GOOD GOVERNMENT BY PROSECUTORIAL DECREE: THE USE AND ABUSE OF MAIL FRAUD

Gregory Howard Williams*

INTRODUCTION

The mail fraud[1] statute bears the distinction of being one of the oldest federal criminal provisions in continuous use. Initially enacted in 1872,[2] it has been called the the federal government's number-one weapon in the fight against crime.[3] U.S. Attorneys marvel at its ability to cover a wide range of criminal activity,[4] yet others recoil at its broad application.[5] In the past two decades, the statute has been used

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* Professor of Law, University of Iowa College of Law. I am indebted to my colleagues, Professor of Law Robert N. Clinton of the University of Iowa, Professor of Law Ronald J. Allen and Visiting Professor of Law A.T.H. Smith of Northwestern University for their comments on an earlier draft of this article. I also benefitted from the help provided by my research assistants Michael Rabbitt, Steve Rhodes, Sam Spounias, Natalia Williams and, most especially, Kathy Schlueter.

1. 18 U.S.C. § 1341 (1988).

2. The Act of June 8, 1872, ch. 335 & 301, 17 Stat. 323 (repealed 1909), provided in pertinent part:

> That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person . . . by means of the post office establishment . . . such person, so misusing the post office establishment, shall be guilty of a misdemeanor, . . . the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters, . . . into such fraudulent scheme and device.

3. *See* Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980), where the statute is referred to by federal prosecutors as "our Stradivarius, our Colt 45, our Louisville Slugger, [and] our Cuisinart."

4. For example, some of the activities to which the mail fraud statute has been applied include stock fraud, *see* Bobbroff v. United States, 202 F.2d 389 (9th Cir. 1953); land fraud, *see* United States v. McDonald, 576 F.2d 1350 (9th Cir.), *cert. denied sub nom.* Stewart v. United States, 439 U.S. 830, *cert. denied sub nom.* Besbris v. United States, 439 U.S. 927 (1978); bank fraud, *see* United States v. Miller, 676 F.2d 359 (9th Cir.), *cert. denied*, 459 U.S. 856, 866, and *cert. denied sub nom.* Harrington v. United States, 459 U.S. 866 (1982); insurance fraud, *see* United States v. Peters, 732 F.2d 1004 (1st Cir. 1984); commodities fraud, *see* Lonergan v. United States, 88 F.2d 591 (9th Cir.), *rev'd on other grounds*, 303 U.S. 33 (1937); blackmail, *see* Lupipparu v. United States, 5 F.2d 504 (9th Cir. 1925); counterfeiting, *see* Blanton v. United States, 213 F. 320 (8th Cir. 1914); election fraud, *see* United States v. Clapps, 732 F.2d 1148 (3d Cir. 1984); and bribery, *see* United States v. Craig, 573 F.2d 455 (7th Cir. 1977). Rakoff, *supra* note 3, at 772.

5. *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 139-44 (2d Cir. 1982), *cert. den.*, 461 U.S. 913 (1983) (Winter, J., dissenting). "The mail fraud statute is one of several federal statutes whose recent expansion permits the prosecutor to exercise virtually unfettered discretion in defining the kind of misbehavior on which he intends to focus." Coffee,

to convict a number of public officials on the theory that failure to conduct the affairs of their office honestly constituted fraud or a denial of "good government" due the general public.[6] Critics have been largely unsuccessful in generating either legislative amendment,[7] lower court reinterpretation,[8] or Department of Justice rules to control such a broad interpretation of the statute.[9] Consequently, recent Supreme Court action in *McNally v. United States*,[10] which limited the scope of the statute, was completely unexpected. In *McNally*, the Court held that the statutory language "scheme to defraud" does not include as a "fraud" deprivation of the so-called right to "good government." By limiting the mail fraud statute's term "scheme to defraud" to frauds depriving one of property rights, the Court required the showing of a more tangible loss rather than the vague and ambiguous "good government" standard of conduct.

Following *McNally*, the Supreme Court decided *Carpenter v. United States*.[11] That case, while affirming lower court mail fraud convictions, reinforced the view that the mail fraud statute was much more narrow than previously believed.[12] *McNally* and *Carpenter* signaled a new approach which required prosecutors to analyze more carefully mail fraud prosecutions and determine if they fit within the statute's narrowed framework. This heightened review of mail fraud prosecutions ended in late 1988 when Congress attempted to overturn the *McNally* decision. With little debate or discussion, an amendment mirroring many of the problems identified by the Court in *McNally* was added to the 1988 election-year Drug Abuse bill. The amendment virtually ensures that lower courts once again will have to address claims that the statute is unduly vague, violates due process, and is subject to abuse by prosecutors.

The Mestastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White Collar Crime, 21 AM. CRIM. L. REV. 19 (1983).

6. *See infra* note 137.

7. In fact, shortly after the U.S. Supreme Court's 1987 decision in McNally v. United States, 483 U.S. 350 (1987), which limited the scope of mail fraud, H.R. 3089, 100th Cong., 1st Sess. (1987), was introduced to include within the definition of fraud for the purpose of federal laws, frauds involving intangible rights, a position directly contradictory to the one taken by the U.S. Supreme Court in *McNally*. A proposal similar to H.R. 3089 became part of the Anti-Drug Abuse Act of 1988. The amendment provided that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Pub. L. No. 100-690, § 7603, 102 Stat. 4818 (1988). Unfortunately, the amendment does not include any definition of "intangible rights" or "honest services," and there was no helpful discussion on the floor or in the committee report on the meaning of the phrase. 134 CONG. REC. 1-111, 251 (daily ed. Oct. 21, 1988). In essence, Congress has, in one fell swoop, established criminal liability for duties and responsibilities that would be difficult to enforce in civil courts. It has left to the discretion of federal prosecutors the power to decide what constitutes good government and criminal business practices.

8. According to Justice Stevens' dissent in *McNally*, 483 U.S. at 376, the tide of court opinion has clearly been against limiting the statute.

9. *See infra* notes 52-53 and accompanying text, on Department of Justice rules concerning enforcement of the mail fraud statute. Recognition of the excessive discretion existing under the mail fraud statute transcends U.S. boundaries. In the case of *Re* Lamar, 2 W.W.R. 471, 477 (1940), the Supreme Court of Alberta refused to extradite Lamar to the United States to answer a federal mail fraud charge. Although the extradition treaty between the United States and Canada included fraud within it's coverage, the court found that "mail fraud" as defined in the United States was not a recognizable offense in Canada.

10. 483 U.S. 350 (1987).

11. 484 U.S. 19 (1987). *See infra* notes 214-20 and accompanying text for discussion.

12. Some writers have argued that the *McNally* and *Carpenter* decisions are inconsistent. *See infra* note 216.

The likelihood of imminent court review is evident by recent expansive use of the statute. For example, the United States Attorney for Northern Illinois relied upon the mail fraud statute in a novel manner to prosecute college athletes and sports agents.[13] The agents and athletes allegedly defrauded several universities by entering into clandestine agreements for future professional contract representation in violation of NCAA (National Collegiate Athletic Association) rules.[14] Although it would be difficult for a university or the NCAA to prevail in a civil suit for damages against either the agents or student-athletes on the grounds there was a breach of an employment contract, the jury had little trouble convicting the defendants. It may be that the jury, like the U.S. Attorney concerned about the practice of sports agents preying on young athletes, saw the need to punish the agents. Yet, an overlooked question is the appropriateness of using the mail fraud statute to curtail practices bearing little resemblance to the statutory language "scheme to defraud." What criminal law theories permit such novel interpretations of the mail fraud statute?

Chief Justice Burger's dissent in *Maze v. United States*[15] provides one widely embraced theory supporting unrestricted use of the statute:

> Section 1341 of Title 18 U.S.C. has traditionally been used against fraudulent activity as a first line of defense. When a "new" fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.[16]

Also, such readiness to expand[17] the statute may be motivated by efforts to punish white-collar criminals, persons whose conduct has often gone unpunished.[18] Yet,

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13. N.Y. Times, Aug. 25, 1988, at 1, col. 3-5.

14. *Id.*

15. 414 U.S. 395, 405 (1974). The majority opinion in *Maze* upheld the reversal of a lower court conviction for mail fraud in a situation where the defendant stole a credit card from a friend and travelled across country. According to the government, the defendant took advantage of the delayed detection caused by the merchants' use of the mails. The government argued that each merchant from whom Maze purchased goods would send the sales slips through the mail, thereby causing a use of the mails sufficient to violate the mail fraud statute. The Supreme Court indicated that the use of the mail fraud statute in this case was inappropriate. *Id.* at 400, *citing* Kann v. United States, 323 U.S. 88 (1944). In spite of the majority decision in *Maze*, Chief Justice Burger's dissent did establish a theory for the usage of the mail fraud statute on which there has been considerable reliance. Even the majority opinion failed to hold that the mail fraud statute had been displaced by 15 U.S.C. § 1644 which made the use of a fraudulently obtained credit card in a "transaction affecting interstate or foreign commerce" a criminal offense.

16. *Maze*, 414 U.S. at 405-06. Furthermore, even when particularized legislation is enacted, "[t]he mail fraud statute continues to remain an important tool in prosecuting frauds." *Id.* at 406. "Despite the pervasive Government regulation of the drug industry, postal fraud statutes still play an important role in controlling the solicitation of mail-order purchases by drug distributors based upon fraudulent misrepresentations . . . ." *Id.* at 406-07.

17. One recent example of its expansion is found in United States v. Mueller, 786 F.2d 293 (7th Cir. 1986), holding that the United States had criminal jurisdiction in a case when the actual fraud was on a German Bank. The court found no actual fraud in the United States. Mueller transferred the illegally obtained funds to his American account which, in the view of the court, created federal criminal jurisdiction.

18. Apparently courts view laws detracting from the prosecution of white- collar criminals with hostility and suspicion. Justice Stevens, dissenting in *McNally*, expressed his "lingering questions about why a Court that has not been particularly receptive to the rights of criminal defendants in recent years has acted so dramatically to protect the elite class of powerful

while it is appropriate to prosecute and punish white- collar criminals, there is an equally compelling argument that criminal defendants be charged and convicted under carefully drafted statutes that clearly establish the range of conduct covered.

As courts prepare to address the growing dispute over the scope of the recently amended mail fraud statute, it is important to develop an understanding of the breadth of discretion under that statute and the problems it presents. It is also important to analyze what the Court did in *McNally* and how it might respond to the newly amended statute. The remainder of this article addresses these issues.

CHARGING DISCRETION

After the Civil War, there was widespread concern that use of the U.S. mails facilitated a variety of inappropriate activities. To control the mailing of obscene materials the Post Office Department received limited congressional authorization to exclude such items from the mails.[19] In 1866 Congress had before it another, more broadly based bill addressing the problem of "the perversion of the mails to fraudulent and illegal purposes."[20] There was no action on that bill, but interest grew in dealing with the many frauds and swindles occurring across the country conducted via the U.S. mails. Chief among those frauds were lottery and gift schemes which caused Congress in 1868 to enact legislation providing "[t]hat it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."[21] Enforcement problems arose due to the vagueness of the statute, and the Postmaster General sought guidance on applying the law. The Attorney General determined that the Postmaster General had broad discretion "to protect the public from fraud," but should only act when he was certain of unlawful conduct.[22] In exasperation, the Postmaster General wrote the Attorney General in 1868, stating that he could not possibly determine what was truly unlawful conduct.[23] Finally, in 1870, a Post Office Committee Report urged "(C)ongress . . . to go to the extreme limit of its power to prevent . . . frauds . . . which . . . could not successfully be carr[ied] on except by using mail facilities."[24] Consequently, Representative Farnsworth introduced one of the first mail fraud bills. He referred to the problem as "frauds

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individuals who will benefit from this decision." *McNally*, 483 U.S. at 377. Rather than argue that the Court is not equalizing its treatment of criminal defendants, one might respond that the *McNally* decision is simply a recognition of the limits of the mail fraud statute, one of the most selectively enforced statutes in the history of the federal criminal law. If Justice Stevens' comments are motivated by a view that white-collar criminals receive more lenient treatment from his brethren in the lower courts, he may be wrong with respect to mail fraud. The conviction rate for mail fraud is similar to that for criminal offenses generally, averaging almost 88 per cent for the 1980's. *See infra* note 39. If there is disparity in treatment it appears to be not in conviction, but in sentencing. Attempts to limit judicial discretion in sentencing have met with considerable resistance from the lower federal courts, yet the Court has upheld federal sentencing guidelines that may serve to reduce serious problems of sentence disparity. United States v. Mistretta, 109 S. Ct. 647, 102 L. Ed. 714 (1989).

19. D. FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE 56 (1977). Although the Postmaster General had previously banned obscene materials on his own personal initiative, legislation passed in 1865 also excluded it from the mails.

20. *Id.* at 57.

21. An Act to further amend the postal Laws, 15 Stat. 196 (1868).

22. D. FOWLER, *supra* note 19, at 58.

23. *Id.*

24. Brief for Petitioner at 25-26, Fasulo v. United States, 272 U.S. 620 (1962) (quoting the Report of the Committee on Post Office Officials 19-20 (Mar. 30, 1870)).

which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."[25] Two years later Congress followed the Post Office Committee's suggestion and enacted the mail fraud statute[26] to deal with these pervasive scandals.[27]

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25. H.R. No. 2295, CONG. GLOBE, 41st Cong., 3d Sess. 35 (1871) *See also* Note, *Intracorporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427 (1985) ("Mail/wire fraud law has evolved from its origins as an antidote to 'lottery swindles.'").

26. Act of June 8, 1872, ch. 335 ,§ 149, 17 Stat. 302 (repealed 1909). Congress later amended the statute to also cover counterfeit money schemes. Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873. From the initial committee report the question arises as to whether the principal focus of the statute was to protect the integrity of the United States mail system, or to expand the ability of the federal government to control criminal conduct. *See* Rakoff, *supra* note 3, at 783-86. Action to protect the mails is appropriate, as the federal government has responsibility for the mails. If the objective of the statute is to provide a vehicle to control frauds generally, however, then one could argue that the statute takes federal law enforcement authorities beyond the scope of their constitutional authority, particularly in providing a vehicle for federal intervention in cases of nominal federal interest. Unfortunately, there is no easy answer to this question. Rakoff characterizes the mail fraud statute format as "idiosyncratic." *Id.* at 777. While courts direct attention to the use of the mails, not the type of fraud perpetrated, the overriding concern of "those who commit mail fraud, those who legislate against it, those who prosecute it, and those who judge it, is the fraud and not the mailing." *Id.* at 778. Thus, while the desire is to expand the scope of criminal jurisdiction, the legal fiction that "mailing is the 'gist' of the crime" leads to some "unusual practical consequences." *Id.*

27. Part of the rationale behind passage of the Act seems to be that state and local police departments were in a pre-modern period and ill-equipped to deal with the frauds perpetrated on an unsuspecting public. Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, 47 LAW & CONTEMP. PROBS. 123, 130-32 (1984). Of course, the federal law enforcement effort was not substantially developed either, as the present major federal investigative body, the Federal Bureau of Investigation (FBI), did not form until 1908. *See* N. ABRAMS, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 6 (1986). However, the major responsibility for enforcing the mail fraud statute remained with the Postal Inspection Service, one of the nation's oldest federal law enforcement agencies in operation since 1836. Although special postal agents existed in 1801, it was not until a post office reorganization during the Jackson administration that an inspector's office was established. D. FOWLER, *supra* note 19, at 17, 25.

In addition to the lack of adequate machinery to deal with frauds, another important reason for state inaction in the late 1800's was the minimal effect of fraudulent schemes in specific local communities. Those engaged in fraudulent schemes were constantly moving across state lines, and the fraudulent activity was often so negligible in one state that it discouraged the considerable effort required for civil or criminal redress in the courts. Rakoff, *supra* note 3, at 797-98, describes some of the reasons for the reluctance to prosecute under state law. For example, in the "sawdust swindle" the schemer would pretend to have counterfeit money for sale, the victim would pay in advance, and the goods would never arrive. The schemer knew the victim would not report the fraud because the victim's own criminal intent was exposed. *See also* J. THOMAS, LOTTERIES, FRAUD AND OBSCENITY IN THE MAILS 237-39 (1900), describing several schemes, including one where the schemer offered to send a steel engraving of General Washington for a small sum of money sent in advance, and the schemer sent back a postage stamp with Washington's engraving on it. The small amount of cash lost discouraged victims from going to the expense of seeking legal redress. Federal involvement permitted a much more comprehensive approach. Since each mailing was a separate scheme to defraud, it was simple to compile numerous violations of the statute and provide a more complete perspective on the nature of the fraudulent scheme. For example, under the statute, use of the mails to entice a victim and the victim's response combined for two counts of mail fraud. Rakoff, *supra* note 3, at 784 n.61. The Supreme Court reversed this interpretation of the statute in the case of *In re* Henry, 123 U.S. 372 (1887). The Court found this provision to be a matter of permissive joinder. The consequence of the Court's decision was that a defendant could be prosecuted and sentenced on any number of mail fraud counts from any number of schemes during a period of time as long as there were no more than three counts joined in any given indictment.

The mail fraud statute has had an important and useful role in prosecuting business and commercial fraud and, when limited to that role, has served its purpose well. Problems arise when prosecutors attempt to use the statute to control conduct outside traditional notions of fraud. The Supreme Court first addressed this issue in *Fasulo v. United States*.[28] In a discussion strikingly similar to the one in *McNally* over sixty years later,[29] the *Fasulo* Court refused to extend the statute to cover extortion in spite of a strong plea from the Justice Department that "[i]t is incredible that Congress has intended all these years to prohibit the use of the mails to defraud by trick or false pretenses but to leave the mails open to use by blackmailers or extortionists."[30]

Writing for the majority in *Fasulo*, Justice Butler sought to discover the "evils that called forth the enactment"[31] of the statute. While recognizing that the Court in the landmark case of *Durland v. United States*[32] gave a very broad interpretation to the statutory phrase "scheme or artifice to defraud," the *Fasulo* Court made it clear the statute did not punish threats and coercion.[33] According to the Court, punishment was appropriate only when a person's conduct was "plainly within the statute."[34] Ironically, today we are once again, even after the *McNally* decision, concerned with determining what conduct is prohibited by the statute.

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28. 272 U.S. 620 (1926).

29. *McNally*, 483 U.S. at 359.

30. 272 U.S. at 625. The Justice Department even offered a reliance theory, arguing that "Congress has acquiesced in [such] construction of the law. Its failure to pass bills introduced to prohibit the use of the mails for 'blackhand' letters has no doubt been due to the belief that the subject was covered by existing statutes as construed by the courts." *Id.* While agreeing that "obtaining . . . money by threats to injure or kill is more reprehensible than cheat[ing], trick[ery] or [acting under] false pretenses," *id.* at 628, it was nonetheless insufficient to expand the scope of the statute.

31. *Id.* at 628. While that approach did "not require the words to be so narrowed as to exclude cases that fairly may be said to be covered by them, it [did] not [permit] . . . the court to search for an intention that the words themselves [did] not suggest." *Id.* at 628, *citing* United States v. Wiltberger, 18 U.S. (5 Wheat. 35, 43) 76, 95 (1820).

32. 161 U.S. 306 (1896). Durland was involved in a scheme to sell bonds. The bonds promised to pay a redemption price in excess of the purchase price, in some cases 50 percent more. At no time did Durland intend to pay the redemption price of the bonds. Rather, Durland intended to keep the money supposedly used for buying bonds for himself.

The Court found that Durland's promises as to future performances constituted a violation of the mail fraud statute. The Court made no distinction between materially misrepresenting existing facts and misrepresenting future facts. The Court viewed the legislative purpose as affecting any scheme to defraud. The *Durland* Court held that the mail fraud statute extended beyond the common law which in the Court's view covered only misrepresentations as to present or past facts as a basis for charging fraud.

33. The appellate court, in affirming Fasulo's conviction, had attempted to determine the meaning of "defraud" solely by "a search of the dictionaries . . . and selected the broadest definition given and then applied it in a broader sense than that intended by the dictionary." Brief for Petitioner at 44, *Fasulo*, 272 U.S. at 620. The Supreme Court rejected that approach and concluded:

> If any definition of a dictionary or the misuse of a word may be resorted to in construing a statute, then the ascertainment of what was in the mind of the legislature is not the paramount rule of construction, nor then is our boast that our laws are statutory, founded in fact, nor then is it true that promulgation is one of the first essentials of a law, for such a law would have no more promulgation than had those certain laws which Caligula caused to be written in very small characters then posted high on the pillars of public buildings.

Id. at 47.

34. 272 U.S. at 629.

Several federal agencies have the authority to enforce the mail fraud statute,[35] yet it is most frequently a tool of the Postal Service and the FBI. Mail fraud investigations by the Postal Service follow a general pattern. First, after receiving a complaint about a mailing, the agency decides whether the mailing is "merely confusing"[36] or in violation of the statute. If the mailing is found to fall within the statute, the investigation focuses on whether or not the "use of the mails is an intentional part of a scheme to defraud."[37] If the investigation results in evidence that the use of the mails was intentional, the case is referred to the appropriate U.S. Attorney.[38]

A review of available data[39] on mail fraud offenses shows mail fraud charges are a significant part of the federal government's criminal case load. For example, in September of 1985, mail and wire fraud charges constituted the fourth highest number of criminal cases pending in the federal courts.[40] In fact, the ranking in some years may be even higher as the second largest number of cases pending was just over one-half of a percentage point higher than mail and wire fraud charges.[41] Yet mail fraud investigations during the past two decades have occurred in no more than six percent of the complaints brought to the attention of the U.S. Postal Service. Arrests likewise have been historically low. For example, during the 1960's arrests for mail fraud averaged around 8 per cent of the investigations completed. During the 1970's, that increased to an average of 25 per cent of the investigations completed. With relatively incomplete data for the 1980's, figures show that investigations result in only 1.3 per cent of the complaints made, yet 46 per cent of the investigations result in arrest.[42] Thus, an 80 per cent rate of conviction results in a .0047840[43] probability of an investigation occurring which results in arrest and conviction for mail fraud.[44]

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35. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-43.110 (1983 reprint) [hereinafter ATTORNEYS' MANUAL]; D. TORRES, HANDBOOK OF FEDERAL POLICE AND INVESTIGATIVE AGENCIES 329-30 (1985).

36. *Deceptive Mailings Prevention Act of* 1987: *Hearings on H.R.* 939 *and H.R.* 1550, 100th Cong., 1st Sess. 44-45 (1987).

37. *Id.*

38. *Id.* at 45.

39. The following statistics are based primarily on the period from 1960-1985 found in NAT'L CRIMINAL JUSTICE INFORMATION & STATISTICS SERV., U.S. DEP'T OF JUSTICE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1986) [hereinafter SOURCEBOOK].

40. U.S. DEP'T OF JUSTICE, 1985 UNITED STATES ATTORNEYS' FISCAL YEAR STATISTICAL REPORT 15.

41. *Id.*

42. SOURCEBOOK, *supra* note 39, at 367, Table 5.28.

43. The probability of investigation is determined by dividing the total number of investigations completed by the total number of complaints received for the years 1970-1984. The probability of arrest is determined by dividing the total number of arrests by the total number of investigations completed for the years 1970-1984. The probability of conviction is determined by dividing the total number of convictions by the total number of arrests for the years 1970-1984. For the total number of complaints, investigations, and convictions, see SOURCEBOOK, *supra* note 39, at 367, Table 5.28. To obtain the probability of a case proceeding through the various stages it becomes necessary to multiply the individual probabilities at each stage. The product is the overall probability of a case going through the four stages listed.

44. Because mail fraud violations constitute a significant percentage of the offenses in claims of public corruption, it might be appropriate to compare those figures to data available on federal, state, and local officials charged with violating federal statutes designed to protect public integrity. There is also approximately an 80 per cent chance of conviction if indicted under a public integrity statute. SOURCEBOOK, *supra* note 39, at 371, Table 5.35. The probability of conviction depends upon the category of public official. For example, 86 per cent of indicted federal officials are convicted. State officials, on the other hand, have a 73 per cent chance of

The selective enforcement aspect of mail fraud becomes even more pronounced when it is realized that federal law enforcement officials are apparently selecting a small number of persons for prosecution from among a relatively large group of potential offenders. They are constantly defining and redefining the meaning of fraud as they choose offenders. Clearly, prosecutors must exercise some discretion in the selection of cases. In fact, Kenneth Culp Davis, one of the foremost experts on discretion, estimates that the appropriate norm would be for officials to select 40 to 60 percent of potential cases for prosecution.[45] When only 1.3 per cent of complaints are investigated, however, it is clear that discretion in the mail and wire fraud area far excceds that norm. One can honestly wonder whether the open-ended meaning of the phrase "scheme to defraud" allows personal and political judgments to influence charging decisions.

The selection process in *McNally* itself may have had some impact on the ultimate decision of the Court in that case. In *McNally*, three persons, a private individual (McNally), a former Kentucky state official, and the Chairman of the State Democratic Party, were charged with violating the mail fraud statute. Federal prosecutors claimed the three improperly shared commissions through a patronage scheme of selecting insurance agencies from which the state would purchase its workmen's compensation policies, and the insurance agent would share its commissions. There was no showing that the Commonwealth of Kentucky was defrauded of any money or property. Nor was it charged that, in the absence of such a scheme, the Commonwealth of Kentucky would have paid a lower premium or secured better insurance, nor that the defendants violated any civil or criminal law of the Commonwealth of Kentucky. While the conduct may have been reprehensible, the lack of state statutes or political norms circumscribing this conduct raises the question as to whether it is appropriate to charge an ambiguous violation of mail fraud in such a circumstance.[46]

Although little information about non-Postal Service usage of the mail fraud statute is available, it appears to be used primarily in cases involving public corruption. Mail and wire fraud charges arise in no less than 40 per cent of such cases.[47] That selection process is drawn into question when it is discovered that

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conviction if indicted, and local officials have a 76 per cent chance of conviction. Due to the absence of data regarding pre-indictment investigations, the probability of being indicted after an investigation cannot be computed. Nonetheless, some comparisons can be made. The Department of Justice acknowledges an increased focus on abuse of public office at the federal level in recent years. SOURCEBOOK, *supra* note 39, at 371, Table 5.35.

The result of this increased attention would be a higher level of indictments and, by implication, a high ratio of indictments to investigations undertaken. It would be plausible to assume this concern with public integrity exists at the state and local levels, resulting in high indictment to investigation ratios for those categories as well. While it is plausible that the various categories of public officials would share similar risk of arrest, there still remains the difference in probability of conviction. One reason for the different figures might be the availability of evidence. The federal government may, due to easier access to federal records, be able to uncover more and stronger evidence of wrongdoing. This increase in evidence may result in a stronger case for the prosecution and, subsequently, a higher number of convictions.

45. K. DAVIS, POLICE DISCRETION 155 (1975).

46. *See* Brief for Petitioner Gray at 35-36, *McNally*, 483 U.S. 350.

47. Coyle, *U.S. Prosecutors Reel in Wake of Mail Fraud Ruling*, NAT'L L.J., July 20, 1987, at 1, 36. One problem is that it appears the mail fraud charges buttress an investigation which has turned up minimal evidence of violations of other more particularized statutes. Often there will be several counts of mail fraud charged, which raises questions about stacking of penalties. Stacking of penalties is not uncommon, but it has long been frowned upon by criminal law scholars. Almost thirty years ago, Professor Goldstein, speaking in the

federal law enforcement officials have disproportionately targeted state and local officials for abusing public office. During the 1970's, the number of state and local officials indicted for abuse of public office was almost twice that of federal officials.[48] Even during the 1980's, when there was a greater focus on federal corruption, indictments of state and local officials for abuse of public office still accounted for the largest proportion of cases brought by United States Attorney General's offices.[49] Mail and wire fraud appear to be the crime most often selected to be charged. In 1981, 34 percent of the state officials prosecuted for public corruption were charged with mail fraud and 45 percent of the local officials prosecuted had a mail fraud charge levelled against them.[50] Furthermore, there is little uniformity in the selection of cases across the country. Some areas are the venue of many cases, while others see few. For example, in the early 1980's federal prosecutors indicted approximately 200 county officials in Oklahoma as the result of investigations into corrupt practices by Oklahoma County Commissioners.[51]

Lack of a uniform approach is largely the result of the general policy of the Justice Department's Public Integrity Section automatically to approve public-corruption prosecutions against low-level government officials. The only guid-

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context of a conspiracy to defraud under 18 U.S.C. § 371, argued that the usage of the "defraud language" to reach fraud falling outside the ordinary meaning of fraud is inappropriate when more specific offenses exist. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

"It seems unreasonable to assume that Congress regularly intends to pile one penalty upon another for substantially similar conduct." *Id.* at 450. Goldstein specifically suggested the need to narrow the scope of "conspiracy to defraud" language, so that when an income tax evasion statute is enacted, conspiracy to defraud would be inapplicable. This point is directly applicable to mail fraud cases, especially when more specific statutory prohibitions exist.

The SEC acts passed in 1933 and 1934 contained provisions to control fraudulent activities with regard to the use of securities, yet in 1974 Justice Brennan hailed the use of the mail fraud statute in securities violation cases. The "particularized legislation" mentioned by Burger in *Maze* only rarely supplants the more general "bad person" mail fraud statute. *See supra* note 16. Instead, both are used in conjunction to compound charges whenever a prosecutor feels that the accused deserves it. United States v. Henderson, 386 F. Supp. 1048, 1054 (S.D.N.Y. 1974), expressed concerns about multiple sentences "reaching staggering, if not utterly unrealistic, years of imprisonment." The court found that the mail fraud counts were "impermissibly used . . . to increase penalties . . . ." *Id.* at 1054. Several circuits have rejected *Henderson*.

Stacking of penalties may also violate double jeopardy provisions, especially when Congress has provided a "particularized" statute and when the definition of fraud under the mail fraud statute seems to encompass whatever particular act is the subject of prosecution at the time. If the mail fraud statute is used to charge a violation of what is now covered under the 1974 Credit Card Fraud statute 15 U.S.C. § 1644 and both statutes are applied to the same behavior, it would appear that both statutes are punishing the same conduct. Even if the Blockburger v. United States, 284 U.S. 299 (1932), test is applied and both statutes are found applicable as they require different elements of proof, it is still arguable that the creation of Section 1644 should exclude the use of Section 1344 because Section 1344 was originally used to prohibit behavior not yet covered by other statutes. *But see* United States v. Computer Science Corp., 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), where the court held that the double jeopardy clause was not violated. Even if the new statute is not used, one could argue the definition of fraud should be controlled by the definition of fraud in the new statute.

48. SOURCEBOOK, *supra* note 39, at 371, Table 5.35.

49. *Id.*

50. U.S. DEPT. OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 1981, 26-27 (April, 1982)

51. East, *Ex-Commissioner Freed*, Tulsa Trib., Jan. 30, 1988, at 1A, col. 1. *See also* United States v. Shelton, 736 F.2d 1397, 1399 (10th Cir.), *cert. denied*, 469 U.S. 857 (1984).

ance for U.S. Attorneys in the selection of mail and wire fraud charges is found in the *United States Attorney's Manual*.[52] The *Manual* directs a filing of a mail fraud charge "if the scheme is in its nature directed to defrauding . . . the general public, through the mails with a substantial pattern of conduct."[53] In the political corruption arena, this statement establishes virtually no guidance for prosecutors.[54] Thus, U.S. Attorneys or their assistants decide largely on their own what improper practices warrant federal prosecution.

This woeful lack of direction is even starker when compared to other efforts to limit the scope of federal criminal statutes. For example, the RICO Prosecutorial Guidelines provide much more comprehensive guidance.[55] The preface to the RICO guidelines states that the decision to prosecute is based on several basic principles. First, in spite of the broad and all inclusive language of the RICO statute, "it is the policy of the Criminal Division that RICO be selectively and uniformly used."[56] Second, "imaginative prosecutions" which are contrary to the intent of Congress in enacting the statute are improper.[57] For instance, the RICO statute is not to be used to buttress other charges absent some special purpose.

Admittedly, there may be certain factors compelling a more extensive development of RICO Guidelines than those for mail fraud, such as the more ex-

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52. ATTORNEYS' MANUAL, *supra* note 35, § 9-43.120:

> Ordinarily prosecutions should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts. On the other hand, if the scheme is in its nature directed to defrauding a class of persons, or the general public, through the mails, with a substantial pattern of conduct, serious consideration should be given to prosecution.

53. *Id.*

54. There are additional problems with the directions given in the mail fraud prosecutorial guidelines. The Guidelines do *not* define "isolated transaction," "minor loss," "defraud," "through the mails," or, most importantly, "substantial pattern of conduct." The *U.S. Attorneys' Manual* attempts to expound more thoroughly on how the various elements of mail fraud can be proven, yet this merely recites case law and includes several statements of what conduct may or may not constitute mail fraud. The only *policy* statement is the general direction given in Section 9-43.120. Nothing in the Guidelines indicates the purpose of mail fraud — whether it is to protect the integrity of the mails or to attack particular kinds of schemes to defraud. If the latter, the Guidelines do not address what type of schemes to defraud fall within the mail fraud language.

It would seem that in order for a prosecutor to pay heed to not only the letter of the law but also the *spirit* of the law, some statement of purpose should be included in the Guidelines, otherwise substantial problems can occur in deciding the circumstances under which the statute is to be enforced. One example of the type of problem likely to occur can be seen in analyzing a relatively minor state criminal offense, such as under IOWA CODE § 718.6 (1987) on False Reports to Law Enforcement. Violation *could* include giving an officer a fake name, letting him start to write it down, and then stopping him and correcting the lie. Technically, the statute's *letter* has been violated. A magistrate, however, would be unlikely to allow a conviction, as such conduct would not be within the "spirit" of the statute, which is to target those who falsely report crimes, accidents, etc. This "purpose" can often be conveyed orally, but this would seem to be an inefficient, time-consuming, and ill-conceived method to apprise law enforcement officers the purpose of the statute. Thus, mail fraud, especially in light of its widespread usage, should clearly include some prosecutorial objectives in its Guidelines. It would provide notice to one charged with the crime and would enhance society's belief in the validity of the prosecutor's judgment.

55. The following discussion is based on an analysis of RICO Guidelines found in ATTORNEYS' MANUAL, *supra* note 35, § 9-110.200.

56. *Id.*

tensive penalty for violating the RICO statute.[58] Also, RICO prosecutions rely on other specific federal and state crimes for implementation. Yet even statutes providing a lesser penalty upon conviction than RICO have been enforced with greater circumspection and control. For example, in spite of broad statutory power, the *United States Attorney's Manual* limited Mann Act[59] prosecutions to persons engaged in commercial prostitution.[60]

U.S. Attorneys are a highly politicized group and their particular views on government affect charging decisions.[61] Justice Winter's dissenting opinion in *United States v. Margiotta*[62] vividly underscores concern about how the ambiguity of the mail fraud statute affords federal prosecutors broad discretion and the corresponding need to control it.[63] He is profoundly troubled by "the degree of raw political power the free swinging club of mail fraud affords federal prosecutors."[64]

The 1949 prosecution of independent automobile manufacturer Preston Tucker illustrates the potential for political manipulation of the mail fraud statute.[65] Michigan Senator Warren Ferguson, who had received substantial campaign support from the "big three" auto manufacturers in Detroit, made repeated and highly publicized allegations concerning the propriety of Tucker's business transactions.[66] A Securities Exchange Commission prosecutor, allied with Senator Ferguson's faction, secured a grand jury indictment against Tucker and other corporate officers, charging them with mail fraud, conspiracy, and several

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57. *Id.*

58. *See* 18 U.S.C. § 1963 (1988), which provides fines of up to $25,000 and imprisonment of up to twenty years. Mail fraud under 18 U.S.C. § 1341 punishes with a fine of up to $1,000 and imprisonment of up to five years.

59. 18 U.S.C. §§ 2421-2422 (1988).

60. ATTORNEYS' MANUAL, *supra* note 35, § 9-79.100. In November of 1986, the Mann Act itself was amended to focus the statute on transportation for the purpose of prostitution or cases in which sexual activity is involved for which a person can be charged with a criminal offense. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910), 18 U.S.C.A. §§ 2421, 2422 (West 1984), *amended by* Pub. L. 99-268, § 5(b)(1), 100 Stat. 3511 (1986).

61. Coffey, *supra* note 5, at 19, sees "the mail fraud statute (as) one of several federal statute whose recent expansion permits the prosecutor to exercise virtually unfettered discretion in defining the kind of misbehavior upon which he intends to focus." *See also* Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1206 (1977), for discussion on the wide discretion given federal prosecutors. For more general information regarding prosecutors, *see also* Johnson, *The Influence of Politics Upon the Office of the American Prosecutor*, 1 AM. J. CRIM. L. 187, 189-93 (1973); Note, *Prosecutor Indiscretion, A Result of the Political Influence*, 35 IND. L.J. 477 (1959); Ori, *The Politicized Nature of the County Prosecutor's Office, Fact or Fancy? The Case in Indiana*, 60 NOTRE DAME L. REV. 283 (1965). Two candid analyses of prosecutorial bias are treated in Hobbs, *Prosecutor's Bias, An Occupational Disease*, 2 ALA. L. REV. 40 (1949), and Seymour, *Why Prosecutors Act Like Prosecutors*, 11 REC. A.B. CITY N.Y., 302 (1956). The structure and the need for change in prosecutors' offices are examined in Note, *Role of the Prosecutor in Utah*, 5 UTAH L. REV. 70 (1956) and Fairlie & Simpson, *Law Officers in Illinois*, 8 J. MARSHALL. L. REV. 65 (1942).

62. 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

63. *Id.* at 143.

64. *Id.*

65. *See* Flint & Contavespi, *Wrong Villian*, FORBES, Sept. 19, 1988, at 34; C. PEARSON, THE INDOMITABLE TIN GOOSE: THE TRUE STORY OF PRESTON TUCKER AND HIS CAR (1960).

66. Wisely, *Tucker Real Life Saga Not Quite the Same as Film Version*, AUTOMOTIVE NEWS, Nov. 21, 1988, at 24, col. 1.

SEC violations.[67] Though the defendants were ultimately cleared of all charges, the damage to the corporation in the form of weakened investor confidence proved fatal.[68] Preston Tucker's dream of completing with the auto industry giants was crushed.[69]

Similarly, the United States Attorney General's office during the Nixon administration utilized mail fraud charges to prosecute then appellate judge and former Illinois governor Otto Kerner, Jr.[70] Kerner's statehouse victory, propelled by Chicago Mayor Richard Daley's infamous "machine," was pivotal in carrying Illinois for John F. Kennedy, and thus denying Nixon the presidency in 1960.[71] Some nine years later, Nixon administration officials learned of stock transactions within the Illinois racing industry in the early 1960's involving Illinois politicians from both parties, including federal judges.[72] Although thirteen key legislators were known to be involved, only Otto Kerner was prosecuted and subsequently convicted.[73]

Despite the potential for abuse, few federal courts have recognized the need to control prosecutorial discretion in the area of public corruption. One exception is the case of *United States v. Archer*,[74] where Judge Friendly found that the Government's attempt "to set up a federal crime for which . . . defendants were convicted went beyond any proper prosecutorial role . . . ."[75] In what might be a reminder for courts when mail fraud indictments exceed these boundaries, Judge Friendly in *Archer* made it clear that federal courts have the power to dismiss a prosecution "as an abuse of federal power."[76] Still, few federal courts have responded by actually dismissing prosecutions to limit the power of federal prosecutors.[77] Irrespective of the lack of federal court scrutiny, the broad nature of discretion available under the statute reinforces the appropriateness of questions that its usage violates principles of legality and vagueness as well as intrudes on the domain of the states in enforcement of criminal sanctions. It is to those questions we now turn.

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67. *Id.*

68. *Id.*; Krebs, *Remembering A Man and His Dream: Preston Tucker and His Auto*, AUTOMOTIVE NEWS, June 25, 1984, at 4, col. 1.

69. Wisely, *supra* note 66; Krebs, *supra* note 68.

70. *See* H. MESSICK, THE POLITICS OF PROSECUTION: JIM THOMPSON, MARJE EVERETT, RICHARD NIXON AND THE TRIAL OF OTTO KERNER (1978).

71. *Id.* at 2.

72. *Id.* at 63.

73. *Id.* at 216. "The truth about Richard Nixon helps convince many that Kerner was but the innocent victim of a vindictive president." *Id.* at 220.

74. 486 F.2d 670 (2d Cir. 1973).

75. *Id.* at 678.

76. *Id.* at 682, *quoting* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1287 (2d. ed. 1973). Unfortunately, the concern about discretion expressed in *Archer* has not found its way to many other federal criminal cases. In fact, the *Archer* approach was rejected in the context of a mail fraud case in United States v. Anderson, 809 F.2d 1281 (7th Cir. 1987). However, *see* United States v. Shuck, 705 F. Supp. 1177 (N.D.W.Va. 1989), which overturned a perjury conviction based on prosecutorial misconduct.

77. This alternative may become even more desirable and possibly viable in the future as federal courts recognize that their ability to temper over- zealous prosecutors is limited under the new federal sentencing guidelines.

LEGALITY AND VAGUENESS

The principle of legality which forbids punishment without explicit legislative provisions is firmly embedded in our scheme of government.[78] It can be traced to the adoption of Montesquieu's theory of separation of powers. Montesquieu intended a clear division between crime creation and judicial punishment. According to him, "there is no liberty if the judiciary power be not separated from the legislative and executive."[79]

Initially, the principle of legality addressed situations in which courts created new crimes.[80] As there are few recent instances of express judicial crime creation,[81] present-day concern has focused on the abuse of discretion in the enforcement of the criminal law. Herbert Packer captured the essence of the contemporary nature of the legality issue:

> [P]rosecutors operate in a setting of secrecy and informality. Their processes are subjected to public scrutiny in only the most sporadic and cursory way . . . . When judges deviate from the model of openness, evenhandedness, and rationality, it is recognized and deplored as a deviation from their ideal role. But no one expects . . . prosecutors to behave the way a court is supposed to behave; that is simply not their role, and they are not subjected to even the minimal psychological constraints that flow from self-perceived deviation from an acknowledged role.
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> The principle of legality, then is important for the allocation of competencies not between the legislative and judicial branches, but among those who initiate the criminal process through the largely informal methods of investigation, arrest, interrogation, and charge that characterize the operation of criminal justice.[82]

Prosecutorial discretion must be controlled if we are to have a principled system of criminal justice. Allowing federal prosecutors unfettered discretion to expand the meaning of fraud under the mail fraud statute clearly violates the principle of legality. It is the virtual equivalent of permitting prosecutors to shape a statute to punish those whom they have identified as "bad," and is comparable to the principle of "analogy" which exists in some anti-democratic regimes. "Analogy" in that context allows the conviction and imprisonment of a person "[i]f the actions of the accused are perceived to be inimical to the socio-political

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78. P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW: CASES AND MATERIALS 34 (2d ed. 1986).

79. C. MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (T. Nugent, trans. 1949).

80. *See* Shaw v. Director of Public Prosecutions, [1962] A.C. 220, for an example of a case in which the court essentially created a new crime and punished the publication of a directory of prostitutes under the common-law misdemeanor of conspiracy to corrupt public morals.

81. For what have been characterized as two unambiguous examples of judicial crime creation, *see* Commonwealth v. Mochan, 177 Pa. Super. 454, 110 A.2d 788 (1955) (sustaining defendant's conviction on an indictment for "immoral practices and conduct" despite the lack of any precedent or statute defining a criminal offense for making obscene phone calls); Commonwealth v. Donoghue, 250 Ky. 343, 63 S.W.2d 3 (1933) (defendant convicted on a conspiracy indictment in the absence of any statutory or common law offense making it a crime to charge usury); P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 78, at 38.

82. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 89 (1968).

order,"[83] even though there is no evidence of specifically defined criminal conduct. There was widespread and uniform scorn for the Soviet Union's usage of the principle of analogy which continued until 1958, and the even more recent application in China.[84] Apparently, the Chinese used the principle of analogy as "a means of enforcing whatever ideology [was] currently valued."[85] It is clear that expansion of the mail fraud statute to new and novel situations comes dangerously close to adopting the principle of "analogy" with all its negative implications.

Related to the legality concern are problems of vagueness. The Supreme Court's distaste for "vague" statutes is well established, and vagueness in enforcement policy is as serious as vagueness in statutory language.[86] The constitutional dimension of vagueness in enforcement policy was delineated in *Papachristou v. City of Jacksonville*.[87] There a local vagrancy ordinance was found to be constitutionally deficient because it "fail[ed] to give a person of ordinary intelligence fair notice that [the] . . . contemplated conduct [was] forbidden by the statute,"[88] and "it encourage[d] arbitrary and erratic arrests and convictions" by allowing the police excessive discretion.[89] The vagueness of the *Papachristou* statute thus created a situation where the police officers themselves were responsible for defining what constituted criminal conduct.[90]

The vagueness test is governed by three basic questions. First, does the statute give fair notice to those persons potentially subject to it? Second, does it adequately guard against arbitrary and discriminatory enforcement? Third, does it

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83. Giovanetti, *The Principle of Analogy in Sino-Soviet Criminal Laws*, 8 DALHOUSIE L.J. 321, 381-82 (1984).

84. *Id.*

85. *Id.* at 399-400. In the past, American courts employed "analogy" primarily to reflect:

> the day-by-day growth of criminal law which, for the most part keeps pace with change in the language institution itself. It has thus amounted largely to an all-but-unnoticed bringing up-to-date of old terms so that, filled with new content, they referred more adequately to the changed conditions. When American judges speak of expanding criminal law by "analogy," they certainly do not mean the so-called "legal analogy," the deliberate lawmaking, avowed and apparent to all, which was required in the Russian and German innovations.

J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 48-49 (1960).

86. Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, 47 LAW & CONTEMP. PROBS. 123, 174 (1984).

87. 405 U.S. 156 (1972).

88. *Id.* at 162 (citing United States v. Harriss, 347 U.S. 612, 617 (1954)).

89. *Id.* at 162 (citing Thornhill v. Alabama, 310 U.S. 88 (1940)).

90. Many scholars have recognized vagueness in the mail fraud statute. *See* Miner, *Federal Courts, Federal Crimes and Federalism*, 10 HARV. J. L. & PUB. POL'Y 117, 128 (1987); Duke, *Commentary: Legality in the Second Circuit*, 49 BROOKLYN L. REV. 911, 931 (1983); Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 441 (1983); and, most recently, by the Second Circuit in United States v. Blackmon, 839 F.2d 900 (2d Cir. 1988), where the court reviewed the intent of the Congressional committee that drafted Section 1344 of the federal bank-fraud statute, which was based on the mail fraud statute, Section 1347. The Second Circuit, in *Blackmon*, drew a clear line between the manner in which the mail fraud statute had been allowed to expand and the manner in which the new bank fraud statute should be permitted to develop. The court noted that while Congress realized that other reprehensible activity could be brought within the purview of the new statute, due process and notice "argue for prohibiting such conduct explicitly rather than through court expansion of coverage." *Blackmon*, 839 F.2d at 906. Arguably, the *McNally* decision likewise recognized such problems in the mail fraud statute by its rejection of a construction of the "statute in a manner that leaves its outer boundaries ambiguous and involved the federal government in setting standards for local and state officials." *McNally*, 483 U.S. at 372.

provide sufficient latitude for the exercise of first amendment rights?[91] Warning that conduct may invoke criminal liability is constitutionally required and the Supreme Court has held that such warning must be clear to the "average [person],"[92] "[people] of common intelligence,"[93] and "ordinary people."[94]

The floating definition of "a scheme to defraud" does not give fair notice to those persons potentially subject to it. However, general vagueness attacks on the mail fraud statute have normally failed and schemes "to defraud" have been found to include everything from selling bootleg record albums[95] to bribing public officials.[96] In spite of being characterized as "vague," many statutes have withstood attack where the claim can be made that persons can reasonably be expected to conform to a higher standard of knowledge of the scope of permissible conduct.[97] For example, there is an expectation that persons engaged in specialized areas like food production and distribution should possess a greater amount of knowledge regarding appropriate conduct. In addition, licensing and reporting requirements of many professions reinforce the appropriateness of a higher standard of knowledge in certain occupations. The U.S. military requires a higher standard of conduct in spite of only a general description of conduct requirements. In *Parker v. Levy*[98] an Army physician was charged during the Vietnam War with violating articles of the Uniform Code of Military Justice by conduct "unbecoming an officer and a gentleman."[99] While upholding the conviction of Captain Levy, the majority took particular pains to distinguish the application of the code provisions in *Levy* from those in other criminal statutes. The Court argued that "longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards of" conduct unbecoming an officer,[100] and indicated that the Court of Military Appeals had "narrowed the very broad reach of the literal language of the articles."[101]

Nevertheless, mail fraud, especially in the context of political corruption, differs in several respects from the more specialized situations like the military and regulated industries. Politics is infused with personal judgments about public policy matters, and to suggest that "fair notice" concerns can be automatically inferred from a so-called common understanding of the "rightness" of those judgments defies belief. While George Washington Plunkitt's characterization of inappropriate action of politicians as the difference between "honest graft and dishonest graft,"[102] may be wide of the mark, there is considerable variation of views on the political acceptability of failing to implement campaign promises or

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91. W. LAFAVE & A. SCOTT, CRIMINAL LAW 92 (2d ed. 1986).
92. Cline v. J. Frink Dairy Co., 274 U.S. 445, 464 (1927).
93. Kolender v. Lawson, 461 U.S. 352 (1983).
94. *Id.*
95. United States v. Dowling, 739 F.2d 1445 (9th Cir. 1984).
96. United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974).
97. *See* Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 80 (1948). *Also see* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) (persons working in area of economic regulation must ascertain certain facts about the applicable professional standards in the area).
98. 417 U.S. 733 (1974).
99. Article 133 of the Uniform Code of Military Justice, 10 U.S.C. § 933, provides: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."
100. 417 U.S. at 746-47.
101. *Id.* at 754.
102. W. RIORDON, PLUNKITT OF TAMMANY HALL 3 (1963).

using patronage to develop a cadre of party loyalists.[103] To require state and local politicians to know exactly what political behavior might constitute mail fraud places far too much guesswork in the interpretation of criminal statutes.

The second prong of the vagueness test seeks to determine whether discretion[104] under a statute is arbitrary and discriminatory, a charge which has consistently been levelled against the mail fraud statute. Clearly, prosecutors have used the mail fraud statute in novel and arbitrary ways.[105] However, the principle of "necessity"[106] requires that prior to overturning a statute on these grounds, a court should ask if it is possible for the legislature to define the prohibited conduct more clearly. If it is impossible to craft a statute more carefully, courts will rarely overturn it. In the context of the mail fraud statute one can argue that, not only can explicit examples of corruption be specified,[107] but the legislature violates the vagueness principle by failing to specify prohibited conduct.

The third reason statutes have been found to violate principles of vagueness is that they unduly interfere with protected first amendment rights. Judge Winter recognized this problem in the context of the mail fraud statute in his dissent in *United States v. Margiotta*.[108] There he developed a range of benign political practices prosecutable under a broad view of the mail fraud statute, that would conflict with valued first amendment rights.[109]

In spite of the notice and discretionary enforcement problems created by broadly drafted criminal statutes, claims of vagueness rarely have been successful.[110] Part of the reason may be the view that the vagueness principle is outmoded and of no present utility. Some critics see the vagueness inquiry as hopeless because "there is no yardstick of impermissible indeterminacy . . . [and] the inquiry is evaluative rather than mechanistic."[111] Yet, a recognition of the

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103. *See* Judge Winter's dissent in United States v. Margiotta, 688 F.2d 108, 139-40 (2d Cir. 1982), for a discussion of the problem of classifying acceptable and unacceptable political behavior. Judge Winter states that "there is no end to the common political practices which may be swept within the ambit of mail fraud." *Id.* at 140. For example, "a candidate who mails a brochure containing a promise which the candidate knows cannot be carried out is surely committing an even more direct mail fraud . . . ." *Id.* Also, "a partisan political leader who throws decisive support behind a candidate known to the leader to be less qualified than his or her opponent because that candidate is more cooperative with the party organization, is guilty of mail fraud unless that motive is disclosed to the public." *Id.* The statute used in this manner creates a catch-all political crime according to Winter. *Id.*

104. Kolender v. Lawson, 461 U.S. 352 (1983).

105. *See supra* note 13 and accompanying text.

106. United States v. Petrillo, 332 U.S. 1, 5 (1947).

107. *See* Baxter, *Federal Discretion in the Prosecution of Local Corruption*, 10 PEPPERDINE L. REV. 321, 348-71 (1983), for a listing of examples of statutes that might appropriately be charged in the context of efforts to seek out and punish corruption.

108. 688 F.2d 108, 140 (2d Cir. 1982).

109. *Id.*

110. Goldstein, *supra* note 47, at 442.

111. One writer argues that the vagueness inquiry includes too many factors: 1) "the nature of the governmental interest;" 2) "the feasibility of being more precise;" 3) "whether the uncertainty affects the fact or merely the grade of criminal liability;" and (4) the range of prosecutorial discretion. While all are "meaningful," they are also too "contextual and impressionistic." Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196, 197 (1985). Professor Jeffries sees support for the *nulla peona sine lege* principle (literally translated, no punishment without a law), the vagueness doctrine, and the rule of strict construction, motivated by three concerns: 1) the association of popular sovereignty with legislative primacyor separation of powers; 2) concerns about notice and fair warning; and, 3) the potential for arbitrary and discriminatory enforcement. He then effectively destroys those

deficiencies of the vagueness principle does not warrant a conclusion that it has no validity. To refuse to engage in a vagueness inquiry because the inquiry is evaluative contradicts much of the work of courts. For example, in litigation of fourth amendment due-process claims, courts constantly make value judgments and balance the nature of the governmental interest in providing greater community protection against the right to be left alone.[112] In fact, one could argue that the willingness of courts to guide and structure post-arrest procedural matters and not pre-arrest substantive criminal law issues exhibits a significant misplacing of priorities.[113]

While critics might be correct that a direct attack on statutes under a vagueness theory are unlikely to be successful, the *McNally* case may be viewed as an example of a developing line of decisions which provide a substitute for a constitutional-vagueness analysis. Those decisions have, under a more palatable statutory-interpretation scheme, required that statutes be sufficiently clear in their language and have a firm jurisdictional base.[114] Consequently, it is possible that the 1988 rider to the Anti-Drug Abuse Act, with its ambiguous language concerning "intangible rights of honest services," reincorporates and expands vagueness problems of the mail fraud statute. Due to judicial disdain for statutes that are vague and do not comport with the legality principle, the recent amendment to the mail fraud statute may meet the same fate as its predecessor in *McNally*, although under a statutory interpretation rationale.[115]

FEDERALISM

Though the *McNally* decision devotes little specific discussion to federalism questions, many of the points expressed in the opinion raise the question of the appropriateness of federal enforcement of criminal laws against activities primarily

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concerns as being unrealistic, and argues that an analysis of separation-of-powers problems is not very helpful in working through contemporary criminal-law problems. *Id.* at 201-19.

112. Terry v. Ohio, 392 U.S. 1 (1968).

113. *See* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970). Critics see concerns about "notice" and "fair warning" as artificial concepts that do not deserve serious consideration. *See* Jeffries, *supra* note 111, at 212. This view trivializes the importance of notice by arguing that "the kind of notice required is entirely formal." *Id.* at 202. Compromises on how to provide notice do not detract from the value and importance of notice as an overriding principle of criminal law. Compromises about application of the doctrine can convey many different views.

Furthermore, there are many other compromises on criminal law principles which one might argue "trivializes" those principles. Yet there are few serious calls for abolition of those principles. It is clear that few courts will accept a mistake of law defense on the basis of a claim that a citizen was unaware of the existence of a law because promulgation of the law was formal and there was no showing that the general populace could likely have been aware of such a law. *See* S. KADISH, ENCYCLOPEDIA OF CRIME AND JUSTICE 1067 (1983). Yet, in spite of the rejection of the traditional concept of vagueness, Jeffries finds a danger in the courts' tendency to turn mail fraud into a broadly based statute of indefinite standards, without any rules to guide future application. The failure of the court to limit the range of persons properly charged under the statute "broadly delegates enforcement authority to federal prosecutors to determine, at least in the first instance, which private citizens are sufficiently influential to be labeled fiduciaries and whether they have lived up to their duty to participate honestly and faithfully in the public's affairs." Jeffries, *supra* note 111, at 240. He sees *Margiotta* as a "failure to appreciate the dangers in this context of judicial reversion to the methodology of the common law." *Id.* at 242.

114. *See* Perez v. United States, 402 U.S. 146 (1971).

115. *See infra* notes 137-220 and accompanying text.

intrastate in character.[116] Since corrupt political officials rarely need to rely on an interstate connection for their activities to be successful, use of the mail fraud statute to prosecute state political corruption sharpens the question about the division of responsibility between the federal and state government in prosecution of such activities. Federal courts seldom have held that use of the mail fraud statute to prosecute local corruption violates federalism principles.[117] Yet the growing divergence of views between federal and state governments on criminal justice issues may revive questions about the role of the federal government in establishing ethical standards for the states.[118]

In the context of this rapidly evolving federal-state division on criminal justice issues, there is a special need to respect governmental boundaries and limit the intrusiveness of the federal government into state matters. The Supreme Court itself has sounded the need for caution. In *Rewis v. United States*[119] the Court recognized the dangers of upsetting the sensitive federal-state balance, overextending limited federal police resources, and turning minor state offenses into federal felonies.[120] Likewise, in *United States v. Bass*,[121] the Court saw the importance of maintaining the traditional boundaries between state and federal criminal law enforcement, and urged that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."[122] Thus, federal intervention in areas of state criminal law must be defined

116. Especially the concern about federal prosecutors establishing standards of good government for state and local communities. *McNally*, 483 U.S. at 372.

117. The statute generally has withstood constitutional challenge on the federalism question. *Ex Parte* Jackson, 96 U.S. 727 (1877).

118. The range of disagreement on basic policy issues of criminal justice is evident in some areas. For example, the states and the federal courts have disagreed on how to determine when facts present sufficient evidence of probable cause to allow the police to arrest, search, or seize evidence or persons. G. WILLIAMS, THE IOWA GUIDE TO SEARCH AND SEIZURE 13-26 (1986). Unfortunately, state decisions rejecting the federal approach often have been met with outright anger and resentment by federal officials. *See* Florida v. Casal, 462 U.S. 637 (1983). In *Casal* Chief Justice Burger indicated that "when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement." *Id.* at 639. There also has been a dispute as to whether there should be good-faith exceptions to the warrant requirement. Recently the State of North Carolina in State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988), joined the list of other states rejecting the good-faith exception established in United States v. Leon, 468 U.S. 897 (1984).

The degree of privacy a citizen is entitled to expect from the government is another point of division. The Massachusetts Supreme Court in Commonwealth v. Blood, 400 Mass. 61, 507 N.E. 2d 1029 (1987), held that even though eavesdropping may comport with federal constitutional standards, it violates the state constitution when used to justify warrantless eavesdropping on conversations in a private home. Also, in the administration and control of law enforcement agencies, local governments are giving more attention to the need to control discretionary decision-making. Finally, while federal courts vigorously oppose the need for sentencing guidelines, state courts largely accept the need for such guidelines. *See* J. KRESS, PRESCRIPTION FOR JUSTICE: THE THEORY AND PRACTICE OF SENTENCING GUIDELINES 3 (1980); MASSACHUSETTS CRIMINAL LAW REVISION COMM'N, PROPOSED CRIMINAL CODE OF MASSACHUSETTS, ch. 264 (1972); Gerber, *Arizona's New Criminal Code: An Overview and a Critique*, 1977 ARIZ. ST. L.J. 483, 502-06.

119. 401 U.S. 808 (1971).

120. *Id.* at 812.

121. 404 U.S. 336 (1971).

122. *Id.* at 349.

by statute. If the intention of such intervention is not clear under the statute, courts are not to intrude into new areas.[123]

This admonition has particular relevance when considering the use of the mail fraud statute to prosecute state political corruption. In these cases, charging decisions involve not only choices on allocation of resources and targeting of persons, but also *political choices.* The political choices include assessments of which local political activities are proper and which deserve exposure and condemnation. Who should decide? Those in favor of an expanded federal role have offered three basic reasons why federal prosecutors are best suited to decide such questions.

The primary rationale is that state officials are less inclined to investigate their "own" people and more likely to accept a lower standard of conduct from political colleagues that they would not tolerate from others.[124] There can be little doubt that the early history of state prosecutors shows them as primarily career-oriented persons desirous of seeking higher office or enhancing their law practice.[125] Today, however, there is little basis for arguing that local cultural norms permit a lower standard of ethical conduct than exists at the federal level.[126] Most state prosecutors are elected officials truly responsive to their constituencies, and realize that failure to prosecute graft and corruption at the local level raises questions about their own integrity. Recent history has seen them exercise independent judgment in fighting crime.[127]

The second reason, often articulated as the basis for federal intervention to control state and local corruption, is that the federal government has a special constitutional obligation to ensure that states are free of public corruption and managed on a fair and non-partisan basis. The federal government clearly has the power to monitor state action to ensure that the states conduct public affairs consistent with constitutional principles, and may enact federal statutes designed to effectuate those principles. However, since removal of public officials from office goes directly to the issue of state sovereignty, attempts to control state and local government require special caution. If the federal government is concerned about the effect of state corruption on the national body politic, then specific statutes

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123. As the majority noted in *Maze*, "[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." *See Maze*, 414 U.S. at 405 n.10.

124. F. INBAU, J. THOMPSON & A. MOENSSENS, CRIMINAL LAW: CASES AND COMMENTS 69 (4th ed. 1987) [hereinafter CRIMINAL LAW].

125. *See* Baker & Delong, *The Prosecuting Attorney and his Office* (pt. 1), 25 J. CRIM. L. & CRIMINOLOGY 695, 698-701 (1935); Nedrud, *The Career Prosecutor, Defects and Problems of the Present Prosecuting System*, 51 J. CRIM. L. & CRIMINOLOGY 557, 558 (1961).

126. Arrests in Mingo County, West Virginia, exemplify state actions to control public corruption. In Mingo County, prosecutors indicted fifteen public officials for bribery, false accounting procedures, illegal contributions, illegal expenditures, and even drug dealing. Des Moines Register, Apr. 8, 1988, at 3, col. 2. *See also* State *ex rel.* Owens v. Brown, 351 S.E.2d 416 (W. Va. 1986). Furthermore, over a decade ago the National Association of Attorneys General began to chronicle and promote efforts of state Attorneys General to control state and local corruption. *See* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ATTORNEYS GENERAL'S CORRUPTION CONTROL UNITS (1978). None of this is to suggest that there is no role for the federal government in monitoring and prosecuting some instances of local corruption. Rather the point is that, as a society, we appear to have moved beyond the stage where misconduct by local officials is consistently tolerated by state prosecutors.

127. Williams, *Police Discretion: The Institutional Dilemma—Who Is in Charge?*, 68 IOWA L. REV. 431, 457-59 (1983).

must be enacted. Absent such statutes, claims that the federal authorities are acting in a capricious and arbitrary manner take on great weight.

A final argument frequently offered to support federal prosecution of local officials is the resource rationale. Clearly, the federal government commands vast police and prosecutorial resources. The resource advantage may be more theoretical than real, however, as the rapidly increasing number of genuine fraudulent schemes[128] now are taxing federal resources. In any event, resource advantage alone surely cannot be determinative of federal prosecution of state officials. More principled reasons for intervention must exist.[129]

Moreover, remarkably absent in the criteria discussed for federal intervention is consideration of the state's interest in controlling its own political forums. States should have the opportunity to act against local corruption and legitimate themselves before the federal government intercedes.[130] This does not mean there is no appropriate federal role in controlling corruption nationwide,[131] but

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128. *See Fraud, Fraud, Fraud: The White-Collar crime wave is spurring a determined cleanup operation*, TIME, Aug. 15, 1988, at 28.

129. Along those lines, one source suggests that

> A key yardstick for measuring the degree to which the federal government should enter into this area is the quality of the local prosecutor's office. While some part of this evaluation may be subjective, factors such as community confidence in local authorities, as reflected by the media, the extent of local resources devoted to the prosecutor's office and the relationship between that office and local judges are relatively objective considerations in the overall determination. Moreover, where the same political party that controls a large part of the local government also controls the prosecutor's office, it is inconceivable, either because of purse-string control or political association, that local officials can always deal satisfactorily with the problems of official corruption. And where corruption appears in the local prosecutor's own investigative force . . . it is virtually impossible for him to take any extensive action because of the cohesion within the police fraternity. In instances such as this, an independent investigative agency, such as the FBI, is essential.

CRIMINAL LAW, *supra* note 123, at 69.

It is difficult to conceive of the factors mentioned above as being anything other than subjective. Surely attempts to measure community confidence "as reflected by the media" places subjective judgments on top of other subjective judgments. Furthermore, relationships between judges and prosecutors are almost always close, even at the federal level, and one can always justify a conclusion that an "independent" federal agency might be better positioned to prosecute state and local corruption. The purse-string argument is superficially compelling and a theoretical argument that budgetary power controls law-enforcement decisions can be easily constructed. The fact is, there has been very little recent effort on the part of county and local governments to influence law-enforcement decisions. G. WILLIAMS, THE LAW AND POLITICS OF POLICE DISCRETION 104-07 (1984).

Decisions by federal prosecutors to intercede to prosecute perceived local corruption are almost entirely subjective and guided by little more than general political assessments of the appropriateness of the intervention of the federal criminal law. Sharp criticism has been made of permitting a "federal prosecutor . . . [to decide] what the public . . . should expect by way of an ethical and honest performance of a state official . . . ." United States v. Mandel, 591 F.2d 1347, 1357, *reh. denied*, 609 F.2d 1076 (4th Cir. 1979).

130. Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROBS. 86-87 (1948); and Baxter, *supra* note 106, at 354-64.

131. One alternative would be for the federal government to use its investigative resources, but turn the results of its investigations over to the states for action. There is an example of this approach in some federal statutes. For example, Title 18, § 1073 gives the federal government power to prosecute persons who seek to flee across state and national boundaries to avoid state criminal laws. While the FBI actively pursues such persons if requested to do so by the states, rarely are such persons prosecuted at the federal level. In 1961, 1,878 such arrests were made resulting in only one prosecution. CRIMINAL LAW, *supra* note 124, at 72. Providing investigative assistance and then permitting states to prosecute under

states' efforts to police public corruption should be recognized and encouraged.[132] In fact, many states have grappled with thorny questions surrounding bribery and corruption. The results reached in these states show that by using the mail fraud statute to develop an *ad hoc* Federal Code of Political Conduct, the federal government superficially treats a very important problem. The states, while not achieving definitive conclusions on how to control political corruption, have at least recognized the significant political judgments made when developing such legislation. For example, in fashioning legislation to control public corruption, state legislators must create statutes that clearly distinguish between legislative compromises[133] and political payoffs, and try to define vague terms such as "corruptly."[134] The drafters of the Model Penal Code recognized the difficulty of developing such statutes, and urged more specificity in bribery legislation to avoid delegating to the courts and prosecutors the responsibility for determining bribery "on a case by case basis."[135] Even Congress, in other attempts to deal with public corruption, has recognized the tremendous difficulty in developing such standards and applying them to corrupt federal officials.[136] Yet federal prosecutors continue to fashion new definitions of mail fraud on a regular basis, and Congress has now endorsed that practice.

Having discussed the problems resulting from prosecutorial manipulation and misuse of the mail fraud statute, I will now turn to an analysis of what the Court did in *McNally* and its likely approach to the new amendment.

MCNALLY: AN EXERCISE IN STATUTORY INTERPRETATION

In *McNally*, three persons were convicted of mail fraud, and the convictions were affirmed by the Sixth Circuit Court of Appeals under the theory that a public official owes a fiduciary duty to the public and misuse of his office for private gain is a fraud.[137] The Supreme Court rejected this broad view of the mail fraud statute. According to the Court, Congress acted in 1872 to create a statute containing a general proscription against using mails to initiate correspondence in furtherance of "any scheme or artifice to defraud"[138] in a much more limited sense.

The speed with which Congress acted to overturn the *McNally* decision raises several questions. Did Congress think the Supreme Court abandoned its decision making process, or was its interpretation of the mail fraud statute so at odds with past congressional thinking that it obviated the need for congressional

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specific state laws directed at bribery and corruption would minimize claims of federal arrogance and the arbitrary creation of personal standards of conduct.

132. Some efforts have been very extensive, such as the effort by the Governor of Mississippi "to replace a 100-year-old system of rural county government that has been blamed for widespread corruption and influence peddling." N.Y. Times, Nov. 7, 1988, at 13, col. 3. In fact, one could argue that state bribery statutes are more appropriate to police public corruption than the federal mail fraud statute. For example, in the State of Iowa, public corruption has been attacked by enactment of a number of provisions: against accepting gifts, IOWA CODE § 68B.5 (1987); bribery and corruption, *Id.* § 722; official misconduct, *Id.* § 721; and other improper conduct in office, *Id.* § 66.

133. MODEL PENAL CODE § 240.1 commentary at 6 (Official Draft and Comments 1980).

134. *Id.* at 5.

135. *Id.* at 9.

136. 18 U.S.C. § 201, 666 (1988).

137. *McNally*, 483 U.S. at 355.

debate and discussion? There is no sign that the Court abandoned its normal decision-making process in deciding *McNally*. That leaves the question whether the decision is consistent with any of the current theories of statutory interpretation. Because the congressional amendment reflects many of the same problems the Court identified in the mail fraud statute,[139] an analysis of how the Court approached the statute in *McNally* may indicate how the Court would approach the new statute as well.[140]

Although quick action by Congress may have been motivated by its belief that the Supreme Court did a particularly poor job of statutory interpretation of the mail fraud statute, after careful analysis it is clear, the Court's interpretation is thoughtful and thorough. Therefore, a similar interpretative approach will probably be followed in its future analysis of the recent amendment to the mail fraud statute.

There are several ways to approach statutory interpretation. The most basic approach requires one to focus directly on the specific words of the statute and to ascertain the "plain meaning" of the language used by the legislature. However, due to the vagaries of language, the meaning of words is often difficult to discern. In such a case, an attempt to determine the intent of the legislature in enacting ambiguous statutes is appropriate. Often courts and scholars have found the results of both the plain-meaning and legislative-intent analysis unhelpful, and have suggested other ways to ascertain the true meaning of statutes. Three alternative approaches often suggested are: attribution of purpose,[141] imaginative reconstruction,[142] and dynamic statutory interpretation.[143]

Literal Mode and Legislative Intent

Under the plain-meaning approach, the interpreter analyzes the specific statutory language and offers an interpretation that accords with the language of the statute.[144] In *McNally*, Justice Stevens' dissenting opinion advocates this theory to determine if the activity charged falls under the definition of "scheme to defraud." While Stevens began by stressing the broad and sweeping nature of the

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138. *Id.*

139. *See supra* note 7 and accompanying text.

140. In the decade prior to *McNally*, several lower federal courts expanded the definition of "scheme to defraud" to establish: a general corporate employment code for businessmen, see United States v. Newman, 664 F.2d 12 (2d Cir. 1981), United States v. Siegel, 717 F.2d 9 (2d Cir. 1983); and an "intangible right to good government" employment obligation for public officials, see United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 116 (1979), *Mandel*, 591 F. 2d 1347; United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); and *in relevant part* 602 F.2d 653 (1979), *cert. denied*, 445 U.S. 961 (was reversed in light of the *McNally* decision which rejected the intangible-rights doctrine in political corruption cases). *McNally* was the first Supreme Court case to reject such an approach in the context of political corruption. *McNally*, 483 U.S. 350.

The majority reiterated the words of Congressman Farnsworth that the measure was needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." The review of the legislative history led the Court to conclude that "the original impetus" of the statute was "to protect people from schemes to deprive them of their money or property," not intangible rights. *McNally*, 483 U.S. at 356.

141. *See infra* note 167 and accompanying text.

142. *See infra* note 172 and accompanying text.

143. *See infra* note 200 and accompanying text.

statute, he quickly dissected it into three component parts: "(1) Any scheme or artifice to defraud, (2) or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, (3) or to sell, dispose of, loan . . . counterfeit or spurious coin, obligation, security, or other article."[145] Stevens then proceeded to argue that each clause was independent of the others, and concluded that it was possible to violate one clause without violating either of the other two. He claimed there could be a violation of the clause prohibiting a scheme to defraud without violating the counterfeiting provision, and one could obtain money or property by false pretenses without violating the counterfeiting provision. According to his view, the majority, in rejecting the "intangible rights" theory, improperly modified the first clause by requiring that "any scheme or artifice to defraud" be for the purpose of "obtaining money or property."[146] Justice Stevens accused the majority of ignoring the plain language of the statute, and sought to reinforce his conclusion by stressing that every court considering the issue had agreed with his interpretation.

Stevens also assessed the specific legislative intent of the statute. He argued that "[e]xamination of the way the term 'defraud' has long been defined, and was defined at the time of the statute's enactment, makes it clear that Congress' use of the term showed no intent to limit the statute to property loss."[147] To support his definition of fraud, Justice Stevens, much like the Court of Appeals in *Fasulo*,[148] reviewed law dictionaries used around the time of the passage of the statute to ascertain the meaning of fraud. He arrived at a generic definition of fraud which included the following: "[t]o cheat; to deceive; to deprive of a right by an act of fraud . . . to withhold from another what is justly due him, or to deprive him of a right, by deception or artifice."[149]

In addition to offering a dictionary definition of fraud, Justice Stevens compared cases that defined "defraud" within the context of the federal conspiracy statute[150] to cases defining "defraud" within the context of the mail fraud statute. His chief example was *Haas v. Henkel*,[151] which "rejected the argument that there could be no conspiracy to defraud in the absence of contemplated monetary or property loss. . . . [and decided the federal conspiracy] statute [was] broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government."[152] According to Justice Stevens, the *Haas v. Henkel* view was reinforced in *Hammerschmidt v.*

144. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 286 (1975).

145. *McNally*, 483 U.S. at 364-65

146. Although the majority did not specifically address Justice Stevens' argument concerning the independent nature of the three clauses, they apparently viewed the statute as serving two separate purposes. First, to prohibit the use of the mails for any scheme to defraud that deprives a person of money or property and, second, quite separately to prohibit use of the mails to transport counterfeit coins, securities, obligations or similar articles. *See McNally*, 483 U.S. at 356-57.

147. *Id.* 370.

148. *See supra* note 33 and accompanying text.

149. *McNally*, 483 U.S. at 370-71, *citing* W. ANDERSON, A DICTIONARY OF LAW 474 (1893). *See also* BURRILL'S LAW DICTIONARY 658-59 (1859), and 1 BOUVIER'S LAW DICTIONARY 530 (1897). Reliance on dictionaries to define "defraud" was called into question in *Fasulo*. *See* Brief for Petitioner at 44, *Fasulo*, 272 U.S. 620.

150. 18 U.S.C. § 371 (1988).

151. 216 U.S. 462 (1910).

152. *McNally*, 483 U.S. at. 368.

United States,[153] which prohibited conspiracies to "cheat the Government out of property or money, . . . [and] to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery . . . ."[154] Stevens thus decided that "[t]here is no basis for concluding that the term 'defraud' means something different in § 1341 . . . than what it means in § 371."[155]

Stevens' argument is very persuasive, both with regard to the words of the statute and legislative intent approaches. Particularly significant is his implicit argument that the approach suggested by the majority would render the first clause "any scheme or artifice to defraud" to have no effect independent of the modifying language found in the second clause. One could argue that the majority, in rejecting Stevens' approach, violates at least two canons of construction: (1) "If language is plain and unambiguous it must be given effect,"[156] and (2) "Every word and clause must be given effect."[157] Yet as Professor Llewellyn suggested almost forty years ago, the canons are simply guides to statutory interpretation, and words should not be interpreted literally when they are superfluous[158] or "thwart manifest purpose."[159]

Slavish adherence to the canons and the plain-meaning approach has resulted in great dissatisfaction with efforts to interpret statutes. In fact, Judge Wald observed:

> To stop at the purely literal meaning of a word, phrase, or sentence — if indeed the purely literal meaning can be found — ignores reality. In the context of the statute, other related statutes, or the problems giving rise to the statute, words may be capable of many different meanings, and the literal meaning may be inapplicable or nonsensical.[160]

Judge Wald's comments have special relevance to Justice Stevens' analysis of the mail fraud statute. While the statute does use the language "any scheme to defraud," to rely on those words to the exclusion of other provisions of the statute or its legislative history is particularly troublesome. When attempting to fit acts of political corruption into the definition of "scheme to defraud" that are not mentioned in the statute or its legislative history, the statutory construction becomes even more problematic.

Still, in response to Justice Stevens' argument the majority recognized the need to distinguish the use of the term "defraud" in both the conspiracy and mail fraud context. They found the "broad construction of § 371 [in]applicable to the mail fraud statute, . . . [as] § 371 was aimed at protecting the Federal Government alone, however, the mail fraud statute . . . had its origin in the desire to protect individual property rights. . . ."[161] For support the majority cited *Curley v. United*

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153. 265 U.S. 182 (1924).
154. *Id.* at 188.
155. *McNally*, 483 U.S. at 368.
156. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How the Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 406 (1950).
157. *Id.* at 404.
158. *Id.*
159. *Id.*
160. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 199 (1983).
161. *McNally*, 483 U.S. at 358, n. 8.

States,[162] in which Judge Aldrich showed that the statute prohibiting conspiracy to defraud the United States was quite different from an ordinary conspiracy statute.[163] Although not discussed in the opinion, the position of the majority is also consistent with Professor Abraham Goldstein's seminal work on conspiracy to defraud the United States.[164] Professor Goldstein's article, in an exhaustive analysis of conspiracy-to-defraud cases, found "conspiracy to defraud the Government was . . . [broader] than conspiracy to defraud a private person."[165] In fact, he cited several cases in which courts expanded the definition of conspiracy to defraud the United States beyond the "settled" meaning of fraud because of the broader effect of frauds against the United States than private parties.[166] The majority opinion, however, rather than relying on efforts to distinguish the meaning of the term "defraud" in these different contexts, moved away from a review of the specific language of the statute and sought other ways to determine the meaning of the statute.

Attribution of Purpose

This theory attempts to interpret the statute in a manner consistent with the overall tenor of the law.[167] The legislature is presumed to act pursuant to rational purposes that can be discovered from the context of its acts.[168] "Every statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law."[169]

Normally a review of hearing transcripts, committee reports or floor statements provides clues to the objectives of the legislature in enacting the statutes. A particular problem in discerning the purpose of the mail fraud statute is its sparse legislative history. This is vividly portrayed in the *McNally* opinion in which the Court finds little information on the passage of the statute in 1872, or even the 1909 amendment to the statute. From the information that does exist, the *McNally* opinion saw Congress' purpose in adding the language "or to obtain money or property by means of false or fraudulent pretenses" designed solely to codify the holding in *Durland*, and to extend the reach of the mail fraud statute to schemes where future as well as current facts were misrepresented. *McNally* concluded that congressional action could not be deemed to have extended the statute to schemes seeking to deprive persons of purely intangible rights as the 1909 amendment "simply made it unmistakable that the statute reached false

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162. 130 F. 1 (1st Cir. 1904).
163. *Id.* at 7.
164. Goldstein, *supra* note 47.
165. *Id.* at 424.
166. *Id.* at 420-21. While Professor Goldstein recognizes the expansive nature of the federal conspiracy statute, he also indicates the substantial vagueness problems created by such expansion and the need to bring the statute under control. *Id.* at 441-48. Many of the deficiencies of the conspiracy statute, as regards vagueness, are remarkably similar to the mail fraud statute. *See supra* note 47 and accompanying text.
167. W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 576 (1988).
168. The following discussion is derived from discussion of the attribution of purpose approach in Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post Legal Process Era*, 48 U. PITT. L. REV. 691, 694-97 (1987).
169. *Id.* at 695, *quoting* H. HART. & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1156 (tent. ed. 1958).

promises and misrepresentations as to the future as well as other frauds involving money or property."[170]

While conceding that the mail fraud statute could be read more broadly, *McNally* felt to do so would improperly enable courts and administrators to manipulate congressional purpose when developing enforcement standards. Thus, while the ambiguous language of the statute permitted broad interpretation, this language was objectionable when it could be interpreted to permit federal prosecutors without guidance from Congress to set "standards of disclosure and good government for local and state officials."[171]

Imaginative Reconstruction

The *McNally* dissent did not contest the view that the 1909 amendment was an attempt to codify *Durland*, but rather moved from its plain-meaning and legislative-intent approach to attempt an "imaginative reconstruction" of the statute. Imaginative reconstruction is undertaken when a legislative body did not contemplate the particular issue under consideration. Its proponents assume individuals are "egoistic, rational utility maximizers"[172] and that legislatures are nothing more than an arena where competing interest groups fight for their positions. The legislation that emerges from this process is a reflection of political compromise among opposing groups.[173] One strong advocate of this approach is Judge Richard Posner.[174] In Judge Posner's view, the court's role is to give effect to political compromises, and to imaginatively reconstruct the intent of the enacting legislature.[175] In his "imaginative reconstruction" of the passage of the mail fraud statute, Justice Stevens chastised the majority for failing to understand the typical approach to legislative enactments during the period surrounding the passage of the mail fraud statute, which he saw as one that included the enactment of many broadly based statutes. According to Justice Stevens,

> the Court's holding would reflect a strange interpretation of legislation enacted by the Congress in the 19th Century. Statutes like the

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170. *McNally*, 483 U.S. at 359.

171. *McNally*, 483 U.S. at 360. Justice Stevens, in contrast, while admitting that "there may have been some overly expansive applications of [the mail fraud statute] in the past," *McNally*, 483 U.S. at 376, rejected that as a rationale for limiting the current expansion of the statute.

The attribution-of-purpose approach also seeks to identify situations where the statute clearly applies, such as in the case of mail fraud counterfeit schemes and large-scale consumer frauds, and with guidance from those cases where the statute's overall purposes are clear to analogize to new cases. According to the majority, a review of the activities initially included under the statute over one hundred years ago, and even up until the past decade appeared to warrant the conclusion that expansion of the mail fraud statute to the *McNally* factual situation was unjustified as a matter of law. *Id.* at 356.

172. D. MUELLER, PUBLIC CHOICE 1 (1979).

173. Eskridge & Frickey, *supra* note 167, at 703, *quoting* E. LATHAM, THE GROUP BASIS OF POLITICS 35-36 (1952). This description, of course, is the set of assumptions about government that James Madison reflected in THE FEDERALIST NO. 10 (J. Madison).

174. According to Eskridge and Frickey, Judge Posner sees legislatures functioning like markets, with supply and demand governing their operation. The degree and nature of interest groups determine the demand for legislation. The demand is high when each person has a substantial stake in the outcome of the legislation. The costs and benefits of various types of legislation determines the supply of legislation. Legislators' purpose is assumed to be reelection, so they will act to please the most powerful organized interest groups. The result of this is that much legislation supports the powerful, well-organized groups. Eskridge & Frickey, *supra* note 167, at 703-06.

175. R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286 (1985).

> Sherman Act, the civil rights legislation, and *the mail fraud* statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified.[176]

Stevens argued that statutes enacted during the Reconstruction period were "implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case by case adjudication."[177]

Justice Stevens' argument could influence the determination whether the statute includes the deprivation of intangible rights within the meaning of "scheme to defraud." Unfortunately, the majority does not address Justice Stevens' argument. While the Sherman Act and the civil rights statutes undoubtedly are broad and comprehensive statutes, it is highly questionable to classify the mail fraud statute as comparable to that legislation.

First, it is impossible to conclude from an analysis of only three bills passed during the nineteenth century that the normal approach was to draft statutes in "broad general language?"[178] Surely there needs to be a narrower focus on the time span surrounding passage of the specific legislation under consideration, as well as a closer look at the legislation itself. While Congress enacted the civil rights statutes near the time of passage of the mail fraud act, the Sherman Act did not become law until approximately eighteen years after passage of the mail fraud act. Was all legislation enacted during this intervening eighteen years intended to be broadly construed? In fact, one might question the breadth of the Sherman Act and the civil rights statutes which were enacted during the Reconstruction period. While the Sherman Act revolutionized the relationship between the federal government and business and included some expansive terms (such as the meaning of "price fixing"), the legislation was not comprehensive.[179] Certain fields were exempt from Sherman Act coverage,[180] much like the extortion exemption from coverage under the mail fraud act.[181] Furthermore, the effort to control business practices did not end with the Sherman Act. In 1914 Congress enacted the Clayton Act,[182] which intended to control the sale of commodities, and the Federal Trade Commission Act[183] designed to control practices of unfair competition. These statutes were enacted to compensate for the Sherman Act's limitations. History is replete with other amendments enacted to control business activities.[184] By contrast, in its 116-year history the mail fraud act has had only one arguably substantive amendment.[185] The lack of amendment or expansion compared to its so-called "counterpart" the Sherman Act, leads one to conclude that Stevens' comparison of the two as "broad, general" statutes is overdrawn.

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176. *McNally*, 483 U.S. at 372 (emphasis in original).
177. *Id.*
178. *Id.*
179. A. BEQUAI, WHITE COLLAR CRIME: A 20TH CENTURY CRISIS 96 (1978).
180. *Id.* at 98. The exemptions may have been the result of erroneous judicial interpretations animated by a narrow view of the commerce power.
181. *Fasulo*, 272 U.S. at 624.
182. Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914).
183. Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717 (1914).
184. A. BEQUAI, *supra* note 179, at 100.
185. Rakoff, *supra* note 3, at 819, suggests that the 1909 amendment to remove the mail-emphasizing aspect of the statute, thus resulting in regarding the mailing requirement as nothing more than a jurisdictional element and not central to the "scheme to defraud," is considered the most important change made during the life of the statute.

To place the mail fraud statute in the same category as the civil rights legislation passed following the Civil War is even more questionable than the attempted linkage with the Sherman Act. The civil rights statutes passed in 1866,[186] 1871,[187] and 1875[188] were based on constitutional amendments. They were adopted following a civil war during which many of the issues addressed in those statutes were matters of intense public debate. Concerns about frauds were never subject to the same public exposure and discussion. The constitutional amendments concerning civil rights issues and the resulting statutes were, by intention, comprehensive in scope. The mail fraud statute was based on the much more limited power of the federal government to control the mails. Finally, much like the Sherman Act, only the enactment of amending and clarifying legislation enabled the civil rights legislation to achieve its societal objectives.[189]

In spite of Justice Stevens' analysis, "imaginative reconstruction" of the statute in the context of the history of the period provides an explanation of the statute that supports the majority decision. First, it is clear Congress intended to protect persons from counterfeit-money schemes and consumer swindles effected through the mails. What were these schemes and swindles? Anthony Comstock, a fraud expert of the period, provides numerous examples in recounting his seven years' experience as a special agent of the Post Office Department.[190] While Comstock's overriding (and, some would argue, blinding) concern was discovering obscene publications and materials sent through the mails, even his critics applauded his ability to identify and eliminate frauds that thrived on the usage of the U.S. mails.[191] In his book on fraud, he describes all manners of schemes and swindles, including counterfeit-money scams, stock-speculation schemes, bogus lotteries and watch- and-jewelry swindles. Yet in nearly six hundred pages Comstock does not discuss the need to use the mail fraud statute to fight corruption of public officials.[192]

Prior to the *McNally* decision, the mail fraud statute had been amended five times since its passage, covering a span of eighty-one years from 1889 to 1970.[193] Yet no amendment has focused on the problem of governmental corruption. Furthermore, there are countless examples of political scandals during that time period which could have been the basis for using the mail fraud statute to focus on that issue. For example, public corruption was an important concern at the initial passage of the act. In 1871, the infamous William Marcy Tweed, leader of the "Tweed Ring," was the subject of a citizen investigation committee in New York City.[194] The Tweed Ring amassed between $75 million to $200 million in corrupt

186. Civil Rights Act, ch. 31, 14 Stat. 27 (1866).
187. Civil Rights Act, ch. 22, 17 Stat. 13 (1871).
188. Civil Rights Act, ch. 114, §§ 3-5, 18 Stat. 336, 337 (1875).
189. Civil Rights Act, ch. 21, § 201, 78 Stat. 241 (1964).
190. A. COMSTOCK, FRAUDS EXPOSED; OR HOW THE PEOPLE ARE DECEIVED AND ROBBED, AND YOUTH CORRUPTED (1880 & reprint 1969).
191. D. BENNETT, ANTHONY COMSTOCK: HIS CAREER OF CRUELTY AND CRIME 1010-11 (1878 & reprint 1971).
192. While Comstock was almost single-handedly able to secure federal legislation to deal with the distribution of obscene material, political corruption or moral lassitude in business was not an issue he considered within the ambit of the mail fraud statute.
193. *See* Act of March 2, 1889, ch. 393, § 1, 25 Stat. 873; Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130; Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763; Act of May 24, 1949, ch. 139, § 34, 63 Stat. 94; Act of Aug 12, 1970, Pub. L. No. 91-375, § 12(11), 84 Stat. 778.
194. R. MARTIN, THE BOSSES 28 (1964).

and unethical dealings in New York, yet there was no attempt to expand the mail fraud statute to facilitate prosecution of persons like Mr. Tweed. Nor was there any later attempt to use the statute against corrupt federal officials. In 1873, Oakes Ames, a Congressman from Massachusetts, was censured by the House of Representatives for bribing members of Congress in the Union Pacific/Credit Mobilier scandal.[195] He was not prosecuted for violation of the mail fraud statute.[196] In March of 1876, Secretary of War Belknap resigned from his office. The reason for his resignation involved governmental fraud. During the prior five years an Indian trader had been paying between $6,000 to $12,000 per year to retain his position at Fort Sill. The payments were to a friend of the Secretary. The friend then later delivered the money, either to the Secretary or to a member of his family.[197] Secretary Belknap's punishment was to resign his office. By today's broad and expanding standards, this would not be an ideal application of the mail fraud statute.

Preceding enactment of the much-touted 1909 amendment to the mail fraud act was Lincoln Steffens' widely discussed *Shame of the Cities* published in 1902 and George Washington Plunkitt's reminiscences on graft and corruption in New York politics in 1905.[198] Yet there was no attempt to amend the statute in 1909 to enable federal prosecutors to address problems of state and local corruption. The 1948 and 1949 amendments were likewise undertaken during a time of substantial public awareness of corruption at the state and local level. In 1948, memories of the corrupt political machine molded by Frank Hague, Mayor of Jersey City, New Jersey were still strong. In fact, in 1943 the activities of Mayor Hague were the subject of a Justice Department investigation, and newspapers throughout the country denounced Hague as the worst political "boss" in the country.[199] At the time of each amendment to the mail fraud act, Congress was aware of public corruption and could have explicitly dealt with those concerns. Nevertheless, Congress never chose to expand the scope of the statute. Indeed, the limited scope of the statute was affirmed by all the Congresses that acted to amend the mail fraud statute prior to the *McNally* opinion. Consequently, Justice Stevens' analogy to the Sherman Act and the Civil Rights acts is not only insupportable, but imaginative reconstruction of the statute suggests that Congress intended to restrict the mail fraud statute to common frauds. Only the imaginative minds of federal judges and prosecutors have expanded the mail fraud statute to include political corruption. Congress apparently never considered it.

Dynamic Statutory Interpretation

Perhaps Justice Stevens recognizes the weakness of the comparison of the mail fraud statute to the Sherman Act and the civil rights legislation when he offers yet another way to convict Mr. McNally in an approach which falls under the "dynamic statutory interpretation" rubric.[200] Quoting *United States v. Holzer*,[201] a

195. Noonan, *Bribery*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 120 (1983).

196. Ames died at his home in Easton, Massachusetts in 1873, shortly after he was censured by Congress.

197. *See* A. HART, 22 AMERICAN NATION 287 (1907).

198. W. RIORDON, PLUNKITT OF TAMMANY HALL vii (1963).

199. R. MARTIN, THE BOSSES 198, 205 (1964).

200. *See* Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987), where he argues that statutes should be interpreted "'dynamically,' that is, in light of their present societal, political and legal context."

201. 816 F.2d 304 (7th Cir. 1987).

recent Court of Appeals decision, Stevens argues the statute is constantly evolving: "[The argument that the meaning of fraud was frozen in 1872] seems to us the opposite and equally untenable extreme from arguing that fraud is whatever strikes a judge as bad . . . ."[202] Unfortunately, Stevens offers little more to support his view than a simple and unilluminating statement that the definition of "fraud" to include the doctrine of "the 'intangible rights concept' . . . is too well established . . . for us to disturb,"[203] parroting the view expressed in *Holzer*.[204]

While the *Holzer* court viewed the offense of mail fraud as having some limits, the exact nature of those limits is unclear. Judge Posner, who wrote the majority opinion in *Holzer*, randomly described fraud under the statute to include the deliberate concealment of material information in a setting of fiduciary obligation,[205] "overreaching, undue influence and other forms of misconduct."[206] His extremely broad view of the nature of the fiduciary relationship implies that the violation of ethical standards establishes criminal liability.[207] *Holzer*'s working definition of mail fraud is that when a person engages in (1) elaborate efforts to conceal attempts to secure loans of money, and (2) makes "repeated public denials of receiving favors of any kind,"[208] there is violation of "an ethical standard well known to him and to the whole community, and not just something thought up after the fact by a perhaps overly sensitive federal judge."[209] One might argue, based on the historical analysis undertaken in the previous section on "imaginative reconstruction," that the statute has not evolved as "dynamically" as suggested in the *Holzer* opinion. Surely if the statute has "evolved" as Justice Stevens and Judge Posner would have us believe, those changes would have been captured in at least one of the five amendments to the statute. In addition, use of this theory in the mail fraud context is inappropriate, as dynamic statutory interpretation does not apply if "it seems unfair in a particular case and is not compelled by the language of the statute."[210]

In short, while the *McNally* dissent offers interesting arguments on the interpretation of the mail fraud statute, the interpretation proffered fails under virtually all of the theories of statutory interpretation currently in use.[211] Although the

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202. *Id.* at 310.
203. *Id.* at 310.
204. *Id.*
205. *Id.* at 307.
206. *Id.* at 309.
207. *Id.*
208. *Id.*
209. *Id.*
210. W. ESKRIDGE & P. FRICKEY, *supra* note 167, at 616.
211. Two other theories might offer some insight into the question of the scope of the mail fraud statute. The first starts with the premise that the meaning of statutes changes over time. In interpreting a statute, the interpreter is urged to take into account the statute's entire history, including how other judges have interpreted the statute. The interpreter is to add to this history, not change it. It is guided by the belief that people act pursuant to a set of basic community principles, and that legislation should be interpreted in light of these principles. R. DWORKIN, LAW EMPIRE 209-11 (1986). In this way judges can advance progressive social policies without substituting their own values for those of the legislature. However, this theory appears unworkable in the case of a statute like mail fraud, as there appears to be no way by which a statute that has been over-expanded or misinterpreted can be changed. Congress recently recognized that the mail fraud statute has been expanded beyond its original intent, as indicated in a case that analyzed the bank fraud statute, 18 U.S.C. § 1344 (Supp. IV 1986), which Congress modeled on the mail fraud statute. According to *Blackmon*, 839 F.2d 900, Congress wanted to ensure that the new statute would not be over-expanded like its predecessor.

majority may not have expressed fully its view of statutory construction, their analysis of the statute has a strong legal basis and is consistent with efforts at statutory interpretation that seek to assess legislative intent and purpose and which imaginatively reconstructs the statute.[212] Also, the decision reinvigorates the rule of lenity, a major theme in interpretation of criminal statutes.[213] Thus, the recent congressional amendment to the mail fraud statute may not remedy the concern addressed by the Court in *McNally*.

The *McNally* decision was an effort to limit mail fraud consistent with the intent of the original drafters of the Act. However, the Court's effort is largely undone by recent congressional action that attempts to broaden the scope of the Act and restore it's usage to the status quo ante. The *McNally* opinion itself did not define "honest services," holding that only obtaining *property* by fraudulent means is included within the mail fraud statute.[214] *Carpenter v. United States*[215] moved closer to providing a definition of "honest services," but in keeping with the *McNally* decision relied on a property analysis to amplify the meaning of that term.[216] Still, there is language in *Carpenter* suggesting that it would be unconstitutional for the mail fraud statute to include anything but deprivation of a property right. The Court noted that a "contractual right to [an employee's] honest and faithful service" was an "interest too ethereal in itself to fall within the protection of the mail fraud statute."[217] This language in *Carpenter* emphasizes the dispute over the meaning of the term "honest services," and raises significant questions about the new amendment. Thus, in spite of congressional action, we will once again, as suggested by Judge Winter's dissent in *United States v. Margiotta*, be confronted with problems of the meaning of "honest services" and "fiduciary duty."[218] Judge Winter, in objecting to the defendant's mail fraud conviction, proclaimed that:

> The words fiduciary duty are no more than a legal conclusion and the legal obligations actually imposed under that label vary greatly from relationship to relationship.

> The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions. The committee believes that while the additional activity that could thus be brought within the purview of the language might well be reprehensible, and probably should be criminal, due process and notice argue for prohibiting such conduct explicitly, rather than through court expansion of coverage.

Id. at 906 (quoting H.R. Rep. No. 901, 98th Cong., 2d Sess 2, 4 (1984)).

Second, another statutory-interpretation methodology might be "original understanding." Arguably it is probably best subsumed under the legislative- intent section, but true adherents to legislative understanding may mean something different. Specifically, they hold the view that the statute can have only the drafters' conception (to use Dworkin's term) of its scope, and no more. By contrast, a purpose analysis of any sort permits new objects to enter the calculus if within the original purpose (a concept in Dworkin's terms) envisioned by the drafters.

212. For a view arguing in favor of dynamic statutory construction of the mail fraud statute, see *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 119, 336-39 (1987).

213. McBoyle v. United States, 283 U.S. 25, 27 (1931).

214. *McNally*, 483 U.S. at 361.

215. 484 U.S. 19.

216. One writer argues that *McNally* and *Carpenter* are inconsistent. Bradley *Supreme Court Review: Forward: Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573, 595 (1988).

217. 484 U.S. at 25.

218. 688 F.2d 108, 139, *reh. denied*, 811 F.2d 46 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

. . .

> Although the courts have, with precious little analysis, brought virtually all participants in government and politics under the rubric fiduciary, the obligations imposed are wholly the creation of recent interpretations of the mail fraud statute itself. . . . One searches in vain for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs "honestly" or "impartially," to insure one's "honest and faithful participation" in government and to obey "accepted" standards of moral uprightness, fundamental honesty, fair play and right dealing.[219]

Judge Winter's concerns are ever-present at the prospect of decoding what Congress meant by "honest services" in the 1988 Drug Abuse Act and in determining whether it is consistent with the limits of the mail fraud statute established by *McNally* and *Carpenter*.[220]

CONCLUSION

The *McNally* decision opened the door and legitimized inquiry and review of the mail fraud statute. Contradictory approaches taken by the federal courts following *McNally* indicate that questions concerning the application of the statute are far from settled.[221] It is hoped that either Congress or the courts will move to

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219. *Id.* at 142-43.

220. Until Congress or the Supreme Court defines the meaning of "honest services," the district and circuit courts will have to fashion their own interpretations of this phrase. The Supreme Court spoke to the issue of fiduciary duty regarding SEC Rule 10(b)-5, 17 C.F.R. § 240.10b-5 (1983), in Dirks v. Securities & Exchange Comm'n, 463 U.S. 646 (1983). In *Dirks*, the Court was unwilling to find a breach of fiduciary duty unless the transfer of an "objective benefit" was present. *Id.* at 663. The objective benefit requirement was added to relieve courts of the task of wading through a subjective quagmire to determine if there has been a violation of the duty. *Id.* at 664. If this approach is taken in defining the new meaning of the mail fraud statute, we are back full circle to the *McNally* property requirement for a scheme or artifice to defraud, because "objective benefit" nearly always equates to "tangible or intangible property." Thus, Congress' attempt to overrule *McNally* legislatively would have been a poorly drafted attempt.

221. There were a number of unanswered questions left after *McNally*, the most important of which was the scope of the decision. Justice Stevens in a footnote suggested that *McNally* may be quite limited:

> When a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer—who is not getting what he paid for. Additionally, '[i]f an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal.' Restatement (Second) of Agency § 403 (1958). This duty may fulfill the Court's 'money or property' requirement in most kickback schemes.

McNally, 483 U.S. at 377 n.10.

Stevens' view would limit *McNally* to a formal review of pleadings and require dismissal of cases only when there is no allegation of a property loss. Such an approach, however, is at odds with the substantial change of direction indicated in *McNally* itself, and it is doubtful the Supreme Court would have been willing to brave such a storm of criticism for such a limited effect. *See* Coyle, *supra* note 47, at 1. At a minimum, the Court in *McNally* appears unwilling to countenance a bribery charge under the mail fraud statute unless there is clear evidence of a violation of a specific duty or obligation of office and the loss of an economic benefit to the employer. Nonetheless, some courts followed Justice Stevens' suggestion and developed a "constructive trust" theory to insulate convictions under the mail fraud statute. United States v. Runnels, 842 F.2d 909 (6th Cir. 1988).While criticized as disingenuous by United States v. Ochs, 842 F.2d 515 (1st Cir. 1988), there has been a growing split among the circuits on what

constitutes an appropriate loss for a mail fraud prosecution. In United States v. Rico Industries, Inc., 854 F.2d 510, *reh. denied*, 860 F.2d 438 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1529 (1989), a utility company employee was charged with violating the mail fraud statute when he accepted kickbacks from a company with which he negotiated contracts to purchase natural gas. Statutory provisions regulated the maximum price the utility could charge and the maximum profit it could earn. Even though the kickbacks did not reduce the profit on what it sold since it had received it's maximum profit allowable by law, the court found a violation of the mail fraud statute. The convictions were upheld under the theory that while a

> lower purchase price would not directly create greater profits because its profit from the conduct of its business was set by law, [the utility] could have sold the gas to its customers at a lower rate and still maintained its maximum profit margin. Such a lower selling price translates directly into economic benefits to [the utility]; a lower price increases [the utility's] good will, can increase user consumption and most importantly, confirms [the utility's] fulfillment of its duty as a public utility—to provide quality service at the lowest possible price.

Id. at 714.

The Third Circuit took a different approach to the application of the mail fraud statute in United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989). In that case officials of a union pension fund received kickbacks when they invested in a mortgage company. Although the court upheld terms of the contract and the investment returned was as provided for in the investment contract, the government sought affirmance of a mail fraud conviction. Their theory was that the union had been deprived of the control of its money, much like the *Wall Street Journal* had been deprived of its confidential information in the *Carpenter* case. The Third Circuit rejected the government's argument and held that *McNally* suggested "such a [deprivation of control] theory is too amorphous to constitute a violation of the mail fraud statute as it is currently written." *Id.* at 147 The recent case of United States v. Biaggi, 675 F. Supp. 790 (S.D.N.Y. 1987), upheld a type of deprivation of control theory. In *Biaggi*, the District Court held that the Department of Defense was deprived of control over money provided by a defense contract when the defendants lied in order to secure those contracts. The court held that the Department of Defense was "not getting the benefit of its bargain. When it contracted to buy a certain number of pontoons from Wedtech, it was not also contracting to line the co-racketeers' pockets." *Biaggi*, 675 F. Supp. at 802.

There are a number of contradictions between *Rico Industries* and *Zauber*. For example, in both cases the victims (the public utility and the union) received the exact amount of gain possible under the statute (*Rico Industries*) or the contract (*Zauber*) resulting in no direct economic loss. The lack of economic loss was irrelevant in *Rico Industries*, but important in *Zauber*. Second, *Rico Industries* accepted an argument that had there been no kickbacks the utility might have been able to provide gas at a lower price and increase public good will. In *Zauber* the suggestion that the union pension fund missed investment opportunities was given absolutely no weight. Nor was the fact that union members might have had to pay less for their pension plan considered at all. Thus, a very speculative claim that if given the opportunity the utility in *Rico Industries* might have lowered rates was accepted, while interests of more tangible third-party beneficiaries was rejected in *Zauber*.

Another unsettled matter is the retroactive effect of the *McNally* decision. Several cases have been decided, some reversing convictions and others sustaining them. *E.g.*, United States v. Winans, 612 F. Supp. 827 (S.D.N.Y. 1985), *aff'd in part, rev'd in part, sub nom.*, Carpenter v. United States, 791 F.2d 1024 (2nd Cir. 1986), *aff'd* 108 S. Ct. 316 (1987); United States v. Runnels, 833 F.2d 1183 (6th Cir.1987); United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987). *But see* United States v. Holzer, 840 F.2d 1343, *rev'd* 848 F.2d 822 (7th Cir.), *cert. denied*, 109 S. Ct. 315 (1988), which threw out the *Runnels* constructive-trust theory to get at bribery cases. *See also* Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988), which gave full retroactivity even after final conviction.

In United States v. Mandel, brought shortly after *McNally*, that decision was applied retroactively. United States v. Mandel, 672 F. Supp. 864 (D. Md. 1987). The attack on Mandel's conviction seemed proper under a 28 U.S.C. § 2255 claim (in United States v. Dœ, 867 F.2d 986 (7th Cir. 1989)), a defendant previously convicted and having served his sentence successfully overturned his conviction on motion for a writ of coram nobis) that the initial conviction was for "an act the law does not make criminal." *Mandel*, 672 F. Supp. at 867. The District Court found that the Supreme Court, by interpreting the statute in the manner contrary to its original intent, must view all subsequent convictions as in direct contravention of the statute. However, not all defendants have been similarly successful when seeking to overturn convictions under the "intangible rights" theory of the mail fraud act. In United States v.

resolve such issues as the meaning of "honest services" in light of *McNally* and *Carpenter*. Absent such action, federal prosecutors should develop guidelines clearly delineating the criteria for federal intervention in the prosecution of governmental and corporate corruption. In light of the new amendment to the mail fraud act and the *Carpenter* language expressing concern about such language, it is time to develop some criteria to guide application of the statute. Possibly the federal intervention criteria developed long ago by Professor Schwartz might merit reconsideration. His thesis, that federal jurisdiction should be exercised only where special justification exists, provides some desperately needed guidance.[222]

Callanan, 671 F. Supp. 487 (E.D. Mich. 1987), the court discussed the three-prong test to be used to determine whether a decision should be given retroactive effect. First, does the new rule go to the heart of the truth-finding function of the trial? Second, to what extent have law enforcement authorities relied on the old standard? Third, what would be the effect on the administration of justice if there were retroactive application of the new rule? The district court found the conviction could be justified "upon the finding of a direct pecuniary benefit."

Presently, only one Court of Appeals has considered the retroactive application of the *McNally* decision and concluded that "those convicted were convicted of conduct that was not a crime," Ingber v. Enzor, 841 F. 2d 450 (2d Cir. 1988). This theory was also supported in United States v. Murphy, 836 F.2d 248 (6th Cir.), *cert. denied*, 109 S. Ct. 307 (1988). and consequently prior convictions should be overturned. The *Ingber* court refused to consider the effect of recent opinions on retroactivity in the criminal procedure area. *Ingber*, 841 F.2d at 453, 454 n.1. The issue of retroactivity of *McNally* might also likely be considered in the appeal of Shelton v. United States, 848 F.2d 1485 (10th Cir. 1988).

The *McNally* decision leaves other unanswered questions. The *McNally* opinion accepts without discussion the labeling of non-governmental officials as appropriate targets for mail-fraud charges by endorsing in the *McNally* opinion the conviction of co-defendant Gray, who was not a politician, without any discussion of the implications of the decision. If Stevens' broad agency view for criminal liability under the mail fraud statute is accepted, then it is conceivable that party officials and even campaign workers could be considered agents for purposes of prosecution under the statute, and there might be novel interpretations of what type of conduct can be brought under the statute. Judge Winter in his dissenting opinion in *Margiotta*, 688 F.2d at 139, provided examples of some of the likely possibilities, few of which are eliminated by the *McNally* decision. Chargeable might be a political candidate who mails a position paper containing a promise the candidate cannot keep; an elected official who, for political purposes, without public disclosure, votes to impose unnecessary costs on taxpayers; a political official who supports a less-qualified candidate than an opponent because the less-qualified candidate is more cooperative with the party; finally, a partisan political leader who in an effort to retain jobs for the party faithful refuses to vote to modernize government might likewise be chargeable with mail fraud. *Id.* at 140. Judge Winter's suggestion that all that is required for a mail fraud conviction is (1) a relationship calling for disclosure, (2) a material fact known to the candidate, official or party leader, and (3) a failure to disclose it, is still applicable, even under the *McNally* decision. *Id.*

222. Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion*, 13 LAW & CONTEMP. PROBS. 64 (1948). He makes it clear that "it does not follow that all conduct which adversely affects the federal organization must be dealt with in the federal courts." *Id.* at 68. He suggests that the federal authorities act only when at least one of the following requirements is met: (1) when states are unwilling or unable to act; (2) when the jurisdictional element is an important ingredient of its success; (3) when the jurisdictional element is incidental but another substantial federal interest is at stake; (4) when the criminal operation is interstate in character; or (5) when state authorities would be much less efficient in investigating a complex federal prosecution case. *Id.* at 73. Schwartz in fact suggests that the "mail fraud statute is a . . . typical case based on several" of the above criteria, *id.* at 74, but there is often "considerable resentment against . . . 'interference with purely domestic affairs of the State,'" *id.* at 75, quoting from United States v. Aczel, 219 F. 917 (D. Ind. 1915), *aff'd*, 232 F. 652 (7th Cir. 1916).

Application of the Schwartz criteria to the *McNally* case would have resulted in no federal prosecution as (1) there was no indication that the State of Kentucky was unwilling to act, (2) the mailings were not an important ingredient to the success of the scheme, (3) there was no substantial federal interest in the insurance payoffs that could outweigh the state interest, (4) the scheme was entirely intrastate in nature (within Kentucky), and (5) the scheme was not too

The legitimacy of the criminal law in the final analysis depends on the support of the citizens. If citizens view prosecutors as arrogantly expanding their power and discretion, support for their work will surely erode. The new breed of federal prosecutors would do well to heed the admonition of one of their predecessors: "[C]are must be taken lest under [the mail fraud statute] jurisdiction over frauds that really does not belong to the Federal courts be attempted."[223]

complex for Kentucky authorities to handle. Indeed, in *McNally*, since the Commonwealth of Kentucky itself arguably was the defrauded victim, that state had a special interest in prosecuting the case. States have a special interest in policing their own political actors and should be allowed the opportunity to do so. In this way, a state can demonstrate its political integrity and thereby maintain validity in the eyes of its constituents. *See Mandel*, 591 F.2d at 1363

223. W. ATWELL, A TREATISE ON FEDERAL CRIMINAL LAW AND PROCEDURE 290 (1929).