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Mail Fraud: Opening Letters

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MAIL FRAUD: OPENING LETTERS

ELLEN S. PODGOR*

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I. INTRODUCTION

One might at first blush assume that the criminal offense of mail fraud is an offense centrally focused around fraudulent mailings. In its inception, the mail fraud statute combated crimes of fraud accomplished by use of the postal system.¹ The postal system served as the crux of the offense, with consideration of the "scheme" examined only after meeting this first threshold.²

Although a "mailing" is still necessary to procure a mail fraud conviction, the emphasis of the offense has shifted, drastically reducing the focus on the use of the postal system.³ Today, prosecutors can obtain convictions for mail fraud with innocent mailings,⁴ with mailings dispatched after completion of the alleged scheme,⁵ and when someone other than the defendant deposits the mailings.⁶ Mail fraud, described by Jed Rakoff in 1980 as the prosecutor's Stradivarius or Colt 45,⁷ has in 1992 become the prosecutor's Uzi.

This Article dissects the mail fraud statute, examining briefly its historical origins. It then concentrates on new developments to the crime of mail fraud, namely a legislative enactment that redefines "scheme or artifice to defraud" to include the "intangible right of honest services"⁸ and case law that enlarges the "in furtherance" element

1. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323; see *infra* notes 11-12 and accompanying text.

2. See generally Jed S. Rakoff, *The Federal Mail Fraud Statute* (pt. 1), 18 Duq. L. REV. 771, 784 (1980) (explaining that apparent function of statute was to deter actual and intentional misuse of mails in furtherance of a truly mail fraud scheme).

3. See Donald V. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 47 (1980) (explaining that courts have been able to construe the statute to fit virtually any deceptive conduct).

4. See *Badders v. United States*, 240 U.S. 391, 394 (1916).

5. See *Schmuck v. United States*, 489 U.S. 705, 712 (1989).

6. See *Pereira v. United States*, 347 U.S. 1, 8 (1954); Joseph E. Edwards, Annotation, *What Constitutes "Causing" Mail To Be Delivered for Purpose of Executing Scheme Prohibited by Mail Fraud Statute (18 U.S.C. § 1341)*, 9 A.L.R. FED. 893, 901 (1971).

7. Rakoff, *supra* note 2, at 771.

8. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C.A. § 1346 (West Supp. 1991)).

of the statute.⁹ This Article highlights the confusion and ambiguity caused by these statutory and case-law modifications. It argues that mail fraud, while moving further from its roots, has reached a level that permits its haphazard application to a wide spectrum of criminal conduct. This Article calls for legislative modification and restructuring of the statute, coupled with strict interpretation by the courts, to transform the existing "stopgap"¹⁰ provision into a recognizable crime.

II. ELEMENTS

The crime of mail fraud emanates from an 1872 recodification of the Postal Act.¹¹ The initiation of this criminal offense generated no congressional debate and therefore no legislative history.¹² This precursor to the current statute defined mail fraud to include a "scheme or artifice to defraud" by means of the "post-office establishment of the United States."¹³

Section 1341 of title 18 of the United States Code contains the

9. See *infra* notes 37-46 and accompanying text.

10. *United States v. Maze*, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting) (explaining that when a new fraud develops, the statute becomes a stopgap device to deal with the new phenomenon until Congress can develop legislation to deal with the new fraud).

11. See *supra* note 1 and accompanying text.

12. Rakoff, *supra* note 2, at 779.

13. The 1872 statute stated at § 301:

That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (current version at 18 U.S.C.A. § 1341 (West Supp. 1991)). Congress modified the statute several times. Most significant was the 1909 amendment, which added the language "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130 (current version at 18 U.S.C.A. § 1341 (West Supp. 1991)).

current statutory foundation for the crime of mail fraud.¹⁴ Although a "scheme or artifice to defraud" is still a pivotal aspect of the crime, the emphasis on illicit letters and circulars is noticeably omitted. The elements of the present-day offense are: 1) a scheme devised or intending to defraud or for obtaining money or property by fraudulent means, and 2) use or causing the use of the mails in furtherance of the fraudulent scheme.¹⁵

The first element of the crime of mail fraud affords charges on an array of possible schemes to defraud, including both intangible property and intangible rights. In contrast, the second element of the crime of mail fraud has three subparts that do not operate in the alternative: a) a mailing, b) by the defendant or caused to be mailed by the defendant, and c) in furtherance of a scheme to defraud.

A. First Element—Scheme to Defraud

The first element, the scheme to defraud, encompasses a myriad and ever expanding number of frauds.¹⁶ It is an anomaly that criminal

14. 18 U.S.C.A. § 1341 (West Supp. 1991).

15. Section 1341 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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail 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 not more than \$1,000 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.

16. See, e.g., *Carpenter v. United States*, 484 U.S. 19 (1987) (securities fraud); *United States v. Serlin*, 538 F.2d 737 (7th Cir. 1976) (franchise fraud); *United States v. Edwards*, 458 F.2d 875 (5th Cir.) ("divorce mill" fraud), *cert. denied*, 409 U.S. 891 (1972); *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966) (diet drug fraud), *cert. denied*, 385 U.S. 1001 (1967); *Mishan v. United States*, 345 F.2d 790 (5th Cir. 1965) (fire insurance fraud); Virginia L. Flick, Case Note, 31 VILL. L. REV. 1098 (1986); see generally 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 (1983) (claiming that reach of statute continues to extend to areas not previously thought to be subject to criminal law of fraud). Mail fraud charges recently were filed against owners of a pet cemetery ac-

conduct is excluded as not within the realm of the statute.¹⁷ The "scheme to defraud" element of mail fraud has clearly been the victim of opened letters. This has occurred on three levels: legislative action, judicial interpretation, and legislative reaction to the judiciary's rulings.

The initial 1872 mail fraud statute merely prohibited "any scheme or artifice to defraud" the postal system, thus providing virtually no guidance within the statute as to the scope of the offense.¹⁸ A disparity appeared among courts' rulings during the infancy of the mail fraud statute, with some courts reading the statute literally and others advancing a comprehensive approach.¹⁹ In reaction to these court opinions, Congress modified the mail fraud statute, specifically listing the schemes that they desired to be encompassed by the Act.²⁰

The descriptiveness of this 1889 statutory modification was followed by a Supreme Court decision that extended mail fraud even further than the limitations placed upon it by the statute's terminology.²¹ Mail fraud would now include not only past and present frauds, but future acts to defraud.²² Legislative reaction to this ruling included a codification of the United States Supreme Court's interpretation, thus providing an even stronger foundation for extending mail fraud.²³

The development of the "scheme to defraud" element of mail fraud reached a level of significant controversy during the 1980s. In the decades immediately preceding the 1980s, prosecutors used the crime of mail fraud to pursue political malfeasance. They argued that the "scheme to defraud" element of mail fraud included intangible rights to good government.²⁴ *McNally v. United States*,²⁵ the prosecutor's

cused of scheming to cheat pet owners, veterinarians, and animal hospitals. Patricia Hurtado, *Li Pet Cemetery Owner Arraigned*, *NEWSDAY*, Sept. 14, 1991, pt. II, at 6.

17. See *Fasulo v. United States*, 272 U.S. 620 (1926) (holding that scheme to defraud does not include threats of murder or bodily harm).

18. See Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (current version at 18 U.S.C.A. § 1341 (West Supp. 1991)).

19. See Rakoff, *supra* note 2, at 790-801 (discussing cases that have used the strict constructionist and the broad constructionist approaches); see also Ellen S. Podgor, *Tax Fraud-Mail Fraud: Synonymous, Cumulative or Diverse?*, 57 U. CIN. L. REV. 903, 905-06 (1989) (noting different interpretations).

20. Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873 (current version at 18 U.S.C.A. § 1341 (West Supp. 1991)). This detailed mail fraud statute listed schemes such as the "sawdust swindle" and "counterfeit money fraud." *Id.*

21. *Durland v. United States*, 161 U.S. 306 (1896).

22. See *id.* at 313.

23. See Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130 (current version at 18 U.S.C.A. § 1341 (West Supp. 1991)); *McNally v. United States*, 483 U.S. 350, 357-58 (1987).

24. See *United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

"bombshell,"²⁶ destroyed this intangible rights application. In *McNally* the Supreme Court held that the mail fraud statute required a finding of money or property to satisfy the "scheme to defraud" element. Shortly after the *McNally* decision the Supreme Court accepted and decided a second case, *Carpenter v. United States*.²⁷ In *Carpenter* the Court held that although money or property is a crucial facet of a mail fraud action, the money or property could be intangible in nature, such as the misuse of confidential information.²⁸

Within a year there was legislative reaction to the *McNally* and *Carpenter* opinions. Congress added a new definitional section to the mail fraud statute that effectively voided the *McNally* holding. The amendment, section 1346 of title 18, states that a "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."²⁹ Thus, schemes to defraud can now include traditional frauds³⁰ or yet-to-be determined deprivations of intangible rights to honest government.³¹

Implicit within the "scheme to defraud" element of the crime of mail fraud is an intent by the defendant to commit the fraud. Although it is universally accepted that proof of an actual fraud is not necessary,³² courts have required that the defendant contemplate a defrauding to meet the requisite *mens rea*.³³ Some courts have demanded proof of specific intent to support this aspect of a mail fraud charge.³⁴

25. 483 U.S. 350 (1987).

26. Neil A. Kaplan, *The Convictions That Weren't: How the McNally Bombshell is Exploding in the Prosecution's Face*, A.B.A. SEC. CRIM. JUST., Winter 1988, at 4, 4.

27. 484 U.S. 19 (1987).

28. *Id.* at 25-26; see generally Eli Lederman, *Criminal Liability for Breach of Confidential Commercial Information*, 38 EMORY L.J. 921, 985-96 (1989) (discussing trend in Supreme Court to recognize confidential information as property).

29. 18 U.S.C.A. § 1346 (West. Supp. 1991).

30. See Giannina Lynn, Note, *Mail and Wire Fraud*, 26 AM. CRIM. L. REV. 931, 934-36 (1989).

31. See generally Gregory H. Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990) (criticizing the expansion of the offense beyond traditional notions of fraud and the resulting vagueness and uncertainty about the scope of the mail fraud offense).

32. See, e.g., *United States v. Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

33. See, e.g., *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970) (holding that intent to deceive is insufficient and that defendant must have intent to defraud).

34. See, e.g., *United States v. Gelb*, 700 F.2d 875, 879 (2d Cir.) (holding that although a defendant must prove specific intent, it can be demonstrated through defendant's actions or circumstantial evidence), *cert. denied*, 464 U.S. 853 (1983); see also *United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982) (holding that specific intent is required in mail fraud).

Others, however, have found mail fraud applicable when the conduct is merely "reckless" or when the defendant acts with "willful blindness."³⁵ Irrespective of the standard of intent, courts uniformly have found that a defendant's intent can be inferred from the evidence.³⁶

B. Second Element—Mailing in Furtherance of Scheme

Although the language of the original mail fraud statute required that the offense be "by means of the post-office establishment,"³⁷ today's version of this crime merely requires that the defendant use the mails at some point in furtherance of the scheme.³⁸ As previously noted, this second element has three subparts.

The first subpart, the mailing, is merely the jurisdictional object that brings the fraudulent conduct within the statute. Little, if any, controversy surrounds the definition of "mailing." Litigation involving nonpostal mailings or hand deliveries is conspicuously absent. Although the argument has been made that the delivery could have been effectuated "in person" rather than through the use of the United States Postal System, this argument has been given little credence because it is premised upon mere speculation when, in fact, the United States Postal System has been used.³⁹

The second subpart is the defendant's act of mailing or causing

35. See generally Michael C. Smith, *Recklessness and Good Faith Under the Mail Fraud Statute: Mens Rea by Accident?*, 27 CRIM. L. BULL. 315, 315-26 (1991) (discussing the decisions that have adopted a recklessness or willful blindness approach).

36. See, e.g., *Gelb*, 700 F.2d at 879 (holding that although specific intent is required for mail fraud, it can be inferred from the evidence). Recently, the First Circuit Court of Appeals noted that although good faith serves as a legitimate defense to a charge of mail fraud, a defendant is not entitled to an instruction pertaining to good faith. See *United States v. Dockray*, 943 F.2d 152, 154-56 (1st Cir. 1991). It noted that mail fraud's intent cannot be equated with the willfulness requirement in a tax evasion case. *Id.* at 155-56. Thus, the reversal in *Cheek v. United States*, 111 S. Ct. 604 (1991), for failure to properly instruct a jury to use the defendant's objective intent for evaluating "willfulness," is inapplicable to mail fraud's requirement that the defendant intend a scheme to defraud. *Dockray*, 943 F.2d at 156.

37. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (current version at 18 U.S.C.A. § 1341 (West Supp. 1991)).

38. The actual language of 18 U.S.C. § 1341 is: "for the purpose of executing such scheme." However, most courts state this requirement as "in furtherance" of the scheme to defraud. See, e.g., *United States v. Draiman*, 784 F.2d 248, 251 (7th Cir. 1986); see also 9 DEPARTMENT OF JUSTICE MANUAL § 9-43.221 (Theodore B. Olson et al. eds., Supp. 1989) (stating that "in furtherance" requirement is loosely construed by the courts) [hereinafter JUSTICE MANUAL].

39. See *United States v. Flaxman*, 495 F.2d 344, 348 (7th Cir.), cert. denied, 419 U.S. 1031 (1974). Because courts originally required mailings to be essential to the fraudulent scheme, arguments that the defendant could have effected delivery without use of the mails enjoyed some success. See *United States v. Clark*, 121 F. 190 (M.D. Pa. 1903).

the item to be mailed. Some controversy has entered this aspect of the crime when the defendant does not personally mail the letter. The United States Supreme Court, however, has firmly held that an indictment may be predicated upon a defendant's agent using the mail.⁴⁰ The Supreme Court resolved any ambiguity in 1954 when it stated a test that presumes sufficiency of the defendant using the mail when the defendant acts with knowledge that the mails will be used or if the use of the mails can be reasonably foreseen.⁴¹

The final subpart, the heart of this element of the offense, is that the defendant's mailing be in furtherance of the scheme to defraud. To satisfy the causal connection between the mailing and the scheme, courts originally required a subjective showing that the mailing was essential to the scheme.⁴² Essentiality later was modified by the Court to be merely incidental.⁴³ Subjective review was eliminated and courts were left to objectively determine if the scheme was "closely related" to the mailing.⁴⁴

40. See *United States v. Kenofsky*, 243 U.S. 440 (1917) (interpreting "place, or cause to be placed" language in mail fraud statute to include the defendant's act of giving fraudulent insurance claims to superior for mailing to defendant's home office, thereby making superior defendant's agent).

41. See *Pereira v. United States*, 347 U.S. 1, 8-9 (1954) (explaining that when someone does an act with knowledge that the use of the mails will follow in the ordinary course of business, or when such use can be reasonably foreseen, even though not actually intended, then the person causes the mails to be used); see also *United States v. Smith*, 934 F.2d 270, 271-73 (11th Cir. 1991) (finding insufficient proof that use of the mails was foreseeable); *United States v. Wormick*, 709 F.2d 454, 461 (7th Cir. 1983) (noting that once a defendant "becomes a party to the scheme, he can be held accountable for mailings caused by other members, whether or not he knew of or agreed to any specific mailing"); see generally *James Bucci*, Recent Decision, 63 TEMP. L. REV. 893 (1990) (discussing the reasonable foreseeability standard in light of *United States v. Bortnovsky*, 879 F.2d 30 (2d Cir. 1989)).

42. See *United States v. Clark*, 121 F. 190 (M.D. Pa. 1903). In *Clark* the court stated:

What is sought to be prevented is an abuse of the post office facilities of the country to carry out schemes to defraud, a far wider range being secured through this public agency, with greater chance for immunity on account of the distance at which they are able to be undertaken. But, as stated above, this use must be an essential of the scheme, and not a mere adjunct or incident. The original design of the parties must contemplate and embrace it. So the statute reads, and we cannot enlarge upon it.

Id. at 191.

43. See *Badders v. United States*, 240 U.S. 391, 394 (1916). In the more recent case of *United States v. Serino*, 835 F.2d 924 (1st Cir. 1987), the court stated, "It is not necessary, however, that each mailing guarantee the success of the scheme, or even significantly advance it." *Id.* at 928.

44. See *United States v. Maze*, 414 U.S. 395, 399-402 (1974). In *United States v. Fermin Castillo*, 829 F.2d 1194 (1st Cir. 1987), the court stated: "The communications must also have been more than peripheric; they must have touched one or more of the

Today, in light of the recent case of *Schmuck v. United States*,⁴⁵ the relationship has been transformed to a subjective examination of "whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time."⁴⁶ This evolution significantly expands the scope of conduct that can fall prey to a mail fraud charge.

C. Mail Fraud As It Relates to Wire Fraud and RICO

A significant addition to the fraud section of title 18 is evidenced by the inclusion of a wire fraud provision.⁴⁷ This section operates in *pari passu* to the mail fraud provision.⁴⁸ Like the present mail fraud provision, wire fraud's elements emphasize the scheme to defraud, as opposed to the means used to effectuate the deception.⁴⁹ Here again, although use of the wires is required, its role in the offense is merely perfunctory because the crux of the offense is the fraudulent conduct.⁵⁰

A noteworthy feature of both mail and wire fraud is the fact that these offenses can serve as predicate offenses for a charge pursuant to the Racketeer Influenced and Corrupt Organization Act (RICO).⁵¹ This Act, a provision of the Organized Crime Control Act of 1970,⁵² has been the subject of significant controversy.⁵³ The extensiveness of RICO is demonstrated by the use of mail fraud charges as predicates of

core transactions of the plot. The needed degree of integration defies formulaic quantification. Each case must be judged on its own facts to ascertain whether the predicate message was 'closely related to the scheme.'" *Id.* at 1199.

45. 489 U.S. 705 (1989).

46. *Id.* at 715.

47. See 18 U.S.C.A. § 1343 (West Supp. 1991).

48. See *Fermin Castillo*, 829 F.2d at 1198. The wire fraud statute parallels and was patterned after the mail fraud statute. See *id.* Because the elements of the scheme to defraud are identical under both statutes, courts have used mail fraud cases for guidance in construing cases under the wire fraud statute. *E.g.*, *United States v. Lemire*, 720 F.2d 1327, 1334 n.6 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *United States v. Feldman*, 711 F.2d 758, 763 n.1 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983).

49. See 9 JUSTICE MANUAL, *supra* note 38, § 9-44.210.

50. See *United States v. Mercer*, 133 F. Supp. 288, 289 (N.D. Cal. 1955) (holding that a complaint must allege the particulars of the scheme to defraud).

51. 18 U.S.C.A. § 1961 (West 1984 & Supp. 1991). RICO prohibits the receipt of income from a pattern of racketeering. 18 U.S.C. § 1962(a) (1988). A pattern of racketeering requires two acts of racketeering within the statutory time limits. *Id.* § 1961(5). Activity that is indictable under the mail fraud and wire fraud statutes can qualify as racketeering activity. 18 U.S.C.A. § 1961(1)(A) (West Supp. 1991).

52. Pub. L. No. 91-452, 84 Stat. 922 (1970) (current version at 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1991)).

53. See generally William J. Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639 (1990) (stating that controversies over the large number of predicate offenses and the vague definitions of the statute raise the question whether the RICO statute could sustain a constitutional attack).

the offense.⁵⁴ A pattern of mailed letters can result in a sentence enhancement of up to twenty years.⁵⁵

III. SCHEME TO DEFRAUD

A key controversy of recent vintage involves whether the term "scheme to defraud" permits frauds aimed at a deprivation of intangible rights, or includes only frauds involving money or property.⁵⁶ The intangible rights doctrine can be examined on three levels: initial legislative action, judicial interpretation, and legislative reaction to this judicial interpretation.

A. Intangible Rights Doctrine

In 1909 Congress amended the mail fraud statute by adding the words "or for obtaining money or property by means of false or fraudulent pretenses."⁵⁷ There was inconsiderable legislative guidance offered at the time of its passage.⁵⁸ This amendment codified the holding of *Durland v. United States*,⁵⁹ a case that liberated the statutory constraints of mail fraud by permitting actions premised upon future acts to defraud.⁶⁰

From this legislative base judicial interpretation developed in the 1940s⁶¹ and evolved into full bloom in the 1970s⁶² and 1980s,⁶³ that

54. See *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987) (holding that mailing fraudulent tax returns is a predicate offense under RICO because such mailing is indictable under the mail fraud statute).

55. 18 U.S.C.A. § 1963 (West Supp. 1991). The sentence also can include a fine and forfeiture of the property acquired or maintained from the illegality. *Id.*

56. *Id.* § 1341.

57. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130 (current version at 18 U.S.C.A. § 1341 (West Supp. 1991)).

58. "The sponsor of the 1909 legislation did not address the significance of the new language, stating that it was self-explanatory." *McNally v. United States*, 483 U.S. 350, 358 n.7 (1987) (citing 42 Cong. Rec. 1026 (1908) (remarks of Sen. Heyburn)).

59. 161 U.S. 306 (1896).

60. *Id.* at 313.

61. See *Shushan v. United States*, 117 F.2d 110 (5th Cir.) (holding that any scheme by corruption of a public official is a fraud), *cert. denied*, 313 U.S. 574 (1941), *overruled on other grounds by United States v. Cruz*, 478 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973); *United States v. Classic*, 35 F. Supp. 457 (E.D. La. 1940) (applying intangible rights theory to election commissioner's scheme to defraud).

62. See *United States v. Isaacs*, 493 F.2d 1124 (7th Cir.) (applying intangible rights theory to bribery of state officials), *cert. denied*, 417 U.S. 976 (1974); *United States v. States*, 488 F.2d 761 (8th Cir. 1973) (applying intangible rights doctrine to fraud by candidates for city office), *cert. denied*, 417 U.S. 909 (1974).

63. See *United States v. Holzer*, 816 F.2d 304 (7th Cir.) (applying intangible rights

being, the intangible rights theory.⁶⁴ Prosecutors indicted and convicted public officials pursuant to the intangible rights doctrine with a finding that they had deprived the citizenry of the right to good government.⁶⁵

The progression of this doctrine came to a screeching halt in 1987 when the United States Supreme Court voided the use of intangible rights in the case of *McNally v. United States*.⁶⁶ In a mere stroke of the pen, five justices found that "the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property."⁶⁷

The jury in *McNally* had not been charged to find any defrauding of money or property in reaching their mail fraud conviction.⁶⁸ As such, the conviction, predicated upon evidence of an insurance scheme that operated to deprive citizens of their intangible rights to good government, required reversal.⁶⁹

theory to fraud by county judge), *vacated*, 484 U.S. 807 (mem.), *rev'd*, 840 F.2d 1343 (7th Cir. 1987), *cert. denied*, 486 U.S. 1035 (1988); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (applying the intangible rights theory to a kickback scheme run by a local political leader), *cert. denied*, 461 U.S. 913 (1983).

64. See generally John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981) (criticizing the intangible rights theory in mail fraud cases); W. Robert Gray, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562 (1980) (arguing against use of the intangible rights doctrine in political corruption cases).

65. *McNally v. United States*, 483 U.S. 350, 362 n.1 (1987) (Stevens, J., dissenting) (listing cases in which courts have convicted public officials of "defrauding citizens of their right to the honest services of their governmental officials").

66. 483 U.S. 350 (1987).

67. *Id.* at 356. See generally Paul W. Barnett, Note, *McNally v. United States: Mail Fraud—The Procrustean Bed Couldn't Stretch This One*, 48 LA. L. REV. 723 (1988) (interpreting *McNally* to exclude from the scope of the mail fraud statute a fiduciary violation without a transfer of something with economic value); Ellen Berkowitz, Note, *The Rise and Fall of the Right to Honest Government: Prosecuting Public Corruption After McNally v. United States*, 22 LOY. L.A. L. REV. 325 (1988) (examining development of intangible rights doctrine and the effect of *McNally*); Donna M. Ducey, Note, *McNally v. United States: The Demise of the Intangible Rights Doctrine*, 66 N.C. L. REV. 1035 (1988) (arguing that the Court removed an important protection of the rights of the public).

68. *McNally*, 483 U.S. at 354-55.

69. See *id.* at 360. The governor of Kentucky gave Howard P. "Sonny" Hunt, Kentucky Democratic Party Chairman, de facto control to choose the insurance companies from which the State of Kentucky would purchase its policies. Hunt agreed with the Wombwell Insurance Company of Lexington, Kentucky (Wombwell), which had previously acted as the State's agent in selecting a workmen's compensation policy, that Wombwell would continue to act as the State's agent and would share with other insurance agencies designated by Hunt any commissions paid to Wombwell in excess of \$50,000. Defendants Gray, a former public official of Kentucky, and *McNally*, a private

In a strong dissent Justice Stevens, joined by Justice O'Connor in three of four parts, severely criticized the majority opinion's reading of the statute's phrasing in the conjunctive.⁷⁰ The two justices argued to uphold the multitude of existing precedent that interpreted the statute in the disjunctive, reading merit into the "or" separating "scheme or artifice to defraud" from "money or property."⁷¹ They argued that government attorneys should have the option of proceeding under any one of the following three "separate prohibitions" established by the statute: "[1] any scheme or artifice to defraud, [2] or for obtaining money or property by means of false or fraudulent pretenses, . . . [3] or [counterfeiting]." ⁷²

The aftermath of *McNally* created serious questions on issues such as retroactivity and use of the writ of *coram nobis*.⁷³ Confusion existed on whether to construe *McNally* to affect only cases that omitted charges to the jury of "money or property" or to encompass all cases that had proceeded under an intangible rights doctrine.⁷⁴

The precedential effect of *McNally* was further quagmired when the United States Supreme Court, within five months of the *McNally*

individual, received payments through this insurance scheme. *Id.* at 352-53. The Government's principal theory was "that petitioners' participation in a self-dealing patronage scheme defrauded the citizens and government of Kentucky of certain 'intangible rights,' such as the right to have the Commonwealth's affairs conducted honestly." *Id.* at 352.

70. Justice Stevens wrote:

Yet, today, the Court, for all practical purposes, rejects this longstanding construction of the statute by imposing a requirement that a scheme or artifice to defraud does not violate the statute unless its purpose is to defraud someone of money or property. I am at a loss to understand the source or justification for this holding. Certainly no canon of statutory construction requires us to ignore the plain language of the provision.

Id. at 365 (Stevens, J., dissenting).

71. *Id.* at 364-65.

72. *Id.* (emphasis and brackets supplied by court) (quoting 18 U.S.C. § 1341 (1982)).

73. See generally Craig M. Bradley, *Foreword: Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573 (1988) (demonstrating that many cases should survive collateral attack after *McNally* by showing unjust enrichment of the defendant and an identifiable victim); Peter M. Oxman, Note, *The Federal Mail Fraud Statute After McNally v. United States*, 107 S. Ct. 2875 (1987): *The Remains of the Intangible Rights Doctrine and Its Proposed Congressional Restoration*, 25 AM. CRIM. L. REV. 743 (1988) (noting, for example, that post-*McNally* collateral attacks threaten as many as 185 convictions under the mail fraud statute); Deborah Sprenger, Annotation, *Effect upon Prior Convictions of McNally v. United States Rule that Mail Fraud Statute (18 USCS § 1341) Is Directed Solely at Deprivation of Property Rights*, 97 A.L.R. FED. 797 (1990) (showing that courts have arrived at different determinations of the retroactive effect of *McNally* in the face of challenges to mail fraud convictions based on the intangible rights doctrine).

74. See sources cited *supra* note 73.

decision, took the opportunity to rethink its position by accepting for review the case of *Carpenter v. United States*.⁷⁵ In *Carpenter* the Court upheld convictions for mail and wire fraud that were based upon the misuse of confidential information. Winans, a columnist for the *Wall Street Journal*, disclosed material from his highly regarded column to coconspirators who used the advance information to buy and sell stocks based upon the probable impact of the articles on the market. Profits were shared among the parties. The United States Supreme Court found that this use of the material violated an employee's fiduciary obligation to protect confidential information of the employer secured during employment.⁷⁶ The Court found the information to be property, albeit intangible in nature, but sufficient to meet the property element within the mail and wire fraud statutes.⁷⁷

Carpenter, therefore, serves to reinforce *McNally*'s holding, which required "money or property," but also extends its realm to include both tangible and intangible property. The *Carpenter* Court's clarification also forecloses post-*McNally* writs whenever intangible property, as opposed to intangible rights to honest and impartial government, is portrayed in the charging instrument.⁷⁸

The legislative reaction to the judiciary's interpretations is seen in Congress's acceptance of a challenge by the *McNally* Court to clarify mail fraud's boundaries.⁷⁹ The severe and acerbic criticism⁸⁰ leveled upon the United States Supreme Court's ruling was quickly endorsed by Congress.

The new appendage to mail fraud, section 1346 of title 18, was passed as a segment of the Anti-Drug Abuse Act of 1988.⁸¹ Although it

75. 484 U.S. 19 (1987).

76. *Id.* at 28. The *Carpenter* case has considerable implications in the corporate setting. See generally Peter R. Ezersky, Note, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427 (1985) (discussing the effect of mail and wire fraud on fiduciary breaches prior to *Carpenter*).

77. *Carpenter*, 484 U.S. at 25. The use of information as property also has considerable impact in the law of intellectual property. See Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365 (1989).

78. See John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121, 143 (1988).

79. In *McNally* the Court stated, "If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360.

80. See generally Thomas Brom, *Expanded Mail Fraud a Dead Letter*, 7 CAL. LAW. 11 (Oct. 1987) (quoting several statements opposing the result and effect in *McNally*); Kaplan, *supra* note 26; Jeffrey J. Dean & Doye E. Green, Jr., Note, *McNally v. United States and Its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?*, 39 MERCER L. REV. 697 (1988).

81. Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C.A.

bears no resemblance to its surrounding provisions, it is clear that its inclusion within the Drug Act was to facilitate its passage in Congress. The section expands the term "scheme or artifice to defraud" to include a deprivation of the "intangible right of honest services."⁸²

B. 1346 Ramifications

Section 1346 of title 18 appears to restore mail fraud to its status prior to the *McNally* decision. Clearly the drafters of the one sentence intended that effect.⁸³ In meeting the public's cry for curtailing government corruption, however, Congress has enacted legislation that may prove to be ambiguous, vague, and a source of political retribution.⁸⁴

Section 1346 defines "scheme to defraud" to include the intangible right of honest services. The statute does not, however, define the term "honest services." Absent this definition, when interpreting the statute one can turn to the legislative history. In the legislative history we find that Representative Conyers stated that the purpose of this provision was to restore mail fraud to its pre-*McNally* status.⁸⁵ It is evident that there are a plethora of pre-*McNally* cases that employ the intangible rights doctrine.⁸⁶ Quantity, however, should not be mistaken for propriety.

Defendants have unsuccessfully argued on appeal the issue of

§ 1346 (West Supp. 1991)).

82. 18 U.S.C.A. § 1346 (West Supp. 1991). Section 1346 states, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.*

83. Representative Conyers stated, "This amendment restores the mail fraud provision to where that provision was before the *McNally* decision." See 134 CONG. REC. H11,251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers).

84. Terrance Reed appeared on behalf of the National Association of Criminal Defense Lawyers before the Subcommittee on Criminal Justice during the period that the committee considered an expansion of mail fraud to include intangible rights. Mr. Reed stated:

The proposed modifications would encompass any lie, any misrepresentation, any breach of a promise, or any dashed expectations. It could apply to every Member of Congress who has ever misrepresented his motives in supporting a piece of legislation—by proclaiming an altruistic public purpose, while hiding his real goal of humoring his party's leadership, or of promoting his own reelection. The term "intangible rights" is not defined. It has no limit "whatsoever."

Mail Fraud, 1987: Hearings on H.R. 3089 and H.R. 3050, Fraud Amendment Acts of 1987, Before the Subcomm. on Criminal Justice of the House Comm. of the Judiciary, 100th Cong., 2d Sess. 106 (1988).

85. 134 CONG. REC. H11,251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers).

86. See *McNally v. United States*, 483 U.S. 350, 362 n.1 (1987) (Stevens, J., dissenting).

vagueness when convicted of mail fraud under an intangible rights theory.⁸⁷ Despite strict construction of this penal statute against the Government,⁸⁸ the courts generally have found that there has been both fair warning and an insufficient showing that the statute fails to guard against arbitrary and discriminatory enforcement.⁸⁹ Mail fraud does not rise to the level of vagueness found in a statute that gives police unlimited discretion.⁹⁰ On its face, the courts have found that the language of the statute is not a standardless sweep allowing police, prosecutors, or juries to pursue personal prejudices.⁹¹

These pre-*McNally* cases, however, were not always predicated on the words "honest services," the terms presently used in the most recent mail fraud addendum. Oftentimes terms such as "good government,"⁹² breach of "duty of loyalty,"⁹³ and "betrayal of the public trust"⁹⁴ were the indicted conduct. As such, even the wealth of pre-*McNally* cases employing the intangible rights doctrine need to be mitigated to include only those that provide actual correlation to the language presently used in section 1346.

The United States Supreme Court has yet to squarely find the term "honest services" in the context of the mail fraud statute to be acceptable. The extension of mail fraud into the realm of intangible rights has in fact been the subject of occasional judicial criticism⁹⁵ and constant scholarly censure.⁹⁶ Judge Winter attacked the intangible

87. See *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States v. Louderman*, 576 F.2d 1383 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978).

88. See *Margiotta*, 688 F.2d at 120.

89. See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 92 (2d ed. 1986) (describing the test for determining whether a statute is void for vagueness).

90. See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (finding California statute that required loiterers to provide credible and reliable identification unconstitutional); *Smith v. Goguen*, 415 U.S. 566 (1974) (holding flag misuse statute void for vagueness); see also Anthony G. Amsterdam, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (providing an excellent discussion of the void-for-vagueness doctrine).

91. *Kolender*, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 575); *Louderman*, 576 F.2d at 1388.

92. *Margiotta*, 688 F.2d at 120.

93. See *United States v. Bronston*, 658 F.2d 920, 922 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

94. See *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir.), *vacated*, 484 U.S. 807 (mem.), *rev'd*, 840 F.2d 1343 (7th Cir. 1987), *cert. denied*, 486 U.S. 1035 (1988).

95. See *Margiotta*, 688 F.2d at 140 n.3 (Winter, J., dissenting) (listing cases in which courts have expressed apprehension about the expansion of mail fraud into the area of intangible rights).

96. Coffee, *supra* note 16; Daniel J. Hurson, *Limiting the Federal Mail Fraud*

rights doctrine in his dissent to the majority opinion in *United States v. Margiotta*,⁹⁷ noting that "there is no end to the common political practices which may now be swept within the ambit of mail fraud."⁹⁸

The effect of section 1346 is perhaps best exemplified by considering an absurd application.⁹⁹ President George Bush, in running for the Office of President, was hailed as a man who would not increase taxes. His famous words in the Bush-Dukakis debate were: "'Read my lips: No new taxes.'"¹⁰⁰ The public heard this promise via television and radio, thus, use of the wires. It also is likely that these words appeared in the campaign literature sent to voters through the mail. One can claim that Bush's election to the Office of President was predicated upon voters' acceptance of this campaign promise. Yet, after the election we see President Bush changing heart and saying that taxes may have to increase.¹⁰¹

Can it be claimed that Bush operated a scheme to defraud the public by securing votes on a promise of no new taxes? Clearly, it was his intent to secure voters through this campaign promise. Can it further be claimed that he was not honest with the public? If George Bush authorizes a legislative increase in taxes, will he be acting dishonestly and depriving the public of his "honest services?"

One, maybe, can claim that Bush did not intend to be dishonest in that he could not foresee the economic problems of the future. But this issue of intent would be for a jury to decide, and a zealous prosecutor might argue that Bush should have "foreseen" this possibility. A leading economist claimed that George Bush "was spouting nonsense."¹⁰² But does that nonsense reach the level of dishonesty and criminality under the mail fraud statute?

Obviously, the Justice Department will not charge George Bush with mail fraud.¹⁰³ But the very fact that his conduct meets the statu-

Statute—*A Legislative Approach*, 20 AM. CRIM. L. REV. 423 (1983); Williams, *supra* note 31.

97. 688 F.2d 108, 139-44 (2d Cir. 1982) (Winter, J., dissenting), *cert. denied*, 461 U.S. 913 (1983).

98. *Id.* at 140.

99. The author believes that prosecutorial discretion would cause even the Justice Department not to file this one.

100. Andrew Rosenthal, *Bush Now Concedes a Need for "Tax Revenue Increases" to Reduce Deficit in Budget*, N.Y. TIMES, June 27, 1990, at A1, col. 6.

101. *Id.*

102. Walter D. Fackler, Speech at 30th Annual Business Forecast Luncheon (Dec. 12, 1990) (available as Special Selected Paper, University of Chicago Graduate School of Business). Professor Fackler stated: "In addition to his promise not to increase taxes, President Bush told us that we would outgrow the deficit. I warned in my last two appearances at this podium that he was spouting nonsense." *Id.* at 7.

103. In addition to the absurdity of this application, a procedural impediment is

tory definition exhibits the possibly limitless bounds of the mail fraud statute. The prosecutor that decides not to proceed in this scenario has the equivalent power to use the threat of criminal indictment in instances that have political implications.¹⁰⁴ Clearly, the open-ended gun provided to the executive branch exceeds federalism standards¹⁰⁵ and promotes haphazard application.

The United States Supreme Court should not be satisfied with the legislative response to *McNally* in adding section 1346 to the mail fraud statute, a definitional section that permits a mail fraud scheme to be premised upon the intangible right to honest services. Further clarification is required by the legislature. Congress must enumerate the specific types of conduct that constitute dishonesty and the scope of when a political malfeasance will become criminal. Absent legislative restructuring,¹⁰⁶ it is necessary for our courts to provide judicial interpretation to the newly added definitional section of mail fraud. That interpretation should include a message to the government representatives that further legislative reaction is necessary.

IV. IN FURTHERANCE

Time has served to enlarge the scope of the crime of mail fraud by

prevalent. The Bush-Dukakis debates preceded the passage of § 1346 and therefore would have precluded an indictment premised upon intangible rights. *See United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991) (prohibiting retroactive application of § 1346 to pre-*McNally* intangible rights conduct); *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir.) (finding in a civil action that § 1346 cannot be applied retroactively), *cert. denied*, 111 S. Ct. 536 (1990). *But see United States v. Johns*, 742 F. Supp. 196 (E.D. Pa. 1990) (finding no ex post facto prohibition to pre-*McNally* conduct premised on intangible rights), *aff'd in part and rev'd in part*, 941 F.2d 1204 (3d Cir. 1991).

104. For example, a violation of a disciplinary rule by an attorney may support a mail fraud claim against that attorney, should the prosecutor choose to pursue it:

If the local leader of a political party, who is not a public officeholder, can be convicted of mail fraud for depriving citizens of their right to honest government, no major conceptual leap is required to argue that a lawyer who deprives the public of its right to the honest administration of justice should also be held liable.

Ellsworth A. Van Graafeiland, *The Proposed Model Rules of Professional Conduct and the Mail Fraud Statute*, 48 BROOK. L. REV. 653, 659 (1982) (footnote omitted).

105. *See* Ralph E. Loomis, Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U. L. REV. 63 (1978); *see also* Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321, 336-43 (1983) (discussing federalism concerns as they relate to four federal statutes, including mail fraud, in the prosecution of local corruption).

106. For a discussion of the need for legislative restructuring to the mail fraud statute, *see infra* notes 322-37 and accompanying text.

permitting an increasingly more expansive definition to what will constitute being "a part of the execution" of a scheme to defraud.¹⁰⁷ Limitations that provided defense counsel with arguments to curtail prosecutorial selectivity of charges have, for the most part, been rendered worthless.

A. Conduct

It is difficult to provide a semblance of structure to the concepts elicited from the cases involving the "in furtherance" aspect of the crime of mail fraud. A haphazard approach is apparent, with the United States Supreme Court and lower courts picking and choosing favorable phraseology from precedent without necessarily taking the perspective of the cases immediately preceding the pending matter.¹⁰⁸ Although several rules of law exist that indicate what will or will not satisfy the "in furtherance" element, a discussion of these concepts may appear circular, redundant, and oftentimes lacking order. In this morass, however, it is without doubt that the statute requires some relationship between the mailing and the scheme to defraud.

Several premises have evolved that emphasize the breadth of permissible conduct that will serve to meet the requirement of a mailing that is in furtherance of a scheme to defraud. "Innocent" mailings, as well as mailings between innocent parties, will provide sufficient evidence of this element.¹⁰⁹ Further, it is not necessary that the mailing be an essential element of the scheme. Mere incidence to the scheme¹¹⁰ or one "step in a plot"¹¹¹ is acceptable. Even routine mailings can now suffice.¹¹²

107. 18 U.S.C.A. § 1341 (West Supp. 1991); see Lynn, *supra* note 30, at 941 (stating that the requirement is broadly interpreted and applied).

108. The Court in *Pereira v. United States*, 347 U.S. 1 (1954), ignored a doctrine set forth in the prior case of *Kann v. United States*, 323 U.S. 88 (1944). In *Schmuck v. United States*, 489 U.S. 705 (1989), the court failed to mention the rules in *United States v. Sampson*, 371 U.S. 75 (1962), and *United States v. Lane*, 474 U.S. 438 (1986). For cases of lower courts after the case of *Schmuck*, see *infra* notes 265-87 and accompanying text.

109. See *United States v. Draiman*, 784 F.2d 248, 251 (7th Cir. 1986) (holding that mailings from attorney for defrauded insurance company to persons other than the defendant were sufficient).

110. See *Pereira*, 347 U.S. at 8 (holding that once a scheme is established, it is sufficient if the mailing is incident to an essential part of the scheme).

111. See *Badders v. United States*, 240 U.S. 391, 394 (1916). According to Justice Holmes, the author of the *Badders* opinion, subjectivity can be examined. He noted, "Intent may make an otherwise innocent act criminal." *Id.*

112. See *Carpenter v. United States*, 484 U.S. 19 (1987) (holding that a routine mailing of the *Wall Street Journal* was sufficient). In *United States v. Tarnopol*, 561 F.2d 466, 472 (3d Cir. 1977), the Third Circuit had found, however, that innocent mail-

*United States v. Clark*¹¹³ marks the initial subjective test that required the defendant to contemplate the mailing as an essential aspect of the scheme.¹¹⁴ The court found that a mailing which was merely "adjunct or incident" to the scheme was insufficient to form the necessary causal connection between the mailing and the scheme to defraud.¹¹⁵ In *Clark* the court quashed an indictment that had failed to allege more than mere use of the mails.¹¹⁶ The use, the court stated, was "merely the overt act."¹¹⁷ If the scheme could have been accomplished through canvassers, solicitors, or advertisements in public print, one could not assume that use of the mails was contemplated by the alleged offenders as an essential aspect of the offense. Lacking an allegation or proof of the defendant's subjective intent of essentiality in using the mails to accomplish this fraudulent scheme, the statutory elements were not met.¹¹⁸

Subsequent case law moved away from this subjective test to a standard of whether the mailing was a step in the execution of the fraudulent scheme¹¹⁹ or "a step in a plot."¹²⁰ The courts shifted from the requirement that the mailing be an essential part of the scheme to an analysis of whether it was "incident to an essential part of the scheme."¹²¹ The subjective test, which required contemplation by the defendant of the causal connection between the fraudulent scheme and mailing, appeared to be eliminated by *United States v. Young*.¹²²

ings were insufficient to support a mail fraud conviction. The court analogized innocent mailings to mailings required by law, which the Court in *Parr v. United States*, 363 U.S. 370 (1960), found were not sufficient to satisfy the in furtherance requirement. In the *Carpenter* district court opinion the court distinguished *Tarnopol*, claiming not only that *Tarnopol* dealt with routine mailings, but also that the mailings in *Tarnopol* were unrelated to the fraudulent scheme. *United States v. Winans*, 612 F. Supp. 827, 846 (S.D.N.Y. 1985), *aff'd in part and rev'd in part sub nom. United States v. Carpenter*, 791 F.2d 1024 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987).

113. 121 F. 190 (M.D. Pa. 1903).

114. *Id.* at 191.

115. *Id.* Courts have been notoriously lenient on the admission of evidence to meet the mail fraud statute. As long as the evidence relates to an allegation in the indictment, it is admissible. *See Stokes v. United States*, 157 U.S. 187, 193 (1895).

116. *Clark*, 121 F. at 191.

117. *Id.*

118. *Id.*

119. *See United States v. Kenofskey*, 243 U.S. 440, 443 (1917) (finding mail fraud charge permissible because payment and receipt executed the scheme, but did not "serve to 'trammel up the consequence' of the fraudulent use of the mails").

120. *Badders v. United States*, 240 U.S. 391, 394 (1916).

121. *Pereira v. United States*, 347 U.S. 1, 8 (1954); *see also United States v. Shepherd*, 511 F.2d 119, 122 (5th Cir. 1975) (holding that use of mails was incidental to essential element of defendant's check kiting scheme).

122. 232 U.S. 155 (1914).

Young held that it is not necessary that the scheme contemplate the use of the mails as an essential element.¹²³

The loss of intensity of the relationship between the mailing and scheme is highlighted in more recent decisions, which reveal that courts continue to look objectively for some causality, but stop upon finding a mere tangential relationship between the scheme and the mailing.¹²⁴ Some courts employ a test of whether the mailing was "sufficiently closely related to [the] scheme to bring [the] conduct within the statute."¹²⁵ A mailing prior to contemplation of the scheme appears to be per se sufficient.¹²⁶

B. Limitations

For a number of years several limitations upon the "in furtherance" aspect of mail fraud furnished defense arguments for winning dismissals and reversals in mail fraud cases.¹²⁷ The limitations upon the "in furtherance" aspect of the crime of mail fraud arise from four, basically unrelated, avenues.

The first instance is when the mailing clearly conflicts with, rather than promotes, the scheme.¹²⁸ Second, courts have refused use of the mail fraud statute where the mailing is an imperative duty imposed by the state.¹²⁹ Third, when the mailing occurs prior to the commencement of the scheme, mail fraud is not applicable.¹³⁰ Finally, and most noteworthy, are cases in which the scheme reaches fruition prior to the mailing.¹³¹ An exception to several of these limitations, however, is when the purpose of the mailing serves to lull one into the scheme to defraud.¹³² Thus, mailings that conflict with the scheme or are after

123. See *id.* at 161-62.

124. See *Pereira*, 347 U.S. at 8; see also *United States v. Buchanan*, 544 F.2d 1322, 1325 (5th Cir.) (holding that mails need not be essential, only incident to the essential part: the statute does not require a but-for relationship), *cert. denied*, 432 U.S. 907 (1977).

125. *United States v. Maze*, 414 U.S. 395, 399 (1974).

126. See *United States v. Silvano*, 812 F.2d 754, 760 (1st Cir. 1987); *United States v. McNeill*, 728 F.2d 5, 14-15 (1st Cir. 1984).

127. For a discussion of these limitations, see *infra* notes 133-229 and accompanying text.

128. For a discussion of mailings that conflict with the scheme, see *infra* notes 133-47 and accompanying text.

129. For a discussion of mailings under imperative duty, see *infra* notes 148-63 and accompanying text.

130. For a discussion of mailings prior to the commencement of the scheme, see *infra* notes 164-72 and accompanying text.

131. For a discussion of mailings after the scheme has reached fruition, see *infra* notes 173-211 and accompanying text.

132. For a discussion of the "lulling" exception, see *infra* notes 212-29 and accompa-

completion of the fraudulent scheme and serve as lulling devices for enticing the innocent into the scheme will be mailings in furtherance of the scheme to defraud.

1. *Conflicts with Scheme to Defraud*

Mailings that aid in the detection of fraud or conflict with the ultimate purpose of the scheme are diametrically opposed to the defendant acting with an evil *mens rea* in a fraudulent scheme. Therefore, they are not in furtherance of the scheme to defraud.

This doctrine is evident in the frequently cited case of *United States v. Maze*.¹³³ In *Maze* the defendant's conviction for mail fraud was reversed because the mailings were not sufficiently closely related to defendant's scheme to bring his conduct within the statute.¹³⁴ The defendant allegedly stole his roommate's credit card and used the card to charge food and lodging while traveling to various states.¹³⁵ The defendant's roommate timely reported the theft of his credit card to the issuing bank. The indictment, which charged the defendant with four counts of mail fraud, based the alleged fraudulent conduct upon four of the stolen credit card presentations to restaurants and lodges. The Government contended that the merchant's act of mailing the sales slips to the issuing bank constituted a mailing in furtherance of the scheme to defraud.¹³⁶ The victim of the alleged crime was the issuing bank of the credit card.¹³⁷

The major premise upon which the Supreme Court affirmed the circuit court's reversal of the defendant's conviction was the fact that the mailing occurred after fruition of the scheme to defraud.¹³⁸ However, a subsidiary point mentioned by the Sixth Circuit¹³⁹ and noted by the United States Supreme Court was the counterproductivity of the mailing to the essence of the scheme.¹⁴⁰ The mailing of the credit card slips was in conflict with defendant's purpose. "Indeed, from his point of view, he probably would have preferred to have the invoices mis-

nying text.

133. 414 U.S. 395 (1974).

134. *Id.* at 399.

135. *Id.* at 396.

136. *Id.* at 396-97.

137. *Id.* at 396.

138. For a discussion of the *Maze* decision being premised on the mailing occurring after fruition of the scheme to defraud, see *infra* notes 200-09 and accompanying text.

139. *United States v. Maze*, 468 F.2d 529, 534-35 (6th Cir. 1972), *aff'd*, 414 U.S. 395 (1974).

140. *Maze*, 414 U.S. at 402.

placed by the various motel personnel and never mailed at all."¹⁴¹

The inapplicability of the crime of mail fraud to mailings that conflict with the scheme to defraud also is noted in several circuit court decisions.¹⁴² For example, the Sixth Circuit Court of Appeals reversed a mail fraud conviction in which the mailings emanated from a scheme to defraud an insurance company by an alleged arson of a restaurant to obtain the proceeds of a fire insurance policy.¹⁴³ The court found that the mailings tended to produce evidence of the defendant's involvement and therefore conflicted with the defendant's purpose and were not in furtherance of the scheme.¹⁴⁴

The First Circuit likewise reversed a wire fraud conviction in which telexes forming the object of the wire fraud conflicted with, rather than promoted, the defendant's scheme.¹⁴⁵ Absent a showing that the telexes, which were sent between banks to verify a certificate of deposit given a customer as security for a debt, had lulled the customer into believing that defendant's debt to the customer was secured, the telexes could not be the basis for a wire fraud conviction.¹⁴⁶ Like the accused in the *Maze* case, the defendant in the First Circuit case "probably would have preferred that the telexes not be sent at all since the ultimate result was the detection of his scheme."¹⁴⁷

In determining whether a mailing is counterproductive to the scheme or promotes the scheme to defraud, several avenues of approach are evident. First, one can examine the mailing to determine whether the document is at variance with the defendant's scheme. Second, one can examine whether the letter or wire serves to conceal or promote detection of the defendant's involvement in the scheme to defraud. That which promotes detection is contrary to the document being in execution of the scheme to defraud. Finally, one can examine whether the mailing would have served the intent of the defendant in accomplishing the scheme.

141. *Id.*

142. See, e.g., *United States v. Castile*, 795 F.2d 1273, 1278 (6th Cir. 1986); cf. *United States v. Pietri Giraldi*, 864 F.2d 222, 225 (1st Cir. 1988) (wire fraud case). However, expressing doubt about the validity of the claims in a mailing will not be enough to find that the mailing conflicts with the scheme. See *United States v. Serino*, 835 F.2d 924, 928-29 (1st Cir. 1987); *United States v. LaFerriere*, 546 F.2d 182, 187 (5th Cir. 1977).

143. *United States v. Castile*, 795 F.2d 1273 (6th Cir. 1986).

144. *Id.* at 1279. The Sixth Circuit in *Castile* used the "sufficiently closely related" test of *Maze*, but found that a mailing cannot meet this test if it "conflicts with, rather than promotes, the scheme to defraud." *Id.* at 1278.

145. *Pietri Giraldi*, 864 F.2d at 224-25.

146. *Id.*

147. *Id.* at 225. The First Circuit found, however, that a mailing which was designed to cover up a fraud was in furtherance of the scheme. See *United States v. Forzese*, 756 F.2d 217, 220 (1st Cir. 1985).

These first two examinations entail an objective review of the mailing itself, while the last includes a reflection upon the subjective intent of the defendant. The courts do not differentiate, however, between these two types of standards. Rather, they render a decision upon one or more of the aforesaid rationales with comments that imply a combination of both objective and subjective review.

2. Imperative Duty Imposed by State

Mailings that result from an imperative duty to the state are not in furtherance of a scheme to defraud. *Parr v. United States*¹⁴⁸ is the seminal United States Supreme Court case that describes this "legal duty" exception to a mail fraud charge. *Parr* involved a twenty-count indictment for mail fraud and conspiracy to commit mail fraud¹⁴⁹ stemming from the defendant's scheme to defraud a school district of money through misappropriation and embezzlement.¹⁵⁰ The Court found evidence supporting a "brazen scheme to defraud."¹⁵¹ The scheme included mailings, namely statutorily mandated letters and enclosures pertaining to the assessment and collection of school taxes.¹⁵² Lacking, however, was the element that the mailings be in furtherance of the scheme to defraud. The Court stated:

[W]e think it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal¹⁵³

Although *Parr* establishes the legal duty limitation to the "in furtherance" element, the decision is repeatedly cited for its second holding that the "in furtherance" element of the crime is not met when the mailing occurs after the scheme has reached fruition.¹⁵⁴

148. 363 U.S. 370 (1960).

149. 18 U.S.C. § 371 is the statutory provision of conspiracy that the Court used in *Parr*. *Id.* at 372.

150. *Id.* at 374-78.

151. *Id.* at 385.

152. *Id.*

153. *Id.* at 391. In *United States v. Tarnopol*, 561 F.2d 466, 472 (3d Cir. 1977), the court used *Parr* to extend the legal duty prohibition to innocent mailings. The court stated that mailings required by law are intrinsically innocent, and a distinction does not exist between mailings required by law and other types of innocent mailings. *Id.* at 472. *Carpenter v. United States*, 484 U.S. 19 (1987), limited *Tarnopol* by finding routine mailings of the *Wall Street Journal* sufficient to proceed with a mail fraud charge. *Id.* at 28.

154. *Parr*, 363 U.S. at 393. Actually, only counts 17, 18, and 19 of the indictment

Justice Frankfurter, joined by Justices Harlan and Stewart, wrote a strong dissent in *Parr*. He contended that the lawfulness of the isolated act of mailing should not serve as immunity to a mail fraud charge.¹⁵⁵ Although there has been no open adoption of Frankfurter's dissent, subsequent cases often distinguish the *Parr* rule.¹⁵⁶ Often-times, these distinctions are merely voiced by a statement that there has been no showing that the mailing was after fruition of the scheme to defraud.

For example, when the victim of the fraud is the Internal Revenue Service¹⁵⁷ or a state tax authority,¹⁵⁸ the filing of tax returns, legally compelled documents, will not serve as a bar to a conviction for the crime of mail fraud. A distinction perhaps can be made when the tax returns are not required by statute, as in a case in which the defendant is a scrivener of fictitious returns for the purpose of obtaining undeserved tax refunds.¹⁵⁹ The cases are not limited, however, to schemes of filing tax returns for refunds.¹⁶⁰ Regularly filed tax returns have served as the mailing for a mail fraud charge.¹⁶¹ These cases gloss over the

were found to be after the fruition of the scheme to defraud. *Id.* at 392-93. Yet, *Parr* is often cited as having been reversed upon this rationale. See, e.g., *Schmuck v. United States*, 489 U.S. 705, 711 (1989); *United States v. Wallach*, 935 F.2d 445, 464-65 (2d Cir. 1991). For a discussion of *Parr's* ruling on the mailing being after fruition of the scheme, see *infra* notes 190-99 and accompanying text.

155. *Parr*, 363 U.S. at 396 (Frankfurter, J., dissenting).

156. In *United States v. Brown*, 583 F.2d 659, 667 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), the court found that a routine business mailing does not create a per se exception to a charge of mail fraud. The test is whether the mailing is too remote from the fraudulent scheme. When the mailing is too remote, the court will not view it as being in furtherance of the scheme to defraud. *Id.* at 667-68.

157. See, e.g., *United States v. Condo*, 741 F.2d 238 (9th Cir. 1984) (per curiam) (holding that tax fraud and mail fraud are both permissible charges for submitting false withholding forms), *cert. denied*, 469 U.S. 1164 (1988); *United States v. Miller*, 545 F.2d 1204 (9th Cir. 1976) (holding that mail fraud is justified when a defendant sends false personal and corporate state and federal tax returns), *cert. denied*, 430 U.S. 930 (1977); *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975) (holding that mailings mandated by a cigarette tax law are no defense to mail fraud charge).

158. See *United States v. Mirabile*, 503 F.2d 1065 (8th Cir. 1974) (understatement of gross retail sales in monthly sales and use tax returns filed with the Missouri Department of Revenue), *cert. denied*, 420 U.S. 973 (1975); *United States v. Flaxman*, 495 F.2d 344 (7th Cir.) (false retailers' occupation tax returns submitted to the State of Illinois), *cert. denied*, 419 U.S. 1031 (1974).

159. See *United States v. Mangan*, 575 F.2d 32 (2d Cir.), *cert. denied*, 439 U.S. 931 (1978). The *Mangan* court stated, "The scheme here was to swindle the Government by causing it to pay out money to persons having no entitlement to it, in a fashion similar to those embraced within the historic purpose of the mail fraud statute." *Id.* at 49 (citing *United States v. Maze*, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting)).

160. See generally Podgor, *supra* note 19, at 918-22.

161. See *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987). Recently the United States Department of Justice issued a guideline against the practice of using mail

imperative duty limitation enunciated in *Parr*. In only one instance, a case involving a mailed tax return sent after the object of the scheme had been accomplished, did the court identify the *Parr* holding as the basis for a reversal of the mail fraud counts.¹⁶²

Thus, the doctrine of legal duty as a limitation to a mail fraud charge is best used when the mailing not only is a required document, but also is dispatched after completion of the scheme to defraud.¹⁶³ Absent the latter premise, courts are reluctant to provide immunity to a mail fraud charge.

3. *Mailing Prior to Commencement of Scheme*

In finding the necessary link between the mailing and the scheme to defraud, courts have eliminated those mailings that occur before or after fruition of the scheme. Thus, for many years only mailings occurring simultaneously with the scheme itself supported a mail fraud charge.

The first case to elaborate upon mailings being insufficient to support a mail fraud charge, if prior to commencement of the scheme to defraud, was a district court opinion in 1954. *United States v. Beall*¹⁶⁴ involved mailings that occurred as part of a fund raising campaign for the Infantile Paralysis Foundation. A twenty-count indictment charged the defendant with false statements, embezzlement, and mail fraud.¹⁶⁵ Although the district court found the false statement charges permissible, it dismissed the mail fraud charges and held that they were not in execution of the scheme to defraud.¹⁶⁶ The court noted prior holdings of insufficiency in those instances that the mailing was dispatched after the fraudulent scheme. Although unable to provide any case authority for the reverse scenario, the court noted that "[t]he use of the mails before beginning to carry out a scheme to defraud is not a use for the

fraud for a fraudulently filed tax return. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 6-4.211(1) (1990) (stating that only in "exceptional circumstances" will tax fraud be approved for prosecutions as mail fraud, and hence as a RICO predicate).

162. *United States v. Boyd*, 606 F.2d 792, 794 (8th Cir. 1979) (holding that the mail fraud statute cannot be involved with legally compelled mailings such as IRS income tax payments).

163. *Schmuck v. United States*, 489 U.S. 705 (1989), suggests a new test for *Parr*'s applicability based upon whether the mailings would have been made despite the fraudulent scheme's existence. If "but for" the scheme, the mailings would not have occurred, then *Parr*'s legal duty doctrine is irrelevant. *Id.* at 713 n.7.

164. 126 F. Supp. 363 (N.D. Cal. 1954).

165. *Id.* at 364. The embezzlement violated the Assimilative Crimes Act, 18 U.S.C. § 13 (1988), and § 504 of the California Penal Code. *Beall*, 126 F. Supp. at 364.

166. *Beall*, 126 F. Supp. at 366.

purpose of executing the scheme, any more than is the use of the mails after a scheme to defraud has been completed.”¹⁶⁷

The use of the mails in the *Beall* case was clearly for the lawful purpose of raising money for the Infantile Paralysis Foundation. The mailing was prior to any fraudulent conduct. The later misappropriation of the money was therefore embezzlement of mail matter as opposed to mail fraud.¹⁶⁸ The court rejected the Government’s argument that the mail fraud statute applied because the defendant formed the intent to embezzle the funds before the money was mailed. Intent, the court stated, was immaterial.¹⁶⁹

Clearly we see that the subjective intent of the defendant is irrelevant to whether there is a basis for proceeding with a mail fraud charge. The *Beall* case sets a bright line test: if the mailing falls between the designated lines of before and after the fraud, mail fraud charges are proper.

This rule of law enunciated in *Beall* was reiterated by the Third Circuit Court of Appeals in *United States v. Tarnopol*.¹⁷⁰ Here, the court noted that the question to be asked and answered is whether the mailings are “sufficiently closely related” to the fraudulent scheme.¹⁷¹ Although the question does not turn upon “‘time or space,’” it does eliminate mailings before the object of the scheme has begun and after it has been accomplished.¹⁷²

4. Mailing After Fruition of Scheme

Three cases are noteworthy when discussing mailings that occur after the fruition of the scheme to defraud. These cases, *Kann v. United States*,¹⁷³ *Parr v. United States*,¹⁷⁴ and *United States v. Maze*,¹⁷⁵ all demonstrate the defenses that are available to a defendant when the mailing occurs after the scheme has been accomplished. Each of these cases, however, contains a strong dissent that shows a lack of consensus within the United States Supreme Court. It is also notewor-

167. *Id.* at 365.

168. *Id.* at 365-66.

169. *Id.* at 366. The court also reasoned that “the mail fraud statute was not meant to apply to persons who violate a position of trust and confidence by embezzling funds that come into their hands directed to organizations lawfully entitled to receive these funds through the mails.” *Id.*

170. 561 F.2d 466 (3d Cir. 1977).

171. *Id.* at 471 (quoting *United States v. Maze*, 414 U.S. 395, 399 (1974)).

172. *Id.* at 472 (quoting *United States v. LaFerriere*, 546 F.2d 182, 187 (5th Cir. 1977)).

173. 323 U.S. 88 (1944).

174. 363 U.S. 370 (1960).

175. 414 U.S. 395 (1974).

thy that, although the majority opinions reach consistent results in these three decisions, other cases have carved out an exception to this principle that can effectively emasculate its effect.¹⁷⁶ This caveat involves those instances in which the defendant uses the mailing to lull the victim into the scheme.

The Court's initial adoption of excluding after-the-fact mailings from being in furtherance of the scheme to defraud is represented in *Kann v. United States*.¹⁷⁷ *Kann* involved the use of a change under a predecessor mail fraud statute.¹⁷⁸ Defendant Kann, president of a corporation that manufactured munitions, was indicted along with fellow workers¹⁷⁹ for allegedly diverting company funds from government contracts for personal benefit.¹⁸⁰ The scheme involved the use of a dummy corporation for distributing profits to the defendants.¹⁸¹ The alleged mailings were checks cashed by defendants that were subsequently presented to the drawee banks for collection.¹⁸²

The United States Supreme Court summarily ratified the jury's findings of guilt on the issue of whether the scheme was fraudulent in nature.¹⁸³ The Court likewise found sufficient inferences from the evidence to support the finding that Kann "caused" the mailing of these checks.¹⁸⁴ The third issue concerned whether the mailing was in furtherance of the scheme. The Court concluded that the tangential relationship between the first two elements did not establish mail fraud when the scheme was completed at the time of the mailing.¹⁸⁵

The majority of the Court rejected the Government's argument that the scheme was continuing in nature and therefore the defendant's expectation of future profits made the clearance of the checks essential to the scheme.¹⁸⁶ A strong four-person dissent, however, led

176. For discussion of the exception of mailings that lull the victims, see *infra* notes 212-29 and accompanying text.

177. 323 U.S. 88 (1944).

178. The current version is at 18 U.S.C.A. § 1341 (West Supp. 1991).

179. The codefendants were one officer and five salaried employees of Triumph Explosives, Inc. All except Kann pleaded nolo contendere to the charges. Kann was tried and convicted on the second and third counts of the three-count indictment against the seven defendants. *Kann*, 323 U.S. at 89.

180. *Id.* at 89-90.

181. *Id.* at 89-92.

182. *Id.* at 90-92.

183. *Id.* at 93.

184. *Id.* The Court imputed to the defendants the knowledge that a bank would collect on these checks from the drawee bank through the mails. *Id.*

185. *Id.* at 94. The Court found as a matter of law that it was immaterial to the defendants how the drawee banks collected on these checks. *Id.*

186. *Id.* at 95.

by Justice Douglas,¹⁸⁷ endorsed this position. Highlighting the continuing nature of the scheme, the dissent stated that "[t]he use of the mails was crucial to the total success of the fraudulent project."¹⁸⁸

Applying the redrafted mail fraud statute,¹⁸⁹ the Supreme Court reiterated the holding embodied in the *Kann* decision in the subsequent case of *Parr v. United States*.¹⁹⁰ As previously noted, *Parr* involved several counts of mailings compelled by legal duty that were therefore inappropriate mailings to form charges for the crime of mail fraud.¹⁹¹ Three other counts upon which the defendants were convicted, which were not the subject of reversal on the basis of being legally compelled mailings, also required reversal. The theory for negating the lower court's findings on these three counts was the adoption of the petitioner's argument that the mailings were not in furtherance of the scheme to defraud.¹⁹² These latter mailings in *Parr* involved collection and payment to an oil company from the school district employing the defendants for defendants' fraudulent receipt of gasoline and products.¹⁹³ As in *Kann*, the majority in *Parr* found that the scheme had "reached fruition" in that it was immaterial to defendant's scheme how the oil company would collect its payment from the school district.¹⁹⁴

Justice Frankfurter wrote an eloquent dissent in which Justices Harlan and Stewart joined.¹⁹⁵ Although the mailings' relation to the fraudulent scheme is a question of degree and proximity, Frankfurter was quick to add that "[t]he adequate degree . . . is of course not a matter susceptible of geometric determination."¹⁹⁶ Frankfurter asserted that the critical issue to be resolved was "whether the mailing was designed materially to aid the consummation of the scheme."¹⁹⁷ He asserted that the significance of the relationship is dependant upon "the interconnection of the parts in a particular scheme."¹⁹⁸ Like the *Kann* dissent, the dissent in *Parr* noted the necessity to examine the scheme in its totality. Because the defendants intended to pad the

187. *Id.* at 95-96 (Douglas, J., dissenting). Justices Black, Jackson, and Rutledge concurred in Justice Douglas's dissent. *Id.*

188. *Id.* at 96.

189. The current version is at 18 U.S.C.A. § 1341 (West Supp. 1991).

190. 363 U.S. 370 (1960).

191. *Id.* at 389-91; see *supra* notes 148-63 and accompanying text (discussing *Parr*'s holding on mailings compelled by legal duty).

192. *Parr*, 363 U.S. at 393.

193. *Id.* at 392-93.

194. *Id.* at 393 (quoting *Kann v. United States*, 323 U.S. 88, 94 (1944)).

195. *Id.* at 394-404 (Frankfurter, J., dissenting).

196. *Id.* at 397.

197. *Id.* at 398.

198. *Id.*

bills, the payment of the bills was therefore within the scope of the defendants' intent that the mailings be in furtherance of the scheme to defraud.¹⁹⁹

*United States v. Maze*²⁰⁰ was the final Supreme Court decision which fortified the doctrine that mail fraud is inapplicable to schemes which have reached fruition. As previously noted, *Maze* involved the defendant's alleged use of a stolen credit card and the issuing bank's attempt to collect on the bills created by such use.²⁰¹ Using a new test of proximity that focused on whether the mailings were "sufficiently closely related" to the defendant's scheme to defraud,²⁰² the Court rejected the Government's claim that these collection mailings were necessary to the success of the scheme.²⁰³

Here again, we see a strongly divided Supreme Court, with four Justices dissenting in two separate written opinions.²⁰⁴ In the first dissent, written by Chief Justice Burger, we see the oft-repeated line that mail fraud is a "stopgap" device used to encompass new frauds that develop.²⁰⁵ He emphasized the necessity to retain all possible strength in the statute in order "to be able to cope with the new varieties of fraud."²⁰⁶ The second dissent²⁰⁷ criticized the majority's belief that the fraudulent scheme ends when a defendant uses the credit card as opposed to when the merchant collects on the card.²⁰⁸ Incorporating Justice Douglas's language from the dissent in *Kann*, Justice White stated that the venture was continuing in nature and that because the issuing bank was the actual victim of the fraud, the use of the mails was in furtherance of the fraudulent scheme.²⁰⁹

It is evident from these three cases that despite thirty years of strong dissent, mailings after the scheme would be subject to close

199. *Id.* at 400.

200. 414 U.S. 395 (1974).

201. *Id.* at 396-97. For a discussion of the facts in *Maze* and how the Court found that the mailing conflicted with the scheme, see *supra* notes 133-41 and accompanying text.

202. *Maze*, 414 U.S. at 399.

203. *Id.* The Court rejected the Government's attempt to rely on *United States v. Sampson*, 371 U.S. 75 (1962). The Court found that the mailings in *Maze*, unlike those in *Sampson*, were not designed to lull the victims into a false sense of security. *Maze*, 414 U.S. at 403.

204. *Maze*, 414 U.S. at 405-16.

205. *Id.* at 405-06 (Burger, C.J., dissenting).

206. *Id.* at 407.

207. *Id.* at 408-16 (White, J., dissenting). Chief Justice Burger and Justices Brennan and Blackmun joined in Justice White's dissent.

208. *Id.* at 410-14.

209. *Id.* at 413-14 (quoting *Kann v. United States*, 323 U.S. 88, 96 (1944) (Douglas, J., dissenting)).

scrutiny by courts. Those resembling "post-fraud accounting"²¹⁰ would not be tolerated. Likewise, an examination of the line between the mailing and the scheme to defraud perhaps would consider the defendant's concern for the subsequent mailing, but more importantly would objectively determine whether the mailing was material or "sufficiently closely related" to the defendant's scheme.²¹¹ The mailings' relationship to the total success of the scheme was left to the dissents' reflections.

The caveat to this doctrine, discussed and discarded as irrelevant in *Maze*,²¹² is the applicability of the crime of mail fraud despite the mailing occurring after the scheme if it is used to lull the victims into the defendant's scheme. *United States v. Sampson*²¹³ created this exception and *United States v. Lane*²¹⁴ buttressed it.

Sampson came to the Supreme Court on direct appeal from a district court's dismissal of thirty-four counts of mail fraud and one count of conspiracy to commit mail fraud.²¹⁵ The issue was the propriety of the district court's finding that the mailings were not used for the purpose of executing the fraudulent scheme.²¹⁶ The *Sampson* Court distinguished *Kann* and *Parr*, finding that "outsiders" who had no connection to the scheme dispatched the mailings in each of those instances.²¹⁷ Therefore, the mailings were immaterial to the scheme "as planned and executed by the defendants."²¹⁸ In contrast, the defendant in *Sampson* sent the mailings for the purpose of "lulling [the victims] by assurances that the promised services would be performed."²¹⁹ The *Sampson* opinion noted that *Kann* and *Parr* should not be construed as creating an "automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for

210. *Schmuck v. United States*, 489 U.S. 705 (1989), used this term to describe the mailings in *Kann*, *Parr*, and *Maze*. *Id.* at 714.

211. *See, e.g.*, *United States v. Holmes*, 390 F. Supp. 1077, 1081 (W.D. Mo. 1975) (granting motion to dismiss wire fraud counts using *Maze*'s closely related test because transmittals of money orders had nothing to do with the fraudulent scheme other than to delay the scheme's eventual detection); *see also* *United States v. Giovengo*, 637 F.2d 941, 945 n.6 (3d Cir. 1980) (distinguishing *Holmes* because defendants did not use the wires to conceal their fraud, but to complete their fraudulent scheme), *cert. denied*, 450 U.S. 1032 (1981).

212. *Maze*, 414 U.S. at 403.

213. 371 U.S. 75 (1962).

214. 474 U.S. 438 (1986).

215. *Sampson*, 371 U.S. at 76. The conspiracy count was pursuant to 18 U.S.C. § 371. *Id.*

216. *Id.*

217. *Id.* at 79-80.

218. *Id.* at 80.

219. *Id.* at 81.

the purpose of executing' the defendants' scheme."²²⁰ Case-by-case analysis is necessary to determine whether the defendant or outsiders executed the mailing, whether the scheme contemplated after-the-fact mailings, and whether the mailings served to lull the victims.²²¹

Justice Douglas's dissent noted that *Sampson* serves as a qualifier to the prior *Parr* holding.²²² Reading the majority opinion in a restrictive manner, Douglas argued that the majority had maintained a position that "mere lulling of existing victims into a sense of security is enough" to support a mail fraud charge.²²³ Subsequent jurists confirm Douglas's reading in that the "lulling" exception is repeated while the construction of the indictment and the insider-outsider distinction is lost within the *Sampson* decision.²²⁴

*United States v. Lane*²²⁵ found the United States Supreme Court reinforcing the "lulling" exception in situations in which it is argued that the mailings occurred after the completion of the scheme to defraud. The Court rejected the Lanes' claim that there was insufficient evidence to support several of the convictions because the mailing of insurance claims occurred after fruition of the scheme to defraud.²²⁶ Referring to *Sampson*, the *Lane* Court concluded that the mailings "were designed to lull the victims into a false sense of security."²²⁷ The latitude that will be afforded a jury in inferring the presence of lulling is noted in a footnote to this opinion.²²⁸ It is only here that one sees the Court's avoidance of the issue of what amount of proof will be required to meet an adequate level of sufficient lulling.²²⁹

220. *Id.* at 80.

221. *See id.* at 80-81.

222. *Id.* at 81 (Douglas, J., dissenting).

223. *Id.* at 82.

224. *See United States v. Maze*, 414 U.S. 395, 403 (1974). In the recent case of *Schmuck v. United States*, 489 U.S. 705 (1989), the Court makes no mention of *Sampson*.

225. 474 U.S. 438 (1986).

226. *Id.* at 451-53.

227. *Id.* at 451 (quoting *Maze*, 414 U.S. at 403).

228. *Id.* at 453 n.17.

229. The Court stated:

The Lanes argue that the Government must show that the charged mailings were specifically intended to lull, rather than showing simply a general intention on their part to defraud, in order to come within *Sampson's* holding. We need not determine whether any such specific intent must be shown, as we agree with the Court of Appeals that there was sufficient evidence for the jury to infer specific intent to lull here under these instructions, which the Lanes did not challenge on appeal or in their cross-petition.

Id.

C. Schmuck v. United States

Although the recent Supreme Court decision of *Schmuck v. United States*²³⁰ opens mail fraud's applicability even further than *Sampson* and *Lane*'s "lulling" exception, it fails to incorporate any of the language or reference to either of these prior opinions.²³¹ The *Schmuck* case condenses the four limitations on the charge of mail fraud into one test, that being "whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time."²³² Irrelevant, in consideration of whether the mailing is in furtherance of the scheme, is the counterproductivity of the mailing, the timing of the mailing being either before or after the scheme to defraud, and the routine nature of the mailing.²³³ Lost to history are the four limitations previously used by defense counsel to preclude the prosecution's use of a mail fraud charge.

On August 23, 1983, Wayne T. Schmuck was indicted on twelve counts of mail fraud.²³⁴ The indictment, filed in the Western District of Wisconsin, alleged that Schmuck, doing business in the name of Big Foot Auto Sales, devised a scheme to defraud Wisconsin customers by selling vehicles with rolled-back odometers to Wisconsin automobile dealers.²³⁵ The fraud included selling the automobiles at artificially inflated prices because of the altered low-mileage odometer readings. The specific mailings were twelve title application forms submitted by the dealers, on behalf of their customers, to the Wisconsin Department of Transportation.²³⁶ Although the indictment did not charge Schmuck with personally mailing the applications, it did accuse him of causing the dealers to mail these letters.²³⁷

Prior to trial, defendant Schmuck filed a motion to dismiss his indictment in which he claimed that the mailings were not in furtherance

230. 489 U.S. 705 (1989).

231. In addition to *Schmuck* failing to cite or even mention the *Sampson* and *Lane* cases, the *Schmuck* Court overlooked the requirement that the mailing be dispatched by an insider as described in *Sampson*. Perhaps the *Schmuck* Court's failure to note the distinction between insiders and outsiders is because the people who executed the mailings in *Schmuck* might be considered outsiders. If the Court had used *Sampson*'s reasoning, the holding of *Schmuck* may have been different.

232. *Schmuck*, 489 U.S. at 715.

233. See *id.* at 711-15.

234. Petitioner's Petition for Writ of Certiorari at 7-8, *Schmuck* (No. 87-6431).

235. *Id.* at app. XLII.

236. *Schmuck*, 489 U.S. at 707.

237. The indictment alleged that Schmuck caused the twelve applications "to be delivered by mail . . . to the Wisconsin Department of Transportation." Petitioner's Petition for Writ of Certiorari at app. XLIV, *Schmuck* (No. 87-6431).

of the scheme. He relied upon *Maze* as the basis for his motion.²³⁸ The district court stated that “the indictment is sufficient if it merely alleges that the mailings were caused by the defendant” in order to execute his scheme. Thus, it rejected the motion to dismiss, finding that the jury should decide whether the mailings were in furtherance of the scheme to defraud.²³⁹

The jury convicted Schmuck on all twelve counts of mail fraud.²⁴⁰ This conviction initially was reversed by the Seventh Circuit Court of Appeals, which found that the trial court improperly denied Schmuck’s request for an instruction on odometer tampering, an alleged lesser included offense.²⁴¹ Although the Seventh Circuit initially reversed on the lesser included offense issue, the court approved of the jury’s finding that the mailings were in furtherance of the scheme to defraud.²⁴²

Three months later, on petition for rehearing, the Seventh Circuit vacated the ruling of the three judge panel. The court granted a rehearing en banc to revisit the issue of whether odometer tampering is a lesser included offense of mail fraud.²⁴³ Although the case was reheard en banc on June 9, 1986, the court did not issue its decision until January 21, 1988.²⁴⁴ In contrast to the earlier ruling of the three judge panel, the court affirmed the trial court’s convictions. Despite the court’s rejection of the three-judge panel’s ruling on the issue of lesser included offenses, the full court adopted the segment of the initial ruling that found the mailings to be in furtherance of the scheme to

238. *Id.* at app. XLVI (order denying motion to dismiss indictment). In denying Schmuck’s motion to dismiss, the trial judge reasoned that “mailings which actually enhance the probability of detection are not within the purview of the statute.” *Id.* (citing *United States v. Maze*, 414 U.S. 395 (1974)).

239. *Id.* at app. XLVII.

240. *Schmuck*, 489 U.S. at 708.

241. *Id.*

242. *United States v. Schmuck*, 776 F.2d 1368, 1369 (7th Cir. 1985), *vacated en banc*, 784 F.2d 846 (7th Cir. 1986), *aff’d en banc*, 840 F.2d 384 (7th Cir. 1988), *aff’d*, 489 U.S. 705 (1989). The court held that it was reasonable for the jury to conclude that the “in furtherance” element of the crime was satisfied. The court relied upon its earlier decision in *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982). In *Galloway* the court found that a rational trier of fact could convict for mail fraud when the mailings were made by third party retailers of an odometer tampering scheme. *Id.* at 163-65. The Seventh Circuit also relied on *Pereira v. United States*, 347 U.S. 1 (1954), for the proposition that a person causes a mailing when an individual “‘does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen.’” *Schmuck*, 776 F.2d at 1370 (quoting *Pereira*, 347 U.S. at 8-9).

243. *United States v. Schmuck*, 784 F.2d 846 (7th Cir. 1986) (en banc), *aff’d en banc*, 840 F.2d 384 (7th Cir. 1988), *aff’d*, 489 U.S. 705 (1989).

244. *United States v. Schmuck*, 840 F.2d 384 (7th Cir. 1988) (en banc), *aff’d*, 489 U.S. 705 (1989).

defraud.²⁴⁵

Schmuck thereafter petitioned the United States Supreme Court for a writ of certiorari. Central to this writ was his argument that the district court erred in failing to give a lesser included offense instruction on odometer tampering.²⁴⁶ The petitioner, however, also reasserted his position that the *Maze* doctrine would be dissipated if the Court accepted that these mailings were in furtherance of the scheme to defraud.²⁴⁷ He asserted that, as a matter of law, the mailing of the title documents "were counterproductive to his scheme, or at most routine mailings, intrinsically innocent."²⁴⁸

In petitioner's brief to the United States Supreme Court, he argued at length that mail fraud was inapplicable to mailings that had occurred after the fraudulent schemes had reached fruition.²⁴⁹ Schmuck emphasized the routine nature of these mailings, which he claimed were analogous to those presented and rejected by the Court in *Parr*.²⁵⁰

The Government's response to Schmuck's allegations on this issue

245. *Id.* at 385. The court found that a lesser offense should be included "only when the elements of the lesser offense form a subset of the elements of the charged offense." *Id.* at 387. However, two judges argued in a dissenting opinion that the trial judge should have granted the defendant's requested jury charge on the lesser offense of odometer tampering. The dissent noted that the jury could have acquitted the defendant of mail fraud if it found the mailings to be counterproductive to the scheme and therefore not in furtherance of the scheme. *Id.* at 394 (Flaum, J., dissenting) (Cudahy, J., joining in dissent). Thus, the odometer tampering could still have been proved despite the inability to prove mail fraud.

246. Petitioner's Petition for Writ of Certiorari at 14-19, *Schmuck* (No. 87-6431). The petitioner argued that one should employ an "inherent relationship test" as opposed to an "elements test" when deciding whether a crime is a lesser offense of the charged crime. *Id.*

247. *Id.* at 20-22.

248. *Id.* at 20. He noted that the same argument was rejected by the Seventh Circuit in *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982), but argued that the Supreme Court should accept the dissenting opinion in *Galloway*. In his dissent Judge Swygert argued that the mailings were routine mailings in accordance with *Parr v. United States*, 363 U.S. 370 (1960). Additionally, Judge Swygert argued that according to *United States v. Maze*, 414 U.S. 395 (1974), and *Kann v. United States*, 323 U.S. 88 (1944), the mailings in the instant case occurred after the scheme to defraud. *Galloway*, 664 F.2d at 166-69 (Swygert, J., dissenting). The dissent also contended that like *Maze*, the mailings in *Galloway* were "'not sufficiently closely related'" to the scheme. *Id.* at 168 (quoting *United States v. Tarnopol*, 561 F.2d 466, 472 (3d Cir. 1977)).

249. Petitioner's Brief at 11-13, *Schmuck* (No. 87-6431). Using the cases of *Kann v. United States*, 323 U.S. 88 (1944), and *United States v. Kenofsky*, 243 U.S. 440 (1917), the petitioner argued that the fraudulent scheme had reached fruition prior to the execution of the mailings. Petitioner's Brief at 12-13, *Schmuck* (No. 87-6431).

250. Petitioner's Brief at 21, *Schmuck* (No. 87-6431).

began with a claim that routine mailings can serve as mailings in execution of a scheme to defraud.²⁵¹ Additionally, the Government argued that the scheme had not reached fruition in that the mailing served the purpose of helping to promote the overall fraudulent plan.²⁵² Endorsing *Lane* and *Sampson's* pronouncement that mailings which lull the victims fall within the statute, the Government stated that Schmuck's actions were distinguished from those present in *Parr*, *Maze*, and *Kann* in that they were "incident to an essential part" of petitioner's fraudulent scheme.²⁵³ Since the retail customers and not the automobile dealers were the ultimate victims of the fraudulent scheme, the mailing of the documents to obtain titles was a necessary part of the total scheme.²⁵⁴

The United States Supreme Court affirmed the defendant's convictions on March 22, 1989.²⁵⁵ Although the majority of the Court accepted the Government's position on the "in furtherance" issue, the Court rejected the rationale provided by the Solicitor General's Office in its brief. The Court refused to embrace the "lulling" exception of *Sampson* and *Lane* as the premise for upholding the convictions. The Court factually distinguished *Kann*, *Parr*, and *Maze's* prior holdings that mailings are insufficient when they occur after fruition of the scheme to defraud. The Court found that the mailings in *Kann*, *Parr*, and *Maze* "involved little more than post-fraud accounting" in which "the long-term success of the fraud did not turn on which of the potential victims bore the ultimate loss."²⁵⁶ The ultimate test, enunciated by the Court, is whether the "mailing is part of the execution of the scheme as conceived by the perpetrator at the time."²⁵⁷

Noticeably apparent is the resemblance of this new test to the dissenting arguments presented in the prior cases of *Kann*, *Parr*, and

251. Respondent's Brief at 10, *Schmuck* (No. 87-6431). Respondent cited instances of routine mailings that have been upheld in mail fraud convictions. See, e.g., *Carpenter v. United States*, 484 U.S. 19 (1987) (mailing newspapers in furtherance of a scheme). The Government noted that it is hard to imagine a more routine mailing than the mailing of copies of the *Wall Street Journal* as was the case in *Carpenter*. Respondent's Brief at 11, *Schmuck* (No. 87-6431).

252. Respondent's Brief at 17, *Schmuck* (No. 87-6431).

253. *Id.* at 19.

254. Petitioner *Schmuck* argued in his Reply Brief that this assertion by the Government is not supported by the indictment and evidence in the case. Specifically, *Schmuck* cited paragraph nine of the indictment which charged that "the Wisconsin dealers and the Wisconsin customers would and did rely on the false odometer mileage." Reply Brief of Petitioner at 4, *Schmuck* (No. 87-6431).

255. *Schmuck v. United States*, 489 U.S. 705 (1989).

256. *Id.* at 714.

257. *Id.* at 715.

Maze.²⁵⁸ The majority in *Schmuck* chose to proceed with a subjective examination of the scheme as a totality, as opposed to an objective inquiry into whether the mailings were after the fact.²⁵⁹

This new approach was rebuked by a forceful four-person dissent.²⁶⁰ Justice Scalia, the author of the dissenting opinion, in highlighting the majority's premise that a scheme should be examined by combining all the individual transactions into one ongoing entity, noted how this "identical" proposition²⁶¹ was rejected by the majority in *Kann*.²⁶² To accept the majority view, the dissenters contended, would result in mail fraud becoming a crime of "mail" and "fraud" as opposed to mailings that are "in furtherance of the fraud."²⁶³ Justice Scalia chastised the majority for disregarding precedent and concluded with a prediction that this nonadherence to precedent would "create problems for tomorrow."²⁶⁴

D. After *Schmuck v. United States*

As predicted in the dissent, the *Schmuck* case has left courts in a state of confusion. Interpretations of this decision have reached conflicting results, with the conflict oftentimes resting on the proper interpretation of *Schmuck*, as opposed to the factual distinctions of each new case.²⁶⁵ Oddly enough, although *Schmuck* serves to broaden the crime of mail fraud, one finds that some lower courts are reading the letters that have now been opened. In so reading these letters, summary approval of *Schmuck* is not always apparent.

Schmuck has been cited by courts in both criminal²⁶⁶ and civil actions²⁶⁷ to reinforce the position that a mail fraud action can be predi-

258. However, the Court did not cite the dissenting opinions of those three decisions. Instead, the Court implied that its new test was based upon the majority opinions in *Kann*, *Parr*, and *Maze*. See *id.*

259. *Id.* at 714-15.

260. *Id.* at 722-25 (Scalia, J., dissenting). Justices Brennan, Marshall, and O'Connor joined in Justice Scalia's dissenting opinion.

261. *Id.* at 723.

262. *Id.* at 723-25 (citing *Kann v. United States*, 323 U.S. 88 (1944)). In his dissenting opinion in *Kann*, Justice Douglas noted the continuing nature of the fraudulent venture in that case, and the fact that the mailings were crucial to the total success of the fraudulent project. *Kann*, 323 U.S. at 96 (Douglas, J., dissenting); see also *supra* notes 177-88 and accompanying text (discussing *Kann*).

263. *Schmuck*, 489 U.S. at 723 (Scalia, J., dissenting).

264. *Id.* at 725.

265. See, e.g., *United States v. Pacheco-Ortiz*, 889 F.2d 301 (1st Cir. 1989) (per curiam) (affirming two counts of aiding and abetting mail fraud and reversing one).

266. See *United States v. Shyres*, 898 F.2d 647, 652 (8th Cir.), cert. denied, 111 S. Ct. 69 (1990).

267. See *Dana Corp. v. Blue Cross & Blue Shield Mut.*, 900 F.2d 882, 886 (6th Cir.

cated upon routine mailings. Whether the mailing is a legitimate invoice²⁶⁸ or a bill required by a contract, as long as the mailing is incidental to an essential aspect of the scheme, it is sufficient.²⁶⁹ One court cited *Schmuck* to express the view that the mailing requirement of mail fraud is now easily satisfied.²⁷⁰

Schmuck also has been used to demonstrate the unacceptability of arguments that a mailing is not in furtherance of the scheme if it is counterproductive to the fraudulent scheme.²⁷¹ The fact that the mailing may have hindered the scheme by making it more difficult to reap the illegal benefits of the scheme is irrelevant. Prior cases that found a limitation to mail fraud based upon the conflicting nature of the mailing to the scheme are no longer acceptable precedent to some courts.²⁷²

But not all courts after *Schmuck* are quick to discard prior precedent. For instance, the Ninth Circuit Court of Appeals cited *Schmuck* in a footnote, but described a test that more aptly fit the manner in which *Kann*, *Parr*, and *Maze* were employed.²⁷³ Although the court reversed a mail fraud conviction because of an improper indictment, the court sua sponte alerted defense counsel to the *Schmuck* case. The court provided the defendant with the ammunition to prompt him to request the dismissal of the mail fraud charges on remand. This reference to *Schmuck* is predicated, however, upon the belief that mailings of cancelled checks by a bank are after-the-fact mailings and therefore are insufficient as mailings in furtherance of the scheme to defraud.

1990). Mail fraud applies to civil cases in that it serves as a predicate act in a RICO action. RICO may be brought as a civil action pursuant to 18 U.S.C. § 1964 (1988). Private individuals that bring civil RICO actions may recover treble damages. *Id.* § 1964(c).

268. *Shyres*, 898 F.2d at 652.

269. *Dana*, 900 F.2d at 886.

270. *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1252 (7th Cir. 1989). The court dismissed a civil RICO action, which contained mail fraud as a predicate offense, and noted that because the mailing aspect is now so easily satisfied, courts must be cautious and recognize that not all conduct that is unethical should be considered a scheme or artifice to defraud. The court stated that "such a broad meaning of fraud for the mail and wire fraud statutes 'would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by statute.'" *Id.* (quoting *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir.), *vacated*, 484 U.S. 807 (mem.), *rev'd*, 840 F.2d 1343 (7th Cir. 1987), *cert. denied*, 486 U.S. 1035 (1988)).

271. *United States v. Kuzniar*, 881 F.2d 466, 472-73 (7th Cir. 1989) (holding that a mailing which hinders the fraudulent scheme by making it difficult for defendants to collect insurance proceeds was not a sufficient ground for acquittal on mail fraud charges).

272. *Id.* The Seventh Circuit Court of Appeals cited to *Schmuck's* holding that "[t]he mail fraud statute includes no guarantee that the use of the mails for the purpose of executing a fraudulent scheme will be risk free." *Id.* (quoting *Schmuck v. United States*, 489 U.S. 705, 715 (1989)).

273. *United States v. Soriano*, 880 F.2d 192, 197 n.8 (9th Cir. 1989).

The "totality of the scheme" test formulated in *Schmuck* was omitted from this footnote. Likewise, the court did not discuss the issue of whether the perpetrator conceived of the scheme.²⁷⁴ The court's notation thus appears to interpret *Schmuck* as a limit to after-the-fact mailings.

The differing interpretations of *Schmuck* are not limited to resolutions of all issues. Ambiguity still exists. One case noted that *Schmuck* failed to decide the question of whether the same party must be deceived and injured in order to sustain a mail fraud charge.²⁷⁵

Several courts have chosen to carefully scrutinize mail fraud cases in light of the *Schmuck* decision.²⁷⁶ These courts cited *Schmuck*, but then proceeded to objectively review whether the Government provided sufficient evidence of mailings that advanced the scheme to defraud. Unlike the Court in *Schmuck*, these courts are unwilling to take at face value the Government's contention that after-the-fact mailings can promote the overall fraudulent scheme. *Schmuck's* statement that a rational jury could have found that the defendant was not indifferent to who bore the ultimate loss²⁷⁷ is dissipated by subsequent cases that require affirmative proof by the Government.

For example, the Fifth Circuit Court of Appeals²⁷⁸ reversed mail fraud convictions despite the Government's contention that the mailing of invoices, involving multiple suppliers of pipe, was analogous to *Schmuck's* venture which "'depended upon his continued harmonious relations with and good reputation among retail dealers.'" ²⁷⁹ The court agreed that employing an "overall scheme" theory can provide a basis for a mail fraud conviction. The court held, however, that the Government needed to "demonstrate how such mailings advanced or were integral to the fraud."²⁸⁰ Without such a showing, there could be no jurisdictional component of this federal criminal offense.²⁸¹

Oddly enough, the Fifth Circuit Court of Appeals did not consider the possibility that the jury may have inferred that the defendant intended the mailing to be part of the execution of the total scheme. The

274. *Id.*

275. *Corcoran v. American Plan Corp.*, 886 F.2d 16, 20 n.5 (2d Cir. 1989) (civil RICO case with mail fraud as predicate offense).

276. *See United States v. Pacheco-Ortiz*, 889 F.2d 301 (1st Cir. 1989) (per curiam); *Robert Suris Gen. Contractor Corp. v. New Metro. Fed. Sav. & Loan Ass'n*, 873 F.2d 1401 (11th Cir. 1989); *United States v. Vontsteen*, 872 F.2d 626 (5th Cir. 1989), *cert. denied*, 111 S. Ct. 801 (1991).

277. *Schmuck v. United States*, 489 U.S. 705, 711-12 (1989).

278. *United States v. Vontsteen*, 872 F.2d 626 (5th Cir. 1989), *cert. denied*, 111 S. Ct. 801 (1991).

279. *Id.* at 629 (quoting *Schmuck*, 489 U.S. at 711-12).

280. *Id.*

281. *Id.*

court placed the "totality of the scheme" test of *Schmuck* in a footnote to the decision,²⁸² but employed an objective analysis to determine if there was any evidence to support the conviction.²⁸³ Finding none and unwilling to consider the possibility that this evidence could be inferred from other evidence presented to the jury, the Fifth Circuit Court of Appeals reversed the mail fraud convictions.²⁸⁴

This type of examination is not endemic to the Fifth Circuit in that the First Circuit Court of Appeals also has reversed one count of mail fraud by citing the *Schmuck* case.²⁸⁵ The court found two counts of mail fraud satisfactory in that they were closely related to the purpose of the scheme. The court reversed the conviction on the third count, however, because it played no "part of the planned execution of the scheme and appeared only to enhance the prospects that the scheme would be uncovered."²⁸⁶ It is ironic that the First Circuit Court of Appeals used a counterproductivity argument and cited to *Schmuck*, which found counterproductivity irrelevant. It is likewise ironic to see the citation to *Schmuck* following a reference to the closely related test of *Maze*.²⁸⁷ One can only surmise that some courts are reluctant to apply *Schmuck* expansively. Rather, adhering to *Kann* and *Maze*, these courts prefer to strictly interpret the extent to which the holding in *Schmuck* should be applied.

E. Status Today

The *Schmuck* decision permits trial courts to instruct the jury that a mailing is in furtherance of the scheme to defraud when the defendant perceives that the mailing is part of the execution of the fraudulent scheme. It also tolerates a court's refusal to instruct a jury on the four limitations to a mailing being in furtherance of the scheme to defraud. Subjective scrutiny of the defendant's intent becomes a question of fact within the province of the jury.

In actuality, however, courts have long held that juries may infer a

282. *Id.* at 628 n.3.

283. *Id.* at 629.

284. *Id.* The Eleventh Circuit likewise found a mail fraud count improper when it was being used as the predicate offense for a civil RICO case. The appellate court found "no evidence . . . that the mailings were in any way incident to or part of the execution of some particular nefarious scheme." *Robert Suris Gen. Contractor Corp. v. New Metro. Fed. Sav. & Loan Ass'n*, 873 F.2d 1401, 1406 (11th Cir. 1989).

285. *United States v. Pacheco-Ortiz*, 889 F.2d 301 (1st Cir. 1989) (per curiam).

286. *Id.* at 306.

287. *Id.* The court cited both *Schmuck* and *Maze*, but seemed to employ the *Maze* standard to determine whether the mailings were in furtherance of the scheme to defraud.

defendant's intent from the evidence.²⁸⁸ Therefore, despite the reversal of several convictions after pronouncement of the *Schmuck* decision, it appears that an appellate tribunal has the option of upholding a mail fraud conviction if the jury is permitted the opportunity to consider the defendant's intent and resolves the question based upon inferences from the evidence. Reversals will be relegated to the rare circumstance in which there is no evidence to support the jury's verdict or overwhelming evidence contrary to the jury's decision.²⁸⁹

In contrast to the many courts that have limited mail fraud to mailings in execution of the scheme to defraud, appellate courts now will have little basis to contradict the jury's finding.²⁹⁰ The dissents, espoused by Justices Douglas and White in decisions such as *Kann* and *Maze*, became the prevailing view with use of a subjective test to determine when the scheme has actually terminated and whether the defendant anticipated use of the mails in furtherance of that scheme.

The dissipation of the limitations on the "in furtherance" doctrine of mail fraud serves to place additional power in the hands of the jury. Clearly, when the fraudulent scheme is repulsive in nature, the jury will be quick to let their sentiments prevail by returning a guilty verdict. Thus, mail fraud convictions may turn on the distastefulness of the fraud, as opposed to whether the mailing actually served to further the fraudulent scheme.

Also lost to history as a result of *Schmuck* are exceptions to the legal limitations. Lulling of victims is no longer a valid consideration other than as a government argument that this lulling serves as evidentiary proof of the defendant's intent for the mailing to be part of the overall scheme. Additionally, whether the victim of the fraud is an outsider or an insider is irrelevant.²⁹¹

By condensing the "in furtherance" aspect of mail fraud into one comprehensive test, the Court effectively has taken this crime well beyond its post-office origin. The Court has provided prosecutors with a

288. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 834-37 (3d ed. 1982).

289. See *United States v. Rendini*, 738 F.2d 530 (1st Cir. 1984). In *Rendini* the court stated: "The jury found that the mailing of these checks was in furtherance of a scheme to defraud. Therefore the mailings came within the scope of the mail fraud statute." *Id.* at 534.

290. One possible ground may be based on an argument emanating from the legal duty doctrine of *Parr*. The legal duty would arise as to mailings that were a "direct product" of the scheme and would have occurred despite the scheme's existence. The Supreme Court in *Schmuck* applied a but-for test and found *Parr* distinguishable in that "the mailings in the present case, though in compliance with Wisconsin's car-registration procedure, were derivative of *Schmuck's* scheme to sell 'doctored' cars and would not have occurred but for that scheme." *Schmuck*, 489 U.S. at 713-14 n.7.

291. See *United States v. Sampson*, 371 U.S. 75, 79 (1962).

more accessible statute to use for crimes involving fraud. Yet, despite the simplicity of the test recited in the *Schmuck* case, it is apparent that this area of mail fraud is still riddled with confusion. Some lower courts even appear reluctant to embrace *Schmuck* wholeheartedly.

A return to the four legal limitations of mail fraud would provide some guidelines within which this offense could operate. It would provide credence to the concept of precedent and also provide boundaries within which this criminal statute could function. Mail fraud would be a crime that included the element of "in furtherance," as opposed to being merely a crime requiring a mailing and a fraud.²⁹²

V. MAIL FRAUD AS A PREDICATE ACT OF RICO

A new dimension was added to the crime of mail fraud upon the passage of the Racketeer Influenced and Corrupt Organizations Act (RICO).²⁹³ RICO requires a "pattern of racketeering activity."²⁹⁴ The statute describes the pattern as at least requiring the commission of two or more specified state or federal offenses, known as predicate acts, within a set statutory period.²⁹⁵ The racketeering activities, or "predicate acts," include both mail and wire fraud.²⁹⁶

The simplicity of proof required in establishing a prima facie case of mail fraud or wire fraud is highlighted by its titanic use as a predicate offense to a charge of racketeering. Despite the fact that the RICO statute contains a number of potential predicate offenses, including nine state offenses²⁹⁷ and numerous federal offenses,²⁹⁸ mail fraud is

292. The dissenters in *Schmuck* cautioned that liability is incurred by "mail fraud" rather than "mail and fraud." The dissent further stated, "This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur—nor even by one in which a mailing predictably and necessarily occurs." *Schmuck*, 489 U.S. at 723 (Scalia, J., dissenting).

293. 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1991).

294. *Id.* § 1962. The statute states that a "pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of the racketeering activity." 18 U.S.C.A. § 1961(5) (West 1984).

295. 18 U.S.C.A. § 1961(1), (5) (West 1984 & Supp. 1991). "Unlike other provisions in § 1961 that tell us what various concepts used in the Act 'mean,' 18 U.S.C. § 1961(5) says of the phrase 'pattern of racketeering activity' only that it 'requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970,] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.'" *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989) (brackets supplied by Court) (holding that a pattern requires continuity plus relationship).

296. 18 U.S.C.A. § 1961(1) (West Supp. 1991).

297. The state offenses include "any act or threat involving murder, kidnaping,

the Government's most commonly used predicate act to a RICO charge. Its use is seen not only in criminal actions of racketeering, but also in civil RICO cases.²⁹⁹

The ramifications of using mail fraud as a predicate to RICO in a

gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year." *Id.* § 1961(1)(A).

298. The federal offenses include:

(B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

Id. § 1961(1).

299. See NORMAN ABRAMS, *FEDERAL CRIMINAL LAW* 271 (1986) ("[M]ail fraud . . . is the most frequently used predicate offense in civil RICO cases."); see also Susan Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 VAND. L. REV. 673, 678 (1990) ("The vast majority of civil RICO cases use mail, wire, or securities fraud as the predicate offense.").

criminal case are noted from a sentencing perspective.³⁰⁰ Mail fraud carries a penalty of five years and a fine of one thousand dollars.³⁰¹ This sentence, however, may be enhanced when the violation affects a financial institution. In reacting to the savings and loan crisis, Congress increased mail fraud's penalties to a maximum fine of one million dollars and up to thirty years imprisonment when the fraud relates to a financial institution.³⁰² In contrast to the classic mail fraud conviction, RICO carries a penalty of twenty years, a fine, and forfeiture of property.³⁰³ Thus, conviction on RICO charges with a mail fraud predicate not only labels the defendant as a racketeer,³⁰⁴ but also can significantly raise the stakes of possible punishment.

The penalty consideration is not ameliorated by the new federal sentencing guidelines. The guidelines provide a significant disparity in sentences for these two offenses. Mail fraud is a "base six offense"³⁰⁵ while RICO's base is the greater of a base nineteen or the offense level of the underlying racketeering activity.³⁰⁶ The difference in these base levels results in a possible sentence of zero to eighteen months for mail fraud versus a sentence of thirty to seventy-eight months for RICO. This disparity can serve as an effective plea-bargain-inducement benefiting the Government.³⁰⁷

The elevated effect of mail fraud, when used as a predicate offense for RICO, is best exemplified by the Government's employment of the RICO charge when the two or more predicate acts of mail fraud are mailed tax returns.³⁰⁸ Not only has prosecutorial discretion chosen mail fraud in conjunction with or as opposed to a tax fraud charge, but it also has subjected a criminal defendant to a possible twenty-year sentence for offenses that originally, as tax offenses, carried a five-year maximum.³⁰⁹ Recently, the Department of Justice restrained prosecutorial discretion by internally limiting this application to "ex-

300. Gerard E. Lynch, *RICO: The Crime of Being A Criminal* (pts. 1 & 2), 87 COLUM. L. REV. 661, 661 (1987).

301. 18 U.S.C.A. § 1341 (West Supp. 1991).

302. *Id.*

303. *Id.* § 1963. The sentence may include life imprisonment depending on the predicate offense. *Id.*

304. See Getzendanner, *supra* note 299, at 685. ("No one, especially an accountant, wants to be called a racketeer: 'We are a profession that lives on its reputation.'").

305. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2.F1.1(a) (1990).

306. *Id.* § 2.E1.1(a).

307. See *id.* ch. 5, at 1 (stating that the sentence may vary depending on factors such as the character of the offender).

308. See generally Podgor, *supra* note 19 (outlining prosecutor's use of RICO in mail fraud actions).

309. It should be noted that tax offenses, unlike mail and wire fraud, are not predicate acts of a RICO charge. See 18 U.S.C.A. § 1961(1) (West Supp. 1991).

ceptional circumstance[s]."³¹⁰ This guideline does not, however, totally preclude future application of RICO when the offense is a fraudulently mailed tax return.³¹¹

Mail fraud's elasticity is best seen in the tax offense area. Unlike mail fraud, tax offenses are not included as predicate acts for a RICO charge. Therefore, by calling the fraudulently filed returns mail fraud as opposed to tax fraud, the prosecution accomplishes penalty enhancement for an offense that Congress never even considered during the enactment of the statutory crimes of mail fraud or RICO. Additionally, by calling the offense mail fraud, as opposed to tax fraud, the Government reduces its burden of proof by eliminating the "willfulness" requirement in a tax fraud charge and circumvents the burdensome administrative process afforded a defendant in an Internal Revenue investigation.³¹²

Mail fraud is not only a basis of criminal prosecution, but by becoming a predicate act to RICO, it has entered the civil arena. Here, there are no Justice Department guidelines to limit the pervasiveness of the statute.³¹³ Civil RICO has been the subject of significant controversy, and revisions have been proposed for legislative consideration.³¹⁴

310. UNITED STATES ATTORNEYS' MANUAL, *supra* note 161, § 6-4.211(1).

311. See *United States v. Regan*, 726 F. Supp. 447, 455 (S.D.N.Y. 1989) (holding that new tax fraud guidelines "[do] not bar this or future tax fraud and mail fraud charges from being brought under the RICO statute"), *aff'd in part and vacated in part*, 937 F.2d 823 (2d Cir.), *amended*, 946 F.2d 188 (2d Cir. 1991).

312. See *Podgor*, *supra* note 19, at 925. A defendant in a tax case is entitled to an instruction that a jury should examine the defendant's subjective intent on the issue of "willfulness." A good faith reliance by the defendant can negate criminal liability. See *Cheek v. United States*, 111 S. Ct. 604 (1991). *But see United States v. Gelb*, 700 F.2d 875, 879 (2d Cir.) (holding that mail and wire fraud are more onerous in proof because they are specific intent crimes), *cert. denied*, 464 U.S. 853 (1983).

313. In rare instances, however, a judge will take action to restrain counsel's improper use of the RICO statute. A federal judge in Louisiana chose to sanction the attorneys who filed a RICO action that "took . . . the open-ended RICO laws too far." Frank Polozola, *Making RICO Lawyers Pay*, WALL ST. J., Feb. 19, 1991, at A22, col. 1.

314. See G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 VAND. L. REV. 851, 1049-1101 (1990) (proposed sample legislation); John Conyers, Jr., *RICO Reform a Second Windfall for S & L Crooks*, N.Y. TIMES, July 9, 1990, at A17, col. 1 (arguing against reform); Stephen Labaton, *House Panel Backs Easing of RICO Law*, N.Y. TIMES, May 3, 1991, at D8, col. 4 (reporting that a subcommittee of the House Judiciary Committee approved a bill that would limit RICO's civil application, and critics argued that RICO was the only means by which the Government and plaintiffs could reach white-collar criminals); Timothy Noah, *Bill to Limit RICO Lawsuits Moves Forward*, WALL ST. J., May 3, 1991, at A78, col. 3 (reporting that a House subcommittee approved a reform bill, but the bill's future was uncertain); *The RICO "Reformers" Are Back Again*, N.Y. TIMES, Sept. 24, 1990, at A18, col. 1 (editorial) (warning against reform).

This criticism of civil RICO, however, fails to focus on the crux of the problem.³¹⁵ But for mail and wire fraud's breadth, civil RICO would have minimal application. It is through the spaciousness of the "scheme to defraud" element of mail fraud³¹⁶ that RICO has degenerated to permit "garden variety frauds" that have little bearing on the eradication of organized crime,³¹⁷ the legislative intent at the time of the statute's inauguration.³¹⁸ Although fraudulent acts traditionally have been subject to civil penalties,³¹⁹ their inclusion in RICO actions extends the possible penalties to a "draconian" level.³²⁰ The elimination of mail and wire fraud as predicate offenses to civil RICO would assist in restoring the statute to its intended purpose of fighting organized crime. At a minimum, a clear definition of mail fraud's "scheme to defraud" element is necessary in order to curb its seemingly endless application.³²¹

VI. RESTRUCTURING THE CRIME OF MAIL FRAUD

Mail fraud was passed as one minor section in the recodification of the Postal Act. It was passed with little thought and no debate. The revisions to this statute likewise have not been the subject of significant controversy. Yet, despite the fact that the statutory offense received inconsiderable comment from the legislature, it has been pervasively used by the Government and thus been the subject of significant

315. Some believe that RICO should not be modified in any manner. Indeed, some have alleged that the reformers are actually "targets of thrift, securities, commodities and insurance investigations." See *No Time for RICO "Reform"*, N.Y. TIMES, July 21, 1990, § 1, at 20, col. 1 (editorial).

316. See 18 U.S.C.A. § 1341 (West Supp. 1991).

317. See Getzendanner, *supra* note 299, at 679.

318. RICO was passed as a blueprint to fight organized crime. See *Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 84 Stat. 922 (1970) (current version at 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1991)).

319. In response to Professor Abrams's gatekeeper approach, see Norman Abrams, *A New Proposal for Limiting Private Civil RICO*, 37 UCLA L. REV. 1, 2 (1989), Professor Goldsmith and Mark Linderman argued that the jurisprudence of RICO is not unique in using a civil action to assist in criminal enforcement. They cited wrongful death and civil conversion actions as examples. Michael Goldsmith & Mark J. Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 741 (1990). Their argument failed, however, to note the uniqueness of RICO as an action with treble damages, attorney fees, and the stigma of being labeled as a racketeer.

320. See Lynch, *supra* note 300, at 748-58.

321. Arguments also have been presented that stress the need for a better definition of the pattern element of a RICO charge. See Joseph E. Bauerschmidt, Note, *"Mother of Mercy—Is This the End of RICO?"—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern"*, 65 NOTRE DAME L. REV. 1106 (1990).

controversy in the courts.³²² Central to the discord has been what interpretation courts should give to the words of this statute³²³ and whether such construction should permit the Government to use a charge of mail fraud when the alleged criminal activity is directly covered by another criminal statute.³²⁴

In the earlier years the broad and literal variance was manifested by some courts requiring the scheme to be specifically listed in the statute,³²⁵ while others were satisfied with using mail fraud to reach new crimes omitted as criminal from portions of other statutes.³²⁶ Differing views existed throughout history with respect to the nexus requirement between the mailing and the scheme to defraud. Limitations to the "in furtherance" aspect of the crime of mail fraud arose and were eliminated, oftentimes in five-to-four Supreme Court opinions.³²⁷ At the apex of the confusion we see a case like *McNally v. United States*,³²⁸ in which a seven-to-two Court haggles over the correct grammatical reading of the terms within the statute. In *McNally* legal scholars debated whether a conjunctive or disjunctive reading was proper and, in resolving the issue, they effectively devastated numerous convictions.³²⁹

It is without doubt apparent that the fluctuation of interpretation has existed despite five revisions to the statute. It is also evident that, even today, mail fraud's elements hang on the threads of the present

322. One controversy, not discussed in this Article, is the effect of the mail fraud statute on the First Amendment right to free speech. See generally Peter T. Barbur, Note, *Mail Fraud and Free Speech*, 61 N.Y.U. L. REV. 942 (1986) (arguing that the Third Circuit's analysis of mail fraud seriously threatens public speech).

323. It is arguable that many statutes have an element of unclarity and that vague words within a statute are merely the essence of the interpretive function of the courts. Clearly the mail fraud statute is not a statute that enforces itself. See RONALD DWORKIN, *LAW'S EMPIRE* 313-54 (1986).

324. Prosecutors also have chosen to use mail fraud in conjunction with other criminal offenses, thereby increasing the Government's bargaining strength and conviction rate. See, e.g., *United States v. Weatherspoon*, 581 F.2d 595, 599 (7th Cir. 1978) (noting the longstanding use of mail fraud in concert with statutes that prohibit the making of false statements to governmental agencies).

325. See, e.g., *United States v. Owens*, 17 F. 72 (E.D. Mo. 1883) (stating that a mail fraud statute is not applicable to commercial correspondence solely between a debtor and creditor); see also Rakoff, *supra* note 2, at 790-95 (discussing cases using the literal approach).

326. See, e.g., *United States v. Horman*, 118 F. 780 (S.D. Ohio 1901), *aff'd*, 116 F. 350 (6th Cir. 1902) (stating that the mail fraud statute is applicable to blackmail and blackmail is a scheme to defraud), *cert. denied*, 187 U.S. 641 (1902).

327. For a discussion of the "in furtherance" element of mail fraud, see *supra* notes 37-46, 107-292 and accompanying text.

328. 483 U.S. 350 (1987).

329. For discussion of *McNally v. United States*, see *supra* notes 66-72 and accompanying text.

five-to-four majority in the Court. Meanwhile, despite legal scholars being unable to predict the future interpretation of the mail fraud statute, people are being sent to jail for violation of the statute.³³⁰

The mail fraud statute's uncertainty has exceeded the bounds of mere judicial activism³³¹ and entered the arena of absurdity. A statute beset with legal complications as significant as those evidenced here can only serve to fortify the public's perception of disparity, confusion, and corruption within the legal process. Correction is therefore needed to properly place individuals on notice of what conduct is prohibited and to restore trust in the legal system. Recalibration of the statute is needed to provide consistency and predictability in the translation of the statute's language to actual cases.

This restructuring needs to be an action of our legislature, as opposed to the judiciary. "Adjudication is different from legislation."³³² Yet presently the court serves as the legislator, as opposed to adjudicator, when a mail fraud issue is the subject of the resolution. The legislative "reaction" to judicial decisions is a mere bandage to a more pervasive problem—a statute that lacks focus. Within the mail fraud statute, there is neither a clear position in the traditional body of criminal law,³³³ as for example with murder, nor any enacted positive law via the legislature. Regardless of whether one promotes legislative action following the normative principles that pervade criminal law or merely reflects the political and moral influences of the moment,³³⁴ the result will provide a resolution to the present ambiguity.

It would appear that the legislature has attempted, in drafting the mail fraud statute, to create language that will serve future occurrences of criminality ill-defined in other promulgations. In so doing, our legis-

330. The vagueness of the statute may be acceptable, however, because mail fraud is by its very nature improper. Thus, the distinction between justification (e.g., abortion crimes) and definition (e.g., larceny offenses) is arguable. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 570-73 (1978). The act of mail fraud is not necessarily per se criminal. Many mail fraud offenses are justifiable in that political interpretation of "honest services" may make an offense proper in one context and improper in another. To give courts free reign to guess on the proper interpretation deprives an individual of proper notice of what constitutes criminal conduct.

331. DONALD E. LIVELY, *JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED* (1990) (discussion of court activism).

332. DWORKIN, *supra* note 323, at 410.

333. Fraud, absent its mailing application, has roots in the common law in the form of deceit and misrepresentations. See Donna Maus, Comment, *License Procurement and the Federal Mail Fraud Statute*, 58 U. CHI. L. REV. 1125 (1991). Mail fraud is, however, broader than the common-law fraud because misrepresentation of fact is not required to establish a scheme to defraud pursuant to the mail fraud statute. See *McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir.), *cert. denied*, 111 S. Ct. 536 (1990).

334. FLETCHER, *supra* note 330, at 406-08.

lature is treating the statutory construction from a constitutional perspective, as opposed to it being code or statutory in nature. That being, the drafters are using language that "is framed for ages to come, and is designed to approach immortality"³³⁵ as opposed to language that is specific in nature. The lack of definitiveness to the mail fraud statute results in terminology that glosses over the realities of the moment and provides no guidance for construing the textual wording. This approach is clearly befitting a constitution of a nation, but fails when meeting the immediate needs of a statute or code.

In addition to language that will provide a clearer understanding of the scope of the crime, Congress also must modernize the statute in order to meet the complexities of the computer age. Wire and mail fraud need to be condensed into one formula that includes both tangible and intangible property. The drafters should include specificity about the scope of intangible property, as well as an understanding of what will be a sufficient nexus between the mailing and the fraud.

Ambiguous terms such as "honest services" should be deleted from the statute and substituted by specific types of political fraud that will be prohibited.³³⁶ Statutory guidelines of specific conduct encompassed by this provision are needed to preclude the possibility of political use of this criminal statute. In an age rampant with prosecutorial abuse and zealotry, statutory specificity can serve to curtail discretion that is used improperly.³³⁷

VII. CONCLUSION

It is one thing to find the crime of mail fraud as a "stopgap" provision and leave flexibility in the statute to meet new types of fraudulent conduct. It is another thing, however, to have a statute that is beset with total confusion, thus permitting a court's haphazard application dependent upon the political structure of the court.

Although some may claim that the American system of justice is notorious for writing constitutions that will be "living documents,"³³⁸ it

335. ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 343 (1919).

336. For discussion of ambiguity in the term "honest services," see *supra* notes 82-106 and accompanying text. The interpretive process suggested by Ronald Dworkin does not suffice in this instance. See DWORKIN, *supra* note 323.

337. Overzealous prosecution often is reviewed under the harmless error doctrine. For this reason, statutory specificity is needed to provide the parameters of permissible conduct. See generally Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive & Well & Living In Indiana?*, 3 GEO. J. LEGAL ETHICS 657 (1990) (discussing possible remedies for prosecutorial misconduct); Michael E. Tigar, *Mail Fraud, Morals, and U.S. Attorneys*, 11 LITIG. 22 (1984) (discussing political use of mail fraud statute).

338. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682-83 (1952) (Vinson,

is likewise a system in which statutes are written to provide criminal defendants with due process of law.³³⁹ Due process requires knowledge that the individual's actions were criminal in nature.³⁴⁰ Clearly, if members of the Supreme Court have difficulty with the terms of the statute, the less intelligent criminal defendants will be tried, convicted, and oftentimes punished for crimes that they clearly are unable to understand. Perhaps there is some truth to the words expressed in the jails and prisons of the United States when incarcerated defendants say they really are innocent.

A criminal statute that contains a political element cannot be relegated to an acceptance of a "crime control" argument³⁴¹ that one "will know it when [one] see[s] it."³⁴² Furthermore, the increased opening of letters through a coupling of mail fraud with RICO necessitates immediate scrutiny of this statute. Rectifying this statute is an impossibility. The only hope for correcting the ambiguity and unjustness is for a total demolition and restructuring of the criminal offense presently known as mail fraud. Before we give prosecutors an Uzi, let us require that they be licensed to use it and let us likewise be certain that the victims of their firings are truly guilty of a criminal offense.

C.J., dissenting).

339. U.S. CONST. amend. V.

340. *See Lambert v. California*, 355 U.S. 225 (1957) (reversing a conviction on grounds that the individual did not have fair notice of a municipal ordinance that required convicted persons to register with the police).

341. *See generally* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-73 (1968) (analyzing the criminal process under a due process model as well as a crime control model).

342. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing obscenity).

