UIC Law Review

Volume 14 | Issue 1 Article 3

Fall 1980

The Mail-Fraud Statute: A Procrustean Bed, 14 J. Marshall L. Rev. 55 (1980)

Donald V. Morano

THE MAIL-FRAUD STATUTE: A PROCRUSTEAN BED

DONALD V. MORANO*

INTRODUCTION

The United States mail-fraud statute[1] is one of long lineage. The first version was passed in 1872, and was followed by three major revisions, the latest in 1949.[2] But since there is little, if any, extrinsic evidence of congressional intent in passing the

* J.D., U.C.L.A. (1977); Ph.D., Northwestern University (1968); Assistant Professor of Law at The John Marshall Law School. The author gratefully acknowledges his indebtedness to David A. McGuire and Howard L. Stone of Stone, McGuire, Benjamin & Kocoras, Chicago, and John G. Noble, research assistant, and June M. Podewils, typist, in the preparation of this article.

1. 18 U.S.C. § 1341 (1976) provides:

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

2. In 1872, Congress passed "An Act to revise, consolidate, and amend the Statutes relating to the Post-Office Department," ch. 35, 17 Stat. 283 (1872). Section 301 of that Act proscribed the misuse of the post office. Specifically, the Act provided that anyone who devised or intended to devise any scheme or artifice to defraud which was to be effected by opening or intending to open correspondence with any other person by means of the post office of the United States, and in executing the scheme placed a letter in a United States Post Office, was guilty of a misdemeanor punishable by a fine of not more than $500 and/or imprisonment not to exceed eighteen months.

There seems to be no legislative history concerning this provision, and an equal lack of judicial interpretation. Indeed, the only case decided under this provision is United States v. Hess, 124 U.S. 483 (1888), which dealt with the sufficiency of the indictment and made no attempt to construe the law.

The law was revised by Congress in 1889, when it passed "An act to punish dealers and pretended dealers in counterfeit money and other fraudulent devices for using the United States mails," ch. 393, 25 Stat. 873 (1889). The revisions are numerous, since a laundry list of counterfeit

first statute, and its subsequent revisions have been minor, the

schemes and swindles is included. However, two substantive changes in the law were also made.

First, the laundry list was not included as a *substitution* for the "scheme or artifice to defraud" that was found in the 1872 version. It was inserted as an addition, through the use of a disjunctive. The original language, "devised or intending to devise any scheme or artifice to defraud," was followed by a comma and the words "*or to*," which were followed by the laundry list. The result was that three basic activities were proscribed: (1) A scheme to defraud, (2) counterfeit schemes, and (3) various types of swindles. This disjunctive has remained part of the law, and has had a profound effect on the use to which the law has been put.

The second major change made by the 1889 Act was to provide that the violation would occur whenever a person, in executing a scheme, placed *or caused to be placed* any letter in a post office. This seemingly minor change has also remained in the law, and has played a major role in the expansive use of the present mail-fraud statute.

Two things were not changed: the punishment remained the same, and, more important, the original requirement that the mailing must be for the purpose of executing the scheme was unchanged. Once again, there is a distinct lack of legislative history. However, this version of the law was construed several times by the courts.

By far the most important of the decisions was Durland v. United States, 161 U.S. 306 (1896). In *Durland*, the United States Supreme Court held that the word "defraud" in the statute is not identical to the common law definition of "fraud," which only applies where there is a misrepresentation of an existing or past fact. Rather, the Court held that this law applied to common law fraud *and* suggestions or promises regarding *future* facts or intentions. The key is whether there is a good faith intention to carry out the promise.

Another major case was Stokes v. United States, 157 U.S. 187 (1895). In *Stokes*, the Court set forth the three elements that must be present in order to have a violation of this law: (1) A scheme to defraud, (2) an intent to effect the scheme by the use of the United States mails, and (3) an actual use of the United States mails. Both *Durland* and *Stokes*, as well as cases decided in the circuit and district courts, had one thing in common—they dealt with situations where one person defrauded another of property, mostly money.

In 1909 the statute was once again revised. This revised version was included as part of the United States revised penal laws in "An Act to codify, revise, and amend the penal laws of the United States," ch. 321, 35 Stat. 1088, 1130. This version streamlined the laundry list, changed the punishment to a fine of not more than $1,000 and/or imprisonment of not more than five years, and made two important substantive changes. First, the disjunctive was clarified. On one side of the comma is the "scheme or artifice to defraud;" on the other is "obtaining money or property by means of false or fraudulent pretenses, representations or promises." This is followed by the revised laundry list. The result is that the scheme to defraud is now completely separated from all possible ways of fraudulently obtaining money or property.

The second and more significant change was the removal from the statute of the words "to be effected by opening or intending to open correspondence." This change has resulted in removal of one of the elements of the offense listed by the United States Supreme Court in *Stokes*. An intent to effect the scheme by using the United States mail is no longer necessary.

This point was litigated in United States v. Young, 232 U.S. 155 (1914). The Court held that it is now only necessary that there be a scheme to defraud and that a letter be placed in the United States mails in furtherance of the scheme. Thus, the requirement is no longer scheming to use the mails

courts have been responsible for determining its meaning throughout the more than one hundred-year life of the statute. Moreover, because its language is susceptible of so many interpretations, the courts have been able to construe the statute expansively, using it as a procrustean bed[3] to fit virtually any conduct by defendants accused of a wide variety of deception.

Such eminent jurists as Learned Hand and Oliver Wendell Holmes have extolled the broad sweep of the mail-fraud statute. They were impressed by the cunning of those bent on fraud and, accordingly, believed that no construction of the statute should permit the polymorphously devious to escape its reach.[4] Only recently, Chief Justice Burger recognized the perduring value of 18 U.S.C. § 1341 as a first line of defense against fraud, *i.e.*, as a stopgap against a newly-conceived form of fraud until Congress is able to enact particularized legislation to cope with the

---

fraud and that a letter be placed in the United States mails in furtherance of the scheme. Thus, the requirement is no longer scheming to use the mails in order to defraud; it is scheming to defraud, and happening to use the mails in the process.

3. In Greek mythology, Procrustes invited travelers to spend the night as his guests. Procrustes was, however, far from an ideal host. Once he had succeeded in overpowering his unsuspecting guest, he forced him to lie on an iron bed and then robbed him. But worse than the robbery was Procrustes' practice of either stretching out or lopping off the legs of his victims to make their bodies conform to the length of the bed.

Indeed, since the mail-fraud statute has proven so infinitely malleable for resourceful prosecutors through the years, the high camp of Judge Learned Hand in referring to the doctrine of conspiracy as "the prosecutor's darling" might equally apply to the mail-fraud statute. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

4. Holmes has written about the power of Congress to pass the mail-fraud statute: "Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, *whether it can forbid the scheme or not.*" Badders v. United States, 240 U.S. 391, 393 (1916) (emphasis added). Thus, Holmes accepted as permissible the criminal prosecution of any scheme that meets the vague and unpredictable standard of being "contrary to public policy," notwithstanding the fact that the object of the scheme is not against the law.

Learned Hand has written concerning the loss that has to be proved to convict someone of mail fraud:

> Civilly of course the action would fail without proof of damage, but that has no application to criminal liability. A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed.

United States v. Rowe, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932). Hand then went on to explain that "[f]raud, as colloquially used, implies some kind of cheating, and cheating . . . involves deceit." *Id.* Accordingly, Hand here construes a requirement for conviction under the mail-fraud statute as any form of deceit, notwithstanding the fairness of the transaction (namely, that the defrauded party received a quid pro quo) and the lack of a basis for a civil action, inasmuch as any proof of damages would fail.

scheme.[5] Indeed, federal prosecutors, intent on obtaining convictions and long sentences, will often add mail fraud and conspiracy to commit mail fraud to the other offenses with which a defendant is charged.[6]

Two general categories of schemes have been found to violate section 1341: (1) schemes to defraud individuals of money or other tangible property, and (2) schemes to deprive individuals of intangible rights or interests, which we shall designate "fiduciary fraud."[7] Examples of offenses in the first category are insurance fraud,[8] check kiting,[9] and referral-plan schemes in

5. Chief Justice Burger gave as examples of how § 1341 has been used as a stopgap: (1) To prosecute securities fraud, until the passage in 1933 of the Securities Act; (2) to prosecute loan sharks, until the enactment in 1968 of 18 U.S.C. §§ 891-896, outlawing extortionate extension of credit; (3) to prosecute fraud in the sale of undeveloped land, until the passage of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 in 1969; and (4) to prosecute fraud connected with credit cards, until the passage of 15 U.S.C. § 1644 in 1970. He noted further that, even with the passage by Congress of specific laws to prevent fraud in specific spheres, the mail-fraud statute continues to play an important supplemental role in prosecuting such fraud. United States v. Maze, 414 U.S. 395, 405-08 (1974) (Burger, C.J., dissenting).

6. *See, e.g.*, United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). Former Illinois Governor Otto Kerner and former Illinois Director of State Department of Revenue Theodore Isaacs were prosecuted and convicted of conspiracy (18 U.S.C. § 371) to violate the Travel Act (18 U.S.C. § 1952), and the Mail-Fraud Act (18 U.S.C. § 1341); use of interstate facilities in furtherance of bribery (18 U.S.C. § 1952); mail fraud (18 U.S.C. § 1341); and falsifying tax returns (26 U.S.C. § 7206(1)). Kerner was also convicted of perjury before a grand jury (18 U.S.C. § 1623), and of making false statements to Internal Revenue agents (18 U.S.C. § 1001). *See also* United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) (Maryland governor Marvin Mandel and five others were prosecuted and convicted of racketeering, 18 U.S.C. § 1961, and mail fraud); United States v. Craig, 573 F.2d 455 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) (several defendants were convicted of causing an individual to travel in interstate commerce with intent to promote an unlawful activity, namely bribery, 18 U.S.C. § 1951, conspiracy to commit mail fraud, 18 U.S.C. § 371, and mail fraud).

7. The adjective "fiduciary" is used here in the broadest possible generic sense, including any type of deceit by, for example, a trustee, an employee, or other person in whom another party reasonably placed his trust.

The distinction between tangible and fiduciary fraud, no matter what the slight variations in nomenclature, is found in many recent cases, *e.g.*, United States v. Bohonus, No. 79-1449 (9th Cir. April 18, 1980); United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976).

8. *See, e.g.*, United States v. Minkin, 504 F.2d 350 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975) (scheme whereby automobiles declared junk and paid for by other insurance companies were turned over to defendant salvage dealer for scrap value, reinsured by Hartford Insurance Co., and then claims were made for the original value on the basis of fictional crashes, fires and thefts); United States v. Seasholtz, 435 F.2d 4 (10th Cir. 1970) (defendant osteopath who was the attending physician for his wife devised a scheme to defraud numerous insurance companies by (1) making applications to several insurance companies for health insurance for his second wife, who usually used her maiden name; (2) lying on each application that she had no other health insurance; and then (3) making claims to each company for the same coverage).

9. *See, e.g.*, Suhl v. United States, 390 F.2d 547 (9th Cir.), *cert. denied*,

which the victim is misled into thinking that he can avoid paying for purchases by referring new customers to the defendant.[10] The second category of fiduciary fraud involves vote-fraud schemes[11] and kickbacks or other secret profits to private or public employees.[12]

Through analysis of the expansive use of the mail-fraud statute, especially as a result of the strained, Pickwickian[13] meaning that has been given by courts to "a scheme to defraud," this article will show that concern for due process requires that the courts cease prosecuting fiduciary fraud under section 1341. Furthermore, the *criminal* sanctions of section 1341 should not be imposed on those whose conduct merely falls short of absolute honesty toward others. One way to avoid such an excess in construing section 1341 is not to allow an indictment which alleges only that the defendant's deceptive practices prevented

391 U.S. 964 (1968) (two defendants created a scheme that involved drawing checks made out to each other from accounts they each had in two distant banks; the accounts had insufficient funds to cover the checks, and the time necessary for the checks to travel to the banks delayed the posting to the respective accounts); Stevens v. United States, 227 F.2d 5 (8th Cir. 1955) (defendant would deposit in his bank account in one city checks written against his account in a bank in another city despite insufficient funds to cover the amount, and then reverse the procedure).

10. *See, e.g.*, Nickles v. United States, 381 F.2d 258 (10th Cir. 1967) (defendant set up a corporation that was used to induce people to purchase television sets with the promise that if they could find other customers for defendant's television sets, they would receive commissions; defendant then advertised to other prospective customers that previous buyers were paying for the sets without spending money from their own pockets; Blachly v. United States, 380 F.2d 665 (5th Cir. 1967) (defendant induced persons to purchase water softeners by presenting them a plan whereby they could acquire the softener free of charge, or even make money in the process, when in fact this plan was impossible); Fabian v. United States, 358 F.2d 187 (8th Cir.), *cert. denied* 385 U.S. 821 (1966) (similar to the scheme in *Nickles*, but involving stereo sets).

11. *See, e.g.*, United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974) (fraudulent voter registrations and applications for absentee ballots used to influence the outcome of the election of the Democratic and Republican committeemen in several St. Louis wards; the court held that even though no deprivation of money or tangible property was involved, the citizens of St. Louis and the Board of Election Commissioners were defrauded of certain intangible political and civil rights, an offense under § 1341).

12. *See, e.g.*, United States v. Lea, 618 F.2d 426 (7th Cir. 1980) (defendant manager of Safeway meat buying department channeled meat purchases through a broker who paid the manager kickbacks, resulting in higher meat prices for Safeway; the manager attempted to conceal this scheme from his employer by failing to report the use of the broker as was required by Safeway regulations whenever he used a broker for meat purchases).

13. The word "Pickwickian" is derived from the name of Samuel Pickwick, a character in the Dickens novel, THE PICKWICK PAPERS, who gave common words peculiar, idiosyncratic, whimsically distorted meanings.

the victim from making a better bargain than he did, even though the bargain struck was well within the going rate.

THE ELEMENTS OF THE MAIL-FRAUD STATUTE

Pereira v. United States stated the elements of a violation of section 1341 as "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme."[14] *Gregory v. United States*[15] effectively illustrates the conduct so proscribed. In *Gregory*, the defendant postal clerk used predated cancellations on envelopes in which he mailed predictions concerning college football games for a nationwide weekly contest. The envelopes were postmarked the Tuesday before the games, but mailed only after the Saturday games.

Since the fraudulent use of the mails was indispensable to the defendant's scheme, *Gregory* seems to be a case for which the statute was especially designed. However, it is not so apparent that *Gregory* fulfills the requirement of "a scheme to defraud." Granted, the scheme was dishonest, but it is not apparent that the dishonesty defrauded either the other contestants or the contest sponsor of something that would justify a conviction for the crime of mail fraud.[16]

"A Mailing"

The mail-fraud statute provides that (1) the defendant must himself mail something or receive mail or at least "knowingly cause" mail to be delivered, *and* (2) the mailing must be "in furtherance of the scheme."[17] The latter requirement serves only a

14. 347 U.S. 1, 8 (1954).

15. 253 F.2d 104 (5th Cir. 1958).

16. Certainly the sponsor of the contest suffered no monetary loss, since the sponsor was required to pay the winner, whoever he might be. The only party that conceivably had suffered a monetary loss was the contestant who came in second to the defendant. However, a criminal prosecution would not provide any personal relief for this party; his only relief would be in a suit for restitution against the defendant for his unjust enrichment at the plaintiff's expense.

The issue of whether the defendant in *Gregory* should have been subjected to conviction under § 1341, therefore, depends on whether a tangible deprivation was suffered or, if not, whether the defendant's conduct was subject to criminal punishment for the intangible fraud of depriving the contest sponsor and participants of their expectations of fair play.

17. 18 U.S.C. § 1341 (1976) provides in pertinent part:

> Whoever, having devised or intending to devise any scheme . . . to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office . . . matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing,

jurisdictional purpose, assuring a reasonable connection between the scheme to defraud and the use of the mails, over which federal power exists.[18] In fact, each relevant mailing is a separate offense under the statute.[19] However, the concomitant requirements that the defendant at least cause the mailing and that the mailing further the scheme are given an attenuated meaning. A defendant is deemed to have "caused" a mailing if he could reasonably have foreseen it.[20] Once "caused" is construed to mean "reasonably foreseeable," the added requirement that the mailing be "in furtherance of the scheme" is

---

or knowingly causes to be delivered by mail . . . shall be fined . . . or imprisoned . . . or both.

18. *See, e.g.*, United States v. Reid, 533 F.2d 1255, 1260 (D.C. Cir. 1976) (the defendant former credit director of a store received through the mail from a collection agency hired by the store invoices billing at $2.50 per account, over the months of the scheme, that were found by the trier of fact to total more than twice the number of accounts originally referred by the store).

Justice Rehnquist, in United States v. Maze, 414 U.S. 395, 405 n.10 (1974), seemingly in response to Chief Justice Burger's argument in dissent that the mail-fraud statute should be construed broadly to serve as a stopgap when Congress has not yet passed legislation to cover a new form of fraud, insists that it is not the role of the courts to serve as legislators. In his words, "[i]f the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this Court."

Judge Ross, concurring in United States v. States, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974), expressed his serious misgivings, if not outright disbelief, "that it was the original intent of Congress that the Federal Government should take over the prosecution of every state crime involving fraud just because the mails have been used in furtherance of that crime." Indeed, it is true that instead of being central in many of these cases, the mailing serves merely as a pretext—a tenuous basis—for the federal court to take jurisdiction and thus there is some concern that the federal courts have infringed the jurisdiction of state courts in this matter.

19. *See* 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 47.18 (3d ed. 1977). *See, e.g.*, United States v. Brown, 540 F.2d 364, 370 (8th Cir. 1976) (defendant was charged on seven counts of mail fraud, "four counts for causing the mailing of the rental checks by Reliance to Mansion House, and three counts for mailing the awards of demolition contracts to Reliance and Decco").

20. *See, e.g.*, Pereira v. United States, 347 U.S. 1 (1954) (the defendant "caused" the requisite mailing in the confidence game that he perpetrated against a wealthy widow by marrying her and, *inter alia*, inducing her to have mailed to herself a $35,000 check from her broker in Los Angeles that she then advanced to him as part of the alleged purchase price for the nonexistent hotel venture about which he had told her); United States v. Rabbitt, 583 F.2d 1014, 1023 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) (a state legislator should have foreseen that owners of automobile dealerships would make use of the mails in transmitting the $20,000 fee that he had requested from a statewide dealership association for obtaining passage of a favorable bill); United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976) (a city official who strongly intimated to a contractor that he would be successful in obtaining demolition contracts if he paid the rent for the official's mistress could reasonably have foreseen that the contractor would pay the rent by mail).

diluted of any ordinary meaning of purposiveness and made synonymous with any mailing, no matter how tenuously related to the scheme. The only requirements are that the mailing must not occur after the scheme has reached fruition, and the mailing must not conflict with the scheme.[21]

In the landmark case of *United States v. Maze*,[22] the defendant unlawfully used another person's bank credit card at out-of-state motels, which resulted in the mailing of sales invoices by the motels to the bank, and by the bank to the credit card owner. Obviously, if the requirement of "causing" the mailing was satisfied simply by the reasonable foreseeability of the mailing, standing alone, then the defendant did cause the mailing. The Court, however, put a gloss on the element of "causing" a mailing that took into account the interrelatedness of "cause" with the requirement that the mailing be "in furtherance of the scheme." Accordingly, the Court held that the mailing was not sufficiently related to the defendant's scheme to bring his conduct within the statute. The Court reasoned that since the scheme had reached fruition when the defendant checked out of each motel, the mails were used only for the sake of adjusting accounts between the motels, banks, and card owner. The mailings could only hinder the scheme because they served only to facilitate the defendant's detection. As the Court observed, the defendant would have preferred that the invoices be misplaced rather than mailed by the motels.[23]

21. In United States v. Reid, 533 F.2d 1255 (D.C. Cir. 1976), the court noted that, under the parallel wire-fraud statute, 18 U.S.C. § 1343, it has been held that the use of the federally regulated instrumentality need not even be foreseeable. United States v. Blassingame, 427 F.2d 329, 330 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971). Accordingly, the *Reid* court concluded that, *a fortiori*, the "in furtherance" requirement for a violation of § 1341 should be construed in a "relatively loose manner." 533 F.2d at 1260 n.19. Thus the language of "in furtherance" that on its face bespeaks a requirement of purposiveness is construed by the courts as requiring no more than that the defendant knew or should have known—in other words that there was "reasonable foreseeability" of the mailing.

22. 414 U.S. 395 (1974).

23. *Id.* at 403. The effect of this decision was to curtail any further prosecution of "credit card" swindles under § 1341, *i.e.*, instances in which an individual either fraudulently secures or fraudulently uses a credit card. As the *Maze* Court reasoned, mailings between the defrauded retailer and the credit card issuer, which necessarily occur *after* the defendant has fraudulently obtained the goods or services, are not in furtherance of the deceptive scheme.

Justice Rehnquist noted, however, that even before the *Maze* decision had been handed down, Congress had amended the Truth in Lending Act, 15 U.S.C. § 1644 (1976) making illegal the use of a fraudulently obtained credit card in a transaction affecting interstate or foreign commerce. Rehnquist noted that the lower court had interpreted the above amendment to the Truth in Lending Act as manifesting a legislative judgment that credit card fraud schemes should be excluded from the application of the mail-

However, when the scheme demands continuity and letters are dispatched to reassure those from whom money has already been obtained so that the scheme can be pursued against others, such letters are deemed by the courts to be "in furtherance of the scheme."[24] The metaphor of a lullaby is appropriate because the deceptive practices of such defendants induce a false sense of security in their victims, who relax their vigilance.

"A Scheme to Defraud"

The Statutory Language

Section 1341 provides in part that a person "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" violates the statute, provided that the mailing element of the offense has been satisfied. The statute states the object of the scheme as either "to defraud" or "for obtaining money or property." However, this disjunctive formulation does not prima facie specify two mutually exclusive violations. It may signify no more than the com-

---

fraud statute "unless the offender makes a purposeful use of the mails to accomplish this scheme." 414 U.S. at 403.

Thus, according to the majority in *Maze*, Congress's *expressio unius est exclusio alterius*; Justice Burger, in dissent, reasoned that even with the passage by Congress of specific laws to prevent fraud in specific spheres, the mail-fraud statute should *and does* play an important role in prosecuting such fraud. *Id.* at 406-07. Such "overkill" is one of the abuses against which this article is directed.

24. The *Maze* Court clearly distinguished the facts in *Maze* from those in United States v. Sampson, 371 U.S. 75 (1962). In *Sampson*, employees of a nationwide corporation were charged with a scheme to defraud businessmen of fees on the promise that the defendants would help the victims either to obtain loans or to sell their businesses. Even after the checks representing the fees had been deposited to the accounts of the defendants, however, the plan called for the mailing of the accepted application, together with a form letter assuring the victims that the services for which they had contracted would be performed. The *Sampson* court found, and the *Maze* Court agreed, that the subsequent mailings were designed to lull the victims into a false sense of security, to postpone their ultimate complaint to the authorities, and to make apprehension of the defendants less likely than if no mailing had taken place.

See also United States v. Isaacs, 493 F.2d 1124, 1152, (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (the court rejected any *Maze* defense that the mailings were too late to permit conviction under § 1341, noting that "the success of the scheme to defraud so far as all participants, and particularly [Governor] Kerner and Isaacs were concerned, depended on the continued concealment of the bribery scheme, and the devious and complicated devices which were used until they finally received the cash benefits of the bribery. . . ."); Cacy v. United States, 298 F.2d 227, 230 (9th Cir. 1961) (since the scheme was not limited to obtaining the purchase price from any particular purchaser and demanded continuity, the letters dispatched to reassure those from whom money had been obtained, so that the scheme could successfully be pursued against others, were in furtherance of the scheme).

plementary objectives of a defendant. Accordingly, "to defraud" might refer to the loss to be inflicted on the victim. Conversely, "for obtaining money or property" might refer to the gain desired by the defendant.

Contrary to this analysis, however, the courts have construed the alternatives, "scheme to defraud" or "scheme to obtain money or property," as mutually exclusive disjuncts.[25] The latter scheme has been defined in terms of *economic gain* of money or tangible property sought by the defendant. But it has been defined even more insistently and frequently in terms of the intended *economic loss* of the victim as a result of the fraud. Nevertheless, courts have ruled, especially during the last decade, that a defendant can be found guilty of "a scheme to defraud" because he fraudulently deprived someone of merely intangible rights.[26] Notwithstanding the absence of both economic loss to the victim and unjust enrichment to the defendant, courts have found that a defendant violated the statute by violating a fiduciary duty.[27]

The courts have sometimes justified the mutually exclusive construction of the alternatives expressed in section 1341 by noting the parallel language of 18 U.S.C. § 1371, the general conspiracy statute, which makes it a crime to conspire "to defraud the United States, or any agency thereof in any manner or for any purpose."[28] Since the second specified object of section 1371 is conspiracy "to commit any offense against the United States," "conspiracy to defraud the United States" has been construed as proscribing *conspiracy* to commit an act that, although not otherwise against the law, contravenes public policy because of

25. *See, e.g.*, United States v. Bohonus, No. 79-1449 (9th Cir. April 18, 1980); United States v. McNeive, 536 F.2d 1245, 1248-49 (8th Cir. 1976).

26. *See, e.g.*, United States v. Lea, 618 F.2d 426, 429 n.3 (7th Cir. 1980); United States v. Mandel, 591 F.2d 1347, 1362 (4th Cir. 1979); United States v. Regent Office Supply Co., 421 F.2d 1174, 1180-81 (2d Cir. 1970); Blachly v. United States, 380 F.2d 665, 672-73 (5th Cir. 1967). *But see* United States v. Reid, 533 F.2d 1255, 1261 (D.C. Cir. 1976), in which the court denied that profit from the receipt of kickbacks or *success* of the scheme had to be established, possibly implying that the conviction of the recreant employee was dependent upon at least a *potential* monetary loss to the employer. In the words of the *Reid* court: "Here we think the evidence established a scheme to defraud, a scheme to cause Woodward & Lothrop to pay a substantial amount in excess of what could have been rightfully charged the store on the basis of the number of delinquent accounts referred to Credit Shield." *Id.* at 1261-62.

27. *See, e.g.*, United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974) (scheme to cause false and fraudulent absentee ballots to be counted in a primary election).

28. *See, e.g.*, United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), which traces this construction of § 1371 and applies it, *pari passu*, to § 1341.

its deceptive quality.[29] Courts are able to distinguish a section 1341 "scheme to defraud" from a section 1371 "conspiracy to defraud the United States" when the United States is the intended victim, because a scheme may be concocted by only one person but a conspiracy requires at least two.[30]

The Illegitimate Means Employed by the Defendant

An ambiguity arises from the grammatical structure of the phrase "by means of false or fraudulent pretenses, representations or promises. . . ." Since the disjunctive "to defraud *or* for obtaining money or property" precedes this phrase, it is not clear whether the specified fraudulent means are intended to apply to both the clauses "to defraud" and "for obtaining money or property," or only to the latter. But this ambiguity proves to be no problem for the courts, for they have responded either that no affirmative act of misrepresentation need be established to sustain a conviction,[31] or have construed "false or fraudulent representation" so broadly that it is synonymous with any form of deception.[32]

29. 493 F.2d at 1150.

30. It is black-letter law that a conspiracy is an agreement between two or more persons, whereas a scheme, as a systematic plan of action, need not involve more than one person. Thus, defendants often are charged with both a violation of the mail-fraud statute and *conspiracy* to violate the mail-fraud statute. *See, e.g.*, United States v. Isaacs, 493 F.2d 1124, 1152 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) ("[c]onspiracy is an independent offense, perhaps more reprehensible than the substantive crime").

31. *E.g.*, in United States v. Brown, 540 F.2d 364, 375 n.8 (8th Cir. 1976), the court, citing United States v. States, 488 F.2d 761, 763-64 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974), noted that no false representations are required to convict someone under § 1341 for "any scheme or artifice to defraud." In United States v. Brodbeck, 430 F. Supp. 1056, 1058-59 (E.D. Wis. 1977), the court concluded: "Brodbeck . . . [is] said to have worked this fraud by 'material omissions of fact', that is by failing to disclose to the bank [his] personal financial interests detailed in F.I.'s agreement with Robert Long."

32. Since two adjectives, "false" and "fraudulent," are used as modifiers of "pretenses," "representations," and "promises," it would seem there is a difference in meaning between them. Our linguistic analysis, however, finds a difference only in perspective between these two adjectives. From the objective point of view, "false" specifies that what the defendant presented or promised was not true; from the subjective point of view, "fraudulent" specifies that the defendant intended to deceive someone by his presentation or promise. To be sure, an individual intending to deceive another but who is himself misinformed might be guilty of "intent to deceive" even though he accidentally spoke the truth. Thus a liar always speaks fraudulently even though he may mistakenly speak the truth.

The adjectives "false" and "fraudulent," however, seem superfluous as modifiers of "pretenses" because to pretend is to put on a false appearance, whether by affirmatively simulating what is not true or by negatively dissimulating or concealing the truth. An actor on the stage simulates Lear; a fugitive from justice dissimulates or disguises his identity. Thus, on its

Fraudulent Promises

Since fraud in section 1341 encompasses deception concerning the future, it is defined more broadly than common law fraud, which is limited to misrepresentations concerning past or present facts. The language of section 1341, as well as its predecessors, proscribes "false or fraudulent . . . promises." In the 1896 decision of *Durland v. United States*,[33] the Supreme Court ruled that a defendant could be guilty of mail fraud under the then-existing statute if he induced another to part with his money because of promises about the future that the defendant had no intention of fulfilling. The manifest intent of Congress in passing the mail-fraud statute was to protect the naive against use of the mails by confidence men.[34] In 1932, under the existing mail-fraud statute, Second Circuit Justice Learned Hand affirmed the conviction of defendants whom he said had "inveigled their victims into a position of confidence."[35]

---

face, the statute seems to proscribe affirmative efforts not only to mislead others, but also to conceal the truth from them.

"False or fraudulent . . . representations," as opposed to "pretenses," would seem to emphasize verbal misrepresentations, rather than nonverbal forms of deception. However, if a representation requires a statement, account, or discourse, then there cannot be a violation of § 1341 by failing to make a statement or by concealing the truth through silence. Still, however, if "pretenses" is construed as the generic term, encompassing both verbal and nonverbal forms of deception, then this statute could be violated by concealing the truth from someone by not telling him what he has a right to know. However, the statute on its face provides no guidelines for deciding when a person has a duty to make a statement to someone under pain of prosecution for mail fraud if he does not.

In the recent case of United States v. Kreimer, 609 F.2d 126, 130 (5th Cir. 1980), the court in effect said that where there is intent to defraud by means of deception, the specific form of deception used is irrelevant. In the words of the court: "Congress has not undertaken to catalog the infinite variety of the myriad schemes to defraud that might be concocted by the fertile minds of those bent on despoiling others by cunning. It has branded criminal any use of the mails knowingly and intentionally to achieve a fraudulent end." Such nominalistic definitions, however, are not very helpful since they are circular, defining what is "a scheme to defraud" as any scheme intended to achieve a fraudulent end, and then defining "a scheme intended to achieve a fraudulent end" as a scheme to defraud. In the words of one court: "To try to delimit 'fraud' by definition would tend to reward subtle and ingenious circumvention and is not done." Foshay v. United States, 68 F.2d 205, 211 (8th Cir. 1933), *cert. denied*, 291 U.S. 674 (1934).

In short, no misrepresentation of fact is required if the scheme is reasonably calculated to deceive persons of ordinary prudence. *See, e.g.*, United States v. McNeive, 536 F.2d 1245, 1249 n.10 (8th Cir. 1976); Silverman v. United States, 213 F.2d 405 (5th Cir.), *cert. denied*, 348 U.S. 828 (1954).

33. 161 U.S. 306 (1896).

34. *Id.* at 313.

35. United States v. Rowe, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932).

Although these espoused sentiments of protecting the public from confidence artists are commendable, there is nevertheless an evidentiary problem with which these two reviewing courts did not grapple: how can the trier of fact be convinced beyond a reasonable doubt that the defendant's intention was fraudulent *ab initio* rather than the result of a change of mind at a later date? In short, how can the trier of fact be sure that the defendant committed criminal fraud and not merely a breach of contract? To be sure, if a defendant makes spurious promises to more than one victim over a period of time, then perhaps the conclusion that the promises were fraudulent is inescapable. Since section 1341 proscribes not fraud itself but "devising or intending to devise a scheme to defraud," achievement of the fraudulent aim is not essential to a violation.[36]

Fraud in the Inducement

The expression "fraud in the inducement" means nothing more than the language of section 1341, *i.e.*, obtaining "money or property by means of false or fraudulent pretenses, representations or promises." Thus, "fraud in the inducement" will be used to mean depriving someone of money or property, and any misrepresentations, pretenses, or false promises that are *material* factors in inducing a victim to agree to a bargain.

---

36. *See, e.g.*, United States v. Reid, 533 F.2d 1255, 1261 (D.C. Cir. 1976); United States v. George, 477 F.2d 508, 512 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); United States v. Regent Office Supply Co., 421 F.2d 1174, 1180 (2d Cir. 1970); Post v. United States, 407 F.2d 319, 326 n.42 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969).

Furthermore, since a defendant need only "intend to devise a scheme" to violate the statute, a defendant can be found guilty even though he never in fact hatched a scheme. Thus, on its face this criminal statute would punish not only those who plan such a scheme, but also those who *plan to plan* such a scheme. If it is difficult to establish that someone has in fact devised a scheme, *a fortiori* it would be well nigh impossible to enter the mind of the defendant, as it were, to determine that he had indeed *formed the intention* of devising such a scheme some time in the future. However, we have not unearthed any cases that have gone this far.

It is the fundamental principle of criminal law that criminality turns upon a concurrence of prohibited action and criminal intent. When the famous actor Garrick declared that he felt like a murderer whenever he acted Richard III, Dr. Johnson, the moralist, retorted: "Then he ought to be hanged whenever he acts it!" But criminal law cannot punish the mere harboring of evil intentions.

> [A]s no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reasons, in all temporal jurisdictions, an *overt* act, or some open evidence of an intended crime is necessary . . . before the man is liable to punishment.

4 BLACKSTONE'S COMMENTARIES, ON THE LAW OF ENGLAND 21.

The rub is that "material factor" is hardly susceptible to facile definition. A rule of thumb, however, is that a material factor is any misrepresentation, pretense, or false promise *but for which* it is likely the agreement might never have been struck. Any further attempt to make this "but for" rubric more precise demands attention to the facts of a particular case in the totality of its circumstances.[37]

When the misrepresentation or false promise concerns not the product sold but the buyer's motive for purchasing it, then it is more difficult to decide whether the misrepresentation constitutes "fraud in the inducement." For example, assume that a clean cut young man sold Bibles from house to house throughout the Bible Belt in the southeastern United States during his vacation from college and pretended that he was studying to be a preacher, to receive special consideration from these devout people. Assume further that these orders were filled by mail. Would he be guilty of fraud in the inducement, and therefore of mail fraud?

A 1936 Second Circuit case[38] was analogous: the appellant corporations sold stationery through agents. The corporations were concerned that the misrepresentations of their agents, such as that the call was long distance, that the agent knew an officer of the company called, and that the stationery was specially discounted—all stratagems to get by secretaries on the telephone and to get the purchasing agent to listen to the seller's agent—might constitute violations of section 1341. Consequently, the accused corporations through their officers and their attorney in effect agreed to be indicted and expeditiously tried upon certain "admissions and stipulations" of fact consti-

37. *See, e.g.*, United States v. Allen, 554 F.2d 398 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977) (the defendant, who ran a leasing service that assisted persons wishing to file applications for oil and gas lease drawings by the Bureau of Land Management, entered into contracts with many persons that they would never have entered had they known that he would resort to various forms of concealment, nondisclosure, and fraud to deprive them of the economic interest in valuable leases that they had won in the drawings); Cacy v. United States, 298 F.2d 227 (9th Cir. 1961) (persons were induced into paying as much as $1,200 for supposedly exclusive distributorships of a product, when in fact the identical, though differently named, product was marketed by many other franchisees); Blachly v. United States, 380 F.2d 665 (5th Cir. 1967) (defendant induced persons to purchase water softener by presenting to them a plan whereby they could acquire the softener free of charge or even make money in the process, when in fact this plan was impossible); Henderson v. United States, 202 F.2d 400 (6th Cir. 1953), *cert. denied*, 349 U.S. 920 (1955) (the defendants induced persons to invest in oil and gas interests by diverse misrepresentations and promises that grossly misrepresented the actual interests).

38. United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970).

tuting the alleged crime. The defendants were found guilty and fined.

The Second Circuit deplored the lack of any evidence of the customers' reaction. The court noted, however, that the false representations listed in the stipulation were only preliminary to the salesman's solicitation, and that price and quality of the merchandise were always discussed honestly. Thus the court reversed the convictions, noting that to affirm would imply that any untrue statement designed to obtain the sympathetic ear of a potential customer comes within the purview of the mail-fraud statute. In its *reductio ad absurdum* argument, the court gave as examples of misrepresentations extrinsic to the bargain signs such as "going out of business in 30 days," "fire sale," and "bankruptcy sale" that, when untrue, would have to violate section 1341.[39]

There was no evidence that customers would not have purchased the stationery *but for* any of the misrepresentations. For example, there was no showing that once they learned of the misrepresentation they felt cheated. The court's analysis indicates that had there been such evidence, the convictions would have been upheld. Similarly, the student selling Bibles would have to be found guilty, since undoubtedly many of the purchasers would never have bought them *but for* his misrepresentation that he was studying to become a preacher.

Furthermore, the courts have ruled that a seller can violate section 1341 even though he is not guilty of a misrepresentation of fact.[40] Representations of the value of a product may therefore go so far beyond the proper limits of the enthusiasm or "puffing" of the typical salesman, or the mistaken judgment of the honest man, as to impress them with the badge of fraud.[41]

---

39. *Id.* at 1178.

40. In the eloquent words of Learned Hand:

> It is no longer law that declarations of value can never be a fraud. Like other words, they get their color from their setting, and mean one thing when exchanged between traders, and another when uttered by a broker to his customer. Values are facts as much as anything else; they forecast the present opinions of possible buyers and sellers, and concern existing, though inaccessible, facts.

United States v. Rowe, 56 F.2d, 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932).

41. *See, e.g.*, Henderson v. United States, 202 F.2d 400 (6th Cir. 1953), *cert. denied*, 349 U.S. 920 (1955) (the defendant expressed opinions concerning the future productivity and profitability of leases that his experience would never have justified and that were so exaggerated that they exceeded permissible sales talk). Accordingly, fraudulent opinions, although not qualifying as common law fraud, are prosecutable under § 1341 just as are fraudulent promises and fraudulent schemes that do not succeed.

PROSECUTION OF FIDUCIARY FRAUD UNDER SECTION 1341

Fiduciary Fraud as Criminal Disloyalty

The most significant and expansive use of section 1341 has been its application as a weapon against fiduciary fraud. The courts, however, have insisted that not every breach of every fiduciary duty, standing alone, works a criminal fraud.[42] Nevertheless, prosecutors have, with outstanding success, prosecuted public[43] and private[44] employees, politicians,[45] and union officials[46] under section 1341. They have struck against political corruption and employee disloyalty in both the public and private sectors.[47]

The Defense of Constructive Fraud

In 1949, when the doctrine of fiduciary fraud was still an underdeveloped basis for liability under the mail-fraud statute, the

42. *See, e.g.*, United States v. George, 477 F.2d 508, 512 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); Epstein v. United States, 174 F.2d 754, 764 (6th Cir. 1949).

43. *See, e.g.*, United States v. Brown, 540 F.2d 364 (8th Cir. 1976) (defendant was St. Louis building commissioner); United States v. Bush, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976) (defendant was press secretary for Mayor Daley); United States v. Barrett, 505 F.2d 1091 (7th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975) (defendant was Cook County, Illinois clerk with full responsibility for obtaining insurance on voting machines); Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941) (defendants were various members of the Levee Board of the state of Louisiana); United States v. Faser, 303 F. Supp. 380 (E.D. La. 1969) (defendants were state of Louisiana employees, for example, executive secretary to the governor).

44. *See, e.g.*, United States v. Kreimer, 609 F.2d 126 (5th Cir. 1980) (defendants were insurance agents); United States v. Bryza, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976) (defendant was a purchasing agent); United States v. Brodbeck, 430 F. Supp. 1056 (E.D. Wis. 1977) (defendants were officers of a mortgage corporation).

45. *See, e.g.*, United States v. Diggs, 613 F.2d 988 (D.C. Cir. 1979) (defendant was congressman from Michigan); United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) (defendant was governor of Maryland); United States v. Keane, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976) (defendant was an alderman of Chicago); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (one defendant was Governor Kerner of Illinois).

46. *See, e.g.*, Hoffa v. United States, 387 U.S. 231 (1967) (affirming the conviction of union officials of the International Brotherhood of Teamsters of mail fraud for financially rehabilitating a real estate enterprise in which many of the petitioners had important interests); United States v. Bane, 433 F. Supp. 1286 (E.D. Mich. 1977), *aff'd*, 583 F.2d 832 (6th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979) (conviction of union leader for fraud concerning union funds).

47. *See, e.g.*, United States v. Bryza, 522 F.2d 414, 422 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976); United States v. George, 477 F.2d 508, 513-14 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973).

Sixth Circuit in *Epstein v. United States*[48] reversed a conviction, holding that the defendants' violation of their fiduciary duty constituted no more than constructive fraud and, accordingly, fell short of the actual fraud necessary to convict someone under the statute. But since *Epstein*, defendants charged with fiduciary fraud have invoked the defense of constructive fraud, generally to no avail.

In *Epstein*, two of the defendants had directorates in breweries and brewery supply companies. The government argued that because the breweries bought from those suppliers, and because the defendants did not disclose their conflict of interest, the defendants were guilty of mail fraud. The Sixth Circuit Court of Appeals reversed the conviction, noting that the breweries had suffered no loss, nor had the defendants been unjustly enriched because of their undisclosed conflict of interest. In short, the court found that these transactions carried the earmarks of arm's length bargains and did not depend upon deception. They were not only fair to the corporations, but were even below the market price.

The court held that mere nondisclosure of the conflict of interest could not constitute actual fraud because under applicable law directors can contract with one another or on behalf of their corporations with other corporations in which they are interested. Such contracts are valid so long as they are advantageous and made in good faith. Consequently, the defendants had no duty to make their profit from these transactions available to the breweries, and there is no reason to believe that it would have made any difference to the breweries had they known of the interests of the defendants in the supply companies.

The court defined active fraud as "intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud."[49] Thus, the court recognized both tangible and intangible proprietary and fiduciary fraud but, in contrast to the discussion above, the court required that the fraud succeed to constitute a crime.[50] Aside from insisting that the fraud be "intentional," the court has provided little elucidation of the conduct subsumed under this rubric.

48. 174 F.2d 754 (6th Cir. 1949).
49. *Id.* at 765.
50. *See* note 36 *supra.*

In effect, the court defined "constructive fraud" privatively, *i.e.*, as fraud that falls short of active or actual fraud.[51] The court intimated that constructive fraud, although it breaches a legal or equitable duty, nevertheless lacks an element of moral guilt, perhaps because it falls short of intentional, full-blown fraud.

The Unjust Enrichment of the Defendant

Although the courts generally deny that conviction for fiduciary fraud requires proof of pecuniary or other property loss, they nevertheless find that whenever an employee receives kickbacks, the employer is in fact defrauded to that extent.[52] The argument is that if the party doing business with a company is willing to pay kickbacks to its employee, then this party is willing to enter into an agreement with the company at least as favorable to the firm as a bestowal of the discount on the company itself. Thus, the self-serving employee is unjustly enriched by the kickback.[53] However, the courts do not generally rest

51. The three definitions of constructive fraud given in *Epstein* are: (1) Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests; (2) Constructive fraud may be found merely from the relation of the parties to a transaction or from circumstances and surroundings under which it takes place; and (3) Constructive fraud is a term that means, essentially, nothing more than the receipt and retention of unmerited benefits. 174 F.2d at 766.

52. *See, e.g.*, United States v. Bryza, 522 F.2d 414, 422 (7th Cir. 1975); United States v. George, 477 F.2d 508, 513-14 (7th Cir. 1973).

53. We see the equivocation of the court in United States v. George, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973), in which a purchasing agent of Zenith received kickbacks from a supplier of cabinets to Zenith. On the one hand, the court distinguished *George* from *Epstein* by the fact that in *Epstein* "non-disclosure did not generate a profit at the corporation's expense." As the court reasoned:

> No refuge can be taken in Zenith's policy "normally" to allow suppliers a 10% profit and in Accurate's prices being within that margin. Nothing would have prevented Zenith from bargaining with Accurate for a lesser profit margin, and it would be unrealistic to presume that Zenith would consider the fact of better than $100,000 in actual kickbacks to its buyer—over $300,000 in agreed-to-kickbacks—to be immaterial in its dealings with Greensphan. *It is preposterous to claim that Zenith would have spurned such a discount if offered.*

Id. at 513 (emphasis added).

On the other hand, the court did not rest its case on the monetary loss suffered by Zenith, predicating a second source of criminal deprivation for Zenith on "losing the opportunity to bargain with a most relevant fact before it." In support of its position, the court quoted Judge Learned Hand's construction of the meaning of "a scheme to defraud" in § 1341 in United States v. Rowe, 56 F.2d 747, 749 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932):

> A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain

guilt upon the employee's unjust enrichment at the expense of his employer. Instead, they have invoked the rhetoric of disloyalty, *e.g.*, the employer/victim has been deprived of the ability to bargain with the knowledge of relevant facts;[54] the public or the private employer has been deprived of the disinterested judgment of the public official[55] or private employee,[56] respectively; or the citizens have been deprived of the impartial services of an elected official.[57]

In many cases the defendant either lied in a conflict of interest statement or failed to submit one that was required.[58] In

with the facts before him. That is the evil against which the statute is directed.

Judge Friendly, however, limited the validity of these dicta in United States v. Dixon, 536 F.2d 1388, 1400-01 (2d Cir. 1976). He noted that the Second Circuit had already in United States v. Regent Office Supply Co., 421 F.2d 1174, 1179-82 (2d Cir. 1970) "declined, in the area of private decision making, to follow the letter of Judge Learned Hand's dictum . . . that 'false representations, in the context of a commercial transaction, are per se fraudulent despite the absence of any proof of actual injury to any customer'." *Id.* at 1400.

Judge Friendly went on to note, however, that public officials could be subject to what we have designated "fiduciary fraud," *i.e.*, the improper exploitation of their public positions to enhance their private advantage, often by taking bribes. So, for example, in United States v. Barrett, 505 F.2d 1091, 1103-05 (7th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975), the defendant, who had full responsibility for obtaining insurance on voting machines and received "brokerage fees" from companies to whom he awarded the contracts, was rightfully found guilty of mail fraud, notwithstanding the fact that the insurance commissions had to be paid by the state to someone and the state had suffered no monetary loss. According to Judge Friendly, Barrett's conviction was proper since he, as a public official, had been paid to act in breach of his public duty, so that his conduct possessed the requisite element of corruption. United States v. Dixon, 536 F.2d at 1400.

By contrast, in *Dixon*, the defendant had done nothing more than fail to mail a correct proxy solicitation. There was no contemplated pecuniary loss to anyone, nor contemplated gain by the defendant, and this activity was in the private sector. Accordingly, the court did not have to decide whether the doctrine of fiduciary fraud should be given effect in the private sector whenever "the element of corruption" is present. The court noted that if the defendant had bribed a corporate official to put out a proxy statement known to be incomplete, then an element of corruption would have been present. *Id.*

54. *See* note 53 *supra*.

55. *See, e.g.*, cases cited in note 43 *supra*.

56. *See, e.g.*, United States v. Reece, 614 F.2d 1259 (10th Cir. 1980) (defendants received "brokerage fees" from certain packers who sold beef trimmings to their employer); United States v. Bryza, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976); United States v. George, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973).

57. *See, e.g.*, United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979) (defendant was governor of Maryland); United States v. Keane, 522 F.2d 534, (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976) (defendant was alderman of Chicago); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (defendant Kerner was governor of Illinois).

58. *See, e.g.*, United States v. Bush, 522 F.2d 641, 645 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976) (Mayor Daley required those required by law to

other cases the defendant resorted to stratagems to camouflage his conflict of interest.[59] Perhaps in other cases a defendant did no more than the defendants in *Epstein*: failed to disclose a conflict of interest.[60] Thus, there is a spectrum of conduct ranging from affirmative misrepresentations to artful concealments to acquiescence in misleading appearances performed with an explicit duty to disclose, and these same affirmative misrepresentations, artful concealments, and acquiescences in misleading appearances and failures to reveal with no explicit duty to disclose. The courts have frequently glossed over the issue of a duty to disclose, accepting any one of the above acts as evidence of "disloyalty" and moving quickly to find in any manifestation

---

file statements of economic interests with the clerk of Cook County to file copies of such statements with the mayor's office; although defendant Bush, press secretary and director of public relations for Mayor Daley, reported his stock holdings in DAAI in the original, he presented a doctored copy of his conflict of interest statement to Mayor Daley's office in which he wrote "none" where disclosure of his interest in DAAI was called for); United States v. Bryza, 522 F.2d 414, 422 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976) (Bryza assumed a bogus name, formed a phony company, and lied on his annual company statement that he had no conflict of interest); United States v. George, 477 F.2d 508, 511 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973) (Zenith had a conflict of interest policy providing that no gratuities of any nature were to be bestowed on its purchasing department's employees by suppliers; defendant Yonan, a purchasing agent, twice fraudulently signed documents embodying that policy, which was annually brought to the attention of all suppliers of Zenith by letter).

59. *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1365 (4th Cir. 1979) (Governor Mandel of Maryland misrepresented or concealed the names of the true owners of Marlboro racetrack from the Maryland General Assembly during its 1972 session for the purpose of obtaining legislation financially beneficial to Marlboro); United States v. Bush, 522 F.2d 641, 643 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976) (Bush told Dell, with whom he was a joint venturer in the advertising work done by DAAI at O'Hare Airport for the city of Chicago, that "his [Bush's] name should never be used in connection with any work regarding the airport contract;" furthermore, in an apparent effort to conceal his interest in DAAI, Bush was paid the $40,000 he received from DAAI by Information Consultants, who served as a conduit for the payment, receiving checks payable to it from DAAI, and in turn making checks payable to Bush for such amounts); United States v. Isaacs, 493 F.2d 1124, 1151 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (one of the defendants, Governor Kerner, mailed an IRS form 1099 interest payment notice to Mrs. Everett, and a copy of this to the IRS; however, Mrs. Everett had made no loan to Kerner; rather, the "interest" reported on the form was a deceptive method of legitimizing the backdated note presented to Mrs. Everett in 1966 at the time of Kerner's acquisition of Chicago Thoroughbred Enterprise Stock to make the bribe appear to be a 1962 sale and purchase).

60. *See, e.g.*, United States v. Keane, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976) (former alderman of Chicago and chairman of the city council's committee on finance participated in a scheme to purchase, through an investment company, tax delinquent property from county-sponsored scavenger sales, and voted on certain matters that favorably affected property the investment company had purchased without disclosing his interest to the other aldermen).

of "disloyalty" evidence of "a scheme to defraud," and thus a violation of the mail-fraud statute.[61] We are therefore left with the question of whether the courts have so relentlessly whittled away at the defense of constructive fraud that in fact today a court will find disloyalty in any self-serving activity that is not disclosed to the proper person. Thus, without further ado the court will find fiduciary fraud and a violation of section 1341.

The Seventh Circuit's Expansive Reading of Section 1341

The most important development and articulation of fiduciary fraud as a basis for mail-fraud conviction occurred in Chicago in the early 1970s in the United States attorney's office. This doctrine of fiduciary fraud was not developed out of wholecloth, however. As early as 1942, in *United States v. Proctor & Gamble*,[62] a federal district court held that the disloyalty of an employee can constitute mail fraud. Proctor & Gamble was found guilty of mail fraud for bribing employees of a competitor to divulge confidential information of their employer. The court concluded that whoever tampers with the employer/employee relationship for the purpose of causing the employee to breach his duty is in effect defrauding the employer of a lawful right.[63]

Five major Seventh Circuit cases hammered out the contours of the doctrine of fiduciary fraud. In *United States v. George*,[64] Yonan, a cabinet buyer for Zenith Radio Corporation, was indicted with two other defendants for violating the mail-fraud statute. The grand jury charged that for nearly four years Yonan had received kickbacks on Accurate Box Corporation's sales of cabinets to Zenith. The indictment alleged that the scheme deprived Zenith of its money, and of the honest and loyal performance of Yonan's duties. After a jury trial, the defendants were found guilty, and the Seventh Circuit affirmed the convictions.

Yonan had been given the responsibility to procure cabinets for Zenith's new "Circle of Sound" product. During the indictment years, Accurate, whose president was a codefendant, was

61. *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1363 (4th Cir. 1979), *quoting with approval* United States v. Bush, 522 F.2d 641, 652 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976): "[A]n employee owes his employer a duty of loyalty which includes a duty not to conceal facts known to him which he has reason to believe are material to the employer's conduct of its business and affairs."

In *Mandel, Bush*, and *Brown* the defendants were found guilty of violating § 1341 for such disloyalty.

62. 47 F. Supp. 676 (D. Mass. 1942).

63. *Id.* at 678.

64. 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973).

the sole bidder on, and supplier of, the cabinets. Zenith normally allowed its suppliers a maximum of ten percent profit, and Accurate's prices reflected that profit margin. The president of Accurate agreed to pay Yonan $1 per cabinet on the Circle of Sound unit, and later per-cabinet kickbacks on other models. All of this was contrary to Zenith's express conflict of interest policy, which prohibited members of its purchasing department from receiving any gratuities from suppliers. Yonan twice signed documents embodying that policy.

The president of Accurate admitted receiving annual letters from Zenith that brought this policy to the attention of its suppliers during the period he was channeling payments to Yonan. A number of other Zenith employees testified, however, that Yonan did not give Accurate preferential treatment, but insisted on quality and efficiency from Accurate.

The court found no dispute about sufficiency of the evidence to establish use of the mails. Consequently, it was necessary to find only a scheme to defraud in order to establish mail fraud. The court explained that no proof was required that Zenith was *actually* deprived of Yonan's honest and loyal service through *actual* preferential treatment for Accurate. All that was necessary was that the supplier paid a fee with the *intent* of receiving preferential treatment. The court, however, concluded that Zenith was in fact deprived of Yonan's faithful services, inasmuch as he had solicited no potential competitors of Accurate, and had deprived Zenith of the significant knowledge that Accurate would accept less profit than it was receiving, thus depriving Zenith of the opportunity to bargin with that knowledge.

The court found duplicity: Yonan held himself out to be a loyal employee acting in Zenith's best interest, but he actually compromised that interest for the sake of his own profits. Thus, all three defendants who had participated in the scheme to deprive Zenith of Yonan's faithful services were found guilty of mail fraud.

In *United States v. Bryza*,[65] the defendant was charged in four separate mail-fraud indictments. The allegation was that Bryza, while a purchasing agent for International Harvester Company (I-H), accepted payment from various I-H suppliers in violation of the company's express conflict of interest policy. The government contended that these payments deprived I-H of its right to Bryza's faithful services and to the money that he obtained. Bryza was convicted on all counts.

65. 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976).

The Seventh Circuit upheld his conviction, noting that he had set up a sham consulting company, taken a fictitious name, and demanded that payments be made to him through the "consulting" company as a condition for favorable treatment from I-H. The court found it immaterial that I-H had discharged Bryza on learning of his arrangements for receiving gratuities. It was also found to be irrelevant that the quality and prices of the items purchased by Bryza were acceptable to I-H and that, after terminating him, I-H retained relations with the companies from which Bryza was receiving kickbacks.

What ultimately mattered, the Seventh Circuit held, was that Bryza's efforts to cover up his breaches of fiduciary duty (*e.g.*, assuming a bogus name, forming a phony company, falsifying his annual conflict of interest statements) manifested the requisite specific intent to defraud I-H. I-H was deprived of Bryza's honest and faithful services; it was entitled to negotiate purchases with the knowledge of its employee's interest.

In *United States v. Keane*,[66] a twenty one-count indictment was returned against former Chicago Alderman Thomas Keane. The indictment alleged a mail-fraud scheme in which Keane would purchase through nominees, in some cases with advance information, tax-delinquent real estate in Cook County scavenger sales. These properties would be held in land trusts without disclosure of beneficiaries, and would receive favorable treatment through city council removal of encumbrances without disclosure of Keane's interest. Keane himself would vote to authorize acquisition of parcels near his own properties, and he used his position and influence to aid in the sale of the properties to private and governmental interests.

The indictment alleged that the scheme defrauded the city of Chicago, its citizens, and Keane's fellow aldermen of their right to "conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of official duties" on his part, and to have the city's business conducted "honestly, impartially, free from deceit, craft, trickery, corruption, fraud, undue influence, dishonesty, conflict of interest, unlawful obstruction and impairments, and in accordance with the laws of the State of Illinois and the City of Chicago."[67]

At trial the government introduced evidence of Keane's "scheme to defraud:" (1) He used inside information to determine which tax delinquent properties should be bought by his newly-formed Alpine Investments Corp. He told an unindicted co-conspirator to buy in a particular area because a "big govern-

66. 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976).
67. *Id.* at 538.

ment project" was going up. Only after the tax sale, however, was there a public announcement that the area had been designated for study to see if it qualified for urban renewal. Thus, Keane's inside information was indispensable to the project.

(2) Keane participated in city council proceedings without disclosing the matters in which he had a financial interest. He introduced proposals to benefit his own properties and then voted on them without divulging his interest.

(3) Keane put pressure on the chairman of the Chicago Housing Authority (C.H.A.) to purchase Keane's properties. Such pressure could be inferred from the fact that the C.H.A. acquired or considered acquiring some parcels despite the fact that they were improperly zoned, were outside a certain area, and were significantly more costly than similar properties acquired by C.H.A. Because of this evidence, the trial court found Keane guilty of mail fraud, and the Seventh Circuit upheld his conviction.

In *United States v. Isaacs*,[68] Otto Kerner, former governor of Illinois and then a United States judge for the very Seventh Circuit that upheld his conviction, and Theodore Issacs, former state director of revenue, were convicted of, *inter alia*, mail fraud. They had solicited and purchased shares in two horse racing corporations for a fraction of the market value of the stock from a controlling shareholder. Through a clandestine, circuitous route, the defendants each gained $159,800 from sales and dividends on stock that had cost them only $15,079 apiece. In return, they exerted political influence by initiating legislation favorable to the racing industry and by manipulating the Illinois Racing Board to assign valuable racing dates to tracks owned by the corporations.

The court noted that despite this scheming, none of the competitors of the corporations had lost any racing dates, and state revenues from horse racing had actually increased from $19.1 million to $40 million during the course of the scheme. Nonetheless, the court found the defendants guilty of mail fraud, concluding that Kerner had deprived the state and its citizens of his honest service as governor, and had deprived racing associations of the right to obtain racing dates free from corruption.[69]

In *United States v. Bush*,[70] Earl Bush, who for eighteen years had been press secretary for Mayor Richard J. Daley of Chicago, was convicted of violating the mail-fraud statute, and

68. 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).
69. *Id.* at 1150.
70. 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976).

the Seventh Circuit affirmed. In 1961 and 1962, a new terminal and other facilities were being constructed at O'Hare Airport. To facilitate completion of the work, Mayor Daley established an informal committee to negotiate contracts for the concessions at O'Hare. At that time, Bush's company, Terminal Art, Inc. (whose successor was DAAI) entered into a joint venture agreement with Dell Display, Inc. for the negotiation and service of an O'Hare advertising contract with the city of Chicago. The joint venture agreement provided that John and Robert Dell would do the advertising work and that DAAI would hold the contract with the city. The services that Bush performed were minimal. Furthermore, he instructed Dell that under no circumstances should Bush's name ever be used in connection with the contract.

Bush several times spoke in favor of DAAI to the deputy mayor, who headed the committee responsible for awarding the O'Hare concession contracts. The deputy mayor placed great weight on Bush's recommendation because of his promotional expertise, but also took into account DAAI's experience, the aesthetics of proposed displays, and the fact that DAAI was a local company that guaranteed the city a substantial sum. Consequently, the deputy mayor recommended that DAAI be given the contract, and it was. Before renewal of the contract, Bush met with the city commissioner in charge of O'Hare and discussed a particular display in the airport terminal. At this meeting Bush said, "I have no ideas [*sic*] of telling you this is good because it is a revenue producer, because I have no connection whatsoever with the company."

Between 1962 and 1967, Bush received $40,000 from DAAI. He was paid by a circuitous route, obviously intended to conceal his interest in the transactions. In 1972 he submitted a copy of a conflict of interest statement to the mayor's office. The copy had "none" typed in, but the purported original statement had the typed words "Dell Airport Advertising."[71] When Mayor Daley later read news reports of Bush's conflict of interest, he interviewed Bush, and on Bush's admission that the allegations were true, discharged him.

The court noted that there was no contention that the contracts between the city and DAAI were anything but advantageous. In fact, the city continued its contractual relations with DAAI even after the disclosure of Bush's role in the firm. What constituted the "scheme to defraud" under the mail-fraud statute, however, was the breach of Bush's fiduciary duty in depriving "the City of Chicago, its mayor, officials and employees of

71. *Id.* at 645.

the opportunity to bargain with all relevant facts in their possession."[72] Beyond this, the court found that Bush's elaborate scheme to conceal his interest in the contract, and his affirmative misrepresentations to both the mayor and commissioner, manifested the intent to defraud.

Constructive Fraud Not a Defense

In each of these five cases, although there was undoubtedly a cover-up by the defendants, the Seventh Circuit rejected constructive fraud as a defense. In *George*,[73] the defendant twice failed to disclose in signed conflict of interest statements the kickbacks that he was receiving. In *Bryza*,[74] the defendant received kickbacks in violation of his employer's express conflict of interest policy. In *Keane*,[75] the defendant's profiteering from zoning changes demanded an elaborate operation to conceal his activities from his fellow aldermen. In *Isaacs*,[76] Kerner devised a complex system to camouflage the fact that he had been bribed to grant selected racing dates to certain racetracks. In *Bush*,[77] Mayor Daley's professed disapproval of any interest on the part of his aides in companies that dealt with the city caused the defendant to falsify a conflict of interest statement submitted to Mayor Daley's office, and to arrange to be paid by the advertising corporation by a circuitous route. Thus, in each of these cases, the scheme depended upon an interested party's lack of knowledge of the scheme.

These cases are therefore distinguishable from *Epstein*,[78] since in *Epstein* disclosure by the defendants of their interest in companies doing business with breweries of which they were corporate officers would have made no apparent difference. Since the agreements were favorable to the breweries, in fact more favorable than the market prices of the materials supplied, the other corporate officers would readily have approved the transactions. Nevertheless, what is disturbing about such a *ratio decidendi* in the Seventh Circuit's rejection of the defense of constructive fraud is the way in which any attempt to deceive is construed as a "scheme to defraud" in violation of section 1341. Accordingly, a defendant who is guilty of any deception such as a cover-up, on its face a mode of behavior which, standing alone, should merit no more than moral stricture, is found *eo ipso*

72. *Id.* at 647.
73. 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973).
74. 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976).
75. 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976).
76. 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).
77. 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976).
78. 174 F.2d 754 (6th Cir. 1949).

guilty of the crime of mail fraud, provided there is an incidental mailing.

The Eighth Circuit: Limiting the Scope of Fiduciary Fraud

In *United States v. States*,[79] the Eighth Circuit unequivocally affirmed fiduciary fraud as a basis for conviction under section 1341. The court affirmed convictions for mail fraud and conspiracy to commit mail fraud based on a scheme to have absentee ballots of fictitious and fraudulently registered voters mailed and counted in a primary election. The court noted that the definition of fraud in section 1341 has been broadly and liberally construed since the passage of the original mail-fraud statute in order to serve as an effective weapon against use of the mails to promote fraudulent enterprises. Thus, the Eighth Circuit held that a "scheme or artifice to defraud" need not concern money or property; such a scheme was realized by depriving the public and election authorities of certain intangible political and civil rights.[80]

In subsequent Eighth Circuit cases, however, the court has attempted to limit (the court's own characterization was to "restrict the expansion of") the scope of section 1341.[81] The Eighth Circuit, citing authorities such as *Epstein* and *George*, has ruled that fiduciary fraud alone is not enough to convict a person of a violation of section 1341.[82] This bald proposition seems innocuous at first, but on further reflection may be seen to contain the seeds of the ultimate rejection of fiduciary fraud as a basis for conviction under this criminal statute. If we find the ingredients

79. 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

80. The court ruled in *States*: "The language of the statute on its face does not preclude a finding that a 'scheme or artifice to defraud' need not concern money or property." *Id.* at 764. "The focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails." *Id.* at 767.

81. In United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976), the court concluded:

> While we sympathize with the zealous prosecutor's view in this case that tipping has no place in the administration and operation of a governmental agency, this does not transform the practice into a mail fraud violation, nor does it give the prosecutors a license to inject themselves into local affairs to attempt to rectify the problem. *To permit the Government to do so in this case would effect a further extension of § 1341 so as to cover all actions which might offend the Government's sense of personal propriety.* This we refuse to do, particularly since our acceptance of the Government's theory in this case would have far-reaching ramifications as to the reach of the already pervasive mail fraud statute.

Id. at 1252 (emphasis added).

82. United States v. McNeive, 536 F.2d 1245, 1250 (8th Cir. 1976); United States v. Rabbitt, 583 F.2d 1014, 1024 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

of fiduciary fraud to be all aspects of the scheme that do not involve pecuniary or other property loss by the victim, we are led to the startling conclusion that section 1341 can be violated only when the defendant is guilty of something more than fiduciary fraud, *i.e.*, he has defrauded or attempted to defraud the victim of money or property.[83]

In 1976 in *United States v. McNeive*,[84] the Eighth Circuit reversed the mail-fraud conviction of St. Louis's chief plumbing inspector. The court held that it was contrary to regulation for the defendant to accept mailed $5 checks as tips from a particular contractor for each application from the contractor for plumbing permits. Nevertheless, several factors militated against a finding that the inspector had the fraudulent intent contemplated by section 1341. These factors were: (1) the unsolicited nature of the gratuities; (2) the nondiscretionary nature of the permits; (3) the lack of any evidence of the defendant's bending the regulations in favor of this contractor, all of whose applications were in order and thus automatically entitled to licenses; (4) the absence of any evidence of attempts by the defendant to misrepresent or conceal the tips; and (5) the lack of any monetary loss to the city. In short, the court found that to uphold the conviction for conduct that it called "cupidity," "a minor peculation, possibly a misdemeanor," would impermissibly *extend* the scope of section 1341.[85]

---

83. How is fiduciary fraud to be defined except in terms of conduct that bespeaks disloyalty of some kind? But if we consider the failures to reveal a conflict of interest, attempts to conceal, and active forms of misrepresentation of secret profits (on the one hand) and prescind from, or bracket, the issue of whether or not there is a pecuniary or property loss that results from this less than perfectly open conduct (on the other hand), then such deceptive practices would be included within the definition of "fiduciary fraud, standing alone." Accordingly, all forms of deception, independent of pecuniary or proprietary loss, are encompassed within the definition of "fiduciary fraud, standing alone." Consequently, since conviction under § 1341 requires more than "fiduciary fraud, standing alone," monetary or proprietary loss by the victim should be required for conviction under § 1341.

On the other hand, if "fiduciary fraud, standing alone" is something other than these acts, then it does not seem to have any reality at all. Accordingly, it would seem to be empty rhetoric, providing a defendant with no guidelines for his defense, that his conduct is no more than "fiduciary fraud, standing alone."

Although this dilemma may appear sophistical, still, as the Eighth Circuit attempts to reconcile its decisions with Seventh Circuit cases, we realize that it is far from clear in the minds of the judges exactly what are the contours of "fiduciary fraud, standing alone."

84. 536 F.2d 1245 (8th Cir. 1976).

85. Although the rhetoric of *McNeive* specifies a lack of fraudulent intent as the *ratio decidendi*, such an argument is truly a *petitio principii*, since no scheme to defraud is found because of lack of fraudulent intent and no fraudulent intent is found because of no scheme to defraud. Instead, it would seem that the true reason for the court's reversal of

In attempting to reconcile its decision with Seventh Circuit cases, the Eighth Circuit found that in *George* and *Bryza* the defendants' receipt of kickbacks, standing alone, would not have been enough for their conviction under section 1341. On the contrary, monetary loss by their employers was an essential element for the defendants' convictions.[86] This rendition of the meaning of *George* and *Bryza* seems contrary to the actual holdings. Although the Seventh Circuit noted that the unjust enrichment of the employees at least constituted a discount that could have been reflected in the contracts struck by the disloyal employees, it ruled nevertheless that their convictions did not require proof of pecuniary or property loss to their employers.[87]

Furthermore, this interpretation of *George* and *Bryza* seems to abandon the proposition enunciated in *States* that no monetary or other proprietary loss is a prerequisite to conviction under section 1341. However, a more limited interpretation of that dictum is that conviction of an employee in the *private* as opposed to public sector requires that his employer suffer some economic loss from the fraud.[88] The Eighth Circuit, however, implies that an *elected* public official can be convicted under the statute in spite of the absence of any tangible loss. Thus, it found that Chicago's Alderman Keane, who secretly used inside

---

McNeive's conviction was its refusal to uphold a conviction for the violation of such a trifling duty.

86. 536 F.2d at 1250.

87. *See* note 53 *supra*.

88. Even in its analysis of *Bush*, however, the court noted that the defendant's concealment of his interest in an advertising agency and use of his official influence to induce the city to issue an advertising contract to his agency deprived the city of the opportunity to secure the most *economically* favorable contract. 536 F.2d at 1251. It found, however, that Bush's conduct was cognizable under § 1341, since his failure to provide honest and faithful service was combined with his material representations and active concealment. Thus the city's economic loss was not necessary for Bush's conviction.

One wonders what failure to provide honest and faithful service could be, beyond Bush's material misrepresentations and active concealment. Also, since the contracts were, as the *Bush* court admitted, the best possible contracts that the city could have expected to obtain, it is an error for the court in *McNeive* to try to distinguish *Bush* from *McNeive* in terms of Bush's depriving the city of an opportunity to secure the most favorable contract.

In United States v. Rabbitt, 583 F.2d 1014, 1025 n.19 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979), the Eighth Circuit again construed the nature of the scheme to defraud found in the Seventh Circuit case of United States v. Barrett, 505 F.2d 1091 (7th Cir. 1974), *cert. denied*, 421 U.S. 964 (1974), in terms of potential monetary loss to the city of Chicago. Since the defendant in *Barrett*, a county clerk responsible for obtaining voting machines and the insurance on them, allowed to be considered in the pool only those companies that were willing to supply kickbacks to him, the court concluded that the city might have obtained rates lower by at least the amounts of the kickbacks.

information to purchase properties owned by the city, could be convicted of mail fraud because the citizens were deprived of their right to honest and fair dealing in the conduct of his office.[89]

In *United States v. Rabbitt*,[90] the Eighth Circuit further limited the sweep of section 1341. The defendant Rabbitt, a member of the Missouri House of Representatives between 1960 and 1976 and majority floor leader for much of that period, was convicted by a jury on eleven counts of mail fraud.[91] Rabbitt had agreed to introduce a longstanding friend who was a partner in an architectural firm to state officials who might be able to secure contracts for the firm. Rabbitt was paid a fee of ten percent for all work resulting from these introductions. As a result of this arrangement, he received almost $23,000 from the firm for both city and state contracts attributable to his influence.

The Eighth Circuit reversed his conviction, since it found "the concept of fraud upon the public" falls within the ambit of the mail-fraud statute *only* "where dishonest conduct by a public official *directly* implicates the functions and duties of that official's public office."[92] Thus the court found that not every breach of public trust in connection with a mailing falls within the confines of section 1341. The court saw no evidence that Rabbitt's use of his influence to aid the architectural firm to obtain contracts resulted in inferior work, greater expense, or any other tangible loss to the citizens or state. Thus, his conviction could not be affirmed on the basis of tangible fraud.

Moreover, Rabbitt did not control the awarding of state contracts to architects, nor was there evidence that he had failed to carry out his legislative duties for the sake of the architectural firm. Furthermore, the government referred to no standard of conduct applicable to legislators that clearly required disclosure of his interest in the architectural contracts. The court deplored Rabbitt's unethical conduct in violation of (1) the legal Code of Professional Responsibility, (2) a candidate-disclosure statute requiring disclosure of fees received during the preceding twelve months, and possibly (3) a Missouri law prohibiting "partiality" or abuse in public office. However, the court held that

89. 583 F.2d at 1025 n.20.

90. 583 F.2d 1014 (8th Cir. 1978).

91. Rabbitt was also charged and convicted of three counts of extortion and one count of attempted extortion. However, of these three distinct convictions, based on three different series of events during his public life, only the third one for mail fraud concerns us here. Indeed, the defendant's conviction for mail fraud was reversed by the Eighth Circuit. *See* United States v. Rabbitt, 583 F.2d 1014, 1018 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

92. *Id.* at 1024.

these practices did not constitute a "scheme to defraud" under section 1341.[93]

By underscoring the fact that not every fiduciary fraud constitutes a violation of section 1341;[94] by denying that a defendant can have the requisite intent to defraud when there is no evidence of his taking the initiative or attempting to conceal gratuities received;[95] by requiring a showing of monetary loss by a victim to convict an employee in the private sector and,[96] possibly, even a nonelective public official;[97] and by requiring that the charge of fiduciary fraud against an *elected* public official relate directly to the duties of the office itself,[98] the Eighth Circuit has done much, without fanfare,[99] to limit the far-reaching sweep of the mail-fraud statute. Although the court conceded, in *United States v. McNeive*,[100] that section 1341 can reach activities that contravene public policy or moral standards, at the same time it denied the government a conviction under section 1341 for conduct that merely offends the government's sense of personal propriety. Accordingly, the Eighth Circuit has at least impliedly rejected these amorphous bases for conviction under section 1341.

---

93. *Id.* at 1026.

94. United States v. Rabbitt, 538 F.2d 1024 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); United States v. McNeive, 536 F.2d 1245, 1250 (8th Cir. 1976).

95. United States v. McNeive, 536 F.2d 1245, 1251 (8th Cir. 1976). The court characterized the sums received by the defendant as "unsolicited gratuities," and underscored the lack of any material misrepresentations by the defendant "in order to assure continuation of the gratuities scheme. . . ." *Id.*

96. *Id.* at 1250.

97. The *McNeive* court found that in United States v. Bush, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976), the city of Chicago was deprived "of the opportunity of securing the most economically favorable contract." 536 F.2d 1245, 1251 (8th Cir. 1976). Also, however, the *McNeive* court found that in *Bush* "the defendant had made conscious and calculated efforts to actively conceal the nature and scope of his enterprise." *Id.*

See also United States v. Rabbitt, 583 F.2d 1014, 1025 n.19 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). The court cited United States v. Barrett, 505 F.2d 1091 (7th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975), as standing for the proposition that the public was defrauded of some potential tangible gain, inasmuch as the defendant county clerk responsible for obtaining voting machines and the insurance on them, by allowing only companies that were willing to supply kickbacks, in the pool to compete for contracts, deprived the city of possible lower rates equal to the amount of the kickback.

98. United States v. Rabbitt, 583 F.2d 1014, 1026 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).

99. *See* note 81 *supra.*

100. 536 F.2d at 1252.

THE MAIL-FRAUD STATUTE AND DUE PROCESS

There are limits to the proper scope of the criminal sanction, and contrary to dicta in some of the reported cases on the mail-fraud statutes, a difference should be observed between immorality and criminality: "There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[101] Even though the report which made this statement was concerned with the criminal status of homosexual offenses and prostitution, it nevertheless unequivocally rejected any synonymy of morality and criminality. Furthermore, it also rejected as one of the functions of the criminal law the fostering of morality.[102]

101. REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES & PROSTITUTION, THE WOLFENDEN REPORT, para. 13 (1963).

102. THE WOLFENDEN REPORT specifies as the objectives of the criminal law: "preserv[ing] public order and decency, . . . protect[ing] the citizen from what is offensive or injurious, and . . . provid[ing] sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, [or] inexperienced. . . ." *Id.* A careful reading of this quotation reveals the two paramount purposes of the criminal law to be preserving *public* order and protecting those who cannot protect themselves.

The publication of this report engendered a vigorous debate in England, with Lord Patrick Devlin concluding that the Committee had in fact erred in concluding, for example, that private homosexual acts between consenting adults should be legal. According to Devlin, "[n]o society can do without intolerance, indignation, and disgust; they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice." P. Devlin, *Morals & the Criminal Law*, in MORALITY & THE LAW 40 (R. Wasserstrom ed. 1971). Thus, public morality is viewed by Devlin as "morale," *i.e.*, the *espirit de corps* necessary to preserve a society. This is similar to Hegel's argument for the morality of war, since, according to Devlin, when a society criminalizes that about which it feels "intolerance, indignation, and disgust," (*id.*), it attains a solidarity and vitality that would not be possible without such a source of unified opposition. *See also* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

Professor H.L.A. Hart, while agreeing with Lord Devlin that social morality is important to preserving a society, objected:

> The use of legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence may possibly succeed, but even where it does it contributes nothing to the survival of the animating spirit and formal values of social morality and may do much to harm them.

H.L.A. HART, LAW, LIBERTY & MORALITY 72 (1963).

The ultimate reason for Hart's rejection of Devlin's argument seems to lie in his viewing freedom of choice as the highest value of a society, whose existence is indispensable for the preservation of society. According to Hart, who cited as his authority against Devlin the classical conservative Edmund Burke,

> [T]he value of established institutions resides in the fact that they have developed as the result of the free, though no doubt unconscious, adaptation of men to the conditions of their lives. To use coercion to maintain the moral *status quo* at any point in a society's history would be

Fiduciary Fraud an Improper Basis for Conviction

Invocation of fiduciary fraud to justify section 1341 conviction violates not only substantive due process (since it equates moral notions of "disloyalty," "faithlessness," and "the subordination of the interest of another towards whom one has a duty in the pursuit of one's own interest" with *criminal* conduct) but also procedural due process.[103] The sixth amendment requires that criminal offenses be precisely defined to provide reasonable forewarning of what acts are criminal and what are not.[104] Furthermore, to prevent arbitrary and discriminatory enforcement, laws must provide explicit standards for those who apply them.[105]

---

artificially to arrest the process which gives social institutions their value.

Id. at 75.

103. Procedural due process means simply the rights of fair notice and fair opportunity to be heard. In the words of the sixth amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

In contrast, substantive due process concerns the fundamental rights that accrue to someone as a person: in the words of the Declaration of Independence, the rights to "Life, Liberty and the pursuit of Happiness."

Thus, a person charged with the crime of being a Jew in Nazi Germany might be granted every conceivable *procedural* consideration; his judge might observe scrupulous care in guaranteeing that all the rights of notice and a fair hearing were observed. Still, it is an affront to *substantive* due process that he should be charged with the crime of being born of a Jewish mother. Here the injustice of the criminal statute itself is established by appealing to a transcendental or metaphysical sense of fairness. Accordingly, any actual legal system or criminal code must be consonant with this recognition of imprescriptable rights of the person, otherwise it will violate substantive due process.

The case of the Jew charged with the crime of being a Jew is an egregious example of violation of substantive due process. So, also, is any other status crime. But even to a lesser extent, according to Shaffer v. Heitner, 433 U.S. 186 (1977), it is unfair and, according to our analysis, a violation of substantive due process, for a court to take jurisdiction unless there exist the minimum contacts that make it proper for the court to do so. So, also, in those cases of fiduciary fraud in which there is nothing more than the failure by the defendant to be totally honest and above board with another, but in which he does not profit *at the expense of the other*, it is improper and a violation of substantive due process to prosecute the defendant under *any* criminal statute at all.

104. *See* note 103 *supra.*

105. Laws that fail in this standard violate the due process clause of the fifth or fourteenth amendments, depending on whether federal or state action is involved. In Grayned v. City of Rockford, 408 U.S. 104 (1972), the Supreme Court held that a city anti-noise ordinance prohibiting a person

The courts, however, have deliberately left the meaning of "a scheme to defraud" so vague and all-encompassing that any deceptive conduct in which there has been an incidental mailing fits this procrustean statute.[106] The violence thus done to any ordinary meaning of "scheme to defraud" is dramatically illus-

---

adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session, is not unconstitutionally vague or overbroad. In reaching its decision, the Court provided us with the proper standard that should be used in testing whether a statute is unconstitutional because of vagueness:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Id. at 108-09 (footnotes omitted).

106. The word "defraud" can be used under so many circumstances to denote the perpetration of evil that it is almost as broad as the word "evil" itself. THE OXFORD ENGLISH DICTIONARY 143 (1969) defines "defraud" as "1. To deprive (a person) by fraud of what is his by right, either by fraudulently taking or by dishonestly witholding it from him; to cheat, cozen, beguile. . . . 2. *fig.* To deprive or cheat (a thing) of what is due to it; to withhold fraudulently." To understand this definition, one must know the meaning of "fraudulently," which the same dictionary defines as "in a fraudulent manner, by fraud, with intent to defraud or deceive, dishonestly, wrongfully." *Id.* at 517. Ultimately, an understanding of these words requires a definition of the common root word "fraud," which the same dictionary defines as follows:

1. The quality or disposition of being deceitful; faithlessness, insincerity. Now *rare* . . . .
2. Criminal deception; the using of false representations to obtain an unjust advantage or to injure the rights or interests of another. . . .
3. An act or instance of deception, an artifice by which the right or interest of another is injured, a dishonest trick or stratagem. . . .
4. A method or means of defrauding or deceiving; a fraudulent contrivance; in mod. colloq. use, a spurious or deceptive thing.

Id. at 516.

Apart from the definitional circularity that would confound a person seeking to determine his exposure to criminal liability under the "scheme to defraud" portion of § 1341, these definitions sweep wide enough to encompass almost any conduct the government might without specific advance warning consider wrongful.

trated in a recent Ninth Circuit case[107] in which the court upheld the conviction under 18 U.S.C. § 1343 (section 1341's counterpart proscribing wire fraud) of defendants who were in the business of hunting debtors for their creditors. The court found that the defendants, in misrepresenting themselves over the telephone as postal or phone company employees to gather confidential information, had conducted "a scheme to defraud" by depriving post office and phone company patrons of their right of privacy.[108]

Perhaps there should be *some* criminal law that applies to the conduct of these defendants, but surely only a Pickwickian construction of "scheme to defraud" permits such a prosecution under *this* statute. So, also, one may rejoice that the mail-fraud convictions of Governor Kerner[109] and, in a similar case, Governor Marvin Mandel of Maryland,[110] were upheld because they took bribes for assigning lucrative racing dates. But such satisfaction misses the point. The question is not whether Kerner and Mandel should have been convicted of crimes, the question is whether they were properly convicted under the mail-fraud statute.

Does it not strain credulity to argue that it was the intent of Congress to include such conduct within the purview of section 1341? Does it not strain the ordinary meaning of words to say that citizens have been *criminally* defrauded because the activities of the ex-governors of Illinois and Maryland vitiated their loyalty to the citizens and thus vitiated their judgment in all their official decisions? Even though it appears to violate procedural due process to find the conduct of Kerner and Mandel to be within section 1341, their acts of compromising their fiduciary duties for the sake of personal gain nevertheless seem to be properly subject to some type of *criminal* sanction. In contrast, however, it seems that a case such as *Bush*[111] should never have been prosecuted under any statute. There is in *Bush* simply no evidence of *corruption*, which should be a *sine qua non* for in-

107. United States v. Louderman, 576 F.2d 1383 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978).

108. *Id.* at 1387.

109. United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

110. In United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), Governor Mandel's conviction was upheld since the court found that by misleading the citizens of Maryland, as well as the legislature and racing commission, about the ownership of the racetrack, his business involvements with others, and his receipt of bribes, Mandel had deprived the citizens of the conscientious, loyal, faithful, and honest performance of his duties as governor to which they were entitled.

111. United States v. Bush, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976).

voking a criminal sanction. The defendant simply did not profit at the city of Chicago's economic expense in any but the most strained interpretation. Although Bush submitted a doctored copy of his conflict of interest statement and went to great lengths to conceal his interest in the advertising agency whose services he had recommended to the city, it nevertheless seems farfetched to construe such conduct as "a scheme to defraud," even in the sense that he had subordinated the city's interests to his own. In fact, the advertising contract was a most favorable one for the city, manifesting all the earmarks of an arm's length transaction. Indeed, even after Bush's conviction, the city signed another contract with the same agency. Furthermore, *Bush* cannot be construed as a case of unjust enrichment, as in the many kickback cases invoking the mail-fraud statute, because Bush's profit from his interest in the agency did not, even according to a most strained construction, represent a monetary loss to the city.[112]

Although Bush's conduct was not exemplary, and may have lacked moral uprightness, it nevertheless seems inappropriate to have *prosecuted* him at all, since such conduct seems to be of that realm of private morality or immorality which is not the business of the criminal law. Perhaps it was reprehensible for Bush to deceive Mayor Daley; perhaps the mayor and other city officials deceived by Bush deemed this to be a violation of his duty of loyalty and honesty to them. But such moral outrage, which rightly might result in the discharge of an employee (as it did in Bush's case), is hardly the stuff of which criminal convictions should be made. Thus, Bush's conviction violated procedural due process in the procrustean manner in which the standards for conviction under section 1341 were construed to fit the facts of the case. It also violated substantive due process, since Bush, as the court itself admitted,[113] gave the city the best possible advice in recommending his own advertising firm, and thus in no way sacrificed his duty to the city for personal gain.

That Mayor Daley was especially sensitive about conflicts of interest and would not have permitted Bush to maintain his interest in the firm, had it been disclosed by Bush himself, is the

112. The *McNeive* court strained in attempting to uphold *Bush*, finding a concomitant pecuniary loss with the loss of the faithful and honest service of Bush which it characterized as a deprivation of the city's "opportunity of securing the most economically favorable contract." United States v. McNeive, 536 F.2d at 1251. But how in fact could the city have received a better contract if it had known of Bush's interest in the advertising agency, unless Bush were to be disgorged of his unjust enrichment and his profits awarded to the city as a discount in the contract struck? Procrustes would be hard put to fit *Bush* to his bed.

113. 522 F.2d at 648.

obvious reason why Bush went to such lengths to conceal it. He wanted to retain both his city job and his interest in the agency, but he knew that Mayor Daley would not approve. Bush may have been guilty of personal faithlessness, but this is hardly "a scheme to defraud," even according to the most abstract analysis of the intangible loss suffered by the city of Chicago and its residents. Bush's lack of candor with Mayor Daley and the mayor's deputy could fall under the rubric of interpersonal relationships, or at most private immorality, but not criminality.

Immorality No Justification for Criminal Sanctions

If someone can be convicted of mail fraud for the vague reason that his "conduct . . . fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general business life of members of society,"[114] then everyone is at the mercy of changing community moral values of honesty, loyalty, and trust. One is threatened by the prospect of prosecution for mail fraud, notwithstanding a transaction's fairness, if only because a personal interest in the transaction was not disclosed. Of course, openness and loyalty on the part of an employee, whether in the private or public sector, is commendable. However, only in a theocracy like Calvin's Geneva or colonial Salem would *criminal* sanctions be expected for such nondisclosure.[115]

---

114. *See, e.g.*, United States v. Keane, 522 F.2d 534, 545 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976): "[T]he 'law puts its imprimatur on . . . accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.' " (citations omitted.)

2 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 47.04 (1977) reports concerning § 1341:

> The court is not required to answer a juror's question, after some deliberation had taken place, as to the difference between "fraudulent" and "unethical" conduct, when the original charge properly presented the essential elements and defenses. United States v. Middlebrooks, 431 F.2d 299 (5th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971).

115. John Calvin (1509-64), a Protestant reformer who became the dominant influence in Genevan affairs, envisioned Geneva as a theocracy in which the saints would rule. God's covenanted community was to be based on his law, as revealed in the scripture. No detail of civil or community life was too remote, too secular, or too petty to escape inclusion by the Calvinists in the ecclesiastical sphere of supervision or regulation.

Calvin's conception of the relationship of church and state was that even though the personnel of church government and state government were virtually identical, the two organizations should be distinct in their functions. It was the function of the church community to decide upon doctrine and to maintain moral discipline by spiritual censures; it was the function of the state to enforce this discipline upon recalcitrants.

Idolatrous or heretical beliefs, Catholic religious practices, and misbehavior ranging from public complaints about Calvin to serious sexual

A PROPOSAL TO LIMIT THE SCOPE OF THE MAIL-FRAUD STATUTE

Because conviction for mail fraud, a felony, may bring imprisonment for five years on each count, and because each mailing may constitute a separate count, it seems much too harsh to convict a defendant under this statute for anything less than seriously criminal conduct. Accordingly, a court should reverse the conviction of any defendant charged with violating section 1341 through no more than a violation of fiduciary duty. To be sufficient, an indictment should allege that the defendant used a fraudulent scheme to obtain *tangible* gain at another's expense.

Moreover, the willingness of courts to find the requisite intent to defraud from mere nondisclosure of relevant information should be obviated by a jury instruction that does not beg the question.[116] The jury instruction should explain that when the defendant's conduct can be explained by other than fraudulent intent, then the prosecution has not met its burden of proof of fraudulent intent beyond a reasonable doubt.

In addition, since section 1341 is a *mail*-fraud statute, enabling the federal courts to take jurisdiction and having as its purpose protection of the public from the perpetration of fraud by the use of the mails, the courts should reinstate the centrality of the mailing as a requirement for conviction. To tighten this "mailing" requirement, the "but for" standard should be used to interpret what it means "to knowingly cause the use of the mails."[117] Thus, the mailing must have been an indispensable

---

crimes were ruled on by the elders with the pastors in a body called a Consistory. If the accused was not penitent or if the lapse was serious, the accused could be handed over to the city government for further investigation and punishment. The only punishment the Consistory itself could administer, however, was excommunication, and this was a real threat in an age when the sacraments were taken very seriously. Calvin's political opponents were driven underground, and the freethinker Jacques Gruet and the Unitarian Michael Servetus were put to death by the city government.

The early history of Salem, Massachusetts, was clouded by religious intolerance and the witchcraft trials of 1692, in which 30 persons, most of them women, were condemned; 19 of these were hanged.

116. Note, for example, the question begging of the jury instructions given in *United States v. Bush*, as reported by the Seventh Circuit on appeal:

> A scheme to deprive the citizens of a municipality of the honest and loyal services of a public official comes within the meaning of the term "scheme or artifice to defraud" as that term is used in the mail fraud statute. Similarly, a scheme to deprive public officials of information material to a decision which they are required to make in their official capacity also comes within the meaning of a "scheme or artifice to defraud" as used in the mail fraud statute.

United States v. Bush, 522 F.2d 641, 651 n.10 (1975), *cert. denied*, 424 U.S. 977 (1976).

117. We are not so sanguine as to think that in a footnote we shall in any way remove the ambiguity about causation. Surely, since Hume's publica-

factor in the way the scheme is carried out, and not just *incidental* to effecting the fraud. This construction is more consonant with the requirement that the mailing must be "in furtherance of" the fraudulent scheme.[118]

Furthermore, the ordinary meaning of "causing a mailing" should be revived. The defendant should actually have instigated the mailing, either by inducing the victim, or by instructing another, to mail an item furthering the scheme. Otherwise, federal jurisdiction under the rationale that the fraud is *mail* fraud seems farfetched—a procrustean bed.[119]

These proposed limitations, however, will fail to eliminate much of the abuse in the excessive sweep of the statute as it is now applied if public officials and private employees who re-

---

tion of AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (1748), philosophers have made clear only the insuperable unclarity of the notion of causation. However, I suggest as a rule of thumb way of restricting the too-broad meaning that courts have given to "knowingly causing the use of the mails," the so-called "but for" meaning of causality.

HART & HONORE, CAUSATION IN THE LAW 103-22 (1959), contrary to the fundamental point of view inaugurated by Hume, are willing to speak of the causal conditions of any change as those which were in some sense necessary for its occurrence, or *conditiones sine quibus non.* In other words, these conditions were such that, had any of them not occurred, the change in question would not have occurred. Thus, the mailing must have been absolutely indispensable to bring about the "scheme to defraud" as it was engaged in by the defendant, according to our proposal.

118. Even in the tort law's most expansive construction of the meaning of proximate cause, not every antecedent is deemed the cause of every consequent. So *per* Judge Andrews in his dissent in Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 352-53, 162 N.E. 99, 103-04 (1928):

> What we . . . mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning hay stack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source.

But if there must be such limits to what will be deemed a legal cause in tort law, *a fortiori*, the *criminal* mail-fraud statute should have even greater limitations imposed upon it. How strained to say that a defendant "caused a mailing" when he did no more than foresee that a mailing might take place as a result of his conduct.

119. According to such an expansive construction, a defendant has caused a mailing in furtherance of his scheme to defraud provided that he should have been aware that a mailing might occur when it did, and this mailing is not in opposition to the success of the scheme. No philosophical niceties are needed to know that "incidental to" does not ordinarily mean "in furtherance of" and "collateral to" does not mean "caused by."

ceive secret profits or kickbacks are automatically deemed to have defrauded their employers by the same amount. As explained above, the recipient of a kickback is adjudged unjustly enriched because it is inferred that the person who paid the kickback must have been willing to make a contract more detrimental to himself, at least to the extent of the kickback. Thus, even under the formula of tangible fraud, employees can be convicted merely of depriving their employers of a *better* bargain.

An employee who has an undisclosed interest in a company with which he deals as the agent for his employer, even if he lies in a conflict of interest statement, should not be subject to conviction under section 1341, provided the agreement that he strikes on behalf of his employer is a fair one, *i.e.*, within the range of the going rate. Indeed, the direct basis for this secret profit by the employee in such a case is his *independent* interest in the other company. The employee may have signed a conflict of interest statement that either blanketly prohibited his dealing with any company in which he had an interest, or at least required that he divulge such an interest and receive approval from a superior. Surely, because of the employee's pursuit of his own economic interests, he may in fact have entered into an agreement with one firm that is not as favorable to his employer as another that he might have entered into with the same firm or another. But these acts in themselves, while disloyal to the employer, would not justify a mail-fraud conviction.

A case in which an employee has received kickbacks is a more difficult one, since he has no independent claim to such profit and has at least betrayed if not defrauded his employer. Nevertheless, if the bargain that the employee has struck as the agent of his employer is a fair one, *i.e.*, within the going rate, then the employee should not be subject to conviction under section 1341. Perhaps it is true that payment of the kickbacks indicates that the contract in question could have been more advantageous to the agent's employer, at least to the extent of the kickbacks. But it may also be true that the party paying the kickbacks viewed them as a way of keeping the account, and therefore as a reduction of that party's own profit, but would not have been willing simply to pass on the discount in the form of a reduced price for the other party to the contract. In any case, the proposition of this article permits the concession that the fact of the kickbacks indicates that a better contract could have been reached than the one the agent negotiated. Indeed, this proposal constitutes a radical departure from the way criminal fraud has been viewed within the common law.[120]

120. It is a maxim of Anglo-American contract law that courts will not

In the cases discussed above, whether involving tangible or fiduciary fraud, the deprivation to the victims was deprivation of their *commercial autonomy*. That is, because of the deception, the victim was unaware of a material factor in a business transaction, and accordingly was deprived of his right not to be kept in the dark by a person who had a duty to disclose the information. At least, the victim was deprived of his right not to be misled by those with whom he deals. Accordingly, his agent's garnering of secret profits such as kickbacks defrauds the victim of the best price he could have obtained in the market place. The proof that he was defrauded is found simply in the unjustified lack of awareness of a material fact.[121]

To be sure, it is fundamental agency law that an agent must devote himself exclusively and zealously to the interests of his principal.[122] Accordingly, lack of effort or other negligence on the part of the agent is in obvious derogation of his agency, and may result in his agreement to a contract that is far from optimal. Also, an agent may be timid or simply ineffectual and therefore fail to strike the best possible bargain for the principal. In fact, an agent may be so distracted or exhausted by projects of his own that he fails his principal by missing opportunities for better bargains than those struck. Wisely, the criminal law does not reach such an agent whose fulfillment of his agency duties is deficient, although the law does permit civil redress to the principal.

Likewise, when an employer discovers that his employee has pursued his own interests in ways that may very well interfere with the employer's best interests, the latter's grief may be acute, especially when the employee has been especially prized for his expertise and the employer has come to depend on him. Past transactions that seemed good at the time are now vitiated by the employer's suspicion that they could have been even better, and that his employee was taking advantage of him. Still, even though the employee who receives secret profits more consciously and deliberately compromises his loyalty to his em-

---

question the adequacy of consideration, thus obviating the court's need to make a judgment about the substantial fairness of a deal. Accordingly, the fairness of transactions is preserved only *indirectly* by punishing, as crimes, modes of deception by an interested party to a transaction that interfere with the commercial autonomy of the other party.

Implicit in such an analysis of what constitutes commercial autonomy is a philosophy of contract law, *i.e.*, commercial autonomy is preserved so long as the contracting parties *know* the facts material to the contract notwithstanding their uneven bargaining power. *See* G. FLETCHER, RETHINKING CRIMINAL LAW 50-57 (1978).

121. *See* note 120 *supra*.

122. RESTATEMENT (SECOND) OF AGENCY § 13 (1957).

ployer than do employees in the other circumstances noted, the result is the same in all those cases in which the agent struck a good bargain but not the best one possible. The employee who, because of his moonlighting, is not as alert as he would otherwise be during working hours for his regular employer and therefore deprives him of better bargains than those struck, should not be punished as a criminal. So also, the employee who does a good job for his employer, but not the best job that he could since he accepts secret profits, should not be subject to *criminal* sanctions under section 1341.

If commercial autonomy is abandoned as the test for "a scheme to defraud" under section 1341, the trier of fact need not decide whether a party to a contract who was guilty of concealing, misrepresenting, or failing to reveal something was thereby guilty of a material misrepresentation, *i.e.*, "fraud in the inducement." Thus, according to the proposal of this article, so long as the other party to the agreement receives value such as the going rate, the former party does not violate section 1341.

Accordingly, conviction under section 1341 would be restricted to those commonly known as swindlers and con men—to those who seek to profiteer by getting something for nothing. The intent to defraud in such cases is transparent; the transaction is so patently unfair that the trier of fact would conclude there was indeed theft by deception.[123]

123. As stated in note 53 *supra*, the Second Circuit in United States v. Regent Office Supply Co., 421 F.2d 1174, 1179-82 (2d Cir. 1970) and in United States v. Dixon, 536 F.2d 1388, 1400 (2d Cir. 1976), has rejected Judge Learned Hand's dictum in United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932), that "false representations, in the context of a commercial transaction, are *per se* fraudulent despite the absence of any proof of actual injury to any customer." United States v. Regent Office Supply Co., 421 F.2d 1174, 1181 (2d Cir. 1970). Furthermore, even though Judge Friendly, speaking for the court in *Dixon*, found it appropriate to convict a person under § 1341 for *political* corruption, he refused to rule whether a much clearer indication of actual monetary loss is required to convict someone in the *private* sector. United States v. Dixon, 536 F.2d 1388, 1401 (2d Cir. 1976).

In dicta, the *Regent Office Supply Co.* court went even further in rejecting the use of § 1341 in either the public or private sector, unless there is a clear indication that someone has indisputably suffered an economic loss because of the other party's deceptive practices:

> If there is no proof that the defendants expected to get "something for nothing," Harrison v. United States, 200 F. 662, 666 (6th Cir. 1912) or that they intended to get more for their merchandise than it was worth to the average customer, it is difficult to see any intent to injure or to defraud in the defendants' falsehoods.

421 F.2d at 1181.

George Fletcher, in his monumental study, RETHINKING CRIMINAL LAW 50-57 (1978), provides us with a theoretical framework for evaluating when fraud in the inducement should be deemed *criminal* fraud. He notes that German criminal fraud is narrower in scope than its Anglo-American analogue. The reason for this, according to Fletcher, is that German criminal

This proposal to abandon the rubric of commercial autonomy applies only to the mail-fraud statute. The right of a contracting party to seek rescission for any material misrepresentation by the other party is not affected by this proposal, nor is any other aspect of contract or quasi-contract law. For violations of fiduciary duty, for example, an employer remains free to fire, demote, or even blackball the offending employee. If the employee received kickbacks, the employer may still sue for restitution, petitioning the chancellor to impress a constructive trust on the employee's proceeds.

Undoubtedly, it is proper to prosecute public officials who have violated the public trust in various ways, for example, by accepting bribes. But then those officials should be prosecuted under statutes that clearly delineate the violations. The charge of mail fraud should not be added to the ammunition against such officials. Contrary to Chief Justice Burger's suggestion, if there are lacunae within the criminal law, section 1341 should not be used as a stopgap. Instead, Congress should draft laws that specify the abuses to be eradicated. Only in this way can the competing objectives of punishing political and commercial corruption yet respecting due process rights be achieved.

---

fraud requires interference with the victim's "net wealth," whereas the common law protects commercial autonomy as an end in itself. Accordingly, in a case in which the defendant misrepresented synthetic goods as "pure wool," but nonetheless gave the buyer his money's worth, the German Supreme Court held that there was no offense. *Id.* at 55.

The "net wealth" analysis would obviate the strained reasoning of some courts in finding that an employer has suffered an economic loss as a result of the employee's profit. Notwithstanding any speculation that the kickback received by the employee indicates that the contract could have been discounted to the extent of the kickback, if the contract displays the indicia of an arm's length transaction, fair in every way, then the alleged scheme to defraud cannot be sustained. Using the "net wealth" rubric, then, if a transaction is fair in giving the employer good value, although a better contract might have been struck *but for* the secret profit of the employee, then the charge of *criminal* fraud will fail.

The common law analysis has the advantage of not requiring a substantive judgment about whether the victim received value for his money. But the fair market price of goods is often determined by common law courts in other contexts (*e.g.*, in civil suits for damages or restitution). Furthermore, the common law rubric of "commercial autonomy" is riddled with the far more unmanageable task of defining criminal fraud in terms of legal rights and duties.