known queen of domestic perfection was not prosecuted for insider trading—which was the original focus of the government's investigation and the offense that most casual observers think sent her to jail—but rather for *lying* about why she traded, charges that have been characterized as both “trivial” and “extraneous.”<sup>1</sup> It has also been argued that, even looking at only those facts most favorable to the government, the insider trading case against Stewart was extremely tenuous (although the SEC has now brought a civil petition against Stewart on that ground).<sup>2</sup> On these assumptions, some have suggested that the Stewart prosecution was motivated by sexism or politics, and others view it as proof positive that federal prosecutors have become godlike in their

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\* Professors of Law, University of Florida Fredric G. Levin College of Law. Professor Seigel was a federal organized crime prosecutor in Philadelphia for five years and a First Assistant U.S. Attorney in Tampa, Florida, for four years. We thank the participants in the Criminal Law and Procedure Roundtable at Brandeis Law School for their comments on this article. Professor Seigel also acknowledges the excellent research assistance of Kelly R. McNeal.

1. John Buell, *Is Martha Being Used as a Scapegoat?* BANGOR DAILY NEWS, Aug. 25, 2004, available at [www.commondreams.org/views](http://www.commondreams.org/views) (“[Stewart’s] act is trivial in comparison with an economic and political climate that encourages paper profits, short time horizons, and exploitation of customers and workers.”); Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should Be Charged with Criminal Conduct?*, 109 PENN. ST. L. REV. 1059 (2005) (referring to the “extraneous crimes in the Martha Stewart case”).

2. Christopher Westley, *Martha Stewart’s Surreal Ordeal*, at <http://www.mises.org/fullstory.aspx?Id=1453> (calling the insider trading claim “a truly ridiculous charge when made against someone without any fiduciary responsibility to the firm”). *But see infra* note 19.

ability to convict anyone they want.<sup>3</sup>

The ills purportedly manifested by Stewart's trial and tribulations range from a paucity of controls over prosecutorial decision-making to the "pathological" proliferation of vague statutes that criminalize innocuous or marginally immoral behavior.<sup>4</sup> Proposed solutions to the types of problems evidenced in the Stewart case include more stringent self-regulation of prosecutors based on "proportionality" or "neutrality" principles,<sup>5</sup> adoption of continental practices that better train and monitor prosecutors,<sup>6</sup> and giving judges the power to "nullify" overbearing prosecutorial charging decisions.<sup>7</sup> The consistent concern underlying these proposals is that prosecutors have too much discretion.

This article uses the Stewart case to take a closer look at the various types of discretion prosecutors wield. Unlike some other commentators, we are not persuaded that the case against Stewart was brought in bad faith or that it was unwarranted at its core. As we discuss in the first part of this article, prosecutors had ample reason for investigating her conduct and charging her with a crime.

At the same time, for reasons advanced in the second section of this article, other prosecutorial decisions made in her case give us greater pause. In particular, we critique an aspect of the Stewart prosecution that has yet to be the subject of sustained analysis, having to do with a phenomenon that we call "redundant charging." That phrase refers to

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3. See, e.g., Joan MacLeod Heminway, *Save Martha Stewart? Observations About Equal Justice In U.S. Insider Trading Regulation*, 12 TEX. J. WOMEN L. 247, 247 (2003) (claiming that the Stewart prosecution was infected with sexism at many stages); see also, Buell, *supra* note 1 ("Putting Stewart in her place is a strategy designed to appeal to insecure working class males whose votes Bush needs but whose interest he serves only through symbolic politics."); Harry Browne, *What the Martha Stewart Case Means to You*, available at [www.harrybrowne.org/articles/MarthaStewart2](http://www.harrybrowne.org/articles/MarthaStewart2) (using the Stewart case to bolster the claim that "modern America [is] a place where anyone can be charged with anything").

4. Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases*, 8 BUFF. CRIM. L. REV. 165, 194 (2005) ("Federal prosecutors are subject to minimal supervision and are authorized to make independent decisions that, with few exceptions, are not subject to approval or direction."); William J. Stuntz, *The Pathological Politics of the Criminal Law*, MICH. L. REV. 505, 517 (2001) ("Federal criminal law probably covers more conduct—and a good deal more innocuous conduct—than any state criminal code.").

5. Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723 (1999); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WISC. L. REV. 837.

6. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 617 (1990) (advocating adoption of the continental charge screening process); Moohr, *supra* note 4, at 218 (suggesting that the "imbalance produced by prosecutorial power" could be addressed by adopting "the safeguards that constrain prosecutorial power in inquisitorial systems.").

7. Stuntz, *supra* note 4, at 569.

prosecutors' nearly unrestricted ability to manufacture closely related charges based on the same course of conduct. After describing the problem, we propose that courts develop a "law of counts" to remedy it.

## II. The Decision to Investigate and Charge Stewart

Far more white-collar crime takes place in the United States than federal prosecutors have the resources to pursue.<sup>8</sup> As a result, only a small percentage of this alleged criminal conduct is targeted for federal prosecution. A close look at the winnowing process reveals that prosecutors—and even criminal investigators—play a smaller role in selecting cases for criminal treatment than is commonly believed. Most of the time, white-collar investigations are initiated, not by members of the Department of Justice, but by employees of regulatory agencies such as the SEC, IRS, or EPA. Often the administrative investigation is triggered by a flag raised during a routine screening process. In other cases, the conduct would have escaped official notice (as most white-collar crime probably does) but for a citizen's tip—for example, from an estranged spouse, a nosy neighbor, or a disgruntled shareholder or employee.

Most white-collar crime detected by the government is fully disposed of at the regulatory level.<sup>9</sup> On occasion, however, agency personnel decide, for one reason or another, that the behavior of the putative defendant warrants a criminal investigation.<sup>10</sup> Even then, when lower level bureaucrats make such a determination, some form of supervisory review takes place to confirm that a referral for criminal treatment should be made. Thus, only a small percentage of white-collar cases ever make it to the U.S. Attorney's doorstep.<sup>11</sup>

Even fewer cases get in the door. Due to their relative lack of resources, U.S. Attorney's Offices usually employ a set of intake guidelines to screen out potential cases that are too insignificant to

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8. See Heminway, *supra* note 3, at 252 ("federal investigators have only limited resources available for use in pursuing possible violators. Accordingly, each prosecutor or enforcement agent must pick and choose those against whom the laws within its jurisdiction will be enforced.")

9. See Cynthia Barnett, FBI Criminal Justice Information Services Division, *The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data 6*, available at [www.fbi.gov](http://www.fbi.gov).

10. Statutory formulations, which typically distinguish civil versus criminal liability based upon whether the defendant's conduct was "willful" (see, e.g., 15 U.S.C. § 78ff), are not very helpful in separating out cases for potential criminal treatment, because almost all white-collar malfeasance is willful (as opposed to reckless or negligent). Thus, agencies often rely on other factors, such as the magnitude of the harm or fraud, the criminal history of the subject, and the reaction of the subject to the investigation, in deciding whether to make a criminal referral.

11. See Heminway, *supra* note 3, at 261-65.

warrant a federal prosecutor's attention. These guidelines vary from office to office, administration to administration, and crime to crime.<sup>12</sup> They depend to some degree on Department of Justice priorities as well as local conditions. If an agency refers a matter that does not meet the guidelines, it is promptly declined. If the matter meets the guidelines, it is assigned to an Assistant United States Attorney for evaluation and further development.

Although outsiders can only make educated guesses, something akin to the process just described appears to have taken place in Martha Stewart's case. On December 28, 2001, the value of ImClone stock dropped a precipitous sixteen percent after the announcement that the Food and Drug Administration had declined to review ImClone's key cancer drug, Erbitux. As a matter of routine policy, regulators at the SEC examined the trading of ImClone just prior to its steep decline, looking to see if any insiders or relatives of insiders had traded the stock before the bad news became public. They immediately discovered that both children of ImClone CEO Sam Waksal had, in fact, traded ImClone shares on December 27, one through a Prudential Securities account and one through Merrill Lynch. Inquiries at Merrill Lynch revealed that Sam Waksal had also attempted to sell his own shares of ImClone on the same day, but could not; to its credit, Merrill Lynch blocked the trade. Waksal then transferred these shares to his daughter's account and tried to sell them through her. Once again, Merrill Lynch refused to execute the trade.<sup>13</sup>

It must have been around this time that SEC investigators discovered Martha Stewart's December 27 ImClone trades from her Merrill Lynch account. One can only imagine their reaction at seeing such a famous name appear in the midst of their investigation. They quickly figured out that Waksal and Stewart were close friends. This raised the specter—wrong as it turned out—that Stewart had traded after

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12. Generally speaking, DOJ's prosecutorial guidelines, found in the United States Attorney's Manual, are open to the public, but office-by-office intake guidelines are not. See Green & Zacharias, *supra* note 5, at 843 n.23 (referring to individual prosecutorial offices' non-public intake guidelines). In the experience of one of the authors (Seigel), who served as a prosecutor for nearly a decade, internal guidelines are written to be flexible enough to take special situations into account. These might include pursuing a prosecution that does not otherwise meet the guidelines because it is believed that it will lead to other, bigger cases; pursuing a case that manifests a special federal interest; and pursuing a case that will have a greater deterrent impact than its size objectively indicates. Obviously, this creates a huge pocket of discretion in which prosecutors can and do operate.

13. The timing of the actions set forth in this paragraph can be established by a careful reading of the Waksal and Stewart indictments, especially the conspiracy to obstruct charges. See *United States v. Stewart*, 323 F. Supp. 2d 606, 624-25 (S.D.N.Y. 2004).

receiving an inside tip from the company's CEO.<sup>14</sup> The SEC continued its administrative investigation. On January 7, 2002, SEC staff attorneys interviewed Peter Bacanovic, Waksal's former employee as well as his and Stewart's broker at Merrill Lynch.<sup>15</sup> On January 8, the SEC issued a voluntary request for production of documents to ImClone.

It was only at this point, sometime between January 8 and January 25, that the FBI and the U.S. Attorney's Office joined the investigation.<sup>16</sup> Thus, the U.S. Attorney's Office's determination to participate in the Stewart case came only after the SEC's discovery of her potentially illicit trading and its initiation of an official inquiry. From the public record, it is difficult to discern whether the prosecutors were asked aboard by agency investigators or instead read about the case in the media and joined the investigation on their own. Either way, at the time they became involved there was significant circumstantial evidence suggesting that Stewart had committed insider trading as a classic tippee, evidence that could not be ignored.

Of course, the possibility exists that prosecutors decided to pursue Stewart's case for suspect reasons, based on sexism, a political agenda, or a desire to bask in the media limelight. But in a high profile case like Stewart's, the conscientious prosecutor is strongly motivated to take a leading role early in the investigation to ensure that no embarrassing missteps take place. Further, it is perfectly legitimate to target conspicuous violators so that the deterrent effect of criminal law is maximized.<sup>17</sup> Perhaps most important, if a high profile case identified by the SEC were *not* aggressively investigated under his or her watch, the U.S. Attorney would undoubtedly be accused of favoring the rich and

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14. If Stewart had traded on a tip from Waksal, she would have been a classic tippee and liable under well settled insider trading law. See *Dirks v. SEC*, 463 U.S. 646, 655-56 (1983).

15. See *United States of America v. Stewart*, 323 F. Supp. 2d 606, 624-25 (S.D.N.Y. 2004) (citing Appendix A entitled "Redacted Superseding Indictment," ¶ 24) [hereinafter *Stewart Indictment*].

16. Had the U.S. Attorney's Office for the Southern District of New York been involved any earlier, it would have participated in the January 7 interview.

17. Apparently the SEC routinely targets high-profile defendants. See Vikram David Amar, *The Many Ways to Prove Discrimination*, 14 HASTINGS WOMEN'S L.J. 171, 178 n.13 (2004). But courts have refused to find that this type of practice constitutes a violation of the equal protection clause or some other discrimination principle. *Falls v. Town of Dyer, Ind.*, 875 F.2d 146, 148 (7th Cir. 1989) ("A government legitimately could enforce its law against a few persons (even just one) to establish a precedent, ultimately leading to widespread compliance."); *United States v. Catlett*, 584 F.2d 864, 864 (8th Cir. 1978) (upholding an IRS policy targeting notorious tax protesters); *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 21 (N.Y. App. Div. 1962) ("Selective enforcement may . . . be justified when a striking example or a few examples are sought in order to deter other violators. . . .").

famous.<sup>18</sup> All of these considerations likely influenced the U.S. Attorney's decision to join and pursue the securities investigation.

But what about the prosecutors' ultimate decision to charge Stewart for lying, rather than insider trading? We again can only speculate as to why the latter charge was not brought. Clearly, the original theory of the case—that Stewart had traded on a tip from the company's CEO—did not pan out; instead, the tip had come solely from inside the brokerage house. Although the lower courts have thus far agreed that trading on such a tip constitutes a violation of the insider trading law,<sup>19</sup> the Supreme Court has yet to rule on a case in which a putative inside trader received her tip from a misappropriator. There are several reasons why the U.S. Attorney's Office might not have wanted Stewart's case to be the one to test that proposition in the latter forum (where Stewart surely would have taken it). First, Stewart had the resources to mount the most vigorous, expert defense. Second, the mere fact of Stewart's notoriety might give her a tactical advantage; subconsciously, judges and justices are more likely to have sympathy for someone with fame and fortune.<sup>20</sup> Third, losing to a celebrity at the Supreme Court level would be a conspicuous black eye for the Department of Justice. Better, then, to place this issue on the civil side—which the current SEC case against Stewart does—where the government's burden of proof is lower (critical to success on the *mens rea* issue) and where a loss would not be so harmful to the government's prestige.

But then why not leave Stewart alone? Others have expressed concern over what have been aptly named “sideshow” charges, especially when those charges are primarily based on denials of other, more substantive (alleged) criminal conduct.<sup>21</sup> That concern is

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18. Imagine, for instance, if the prosecutors investigating the Kobe Bryant case had not charged him with rape, even though it now appears that their case was weak. See Gary Tuchman, *Judge Drops Charges against Bryant*, available at <http://www.cnn.com/2004/LAW/09/01/bryant.trial/> (quoting Jeffrey Toobin as saying, “It is a disgrace that these prosecutors have brought a case on such flimsy grounds.”).

19. Criminal cases holding that there is liability in this situation include *United States v. Mylett*, 97 F.3d 663 (2d Cir. 1996), *cert. denied* 521 U.S. 1119 (1997); *United States v. Libera*, 989 F.2d 596 (2d Cir.), *cert. denied*, 510 U.S. 976 (1993); *United States v. Falcone*, 97 F. Supp. 297 (E.D.N.Y. 2000) (reluctantly following the holding in *Libera*). Regulatory cases imposing such liability, which are precedent for criminal cases, include *SEC v. Maio*, 51 F.3d 623 (7th Cir. 1995); *SEC v. Grossman*, 887 F. Supp. 649 (S.D.N.Y. 1995); *SEC v. Musella*, 748 F. Supp. 1028 (S.D.N.Y. 1989).

20. Thus the saying, “There but for the grace of God go I.”

21. Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002–03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 456–57 (2004) (noting that prosecutions on cover-up charges prevent a public trial on the core charges and that such charges are “an end-run around the more difficult to prove, yet suspected (and hyped), actual offense”).

appropriate in some cases.<sup>22</sup> But Stewart's cover-up went beyond a simple denial,<sup>23</sup> as we detail in the next section, the prosecution also had solid reason to believe that Stewart had made *numerous* false statements, altered evidence (if only momentarily), and suborned perjury by her broker.

In short, at the time of charging, the prosecution reasonably could have believed that Stewart had done something plainly wrong, separate and apart from trading on inside information. She not only gave into the understandable but regrettable human instinct to dissemble when confronted with a hand in the cookie jar, but she also tried to muddy the evidentiary trail and lasso a colleague into covering up the swindle.<sup>24</sup> Stewart's conduct may have been near the threshold where prosecutors should avoid filing an indictment. But her conduct was not "trivial." And the charges were not "extraneous" to the criminal justice system's legitimate goals of punishing blameworthy actions and ensuring the efficient prosecution of criminal acts.<sup>25</sup>

### III. The Decision to Charge Stewart with Five Counts

While we think the decisions to investigate Martha Stewart and prosecute her for her cover-up was justifiable, we are more troubled by the *number* and *type* of charges filed against her. The indictment in the Stewart case is an illustration of the tremendous power prosecutors have to shape the contours of a crime and to split it up—perhaps arbitrarily—into many different but overlapping counts. In order to explore these issues further, we begin with a description of that document.

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22. Stuart Green has written an article that explores this issue in some detail. Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM CRIM. L. REV. (forthcoming 2005) (manuscript on file with authors).

23. It was in such cases that the exculpatory no doctrine, which required dismissal of false statement charges based solely on a denial of wrongdoing, was most likely to apply before it was rejected by the U.S. Supreme Court in *Brogan v. United States*, 522 U.S. 398 (1998). While we are uncomfortable with *Brogan*, given the extent to which it permits prosecutors to trap unwary defendants, the doctrine would not likely have applied in Stewart's case, given the elaborate nature of her coverup story. See generally Scott Pomfret, *A Tempered "Yes" to the "Exculpatory No"*, 96 MICH. L. REV. 754 (1997).

24. See Green, *supra* note 22, at 30 ("Destroying evidence or perjuring oneself in response to a governmental investigation involves more than just the usual breach of the supposed duty to obey the law"). That the conduct Stewart covered up may not have been *clearly* illegal arguably only makes her cover-up more culpable. *Id.* at 34 ("[I]t is ironic that the more serious the crime being covered-up, and the more severe the penal consequences, the stronger is the defendant's claim of self-preservation, and arguably the less wrongful is his act of covering up.").

25. The jury agreed. Specifically it found that, in addition to making nine separate false statements to government authorities, Stewart conspired to make false statements, commit perjury (by Bacanovic), and obstruct an agency proceeding. *United States v. Stewart*, 323 F. Supp. 2d 606, 609-10 (S.D.N.Y. 2004) (Cedarbaum, J.).



### A. *The Indictment*

The indictment against Stewart begins with a conspiracy count and alleges that Stewart and Bacanovic conspired to obstruct justice, make false statements, and commit perjury. But the forty-one numbered paragraphs that comprise this count also provide virtually all the allegations supporting the subsequent false statement and obstruction of justice charges. Thus, this part of the indictment must be described not only to understand the conspiracy count but also to grasp the government's entire case against Stewart.

The first twenty-one paragraphs of the conspiracy count provide the government's version of why Stewart sold her shares in ImClone. The indictment details how Bacanovic, Stewart's broker at Merrill Lynch, discovered that Waksal, the president and chief executive officer of ImClone, called in an urgent order to Merrill Lynch to sell all his ImClone stock on the morning of December 27, 2001.<sup>26</sup> It also notes the probable reason Waksal was so persistent about selling at that time: the Food and Drug Administration was about to deny approval for his company's vaunted anti-cancer agent, Erbitux. In fact, the public announcement of the denial was made the next day.<sup>27</sup>

On the morning of December 27, the indictment alleges Bacanovic called Stewart to tell her about the Waksal transaction. He was unable to reach her, however, and simply left a message that he thought ImClone "is going to start trading downward." Since he was on vacation, he directed Douglas Faneuil, his assistant, to tell Stewart about the Waksal order if and when she called back. When Stewart did return Bacanovic's call, Faneuil told her that Waksal was trying to sell all of his ImClone stock, at which point she directed Faneuil to sell all of her ImClone stock as well.<sup>28</sup> That sale provided her with \$45,673 more than she would have received had she waited to sell until the next business day when the news became public, after which ImClone's stock value declined approximately 18%.<sup>29</sup>

At no point prior to the sale was Stewart told why Waksal was selling his stock or the source of information about his sale. The indictment alleges, however, that Waksal and Stewart were personal friends, implying that she knew the reason for Waksal's action. The indictment also points out that Stewart had been a licensed security broker from 1968 through 1975, that she had served on the board of

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26. *Stewart Indictment*, *supra* note 15, ¶ 13. This paragraph also alleges that a member of Waksal's family was put in an order to sell his stock.

27. *Id.* ¶¶ 12 & 19.

28. *Id.*, ¶¶ 15-17.

29. *Id.* ¶ 21.

directors of the New Stock Exchange for about four months in 2002, and that Merrill Lynch policy specifically prohibited its brokers from revealing information about one client's transactions to another unless there was a "need to know" about such matters.<sup>30</sup> These allegations insinuate that both Stewart and Bacanovic engaged in a knowing violation of Rule 10b-5, the insider trading law,<sup>31</sup> he as the "tipper" (who misappropriated confidential information) and she as the "tippee" (who knew the information was misappropriated). As noted above, however, Stewart was never formally charged with that offense.

The next twenty paragraphs of the indictment, still within the conspiracy count, describe the various schemes that Stewart and Bacanovic allegedly devised to hide the real reason Stewart sold her ImClone stock. Although there were several such schemes, it is important to recognize that they all centered around one decision. As the indictment put it, Stewart and Bacanovic "agreed that rather than tell the truth about the communications with Stewart on December 27, 2001, they would instead fabricate and attempt to deceive investigators with a fictitious explanation for her sale—that Stewart sold her ImClone stock on December 27 because she and Bacanovic had a pre-existing agreement to sell the stock if and when the price dropped to \$60 per share."<sup>32</sup> All of the remaining actions the indictment attributes to Stewart and Bacanovic were directed at maintaining this "sale-at-sixty" story.

Focusing solely on the allegations as they pertain to Stewart, the indictment next alleges that, once Stewart learned federal investigators were seeking an interview with her, she changed the phone message from Bacanovic that had read "Peter Bacanovic thinks ImClone is going to start trading downward" to "Peter Bacanovic re imclone" (although she almost immediately told her assistant to change the message back to the original wording).<sup>33</sup> It also alleges that she made several false statements

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30. *Id.* ¶¶ 12, 2 & 6.

31. Insider trading is not expressly forbidden by statute. Rather, the Securities Exchange Act of 1934 proscribes fraud in connection with trading of securities, and the SEC has promulgated a rule ("10b-5") that criminalizes, in connection with the trading of securities, schemes to defraud, the making of statements that are untrue or misleading, the omission of statements necessary to make a statement not misleading, and a transaction that operates as a fraud or deceit. 17 C.F.R. § 240.10b-5.

32. *Stewart Indictment, supra* note 15, ¶ 23. Interestingly, the jury acquitted both Stewart and Bacanovic on the charge that they lied about their agreement to sell ImClone when it went below \$60.00 (the only two false statement specifications on which they were acquitted). See *United States v. Stewart*, 323 F. Supp. 2d 606, 610-11 (S.D.N.Y. 2004) (Cedarbaum, J.). However, the jury also clearly found that the sale-at-sixty agreement was not the reason the ImClone stock was sold. See *id.*

33. *Stewart Indictment, supra* note 15, ¶ 26. Although the latter act could mean she had a change of heart with respect to altering evidence, it more likely evidenced her

during the ensuing interview, an interview that was conducted by members of the SEC, the FBI, and the U.S. Attorney's office on February 4, 2002, with Stewart's lawyers present. Specifically, the indictment avers, Stewart made the following false statements during the interview: she had an agreement with Bacanovic that he would sell her ImClone shares when ImClone's price reached \$60 per share; she did not know whether Bacanovic's phone message of December 27 was recorded on her phone message log; she talked to Bacanovic (rather than Fanueil) on December 27 and much of that conversation was about *her* company's stock; and Bacanovic had not yet informed her that he had been questioned by the federal government.<sup>34</sup>

Federal agents also interviewed Stewart by phone on April 10, 2002. The indictment alleges that, on this occasion, Stewart made several other false statements, to wit: she did not recall discussing Waksal or his sale of ImClone stock on December 27 with anyone from Merrill Lynch; she and Bacanovic had agreed to sell her ImClone stock when it reached \$60 a share; and Bacanovic had told her on December 27 that ImClone was selling below that amount.<sup>35</sup> The conspiracy count ends by alleging that all of these statements, as well as those made during the February 4 interview and the manipulation of the phone log, were in furtherance of the conspiracy to make false statements and obstruct justice.<sup>36</sup> The conspiracy to commit perjury allegation is less clearly delineated, but is based on a combination of Bacanovic's false testimony under oath to an SEC officer repeating the "sell-at-sixty" story and the fact that Stewart made several calls to Bacanovic both the day before and the day of this testimony.<sup>37</sup>

The rest of the indictment, as it pertains to Stewart, is relatively brief. The two false statement counts, based on 18 U.S.C. § 1001(a), incorporate the paragraphs already described and are based on the same allegations. The indictment includes two false statement counts because there were two meetings between Stewart and federal investigators, the February 4 office interview and April 10 phone interview.<sup>38</sup> The obstruction of justice count, under 18 U.S.C. § 1505, references the same paragraphs in the conspiracy count that the false statements counts reference and is based on precisely the same conduct as those counts.<sup>39</sup>

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realization that her assistant had witnessed the change and thus would be able to expose the alteration. The defense made no effort to defend this behavior during trial.

34. *Id.* ¶ 27.

35. *Id.* ¶ 36.

36. *Id.* ¶ 37.

37. *Id.* ¶¶ 40-41.

38. *Id.* ¶¶ 44-47.

39. *Id.* ¶¶ 54-55.

The final count against Stewart is the most innovative. It alleges that she committed securities fraud under 10b-5 when she repeated the “sale-at-sixty” story and various sub-components of it to the Wall Street Journal, the public at large, and a securities analysts’ conference, all in an effort to mislead investors and bolster the value of her own company’s stock.<sup>40</sup> The trial judge, Miriam Cederbaum, acquitted Stewart on this count, reasoning that the prosecution did not prove that Stewart made these statements with the intent to defraud. While Stewart may have known the statements were false and that they would be widely disseminated, there was no evidence that she or her lawyer “reached out to,” “chose,” “organized,” or decided to “take advantage of” the fora for these statements and thus, Judge Cederbaum concluded, there was no evidence of the necessary intent.<sup>41</sup>

The judge allowed the other four counts to go the jury, however. Stewart was convicted on all four. Judge Cederbaum ordered that Stewart be imprisoned for five months and serve five months under house arrest, the lowest possible sentence she could receive under the Federal Sentencing Guidelines, and that she pay a fine of \$30,000, the highest possible fine she could be forced to pay under the Guidelines.<sup>42</sup> Although Stewart has appealed all four convictions, she eventually decided to waive bail pending the outcome of the appeal. Her term of imprisonment began on October 8, 2004.<sup>43</sup>

### B. *The Problem: Charge Redundancy*

The foregoing description of Stewart’s indictment reveals our concern about charge redundancy. As we concluded earlier, Stewart clearly took enough steps in her efforts to hide her malfeasance from

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40. *Id.* ¶¶ 56-67.

41. *United States v. Stewart*, 305 F. Supp. 2d 368 (S.D.N.Y. 2004) (Cedarbaum, J.). We think the judge’s reasoning on this score is suspect. A person can have many motivations for doing something, and can be found criminally guilty even if only one of these motivations furnishes the necessary intent to commit the crime. Here, Stewart appeared to be trying to accomplish many things by falsely proclaiming her innocence; the jury surely could have found that one of them was to reassure nervous investors, the *mens rea* necessary to commit the crime. So, if the issue was intent, the charge should have gone to the jury. The better route, in our opinion, would have been for the judge to declare that the theory of criminal liability set forth in this count of the indictment violated Stewart’s First Amendment right to make a simple public declaration of her innocence. Note, however, that by construing it as a factual issue and entering a judgment of acquittal instead of considering it a legal decision and dismissing the count, the judge insulated the matter from government appeal.

42. Constance L. Hays, *Martha Stewart’s Sentence: The Overview*, N.Y. TIMES, July 17, 2004, at A1.

43. Constance L. Hays, *As Stewart Enters Prison, Her Company Refurbishes*, N.Y. TIMES, Oct. 8, 2004, at C4.

investigators that she deserved to be charged with some type of crime. But that single cover-up resulted in five separate charges. Telling the sale-at-sixty story and related fibs to federal agents on February 4 gave rise to *two* crimes: making false statements and obstruction of justice. When the story was repeated during a separate interview, a *third* crime of making false statements occurred (and presumably another obstruction charge could have been added). Had she been found to possess an intent to deceive, a *fourth* crime would have occurred when she told the story to the public. And when she consulted with Bacanovic to make sure the story would stick, she committed a *fifth* crime.

In fact, prosecutors in Stewart's case were conservative in their approach. In each of the false statement counts, they identified as "specifications" particular statements made by Stewart that were allegedly untrue: eight in count three and three in count four. Under existing case law, prosecutors could have charged each of these lies as a discreet false statement, resulting in *eleven* § 1001 counts instead of just two.<sup>44</sup> Moreover, nothing prevented prosecutors from seeking out Stewart for further discussions, presumably resulting in more false statements, or even asking her to testify under oath before the SEC, resulting in the possibility of multiple perjury counts.<sup>45</sup> In addition, the longer the investigation lingered, the more often Stewart could be counted on to declare her innocence in public fora. Each of these occasions would, in theory, be a new "execution" of securities fraud—and another potential count.<sup>46</sup> As long as Stewart stuck to her story, and as long as her lawyer let her talk, the counts would pile up.

How is this possible? And what are the consequences? We explore the answer to these questions by looking at three possible sources of limitation on redundant charging: the federal criminal code, the Constitution, and the federal sentencing guidelines.

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44. See *United States v. Guzman*, 781 F.2d 428, 432 (5th Cir. 1986) (per curiam) ("Where false statements are made in distinct and separate documents requiring different proof as to each statement, the filing of each false document constitutes a crime, and each filing may be alleged in a separate count of the indictment.").

45. See, e.g., 18 U.S.C. § 1505 (2004).

46. See, e.g., *United States v. Harris*, 79 F.3d 223, 232 (2d Cir. 1996) (when an act is "chronologically and substantively independent" from the other acts charged as the scheme, it constitutes an execution); *United States v. Sirang*, 70 F.3d 588, 595 (11th Cir. 1995) (a single scheme can be executed a number of times, and a defendant may be charged in separate counts for each "execution" of the scheme to defraud); *United States v. Molinaro*, 11 F.3d 853, 861n. 16 (9th Cir. 1993), cert. denied, 513 U.S. 1059, 115 S.Ct. 668, 130 L. Ed. 2d 602 (1994) ("[T]wo transactions may have a common purpose but constitute separate executions of a scheme where each involves a new and independent obligation to be truthful.").

## 1. The So-Called Criminal Code

One might assume that the substantive criminal law would impose meaningful limitations on redundant charging. A rational legislature should seek to avoid promulgating numerous overlapping and vague criminal provisions. Unfortunately, this assumption is incorrect, at least in connection with federal criminal law. There is, of course, a body of law that deals with crime on the federal level, most of which can be found at Title 18 of the United States Code; indeed, Title 18 is often referred to as the United States' "criminal code." But this moniker is misleading. The name implies that a committee of lawmakers and scholars met at an historic place and time to organize the common law of crimes into a coherent body of law setting forth criminal conduct and the penalties faced for engaging in it. The name further implies that this committee, or a successor group of experts, periodically reviews the operation of the code and suggests additions and modifications to it. This scenario does describe, more or less, the creation and maintenance of some areas of American procedural law, such as the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence.<sup>47</sup> But it does not even remotely represent the manner in which the federal "criminal code" has evolved.

Unlike its procedural cousins, the substantive federal criminal law consists of statutes passed on an ad hoc basis. As a political body, Congress addresses criminal issues from a political standpoint and passes criminal laws to satisfy the outrage of the day. It pays scant attention to how the new statutes fit with the old ones. Congress pays equally little attention to how the penalties for one crime can be squared with the penalties imposed for another. Many new criminal statutes tend to (1) duplicate or at least significantly overlap with ones in place; (2) incorporate existing crimes into a new, overarching scheme; or (3) plug a hole discovered in existing law, but with little effort to make the law a rational whole. Although the statutes are subjected to an internal bureaucratic process that places them alphabetically by topic in Title 18 (or occasionally, somewhere else in the federal titles), the resulting "code" is a mess in every sense of the word, as many commentators have recognized.<sup>48</sup>

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47. See *The Rulemaking Process: Judicial Conference Procedures*, available at <http://www.uscourts.gov/rules/procedurejc.htm>.

48. The following description of the federal code is representative:

The current federal criminal code, title 18 of the United States Code, makes "the federal criminal law almost incomprehensible." It is hard to understand, hard to apply, and hard to explain. Title 18 is a compilation, rather than a code, and it is duplicative, ambiguous, incomplete, and organizationally nonsensical. It has aptly been described as "an odd collection of two hundred years of ad

Given the breadth and variety of the federal criminal code, it is likely that a defendant's behavior will potentially violate a multitude of overlapping criminal statutes, especially where white-collar crime is involved. The same course of fraudulent conduct, for example, might constitute mail fraud (if the mails have been used to carry part of it out);<sup>49</sup> wire fraud (if a telephone or the internet was used as part of the execution of the scheme);<sup>50</sup> securities fraud under Title 18 (if the fraud was related to securities);<sup>51</sup> securities fraud under Title 15 (if the fraud was in connection with the purchase or sale of securities);<sup>52</sup> false statements to an agency of the government (if an agency, including the SEC, was one of the "victims" of the fraud) under Title 18;<sup>53</sup> and false statements to the SEC under Title 15.<sup>54</sup> If two defendants are involved, a conspiracy charge can likely be added. And if, as with Martha Stewart and Peter Bacanovic, the defendants attempt to cover up their fraud once an investigation begins, they will probably be liable for a second conspiracy and the additional substantive crimes of false statements, obstruction of justice,<sup>55</sup> and perjury.<sup>56</sup>

Nothing in the code tells a prosecutor how to sort through these options. Thus, she can bring every one of these charges as long as she believes each element can be proven beyond a reasonable doubt. And a prosecutor's choices do not end there, because she must also decide how many times the defendant committed each crime. For example, the crime of mail fraud is not measured by the overall scheme; it is defined as the use of the mails to execute that scheme. Thus, courts have held that every time a defendant mails a letter in connection with his fraud, the defendant has engaged in a discrete violation of the statute.<sup>57</sup> A

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hoc statutes, rather than a unified, interrelated, comprehensive criminal code." Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?* 1 BUFF. CRIM. L. REV. 195, 195 (1997). See also Frank O. Bowman, III, *The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guideline Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 382-83 (2004) (noting "the general confusion created by the absence of meaningful congressional classifications" of economic crimes).

49. 18 U.S.C. § 1341 (2005).

50. *Id.* § 1343.

51. 18 U.S.C. § 1348 (2002).

52. 15 U.S.C. § 78j (2000); 17 C.F.R. § 240.10b-5.

53. 18 U.S.C. § 1001 (2004).

54. 15 U.S.C. § 78ff (2002); see Securities Exchange Act of 1934, § 32; 15 U.S.C. § 78a (2002) (prohibiting the making of false statements to the Securities and Exchange Commission).

55. 18 U.S.C. § 1505 (1994).

56. 18 U.S.C. § 1621 (1994) (relating to perjury generally) or § 1623 (relating to perjury before the grand jury or court).

57. See *Badders v. United States*, 240 U.S. 391 (1916) (upholding charging each mailing sent in execution of scheme as a separate count); *United States v. Vaughn*, 797

similar approach is taken with false statements under § 1001 and false claims under 18 U.S.C. § 287; courts have held that each false statement or claim is a separate violation of the respective statutes.<sup>58</sup> Therefore, during one ongoing course of conduct, the same substantive criminal law can be, and often is, violated multiple times.<sup>59</sup>

In short, the federal criminal code places virtually no restraints on redundant charging. Instead, through its design and application it creates and exacerbates the problem.

## 2. The Constitution: Double Jeopardy Doctrine

One inclined to reduce redundant charging of the sort just described might naturally think of the Fifth Amendment's double jeopardy clause as a source of restriction. After all, that clause prohibits multiple prosecutions or punishments for the "same offense."<sup>60</sup> To the extent that a multi-charge, multi-count indictment smacks of piling on, this prohibition might reasonably be thought to apply. But it doesn't, at least under the Supreme Court's interpretation of the double jeopardy prohibition.

There are numerous ways "same offense" could be defined for double jeopardy purposes. The most rigid, of course, would be to take it literally. But no court has done so in modern times. At the least, courts have considered an offense and its lesser-included offenses the same offense for double jeopardy purposes, a test that has been called the "same element" test. At the other end of the spectrum, some courts have adopted a "same transaction" test, which holds that the double jeopardy clause requires the prosecution to join at one trial and punish as the same crime "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction."<sup>61</sup> Somewhere in

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F.2d 1485 (9th Cir. 1986) (upholding defendant's conviction on four counts of mail fraud, each relating to a separate use of the mails); *cf.* United States v. Poliak, 823 F.2d 371 (9th Cir. 1987) (upholding defendant's conviction for ten counts of bank fraud based on ten kited checks).

58. With respect to false statements, *see supra* notes 44 and 46; *see also* Fain v. United States, 265 F. 473 (9th Cir. 1920) (in a prosecution against an agent of General Land Office for making and presenting false claims against the United States by means of an itemized statement of expenses, several items of which were alleged to be false, each item could be regarded as a separate violation of § 287 and constitute a separate count of the indictment).

59. The most egregious example of this phenomenon that we have been able to find at the state level is *Krueger v. Coplan*, 238 F. Supp. 2d 391 (D.N.H. 2002), where state prosecutors charged ninety separate counts of sexual assault based on one twenty-five minute sex act caught on video. While critical of the prosecution's charging decision, the court held it was technically correct, given the way the statute defined the crime.

60. U.S. CONST., amend V.

61. *See Ashe v. Swenson*, 397 U.S. 436, 453-454 (1970) (Brennan, J., concurring)



between is the “same conduct” test, which looks at the extent to which the conduct underlying two charges is the same.<sup>62</sup>

The Supreme Court’s vacillations on the same offense issue are too nuanced to be described in detail here. Suffice it to say that the Court now subscribes to the same elements test, after flirting with the same conduct test. In *Blockburger v. United States*,<sup>63</sup> the Court held that, in the absence of clear legislative intent, two offenses are normally different for double jeopardy purposes when “each provision requires proof of an additional fact which the other does not.”<sup>64</sup> A few subsequent cases suggested that the Court was willing to broaden this test under certain circumstances,<sup>65</sup> and, in *Grady v. Corbin*,<sup>66</sup> the Court formally adopted a version of the same conduct test. But three years later, in *United States v. Dixon*,<sup>67</sup> five members of the Court reversed *Grady* because it had no “constitutional roots,” conflicted with longstanding precedent, and was confusing to apply.<sup>68</sup> *Dixon* reinstated the *Blockburger* test as the default rule for defining “same offense” when determining whether multiple prosecutions are permitted.

Under the *Blockburger* test, a false statement charge and an obstruction of justice charge are separate offenses because the former statute requires proof of a false statement while the latter does not, and the latter statute requires proof of intent to impede an impending proceeding while the former does not.<sup>69</sup> Conspiracy to engage in these actions is yet another separate offense because it requires proof of an agreement.<sup>70</sup> Thus, in the Stewart case, the prosecution could have subjected Stewart to several different trials without violating the double jeopardy clause.

Most prosecutors would not want to do so, of course, if not from a sense that multiple prosecutions would be oppressive, then simply

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(describing the “same transaction” test).

62. See generally, CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 871-73 (4th ed. 2000).

63. 284 U.S. 199 (1932).

64. *Id.* at 304.

65. See, e.g., *Harris v. Oklahoma*, 433 U.S. 682 (1977) (holding that conviction of felony murder for participation in a death caused during a robbery barred a later robbery prosecution, even though robbery and felony murder—a killing during *any* felony—each require proof of an element the other does not); *Illinois v. Vitale*, 447 U.S. 410 (1980) (dictum stating that if the prosecution had to prove a failure to slow his car in order to prove homicide, conviction on the former charge would bar a separate trial on the latter).

66. 495 U.S. 508 (1990).

67. 509 U.S. 688 (1993).

68. *Id.* at 704-11.

69. *U.S. v. Wood*, 958 F.2d 963, 973 (10th Cir. 1992).

70. *Cf. United States v. Felix*, 503 U.S. 378 (1992) (ruling that conspiring to sell drugs and attempting to sell drugs are not the same offense for double jeopardy purposes).

because of efficiency concerns. More important as a practical matter is whether, when the charges are tried in one trial and all lead to conviction (as occurred in Stewart's case), the sentences can be stacked. Although the history described above demonstrates that the Supreme Court has been somewhat opaque regarding the definition of same offense in *re-prosecution* cases, it has been very clear as to that term's meaning in connection with *multiple punishments*. In *Missouri v. Hunter*,<sup>71</sup> the Court held that legislative intent alone determines the scope of the "same offense" analysis for determining when cumulative punishments may be imposed,<sup>72</sup> and that when legislative intent is not ascertainable, the *Blockburger* test applies.<sup>73</sup> Since Congress has not made clear whether consecutive sentences are permissible for the false statement and obstruction of justice laws, or for conspiracy to commit those crimes, the apposite same-offense rule in Stewart's case is the *Blockburger* test. Because, as explained above, that test treats all of these crimes as separate offenses, Judge Cederbaum could have imposed consecutive sentences for the two false statement charges, the obstruction charge, and the conspiracy charge without violating the double jeopardy prohibition.

The outcome is the same for a whole host of similarly worded white-collar crimes, because each technically requires proof of a fact the others do not. Mail fraud, false statements, false claims, and obstruction of justice are all separate offenses for double jeopardy purposes.<sup>74</sup> One case has even held that the crime of making false statements (which requires lying about a "material" fact) and the crime of making false statements to secure a passport (which only requires making "any false statement") are different crimes under the Double Jeopardy Clause.<sup>75</sup>

Note further that even if the Court were to reverse *Hunter* and adopt the "same transaction test" or something similar for multiple punishment analysis, prosecutors could still engage in redundant charging. As long

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71. 459 U.S. 359 (1983).

72. *Id.* at 368.

Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

*Id.*

73. *Id.*

74. *Cf.* *United States v. Green*, 964 F.2d 365, 375 (5th Cir. 1992) (sentence for mail fraud may be enhanced on obstruction of justice grounds even though conduct for the latter was the basis of conviction for mail fraud).

75. *United States v. Ramos*, 725 F.2d 1322, 1323-24 (11th Cir. 1984). *See also* *United States v. Diogo*, 320 F.2d 898, 902 (2d Cir. 1963) (false statements to immigration authorities under 18 U.S.C. § 1546 a different offense than false statements under 18 U.S.C. § 1001).

as they joined all crimes that are considered the “same offense” in the same indictment, they could avoid violating the Double Jeopardy Clause. Although they would also know that the punishments for these crimes could not be imposed consecutively, that might not provide much of a deterrent to redundant charging, for reasons developed below.

### 3. The Federal Sentencing Guidelines

At this point, some knowledgeable readers might be asking: so what if prosecutors engage in redundant charging? Any resulting unfairness can be corrected after conviction by collapsing similar counts at sentencing. Because that is what happens under the Federal Sentencing Guidelines, complaints about redundant charging in federal cases might be discounted as much ado about nothing.

There can be no dispute that the Guidelines are designed to minimize the effects of multiple charging.<sup>76</sup> Part D of Chapter 3 of the guidelines deals with multiple counts. The preamble to this section specifically states that its purpose is “to limit the significance of the formal charging decision and to prevent multiple punishments for substantially identical offense conduct.”<sup>77</sup> It accomplishes this objective by grouping offenses together for sentencing purposes.

The grouping of counts depends on the type of conduct. For example, most relevant to Martha Stewart’s case, Section 3D1.2(b) provides that “[w]hen the counts involve . . . two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan” they should be grouped together. In contrast, the guideline most applicable to fraud cases, Section 3D1.2(d), instructs that counts should be combined when “the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm.” In the first example, the base offense level is that of crime with the highest offense level in the group; in the latter instance, it is the offense level corresponding to the aggregated quantity.<sup>78</sup>

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76. See Moohr, *supra* note 4, at 181 n.68 (“The Sentencing Guidelines require that similar charges be grouped, thus mitigating somewhat the effect of multiple charges. . .”).

77. U.S.S.G. Manual, Introductory Comments to Part D.

78. U.S.S.G., § 3D1.3, 18 U.S.C.A. This discussion assumes, of course, that the guidelines will survive *Blakely v. Washington*, 124 S.Ct. 2531 (2004), in one fashion or another. See *United States v. Booker*, 125 S.Ct. 738 (2005) (striking down, as a violation of *Blakely*’s requirement that sentence enhancements be found by a jury, the provision in the guidelines that makes them mandatory). Note also that *Blakely*’s requirement that sentences be based on facts found by the jury exacerbates the problem discussed in this article, by requiring prosecutors to include all conduct they want considered by the sentencing judge in the indictment. This requirement will undoubtedly result in more

Given this scheme, multiple charging is not likely to affect the time served by a defendant as long as the prosecution has included a sufficient number of charges in the indictment to cover the maximum guideline sentence. It is for this reason that, despite multiple charges, Stewart received a sentence of only five months in prison and five months of house arrest. It is also for this reason that redundant charging might seem like a benign phenomenon. But it is not. That is because the Sentencing Guidelines only work their count-collapsing magic after conviction, when much of the damage from redundant charging has already occurred.

### C. *The Harms of Redundant Charging*

Most prosecutors are smart people, skilled lawyers, and rational actors. If redundant charging were innocuous, prosecutors wouldn't waste their time doing it. In fact, prosecutors know or intuit that bringing multiple, duplicative, and overlapping charges provides several tactical advantages.

First and foremost, prosecutors bring multiple charges for similar conduct because it maximizes the probability of conviction at trial on at least one of the charged counts. Put bluntly, more charges lead to more convictions, perhaps even when some jurors entertain a reasonable doubt. Understanding how this might happen requires an appreciation of the dynamics of jury deliberation.

Consider first a case in which differences between jurors persist despite deliberation. If only one count is charged, one of three outcomes can result from the jury's split: conviction (if some arms are twisted), acquittal (if other arms are twisted), or a hung jury (if the arm-twisting is unsuccessful). The latter two outcomes are anathema to the prosecution. But if the prosecutor places two or more counts in the indictment, a split among jurors can result in a fourth possibility: a compromise verdict of guilty on some charges and not guilty on the others.<sup>79</sup> Unless the maximum sentence for the former charges is significantly lower than the sentence for the rejected charges, this split verdict is a complete victory

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counts, as prosecutors realize that conduct not charged in the indictment cannot affect sentence. Compare *United States v. Benitez-Hernandez*, No. 8:04CR317, 2004 WL 2359668 (D. Neb. Oct. 19, 2004) (holding that sentence enhancements may be charged in indictment even if not offense elements) with *United States v. Jardine*, No. C.R.A. 04-219, 2004 WL 2314511, at \*6 (E.D. Pa. Oct. 8, 2004) ("this Court will not countenance the Government's attempt to leave irrelevant and prejudicial information in the Indictment 'as a protective measure' 'in anticipation' of pending Supreme Court cases.").

79. The phenomenon of juries nullifying the law by splitting the difference between plaintiff and defendant is well known in civil cases. See, e.g., Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1606-18 (2001).

for the prosecution because the judge does not take the acquittal into account at sentencing.<sup>80</sup> Yet the jury is likely to think otherwise; it will generally be unaware that its compromise had no impact on the ultimate outcome in the case.

A slightly different way in which multiple counts might cause a conviction despite a lack of jury unanimity occurs when, as Stewart's attorney suggested in his closing argument,<sup>81</sup> jurors horse-trade counts after discovering they can't agree on any particular one. In essence, they might say to one another, "I'll give you count 1 if you give me count 2." That type of pact can only occur, of course, if there is more than one count.

In both of these compromise verdict scenarios, "the jury dishonors the reasonable doubt standard, because each faction on the jury surrenders its honestly held beliefs on the question of proof beyond a reasonable doubt."<sup>82</sup> That alone is cause for concern. But redundant charging can also have other, more subtle, unfortunate effects. For instance, some jurors simply bristle at the prospect of rubber stamping the prosecution; multiple counts enable these jurors to demonstrate their independence by rejecting some charges without acquitting the defendant altogether. Splitting the verdict also allows jurors to feel they have demonstrated a capacity to obey instructions to consider each count separately and facilitates their ability to look a likable defendant in the eye and say, in effect, "I did what I could for you." In all likelihood, these influences seldom produce erroneous decisions. On the margin, however, the effect of making conviction psychologically more palatable for jurors increases the probability of conviction in each case, and thus over time it increases the overall number convictions obtained by prosecutors.

Redundant charging can skew plea bargaining as well. Most obviously, multiple charges intimidate defendants. On its face, a multi-count indictment can make the potential sentence look devastatingly

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80. See U.S.S.G. § 1B1 & 3 (setting forth "relevant conduct" to be considered at sentencing).

81. See Closing Argument of Robert Morvillo, March 2, 2004, at p. 10, available at [www.marthataalks.com/trial\\_update/closing\\_argument.html](http://www.marthataalks.com/trial_update/closing_argument.html) ("The one thing you cannot do is compromise. You can't say, I'll give you Count 2 if you give me Count 3. I'll give you Count 3 if you give me Count 4. Because one count of conviction, it's over for us. It doesn't make any difference which count it is. If you convict on one count, we feel the consequences of that conviction as if you convicted on all counts, so please don't compromise.").

82. Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 784 (1998). Muller continues "To be sure, compromise verdicts are undoubtedly quite common, and they help to resolve cases, avoid retrials, and clear crowded dockets. But useful as they may be, compromise verdicts are lawless verdicts." *Id.*

long. In the case of Stewart, for example, the sentences on the five counts added up to some twenty years in jail.<sup>83</sup> True, given the existence of the Guidelines, the long sentence is normally an illusion, something that the defense attorney presumably explains to the terrified defendant. At best, however, that explanation only lessens the intimidation, since the Guidelines permit a judge to depart upward from a guideline sentence if certain factors are met.<sup>84</sup>

Further, in a situation analogous to the jury dynamic described above, defendants may be more willing to give up on a valid defense when they can trade, and trading is more likely when there are multiple counts. As Stephanos Bibas explains, “[o]vercharging . . . provides high anchors for defendants. If the initial charge and sentence serve as anchors and baselines, any prosecutorial concessions look like discounts or savings—wins for defendants instead of reduced losses.”<sup>85</sup>

Multiple charges may also have an effect on defense attorneys engaged in plea bargaining. Defense attorneys like to “win” their cases as much as any attorney. At the same time, there is considerable pressure on defense attorneys to resolve cases efficiently, through pleading their clients guilty in the bargaining process. One way to resolve the tension between these two forces is to define a “win” as a reduction in counts. Even if this reduction will not amount to a shorter sentence, defense attorneys can tell their clients that their superior negotiating skills forced the prosecutor to “drop some charges,” a claim that many clients are likely to think is more than cosmetic. This ruse is not just a way defense attorneys can make themselves feel better about representing clients who are convicted. The danger is that it also makes it easier to represent those clients inadequately.<sup>86</sup> Prosecutors are surely aware of this dynamic, and may use redundant charging to take advantage.

Redundant charges might be rationalized at sentencing. But that does not explain why the practice takes place in the first instance. It persists for a reason, actually for several reasons. And many of those reasons should not be sanctioned if we want convictions based on a

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83. Hays, *supra* note 42.

84. See generally U.S.S.G. § 5K1.1-2.18 (1987).

85. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2519 (2004).

86. Cf. Michael McConville & Chester L. Mirsky, *The Skeleton of Plea Bargaining*, NEW L.J. 1373, 1374 (1992) (under the current plea bargaining system, the defense attorney's “concern is no longer with the sufficiency of the State's evidence but with admonishing the defendant not to be foolhardy and insist upon a trial . . . [B]y becoming the ‘left hand’ of the court while the prosecutor is the ‘right hand’ the defense lawyer accepts and adopts the system of discounts and penalties which the prosecution relies upon to obtain pleas.”).

unanimous jury finding of guilt beyond a reasonable doubt, and plea agreements that reflect the actual culpability of the defendant.

#### *D. Proposal*

We believe that the power of the prosecution to charge multiple, overlapping, and redundant crimes ought to be curtailed. In a perfect world, the problem would be fixed by Congress, as part of a larger project of building a truly comprehensive and coherent criminal code. Such a code could, akin to Chapter D of the Federal Sentencing Guidelines, contain rules limiting duplicative charging. Nudging the definition of same offense in double punishment analysis toward the “same conduct” or “same transaction” test would provide further incentive to avoid double charging. But the chances of either occurring are infinitesimal.<sup>87</sup> Therefore, we advance a proposal that is not quite as bold but is more attainable: we suggest that the courts use their common law power to create a “law of counts.”

Under the law of counts, a court would conduct a pre-trial review of an indictment to determine if the charges in it were duplicative and overlapping in a manner jeopardizing the defendant’s right to a fair trial.<sup>88</sup> In so doing, the court could be guided by the same conduct analysis of Supreme Court double jeopardy doctrine<sup>89</sup> and the grouping rules found in the Sentencing Guidelines. The idea would be for the court to merge, for purposes of plea bargaining, as well as the jury’s

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87. With respect to congressional action, one has only to recall the nineteen-year long attempt to reform the federal criminal code, spanning 1968 to 1984, that ended in complete failure. See Joost, *supra* note 48, at 202. Expansion of the same offense definition is even less likely, given the Court’s decision in *Dixon*. See *supra* text accompanying notes 63-68.

88. The topic discussed here should be distinguished from “duplicitous” charging, which has received more judicial attention. As explained by the Sixth Circuit, “a duplicitous indictment is one that charges separate offenses in a single count.” *United States v. Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988). The Stewart indictment was duplicitous in the sense that it contained several specifications of false statements in one count. In such situations, the trial court must be careful to instruct the jury that it must unanimously agree that at least one of the specified events occurred in order to convict on that count. See *U.S. v. Blandford*, 33 F.3d. 685, 699 (6th Cir. 1994). The law of counts we are advocating deals with a different problem: multiple counts for the same course of conduct.

89. Another well-thought out stab at the “same offense” doctrine which might be particularly helpful in developing a law of counts is found in George C. Thomas, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 CAL. L. REV. 1027, 1069-70 (1995) (arguing that when legislative intent is unclear, as is usually the case, all “blameworthy act-types”—repetitive acts that “manifest the statutory harm in the same way” and are not “individuated by intent”—should constitute the same offense). Under Thomas’s definition, all of the counts in Stewart’s case should have been collapsed into two (conspiracy to commit perjury and making false statements). *Id.*

deliberation and verdict, all counts that deal with the same conduct or transaction. We are not claiming that this analysis would be an easy task; we do believe, however, that the gradual process of the common law would be the perfect vehicle for the development of a counts doctrine.

We also acknowledge that the law of counts could never completely eliminate redundant charging. The courts would still have to follow clear congressional intent concerning specific crimes and the harms they are designed to deter and punish. So, for example, we do not believe that the practice of charging a conspiracy to commit a crime and the related completed crime would be altered. We do believe, however, that if a prosecutor were to bring, for instance, separate mail and wire fraud charges for the same essential conduct, or a dozen separate mail fraud counts for each mailing furthering the same scheme, the court should exercise its common law power to merge all of the charges into a single count.

The authority to do so could come from the due process clause, separation of powers doctrine, or administrative law. Under the fourteenth amendment, courts are obligated to ensure that the adjudication process is fair.<sup>90</sup> Under separation of powers doctrine, courts have the authority to monitor prosecutorial decisions that affect sentencing, a traditionally judicial function.<sup>91</sup> Under principles developed in the administrative law arena, courts routinely review the rationality of decisions made in the executive branch.<sup>92</sup> As Ronald Wright's paper for this symposium issue indicates, New Jersey courts have for some time relied on these types of rationales, in particular the latter two, when regulating various types of prosecutorial charging decisions.<sup>93</sup>

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90. In the charging context, the Supreme Court has only been willing to recognize a due process violation when the charging decision is "vindictive," *Blackledge v. Perry*, 417 U.S. 21, 27 (1974), and it has very narrowly construed the equal protection clause. *See Wayte v. United States*, 470 U.S. 598 (1985). But state courts have been willing to think more expansively. For instance, in *People v. Marcy*, the Colorado Supreme Court stated that "separate statutes proscribing with different penalties what ostensibly might be different acts, but offering no intelligent standard for distinguishing the proscribed conduct, run afoul of equal protection under state constitutional doctrine." 628 P.2d 69, 75 (Colo. 1981).

91. *See State v. Leonardis*, 375 A.2d 607, 611 n.5 (N.J. 1977) (noting that "sentencing is a judicial function" and holding that to the extent prosecutorial charging decisions trench on that function, separation of powers might be violated).

92. *Id.* at 615 (noting that even if prosecutor's decisions are viewed as purely executive in nature, "[t]he judiciary is commonly called upon to review the rationality of decisions by other branches of government or agencies with special expertise.").

93. Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, PENN. ST. L. REV. 1087 (2005) (describing the *Leonardis* decision, as well as subsequent New Jersey cases).



We noted above that the law of counts would be most effective if applied at a preliminary hearing, before serious bargaining takes place. Alternatively, it would be reflected in the judge's instructions to the jury. Either way, the judge's decision on the counts issue would be appealable, to permit fashioning a uniform approach. Over time, the law of counts would exert pressure on prosecutors to modify their charging practices, resulting in fewer multi-count indictments.<sup>94</sup> In this way, charging would become less redundant and more accurately reflect the alleged culpability of the defendant.

#### IV. Conclusion

Martha Stewart's case illustrates a wide variety of prosecutorial decision-making. We have defended the U.S. Attorney's decision to investigate and prosecute Stewart, but called into question the further decision to charge her with five counts. As a way of curtailing the redundant charging phenomenon, which is widespread, we have suggested that the courts develop a law of counts to cabin prosecutorial charging discretion.

Ideally, perhaps, prosecutors could be relied on to self-regulate in this area. But we think it is unrealistic to expect prosecutors to limit their investigative tactics and change practices in substantial ways when the courts and legislatures feel no need to do so. Public and official pressure to get tough on crime is immense, as illustrated by the Department of Justice's recently reiterated directive that federal prosecutors pursue the maximum charge supported by the evidence.<sup>95</sup> It doesn't help that most state prosecutors are elected and that federal prosecutors also care deeply about their public reputations. With respect to the white-collar criminal, which Stewart may not epitomize but certainly exemplifies, the pressure to prosecute aggressively has become particularly intense since Enron and related corporate scams.<sup>96</sup> Further, obtaining convictions under complex fraud statutes is often very difficult, especially when the defendant possesses significant resources, as many white-collar defendants do. Prosecutors understandably want to cover all their bases by piling on as many charges as possible.

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94. Again, the New Jersey experience provides a model for this approach. See Wright, *supra* note 93 (describing judicial monitoring of charging decision in New Jersey through appealable decisions regarding the prosecutor's adherence to statewide charging guidelines, developed after judicial pressure to do so).

95. See United States Attorneys' Manual ("USAM") 9-27.300 (directing prosecutors to file the most serious readily provable offense).

96. See, e.g., Janet Whitman, *Stock Options Face Scrutiny in Wake of Enron*, WALL ST. J., Apr. 3, 2002, at B7B (commenting that the collapse of Enron created a public outcry for greater accountability of corporate boards of directors and executives).

Thus, our proposal to create a law of counts would not require prosecutors to act against their short- or long-term interests. Rather, it would be implemented by judges using the interpretive method, without going so far as to confer on them an undefined “nullification” authority. If instituted wisely, it could have a significant impact on prosecutorial discretion without unreasonably curbing it or preventing government from bringing bad people to justice.

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