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UNITED STATES V. NEWMARK: SEMANTICS AND MISREPRESENTATION IN MAIL AND WIRE FRAUD, DOES IT REALLY MATTER WHO WAS DECEIVED?

Debra Carfora*

Six days per week, an army of 596,000 U.S. postal employees deliver approximately 584,000,000 pieces of mail. Americans trust these postal employees with their personal letters, business correspondence, and other goods and materials, in part because the Fourth Amendment of the U.S. Constitution guarantees the peoples' privacy in these matters. A little-known branch of the Post Office called the Postal Inspection Service (Inspection Service) protects the integrity of the mails.

However, as mail pours through post offices and commercial carriers around the country, so do “attempts to cheat the public [through] fraudulent use of [those] mails.” One of the major objectives of the Inspection Service is to

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1. UNITED STATES POSTAL SERVICE, POSTAL FACTS 2010 4 (2010), available at http://www.usps.com/strategicplanning/_pdf/PostalFacts_03_17_2010.pdf. The spirit and pride of the U.S. mail carriers is captured by an inscription on the James A. Farley Building in New York City: “Neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds.” Id. Although most often attributed as the official motto of the U.S. Post Office, the inscription was adapted from the work of fifth-century Greek historian Herodotus, whose words described Persian messengers of his time. JOHN UPTON TERRELL, THE UNITED STATES POST OFFICE DEPARTMENT: A STORY OF LETTERS, POSTAGE, AND MAIL FRAUD 10-11 (1968) (“The Post Office Department has no official motto.”).

2. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”); see also Ex Parte Jackson, 96 U.S. 727, 733 (1877) (granting the Fourth Amendment rights which prevent any type of inspection or examination of the mail); ELINORE DENNISTON, AMERICA'S SILENT INVESTIGATORS: THE STORY OF THE POSTAL INSPECTORS WHO PROTECT THE UNITED STATES MAIL 12-13 (1964) (explaining that all mail-delivery methods are protected from invasion by any person); TERRELL, supra note 1, at 5 (discussing the illegality of any postal employee opening mailed packages).

3. See DENNISTON, supra note 2, at 14–15 (introducing the Postal Inspectors, their role in the protection of the mails, and Americans’ unfamiliarity with the organization’s achievements).

"protect[] the American public from being victimized by fraudulent schemes involving the mails."

As a primary weapon in protecting the integrity of the mails, the Inspector Service relies on the criminal mail fraud statute, which makes it a felony to intentionally use the mails to defraud.

The wire fraud statute serves as a modern extension of the mail fraud statute, and courts construe the two similarly.

The federal mail and wire fraud statutes function as important tools through which federal prosecutors may keep pace with the modern evolution of new schemes and frauds.

Congress's power to regulate the federal post office and interstate communication wires provides the constitutional basis for the mail and wire fraud statutes.

As judicial interpretation and application of the statute has evolved, however, the required use of the mails (or wires) has been reduced to nothing more than a "jurisdictional hook." The broad language of the statutes gives federal through the mail have been known nationally to affect over 15,000 victims at a time and causing hundreds of millions of dollars in consumer losses annually.

5. Mail Fraud Hearings, supra note 4, at 202 (statement of Kenneth Hearst, Deputy Chief, Postal Inspector Serv.). Because the Inspection Service may only claim jurisdiction after use of the mails is shown, the Inspection Service often shares information with other law-enforcement agencies that have concurrent jurisdiction. Id. at 202–03.

6. See 18 U.S.C. § 1341 (2006 & Supp. II 2009); Mail Fraud Hearings, supra note 4, at 202 (statement of Kenneth Hearst, Deputy Chief, Postal Inspector Serv.). The mail fraud statute has enjoyed a much broader application outside the scope of the Inspection Service. For example, by the end of 1993, the Federal Bureau of Investigation (FBI) estimated that it would charge between ten and twenty percent of pending white-collar crime investigations with violations of the mail fraud statute. Id. at 221 (statement of Frederick Verinder, Deputy Assistant Director, White Collar Crime, FBI).


8. See Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); Flo Messier & Kenneth A. Polite, Mail and Wire Fraud, 36 AM. CRIM. L. REV. 881, 883 (1999) (discussing the overlap of character and scope between the mail and wire fraud statutes); see also infra Part I.A (discussing the wire fraud statute as an extension of the mail fraud 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.

Id.; see also Id. ed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 DUQ. L. REV. 771, 771 (1980) ("To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisiville Slugger, our Cuisinart—and our true love.").

10. See infra note 33 and accompanying text (discussing the Supreme Court's decision in Ex Parte Jackson in which the Court explicitly held that Congress's constitutional authority to regulate the postal system encompasses the power to regulate what is sent through the mails).

prosecutors the needed legal flexibility to pursue criminal liability against those who use the mails or wires to perpetuate fraud upon others. However, the constitutional concept of fair notice in criminal prosecutions has prompted some courts to attempt to limit the vagueness of the statute through a very narrow reading of its language.

Over the past 138 years, the circuit courts have divided both on what types of "schemes" fall within the scope of the mail fraud statute and the degree to which the mails need to be used in furtherance of the recognized schemes. Although no legislative history exists to reveal Congress's initial intent regarding scope and reach, the statute itself has undergone three major revisions expanding the reach of the statute, suggesting that Congress intended the statute's scope to be broad. Additionally, periodic amendments to the statute's language reversed the limiting and narrowing effects of judicial decisions on the subject and evidence Congress's continued intent to maintain the broad scope of the statute.

utilization has expanded such that "[the mail fraud statute, as it exists today, seems to require only a minute link to the mail system]").

12. See Mail Fraud Hearings, supra note 4, at 221 (statement of Frederick Verinder, Deputy Assistant Director, White Collar Crime, FBI) ("[I]t is the mail fraud statute along with the wire fraud statute that works so well, hand in hand, to provide the FBI a nexus into criminal violations not specifically covered by the other Federal laws"); see also Behrens, supra note 11, at 526 (reasoning that "in a society where an alarming number of ever-increasing crimes are occurring, the prosecutors need at least one secret weapon").

13. See McNally v. United States, 483 U.S. 350, 360 (1987) (quoting Fasulo v. United States, 272 U.S. 620, 629 (1926)) (noting that in mail fraud cases, "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute"), superseded by statute, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified as amended at 18 U.S.C. § 1346 (2006)). Because "the punishment of a human being is a very serious matter, any doubt regarding the appropriateness of penal liability should be resolved by narrowing its scope." JEROME HALL, GENERAL PRINCIPLE OF CRIMINAL LAW 3-4 (The Law Book Exchange, 2d ed. 2005); see also Sara Sun Beale, Mail: Federal Mail Fraud Act, ENCYCLOPEDIA OF CRIME AND JUSTICE (Jan. 2002), http://www.encyclopedia.com/doc/lG2-3403000171.html (discussing due process concerns raised by the common law evolution of the mail fraud statute).

14. See Rakoff, supra note 9, at 790–821 (tracing the early division between strict and broad constructionist approaches, and interpretations of the various amendments to the mail fraud statute up through the 1970s).


16. See infra section III.A.3 (demonstrating Congress's intent to foster the broad application of the mail fraud statute through legislation as a reaction to key cases attempting to limit the statute's reach); Behrens, supra note 11, at 495 (recognizing that in Durland v. United States, the Court used the mail fraud statute "for controlling activities that were perhaps questionable outside the scope of what the drafters had intended it to cover. Congress later codified the holding of Durland, further solidifying the belief that the mail fraud statute could be extended in its application"); see also infra notes 65–69 and accompanying text (discussing McNally's limitation of the mail fraud statute to money or property and Congress's acquiescence to the Court's invitation to expand the statute through additional legislation).
Prosecutors must show only two elements to prove mail or wire fraud: (1) the existence of a scheme to defraud; and (2) use of the mails or wires in furtherance of that scheme. Neither the language of the statute nor the extensive judicial interpretations define fraud; therefore, the concept of a scheme to defraud does not have a clear measurable standard outside of a general "plan" with dishonest intention. The second element of the statute requires only evidence of a casual relationship between the mailing (or use of the wires) and the scheme; that is, the mailing itself need not be fraudulent.

Criminal jurisprudence generally disfavors criminal punishment in the absence of a wrongful act. This widely accepted maxim causes tension in mail fraud prosecutions that punish the "otherwise" legal act of mailing, combined with only a mere intent to defraud. Some courts rely on a strict interpretation of the statute's language as a way to avoid extending the statute beyond the inherent boundaries of criminal prosecution into areas not envisioned by Congress. This type of textual interpretation has prompted the

17. 18 U.S.C. § 1341 (2006) ("Whoever, having devised ... any scheme or artifice to defraud ... [and] for the purpose of executing such scheme ... deposits or causes to be deposited any matter or thing ... to be sent or delivered by any private or commercial interstate carrier ... shall be fined under this title ... "); Pereira v. United States, 347 U.S. 1, 8 (1954) (laying out the elements of mail fraud). Pereira v. United States was a critical case for the development of the mail fraud statute because it was the first time the Supreme Court identified the main elements of the offense. Behrens, supra note 11, at 498–99 (1993).

18. See Beale, supra note 13. However, the Court has indicated the statute "is not limited by the common law definition of fraud." ELLEN S. PODGOR & JEROLD H. ISRAEL, WHITE COLLAR CRIME IN A NUT SHELL 60 (4th ed. 2009).

19. See, e.g., PODGOR & ISRAEL, supra note 18, at 60 (noting that a scheme to defraud implies that the defendant have a fraudulent intent); Mark Zingale, Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?, 99 COLUM. L. REV. 795, 800 (1999) (explaining that fraudulent intent may be inferred from a scheme to defraud "because schemes are by definition not accidental but deliberate plans").

20. See Pereira, 347 U.S. at 8 ("It is not necessary that the scheme contemplate the use of the mails as an essential element."); see also Zingale, supra note 19, at 800 (discussing how the existence of an incidental nexus between a mailing and a scheme to defraud sufficiently satisfies the second element of the statute).

21. See Hales v. Petit, (1562) 75 Eng. Rep. 387 (C.B.) [397] ("For the imagination of the mind to do wrong, without an act done, is not punishable in our law . . . ."); HALL, supra note 13, at 185–87 (discussing the principle of concurrence, which manifests the idea that "criminal conduct, not thinking or movement or both of them unrelated to each other, is required to incur criminal liability"); see also Rakoff, supra note 9, at 775 (providing that "devising a scheme to defraud—is not itself conduct at all . . . but is simply a plan, intention, or state of mind, insufficient in itself to give rise to any kind of criminal sanctions").

22. See Rakoff, supra note 9, at 776 (discussing how connections between the elements of mail fraud function to link defendants to an innocent act that has only minute consequences).

23. See, e.g., McNally v. United States, 483 U.S. 350, 360 (1987) (refusing to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," interpreting the mail fraud statute "as limited in scope to the protection of property rights . . . ," and inviting Congress to express its intent more clearly if it desired the statute to
Second, Ninth, and Eleventh Circuits to limit the mail fraud statute by requiring evidence of a direct misrepresentation to the intended victim to sustain a conviction for mail and wire fraud.24 Recently, however, the Third Circuit upheld a wire fraud conviction against Brian Newmark who made misrepresentations to Morgan Stanley during his scheme to defraud Arthur and Thomas Walker of money; Morgan Stanly was a third party not a target of the fraudulent scheme.25 Newmark petitioned the Supreme Court for certiorari claiming that the Third Circuit erred in affirming his conviction, and instead, should have taken an approach similar to that taken by the Second, Ninth, and Eleventh Circuits.26 The Supreme Court denied Newmark’s petition.27 For over twenty years, the circuits have disagreed whether misrepresentations made to someone other than the intended victim of a scheme to defraud are enough to sustain a conviction for federal mail or wire fraud. This disagreement can be attributed to the statute’s turbulent judicial history regarding the scope and extent of its reach.28

This Note begins with a general discussion of the federal mail and wire fraud statutes and depicts the historical evolution of the statutes’ current forms. The Note goes on to review judicial interpretations of the statutory phrase “scheme to defraud” and then traces twenty years of conflicting decisions in the circuit courts regarding the extent of misrepresentation required to sustain a conviction for federal mail or wire fraud. Next, the Note analyzes the Third Circuit’s decision in *United States v. Newmark*, concluding that the court correctly applied a broad interpretation of the statute. Finally, this Note concludes that the historical context in which Congress wrote the statutes, the language of the statutes themselves, and Congress’s reaction to judicial treatment of the statutes indicate that judicial interpretation of the mail and wire fraud statutes must appreciate their broad scope and preserve prosecutorial discretion to punish sophisticated frauds designed by imaginative minds.


28. See infra Part I (discussing the historical battle between the lower courts as to the scope and reach of the mail fraud statute); see also infra Part II (tracing the modern conflict between the lower courts that disagree whether misrepresentations to third parties falls within the purview of the federal mail or wire fraud statutes).
swindlers by not requiring a direct misrepresentation to the intended victim of a scheme to defraud.

I. ORIGINS OF THE MAIL FRAUD STATUTE

The Reconstruction era, the time period following the end of the Civil War, was "one of the most turbulent and controversial eras in American History."\(^2\) The country was in economic and political turmoil, and the federal government, charged with rebuilding the nation, began extending its reach of authority over rights traditionally belonging to the states.\(^3\) As the wealth and economic growth of the nation began to expand, so too did bribery, fraud, and swindles through the U.S. Postal Service.\(^1\) In 1872, Congress enacted the mail fraud statute as part of an overhaul of the Postal Service; the original language of the statute was intended to prevent the use of the Postal Service to perpetrate frauds by establishing a penalty for its misuse.\(^3\) The Supreme Court preempted any challenge to the mail fraud statute in 1877, declaring in *Ex Parte Jackson* that "[t]he power possessed by Congress embraces the regulation of the entire postal system of the country."\(^3\)

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30. *See Richard E. Levy, The Power to Legislate: A Reference Guide to the United States Constitution* 12 (Jack Stark ed., 2006) (explaining that "the Civil War and reconstruction saw both the assertion of federal sovereignty as dominant over states and the expansion of federal legislative power"); Rakoff, *supra* note 9, at 779 & n.41 (listing legislation aimed at mending the widespread social and economic problems prevalent immediately following the Civil War); *see also* Beale, *supra* note 13 (discussing how legislation like the mail fraud statute departed from the traditional notion of the federal government’s role in criminal-law sanctions).

31. *See* Terrell, *supra* note 1, at 59 (explaining that before 1872, because no federal statute addressing mail fraud yet existed, victims had nowhere to turn).

32. Martin T. Biegelman, *Protecting with Distinction: A Postal Inspection History of the Mail Fraud Statute* 2 (U.S. Postal Inspection Service 1999); Terrell, *supra* note 1, at 60. The language of the original statute reads in part:

> [A]ny 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 of the United States, or by inciting such other person to open communication with the person so devising or intending [sic], shall, in and for executing such [sic] scheme or artifice . . . place any letter or packet in any post-office of the United States, or take or received any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor . . . and shall proportion [sic] the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.


33. *Ex Parte Jackson*, 96 U.S. 727, 732 (1877). Jackson was charged and convicted of mailing circulars advertising an illegal lottery under § 3894 of the United States Revised Statutes. *Id.* at 728. The “lottery laws,” which were among the first attempts by Congress to prevent the use of the mails in furtherance of fraudulent purposes, prohibited mailing “any letters or circulars
Nonetheless, constitutional concerns regarding the extent of Congress’s power to prevent fraud through regulation of the mails provoked immediate disagreement among the lower courts. Some courts interpreted the “mail-emphasizing” language of the statute as limiting its reach to include only those “frauds” dependent on use of the mails, while other courts more broadly interpreted the statute as encompassing any “scheme” in which the mails were used. In 1889, Congress attempted to remove the confusion among the lower courts by amending the statute to include a list of prohibited schemes. However, subsequent judicial analysis, relying on a strict textual

concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever.” Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194, 196 (codified as amended at 18 U.S.C. § 1302 (2006)). For many years, Congress was determined to find a way to regulate the mails. Rakoff, supra note 9, at 779–82. After Congress passed section 3894 and Jackson was subsequently convicted under this Act, he petitioned the Supreme Court, complaining Congress lacked the power to regulate what was sent through the mails and so his conviction under the Act was unconstitutional. Jackson, 96 U.S. at 728. A unanimous Court disagreed, finding that Congress derived its ability to take “all measures necessary to secure its safe and speedy transit” from its power “to establish post-offices and post-roads.” Id. at 732. In concluding that “[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded,” the Supreme Court extended to Congress the broad ability to regulate “what shall constitute mail matter.” Id.

34. See Rakoff, supra note 9, at 789–90 (describing how the broad language in Ex Parte Jackson led to the development of two different interpretational approaches the mail fraud statute). Compare United States v. Owens, 17 F. 72, 74 (E.D. Mo. 1883) (limiting the scope of the statute to only schemes where mail is central to the fraud), with United States v. Jones, 10 F. 469, 470 (C.C.S.D.N.Y. 1882) (construing the statute broadly to include any fraud where the mail is used).

35. See, e.g., Owens, 17 F. at 74 (“[T]he act was designed to strike at common schemes of fraud, whereby, through the post-office, circulars, etc., are distributed, generally to entrap and defraud the unwary, and not the supervision of commercial correspondence solely between a debtor and creditor.”); see also LOW & HOFFMAN, supra note 15, at 163–64. Those courts relied on a strict textual interpretation of the statute and “required that the mail be central to the perpetration of the fraud and limited the kinds of schemes to which the statute applied.” Id.

36. See, e.g., Jones, 10 F. at 470 (“[A] scheme to defraud any person upon whom the bad money might be passed . . . is within the scope of the statute, although no particular person had been selected as the subject of its operation. Any scheme, the necessary result of which would be the defrauding of somebody, is a scheme to defraud within the meaning of [the statute] . . . .”); see also LOW & HOFFMAN, supra note 15, at 165. Those courts read the statute as a whole, and found “that the ‘gist’ of the mail fraud offense [was] the mailing—not, perhaps surprisingly, the fraud.” Id. at 165 n.i.

37. The amended language reads in part: [A]ny person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the “sawdust swindle,” or “counterfeit money fraud,” or by dealing or pretending to deal in what is commonly called “green articles,” “green coin,” “bills,” “paper goods,”
interpretation, used the amended language to suggest that Congress intended to include within the statute's reach only those schemes specifically mentioned. On the other hand, courts supporting a broader interpretation read the amended language as evidence that Congress initially intended the statute to apply to the kinds of schemes broad constructionists already found to be within the statute's reach.

In 1896, the Supreme Court first interpreted the phrase “scheme to defraud” in *Durland v. United States.* John Durland was convicted of mail fraud for a scheme in which he used the mail to solicit investments in phony bonds. Durland argued that his conviction rested on some future intent and, therefore, could not stand because a fraudulent act or misrepresentation had not yet occurred. The Supreme Court, however, recognized that Durland had been indicted based on the finding that he intended to cheat innocent victims of their money, and that this activity was specifically the type of activity Congress intended to include within the statute's reach.

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"spurious Treasury notes," "United States goods," "green cigars", or any other names or terms intended to be understood as relating to such counterfeit or spurious articles . . . by means of the Post-Office Establishment of the United States . . . such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months . . . .

Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873, 873 (codified as amended at 18 U.S.C. § 1341 (2006 & Supp. II 2009)); see also Behrens, supra note 11, at 494 (noting that by the amendment, Congress hoped "to better define the types of situations in which [the statute] should be applied").

38. *See, e.g.,* United States v. Beach, 71 F. 160, 161 (D. Colo. 1895) ("The general language of the act must be limited to such schemes and artifices as are ejusdem generis with those [acts enumerated in the statute]."). Those adhering to a strict interpretation of the language in the statute read the "scheme to defraud" term as disjunctive to the added list of schemes, interpreting this to be indicative of congressional intent to sustain a narrow reading of the term "scheme to defraud," while adding a specified list of schemes that should be prohibited in addition to the scheme of defraud. *LOW & HOFFMAN,* *supra* note 15, at 169.

39. *See, e.g.,* Milby v. United States, 120 F. 1, 5 (6th Cir. 1903) (holding that the amendment was not intended to curtail the statute’s application to only the enumerated acts). These courts merely found the amendment as irrebuttable validation of acts that Congress always intended to be included within the statute. Rakoff, *supra* note 9, at 809.


41. *Durland,* 161 U.S. at 307–09, 312. John Durland was the President of Provident Bond & Investment Company. *Id.* at 309. He used the mail to secure monthly investments in his company's bonds. *Id.* His conviction was based on the absolute intention that the bonds would never mature and his victims would never realize the promised redemption amounts. *Id.* at 308–09.

42. *Id* at 312–13. For a discussion of the general principle of criminal law that a person cannot be convicted of criminal "intent" without some overt act, see *supra* note 21 and accompanying text.
sought to prevent. The Court concluded that the mail fraud statute must be read as including "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." Although the language used in Durland supported a broad reading of the statute, the holding itself narrowly defined only the "scheme to defraud" language of the statute. Because of this contradicting dichotomy, the disagreement between the lower courts waged on. In 1909, Congress once again stepped in and amended the mail fraud statute's language to reflect the broad, conclusory language in Durland. The amended language of the statute not only added the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," but, more significantly, Congress eliminated the mail-focused language.

A. Modern Expansions of an Antique Statute

Although the 1909 amendment was the last substantive amendment to the mail fraud statute, the language and effect of the statute has been expanded over the past century to reflect the changes in modern civilization. For

44. *Id.* at 313.
45. *See id.* at 312–14 (stating that the question squarely in front of the court was whether "the statute reaches only such [schemes] as . . . would come within the definition of 'false pretenses'"; *see also* Rakoff, *supra* note 9, at 811–12 (discussing the broad conclusory language of *Durland* in contrast with its narrow holding).
46. *See* Rakoff, *supra* note 9, at 812 (discussing how the Court's opinion in *Durland* supported a broad interpretation of the statute, while not foreclosing a narrow interpretation, thus allowing lower courts to continue to advance opposing interpretations).

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post-office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States . . . shall be fined . . .

49. *See* McNally, 483 U.S. at 357 n.6.
50. *See infra* notes 51–57 and accompanying text (outlining the expansion of chapter 63 of title 18 of the United States Code).
example, in 1948, Congress amended the statute for the sole purpose and effect of eliminating the nineteenth-century language complicating the text;\textsuperscript{51} in 1970, Congress amended the language of the statute to reflect globalization of the post office by substituting “Postal Service” for “Post Office Department”;\textsuperscript{52} and, in 1994, Congress amended the language of the statute to apply to commercial mail services, which now operate as competition for the U.S. Postal Service.\textsuperscript{53}

Additionally, Congress expanded chapter 63 of title 18 of the United States Code to include §§ 1343\textsuperscript{54} and 1346.\textsuperscript{55} Section 1343, the wire fraud statute, mirrors the mail fraud statute, but requires the means of executing a scheme to include “wire, radio, or television communication in interstate or foreign commerce.”\textsuperscript{56} Section 1346 was intended to expand the reach of “schemes to defraud” to “intangible right[s] of honest services.”\textsuperscript{57} This section was enacted as a direct response to the Supreme Court’s holding in \textit{McNally v. United States}.\textsuperscript{58}

Charles McNally, James Gray, and Howard Hunt were involved in a scheme designed to funnel insurance commissions through third-party entities with


\textsuperscript{53} Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (codified as amended at 18 U.S.C. § 1341 (2006)). Letters and packages being sent in the furtherance of a scheme to defraud through commercial carriers, such as Federal Express and UPS, now fall within the reach of the mail fraud statute. \textit{See PODGOR & ISRAEL, supra note 18, at 68}. The current language of the statute reads in part:

\begin{quote}
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatsoever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.
\end{quote}


\textsuperscript{56} 18 U.S.C. § 1343; \textit{see PODGOR & ISRAEL, supra note 18, at 73} (discussing the similarities between the mail fraud statute and the wire fraud statute).

\textsuperscript{57} 18 U.S.C. § 1346.

\textsuperscript{58} \textit{See infra} notes 71–72 and accompanying text (indicating that Congress passed § 1346 in response to the Supreme Court’s demand in \textit{McNally} to speak more clearly about whether “intangible rights” are included in the definition of “scheme to defraud”).
which they were associated. As Secretary of Public Protection and Regulation and Secretary of the Governor of Kentucky’s cabinet, Gray supervised Kentucky’s insurance policies, and, as chairman of Kentucky’s Democratic Party, Hunt controlled the selection of the state’s insurance policy provider. In the interest of maintaining their existing position as the state’s insurance provider, Wombwell Insurance Company offered to “share any resulting commissions in excess of $50,000 a year with other insurance agencies specified by [Hunt].”

Hunt and Gray formed investment companies, which McNally operated, and then identified those companies among the agencies that would share in the Wombwell commissions. McNally and Gray were charged with federal mail fraud through a scheme devised to deprive the people of Kentucky of their right to honest government services.

McNally and Gray were convicted by a jury in the Eastern District of Kentucky and appealed to the Sixth Circuit, complaining that a scheme to “defraud the citizens of their intangible rights to honest and impartial government” was outside the reach of the federal mail fraud statute. The Sixth Circuit, however, upheld the convictions, relying on the conclusions of several other circuits that intangible rights were within the scope of the statute. The Supreme Court reversed, indicating that, although it was clear

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60. Id. at 352-53, 355.

61. Id. at 352. Hunt and Gray recognized this bribe as an opportunity for personal gain. See id. at 353 (discussing the funneling of these commissions to Seton Investments, Inc.—a company created for the sole purpose of distributing Wombwell commissions to both Hunt and Gray).

62. Id. at 352-53.

63. Id. at 353-54 (basing the charges on mailed commission checks from Wombwell to the investment company that the men controlled).

64. Id. at 355. In a separate case, Hunt pled guilty to mail and tax fraud and was sentenced to three years in prison. Id. at 353.

65. United States v. Gray, 790 F.2d 1290, 1292, 1294–95 (6th Cir. 1986), rev’d sub nom. McNally v. United States, 483 U.S. 350 (1987). The concept of public entitlement to an intangible right to honest services derives from a theory that the fiduciary duty running from government officials to their constituency is breached when they participate in activities outside the state’s best interests. See id. at 1294; see also PODGOR & ISRAEL, supra note 18, at 63 (stating that, during the 1980s, “mail fraud was not limited to cases where a victim suffered monetary or property loss but included breaches of an owed fiduciary duty”).

66. See Gray, 790 F.2d at 1294–95 (citing United States v. Alexander, 741 F.2d 962, 964 (7th Cir. 1984), overruled by United States v. Ginsberg, 773 F.2d 798 (7th Cir. 1985)); United States v. Mandel, 591 F.2d 1347, 1364 (4th Cir. 1979); United States v. Dixon, 536 F.2d 1388, 1400 (2d Cir. 1976)). Since the 1940s, prosecutors have been able to successfully convict corrupt government officials of mail fraud on the theory that the corruption deprived citizens of their right to honest services. See United States v. Margiotta, 688 F.2d 108, 121 (2d Cir. 1982) (citing the basic principle that “a public official may be prosecuted under [the mail fraud statute] when his alleged scheme to defraud has as its sole object the deprivation of intangible and abstract political
that the mail fraud statute protected property rights, it doubted that Congress intended that the statute’s protection be extended to intangible rights. 67 Although the added *Durland* language seemed disjunctive to the existing “scheme to defraud” language, the *McNally* Court felt that the 1909 amendment indicated Congress’s intent to limit the existing “scheme to defraud” language to money or property rights. 68 The Court reasoned that Congress did not intend to disrupt the common understanding of the term “to defraud,” which meant “‘wronging one in his property rights by dishonest methods or schemes,’ and ‘usually signifies the deprivation of something of value . . . .’” 69 The Court also provided insight into why some courts had been so hesitant to apply such a broad reach of the mail fraud statute. 70 In conclusion, the Court proclaimed that Congress should speak more clearly if it intended for the statute to have a broader scope. 71 Congress reacted almost immediately: hardly one year after *McNally*, Congress amended the mail fraud

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67. *McNally*, 483 U.S. at 356 (“Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property.” (emphasis added)). The Supreme Court reasoned that without any indication the resulting insurance premiums had been inflated outside of what the state would have paid in absence of the scheme, the state was not deprived of money or property, and, therefore, a conviction under the statute could not be sustained. *Id.* at 360.

68. See id. at 358 (discussing how use of the word “or” between the terms “scheme to defraud” and “for obtaining” makes the statute appear disjunctive in nature and may explain why the lower courts have read the terms independently). *But see id.* at 359 (“As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.”).

69. *Id.* at 358 (citing Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)) (emphasis added). The Court noted that *Hammerschmidt* found this definition to include protection against interference with citizens’ rights to government services, but distinguished that assertion as relevant only to *Hammerschmidt*’s consideration of 18 U.S.C. § 371, which was not at issue in *McNally*. *Id.* at 358-59, 358 n.8. The Supreme Court also considered the textual contents of the definition relating to “something of value” to conclude that Congress was not trying to expand the term “to defraud” in its codification of the *Durland* holding, but was instead limiting the term to tangible money or property. *Id.* at 358–59.

70. See id. at 359–60 (explaining that a well-established principle mandates that courts should avoid interpreting criminal statutes in broad a manner that would permit the punishment of crimes not clearly intended to be within the statute’s scope).

71. *Id.* at 360.
statute to explicitly provide for the protection of "intangible rights of honest services" under the statute. 72

B. Twenty Years of Conflicting Decisions Regarding the Impact of Indirect Misrepresentations to Victims of Mail Fraud Schemes

1. Strict Textual Interpretations Resulting in Narrowing Limitations

Within the past twenty-three years, the Second, Ninth, and Eleventh Circuits have required the government to establish that a direct misrepresentation was made to the intended victim of a scheme to defraud to sustain a conviction for mail or wire fraud. 73 These courts based their holdings on the Supreme Court’s ruling in McNally and the strict textual interpretation of the definition of the term “to defraud” used in that case. 74

The Second Circuit relied on McNally’s strict textual interpretation in United States v. Evans. 75 Samuel Evans participated in a conspiracy with Adnan Khashoggitto, an infamous Saudi arms dealer, to illegally sell U.S.-made arms worth more than $2 billion to Iran. 76 Evans was charged with fifty-five counts of federal mail fraud. 77 The government alleged that Evans devised a scheme to defraud the U.S. government of money and property by mailing false end-user documents, which reported that the arms sales had been made to a permissible entity. 78 Judge Leonard Sand of the U.S. District Court for the Southern District of New York dismissed the federal mail and wire fraud charges against Evans. 79 Agreeing with Evans’s defense, Judge Sand reasoned that “McNally requires . . . that the victim of the deception . . . lose money or property . . . [and] although [the federal government was] deceived [it] lost no money or property.” 80


73. See infra notes 76–102 and accompanying text (outlining the Second Circuit’s decision in United States v. Evans, the Ninth Circuit’s decision in United States v. Lew, and the Eleventh Circuit’s decision in United States v. Bailey, and illustrating the reliance of each circuit on a strict textual interpretation of the language used in McNally v. United States).

74. Infra notes 76–102 and accompanying text.

75. United States v. Evans, 844 F.2d 36, 39 (2d Cir. 1988).

76. Id. at 37.

77. Id. The government charged Evans with multiple counts under a theory affirmed by the Supreme Court that “[e]ach letter so taken out or put in constitutes a separate and distinct violation of the [mail fraud] act.” Durland v. United States, 161 U.S. 306, 315 (1896) (quoting In re Henry, 123 U.S. 372, 374 (1887)). For further explanation of this theory, see LOW & HOFFMAN, supra note 15, at 168 (noting that there is "no substantive limit on the number of offenses that could be spun out of a single scheme to defraud" based on violations for each separate mailing).

78. Evans, 844 F.2d at 37.

79. Id.

80. Id. at 38 (summarizing Evans’s argument that because the weapons were legitimately paid for and provided by manufacturers, and the commissions earned on the illegal sales would be
The government appealed to the Second Circuit. Defending Judge Sand’s decision, the defendant urged the Second Circuit to adopt McNally as directly representing the notion that there can be no mail or wire fraud in the absence of deprivation to the deceived party. The Second Circuit pointed out that McNally established the type of rights that are protected by the statute but did not decide whether the defrauded party’s property must be taken for the statute to apply. Despite this acknowledgment, the court went on to find that the specific language used in McNally’s rationale, such as “deprive them” and “wronging one in his property rights,” suggested that the Supreme Court may have interpreted the statute to read the way the defendant argued. However, the Second Circuit stopped short of upholding the district court’s rationale for dismissal. Instead, the court held that because the U.S. government was not deprived of any “tangible” property rights, as required by McNally, the court did not have to address “whether the person deceived also had to lose money or property.”

The Ninth Circuit boldly went one step further than the Second Circuit and extended the limitations of McNally to require a direct misrepresentation to the intended victim of a scheme to defraud to sustain a conviction for mail fraud. Bill Lew, an immigration attorney, effectuated a scheme in which he made fraudulent statements to the Department of Labor (DOL) to obtain employment certifications for his clients, thereby entitling them to qualify for permanent-resident status with the Immigration and Naturalization Service (INS). The government charged Lew with mail fraud, alleging in the indictment that Lew devised a scheme to defraud his clients of money by making false representations of his ability to help them obtain lawful

paid by foreign governments, ultimately the United States—the party deceived—was not deprived of any money or property).

81. Id.
82. Id. at 39.
83. Id. (citing Carpenter v. United States, 484 U.S. 19, 25 (1987)) (noting that McNally found the scope of the mail fraud statute limited to the protection of property rights).
84. Id.
85. Id. at 40.
86. Id. at 39–40.
87. United States v. Lew, 875 F.2d 219, 221 (9th Cir. 1989); see also infra notes 95–96 and accompanying text (stating the Ninth Circuit’s holding in Lew).
88. Lew, 875 F.2d 220 at 220. The DOL issues employment certifications to alien workers after the employer demonstrates the inability to fill the open position with a United States citizen. Lew. The employer may then file a form requesting permanent resident status for the alien through the INS. Lew’s associate, Joshua Chang, used his existing companies or established new companies as a fictitious employer to claim the employer needs that allowed him to file permanent resident requests. Lew. Chang was also indicted for mail fraud but was given leniency in return for his testimony against Lew. Lew. Id. at 221.
89. Id. at 220. Lew was charged with six counts of federal mail fraud in which he knowingly mailed fraudulent applications for alien-employment certificates to the DOL. Lew.
permanent residency. A jury in the U.S. District Court for the Northern District of California convicted Lew of six counts of mail fraud based on falsified employment-certification applications mailed to the INS in furtherance of this scheme.

On appeal, the Ninth Circuit faced the issue whether McNally required the judge to instruct the jury that it could convict only if it found "that Lew [directly] deceived his clients." Lew argued that McNally required money or property be obtained as a direct result of the fraudulent statements. The government, on the other hand, contended that under McNally, the mail fraud statute applied whenever the primary intent of the scheme was to obtain money or property, even if this money was obtained from entities to whom misrepresentations had not been made. The court considered McNally's specific textual breakdown of the term "to defraud," and concluded that the Supreme Court in McNally had expanded the intent element of the mail fraud statute to require "the intent . . . to obtain money or property from the one who is deceived." Finding that the record lacked any indication that Lew made direct misrepresentations to his clients, the Ninth Circuit reversed Lew's mail fraud convictions.

The Eleventh Circuit also weighed in on the issue of who must be defrauded in United States v. Bailey. The government charged Thomas Bailey with mail fraud for his scheme to defraud Heckler and Koch (H&K), a German firearms manufacturer, and the Internal Revenue Service (IRS) of money and property by ordering firearms in excess of law-enforcement needs with the intention of selling them to civilians at an inflated price. He was convicted on ten counts of mail fraud. On appeal to the Eleventh Circuit, Bailey argued his convictions for mail fraud could not be sustained under McNally and Lew because the evidence did not sufficiently prove that he deprived the intended victims of any money or property. The Eleventh Circuit, however,

90. Id. at 221.
91. Id. at 220.
92. Id. at 221.
93. Id.
94. Id.
95. See id. (relying on the textual structure of the Supreme Court's definition of "the words "to defraud" [which] commonly refer "to wronging one in his property rights by dishonest methods of schemes"" (emphasis added) (citations omitted)).
96. Id. (emphasis added).
97. Id. at 221, 222.
98. See United States v. Bailey, 123 F.3d 1381, 1390 (11th Cir. 1997) (discussing Thomas Bailey's appeal on the issue of misrepresentation).
99. See id. at 1386–88. Bailey possessed a federal firearms license with special authority to sell firearms to law enforcement, which provided him the ability to negotiate a contract price for weapons absent the federal excise tax. Id. at 1384–85.
100. Id. at 1390.
101. Id. at 1390 & 1390 n.12.
did find that Bailey had, in fact, make direct misrepresentations to the intended victims of his scheme, thus avoiding having to determine whether direct misrepresentation is an essential element to a mail fraud charge, but not before accepting the standard laid out in Lew requiring evidence of a direct misrepresentation as correct.102

2. Liberal Interpretations: General Intent to Prevent Fraud

Within the same time period in which the circuit courts decided Evans, Lew, and Bailey, the Third, Eighth, and Fifth Circuits concluded that neither the mail fraud statute nor McNally require a direct misrepresentation to be made to the intended victim of a scheme to defraud to sustain a conviction for mail or wire fraud.103 Each court based its reasoning on the concept of reviewing the totality of the alleged scheme for a general intent to defraud.104

The Third Circuit first considered a general intent to defraud approach in United States v. Olatunji.105 Koya Olatunji, a Nigerian citizen, devised a scheme that would enable him to obtain money in the form of student loans from the United States Department of Education (DOE).106 Olatunji married an American citizen, Sonja Woods, to qualify for a green card, thereby making him eligible for student loans as an American citizen.107 The government charged Olatunji with mail fraud, alleging that he defrauded the DOE of student loan funds by making misrepresentations to the INS on a mailed application for permanent residency.108 The District Court for the Eastern District of Pennsylvania relied on Third Circuit precedent and dismissed the charges against Olatunji because of insufficient evidence pointing to any direct misrepresentation to the DOE.109 On appeal to the Third Circuit, the

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102. See id. at 1390 n.12 (finding direct misrepresentations were made to both H&K and the IRS, the intended victims of the defendant’s scheme, thus satisfying the standard announced in Lew). Bailey defrauded H&K by misrepresenting orders to be subject to tax exemption. Id. at 1385, 1385 & n.5. Additionally, Bailey defrauded the IRS in its ability to collect the taxes on weapons sold to civilians. Id. at 1390 n.12.

103. See infra notes 106–133 and accompanying text (outlining the Third Circuit’s decision in United States v. Olatunji, the Eighth Circuit’s decision in United States v. Blumeyer, and the Fifth Circuit’s decision in United States v. McMillan, and discussing those courts’ consideration of the totality of the circumstances in finding a general intent to defraud).

104. Infra notes 106–133 and accompanying text.

105. United States v. Olatunji (Olatunji I), 872 F.2d 1161, 1167 (3d Cir. 1989).

106. Id. at 1163–64.

107. Id. at 1162.


109. Id. The alleged scheme was one to defraud the DOE of student loan money, but Olatunji was in possession of a valid green card and therefore made no direct misrepresentations to the DOE in his student loan application. Olatunji II, 872 F.2d at 1163. The district court relied on United States v. Frankel. Olatunji I, 1988 WL 117950, at *1 (indictment that charges a violation of 18 U.S.C. § 1341 on the ground[s] . . . of false or fraudulent pretenses (as opposed to only charging a scheme to defraud) must specifically set forth statements which constitute
The government argued that the district court erred in requiring a direct misrepresentation to the intended victim of a scheme to defraud.\textsuperscript{110} The government argued that Olatunji’s purpose in making misrepresentations to the INS was to obtain student loan money.\textsuperscript{111} The Third Circuit reinstated the mail fraud charges on the basis that Olatunji’s misrepresentations to the INS were directly related to his eligibility for student loans.\textsuperscript{112} The court reasoned that “deceitful statements of half-truths or the concealment of material facts” were enough to establish fraud, and that Olatunji’s concealment of his material misrepresentation to the INS made him eligible for student loans.\textsuperscript{113} The court went on to question the logic in dismissing charges of an alleged scheme under “an overly narrow reading of [the statute]” merely because the scheme was sophisticated.\textsuperscript{114}

The Eighth Circuit reached a similar conclusion in \textit{United States v. Blumeyer}.\textsuperscript{115} Insurance companies operating in Missouri are required to obtain a valid certificate from the Missouri Department of Insurance (MDI).\textsuperscript{116} With the purpose of acquiring “a Certificate of Authority to sell property and casualty insurance,” Arthur Blumeyer participated in questionable financial maneuvers to portray his company’s ability to meet MDI requirements.\textsuperscript{117} Blumeyer was indicted for mailing fraudulent financial statements to the MDI in a scheme to defraud existing and potential clients of insurance premiums he kept for personal use.\textsuperscript{118} He was convicted of mail and wire fraud in the United States District Court for the Eastern District of Missouri.\textsuperscript{119}
On appeal in the Eighth Circuit, Blumeyer complained of insufficient evidence to show a direct misrepresentation to the intended victims of the scheme to defraud. However, the Eighth Circuit affirmed Blumeyer's mail and wire fraud convictions on the basis of circumstantial evidence in the record that supported a showing that at least one broker may have directly relied on financial statements filed with the MDI. In recognizing no clear precedent regarding "whether a defendant may be convicted of mail fraud or wire fraud for making false representations only to persons other than the intended victims of the scheme," the court abstained from deciding the issue, but not before contributing its opinion. The court found that analyzing a scheme in its entirety was a more logical approach in delineating a defendant's intended purpose to defraud. Following this approach, the Eighth Circuit viewed the defendant's misrepresentation to the MDI as clear evidence of a broader scheme to defraud others.

*United States v. McMillan* presented the Fifth Circuit with facts similar to those in *Blumeyer*. In an attempt to obtain a Louisiana state license to operate a health maintenance organization (HMO), Robert McMillan participated in questionable financial maneuvers to prove his company's ability to meet Louisiana's net-worth requirements. In addition, he kept the collected premiums as management fees instead of paying for the rendered medical services. McMillan was indicted for mail and wire fraud for indirectly defrauding HMO subscribers and providers by falsely reporting financial claims to the Louisiana Department of Insurance, and he was

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120. See *id.* at 767 (discussing that the intended victims of the scheme were insurance brokers and policyholders with no direct access to Blumeyer's financial claims).
121. *Id.* at 768 (noting that the financial records filed with the MDI were public documents that could be obtained by the general public at any time, and the facts indicated that the records were released to at least one broker).
122. See *id.* at 767–68 (laying out the disagreement between the circuits on the issue of misrepresentation and suggesting that analyzing the scheme as a whole was the more logical approach over requiring direct misrepresentation).
123. *See id.*
124. *See id.* ("We believe that the Seventh Circuit has the better argument: a defendant who makes false representations to a regulatory agency in order to forestall regulatory action that threatens to impede the defendant's scheme to obtain money or property from others is guilty of conducting a scheme [to defraud] . . . ." (internal quotation marks omitted)).
125. Compare *United States v. McMillan*, 600 F.3d 434, 441–42, 447 (5th Cir. 2010) (explaining McMillan's participation in an extremely similar scheme in which McMillan made misrepresentations to an insurance agency in order to defraud current and potential customers), with *Olatunji II*, 872 F.2d at 1162–63, at 762–63 (describing Blumeyer's scheme and third-party reliance on misrepresentations made to a regulatory agency).
127. *Id.* (explaining that McMillan collected such premiums as if the company had met the requisite net-worth requirements).
128. *Id.* at 440–41.
convicted in the United States District Court for the Eastern District of Louisiana.\textsuperscript{129}

On appeal to the Fifth Circuit, the defendants argued that the evidence was insufficient to support a showing of direct misrepresentation to the defrauded parties.\textsuperscript{130} They claimed that their argument was supported by \textit{Cleveland v. United States}, a case in which the Supreme Court concluded that, “for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim.”\textsuperscript{131} They also relied on \textit{United States v. Ratcliff}, a case in which the Fifth Circuit found “no basis to find a scheme to defraud” if the intended victim was not deprived of any money or property.\textsuperscript{132} The Fifth Circuit acknowledged the precedent, but distinguished the cases because they were concerned with property rights and should not be read so literally as to be applied to the question of whose property must be taken.\textsuperscript{133} The court concluded that requiring direct misrepresentation to the intended victim of a scheme to defraud under \textit{Ratcliff} would be “contrary to [that court’s] recognition that misrepresentations need not be made directly to the victim.”\textsuperscript{134} The Fifth Circuit found the indirect misrepresentations sufficient to sustain McMillan’s conviction.\textsuperscript{135} The court’s conclusion emphasized that the sufficiency of a misrepresentation to sustain a conviction for mail fraud should be determined by whether the misrepresentation affected the victim’s property rights.\textsuperscript{136} In reviewing the pertinent scheme as a whole, the court found clear evidence that “the victims’ property rights were affected by the

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  \item \textsuperscript{129} See \textit{id.}.
  \item \textsuperscript{130} \textit{id.} at 447 (discussing McMillan’s argument that because his misrepresentations were not made to the victims of the scheme, he could not be convicted of mail and wire fraud).
  \item \textsuperscript{131} \textit{id.} at 448 (quoting \textit{Cleveland v. United States}, 531 U.S. 12, 15 (2000)). In \textit{Cleveland}, the Supreme Court dismissed charges of mail fraud against Cleveland and others, who allegedly misrepresented facts to the Louisiana state police on an application for a video-poker license, because deprivation of something with questionable future value constituted insufficient money or property under the mail fraud statute. \textit{Cleveland}, 531 U.S. at 15.
  \item \textsuperscript{132} \textit{McMillan}, 600 F.3d at 448 (quoting United States v. Ratcliff, 488 F.3d 639, 645 (2007)). In \textit{Ratcliff}, the Livingston Parish President was charged with mail fraud for improperly concealing campaign contributions from Louisiana’s Board of Ethics in an attempt to secure his re-election. \textit{Ratcliff}, 488 F.3d at 691–92. However, the Fifth Circuit overruled the indictment and found that the President misrepresented facts to the Board of Ethics and the voters, but that these victims were not deprived of any money or property. \textit{id.} at 695.
  \item \textsuperscript{133} \textit{McMillan}, 600 F.3d at 448–49. The question in \textit{Cleveland} was whether a business license could be considered “property” under the mail fraud statute; the Supreme Court found the license to be an intangible regulatory interest, but not “property” protected under the mail fraud statute. \textit{id.} at 448. In \textit{Ratcliff}, the question of whether the Parish was directly deceived was considered only to determine whether the Parish lost money or property when the salary and benefits would have been paid regardless of the misrepresentations; the court found that it was not. \textit{id.} at 448–49.
  \item \textsuperscript{134} \textit{id.} at 449.
  \item \textsuperscript{135} \textit{id.} at 449–50.
  \item \textsuperscript{136} \textit{id.} at 449 (“The issue is whether the victims’ property rights were affected by the misrepresentations. We think they were.”).
\end{itemize}
misrepresentations” made by the defendants, and affirmed the lower court’s convictions.137

II. WHO IS RIGHT? ONE LAST CHANCE FOR BRIAN NEWMARK

Brian Newmark owned and operated an investment-brokerage company.138 Barry Bohmueller was an attorney who maintained a wills, trusts, and estates law practice.139 Newmark conducted marketing campaigns advertising Bohmueller’s services, and then Newmark’s business acted as a notary and courier in the execution of the prepared estate documents.140 Arthur and Thomas Walker were retired brothers in their mid-eighties who had amassed great wealth as successful entrepreneurs.141 After successfully marketing Bohmueller’s services to the Walker brothers in person at their home, a Newmark agent hand delivered the paperwork and acted as the notary during the execution of the various estate documents the Walkers had drafted.142 Upon a second visit to the Walkers’ home, Newmark’s agent successfully sold the Walkers an alternate investment tool in the form of charitable-gift annuities.143 After Newmark’s verbal efforts to initiate the transfer of the Walkers’ funds from a brokerage account at Morgan Stanley failed, he wrote a demand letter for the transfer of funds, which he faxed to a Morgan Stanley compliance analyst using a Bohmueller Law Offices fax coversheet.144 Upon receipt of the fax, Morgan Stanley transferred the funds to the Newmark annuity.145 Although the annuity performed as promised, the brothers brought a civil suit against Newmark, arguing that the investment was inadequate; they

137. Id. at 449–50.
139. Id.
140. Id. Newmark then targeted Bohmueller’s clients and tried to sell them insurance and financial products. Id.
141. Id. at 7–8. The brothers’ assets were valued in excess of $3.5 million, including a securities account managed by Morgan Stanley. United States v. Newmark, 374 Fed. App’x 279, 280–81 (3d Cir. 2010).
142. Petition for Writ of Certiorari, supra note 26, at 8. The Walkers and their neighbors who witnessed the execution of the estate documents all testified that they believed the Newmark agent to be an attorney. Id. The Newmark agent even provided his contact information on the back of a Bohmueller Law Office business card. Id. at 9 n.5.
143. Id. at 8. Morgan Stanley previously managed the Walker’s securities, and either because it recognized the inadequacy of the investment or because it was hesitant to lose the business, Morgan Stanley dragged its feet for more than a month in the transfer of securities to the new account while it tried to convince the Walker brothers of their mistake. Id. at 9–10.
144. Id. at 10–11. The content of the fax suggested that Newmark represented the brothers in a legal capacity. Id. He did not go as far as identifying himself as an attorney, but he specifically referred to the Walkers as his “clients” and attached a letter, signed by the Walkers, referencing “our attorney’s office.” Id. Newmark also changed the phone and fax number on the Bohmueller’s letterhead to that of his own separate office. Id. at 10.
145. Id. at 11.
eventually settled for a refund of the purchase price less the annuity payments already received.  

Federal prosecutors charged Newmark with wire fraud, alleging that his “otherwise” legal interstate fax transmission to Morgan Stanley demanding the transfer of funds was done in furtherance of a scheme to defraud Arthur and Thomas Walker of their securities. The alleged scheme was that Newmark intended to gain the Walkers’ trust by misrepresenting himself as a lawyer to defraud them of $230,000 in commission. A jury in the United States District Court for the Eastern District of Pennsylvania convicted Newmark on three counts of the indictment, after which the court granted a post-trial motion for acquittal on two counts, leaving conviction for one count of wire fraud.

On appeal in the Third Circuit, Newmark argued that a showing of misrepresentation made to Morgan Stanley was insufficient to establish that he devised or participated in a scheme to defraud the Walkers. Newmark relied on precedent from other circuits requiring direct misrepresentations be made to the intended victim of a scheme to sustain a wire fraud conviction. Relying on its own precedent, however, the Third Circuit affirmed the conviction and held that indirect misrepresentations were circumstantial evidence sufficient to prove the existence of a scheme to defraud.

146. Id. at 11–12. This was not the first time the Walkers questioned the adequacy of this financial product; upon discovering that the Walkers were attempting to transfer their securities account, Morgan Stanley sent an investment adviser to their home whereupon the Walkers cancelled their initial purchase. Id. at 9–10. However, the next day Newmark’s agent again convinced the brothers to proceed with the transaction. Id. at 10. The investment performed as promised and delivered each brother a monthly payment of about $13,000. Id. at 11. However, within eighteen months of the purchase, the brothers changed their minds again and brought suit against Newmark. Id.

147. Id. at 4–5, 10.

148. Id. at 6, 11 (“From [the sale of this annuity, Newmark] earned a commission of $230,408, out of which he paid [his agent] a commission of $69,740.”).

149. Id. at 5.

150. United States v. Newmark, 374 F. App’x 279, 282 & n.1 (3d Cir. 2010). The “victim” of his misrepresentation was Morgan Stanley, not Arthur and Thomas Walker, and because the alleged scheme was one to defraud the Walkers, the deceived party was not deprived of any money or property. Id. Additionally, in his petition for a writ of certiorari, Newmark claimed that this fax could not have been sent in furtherance of a scheme to gain the Walkers’ trust because the fax was made absent the Walkers’ knowledge and after they already agreed to the transaction. Petition for Writ of Certiorari, supra note 26, at 4.

151. Petition for Writ of Certiorari, supra note 26, at 14. In reversing a mail fraud conviction in United States v. Lew, the Ninth Circuit required that money or property be received from the “one who is deceived.” See supra notes 94–96 and accompanying text. In United States v. Bailey, the Eleventh Circuit accepted the Ninth Circuit’s decision in Lew as correct. See supra note 98 and accompanying text. In United States v. Evans, the Second Circuit discussed the possibility that Congress may have intended for the mail fraud statute to require direct misrepresentation to the intended victim of a scheme to defraud. See supra note 80 and accompanying text.

152. Newmark, 374 F. App’x at 282 (citing Olatunji II, 872 F.2d 1161, 1168). In Olatunji II, the Third Circuit questioned the logic of dismissing charges of an alleged scheme under “an
Newmark argued to the Supreme Court that the Third Circuit erred in upholding a conviction for mail or wire fraud without direct misrepresentation to the intended victim of the scheme to defraud.\textsuperscript{153} Newmark argued that the rule established in the Second and Ninth Circuits requiring direct misrepresentation to the deceived party was “more logical and better tied to the statutory text,” and more in line with the Supreme Court’s prior decision in McNally.\textsuperscript{154}

III. SOLIDIFYING THE PROSECUTORIAL POWER TO PUNISH SOPHISTICATED FRAUDS

In his dissenting opinion in McNally, Justice John Paul Stevens stated: “In considering the scope of the mail fraud statute it is essential to remember Congress’ [sic] purpose in enacting it. Congress sought to protect the integrity of the United States mails by not allowing them to be used as ‘instruments of crime.’”\textsuperscript{155} Although Newmark correctly identified the need for further clarification in the lower courts regarding the extent of misrepresentations required to sustain a conviction for mail or wire fraud, he incorrectly identified the Second, Ninth, and Eleventh Circuits’ standards as logical because those courts failed to consider the statute’s broad reaching purpose of preventing the use of the mails for fraudulent activity.\textsuperscript{156}

A. The Proof Is in the Pudding: Establishing Congress’s Intent Absent Any Direct Legislative History

Unfortunately, there is very little legislative history discussing the congressional purpose or intended reach of the mail fraud statute.\textsuperscript{157} Absent documented legislative history, those interpreting the statute can rely only on

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  \item overly narrow reading of [the statute] merely because the scheme was sophisticated. \textit{See Olatunji II}, 872 F.2d at 1168.
  \item See Petition for Writ of Certiorari, supra note 26, at 18. There is an inherent unfairness in the disagreement between the jurisdictions as to what constitutes mail fraud and the effect this has on defendants who must defend a tougher standard in one jurisdiction over another. \textit{See Behrens, supra note 11}, at 525.
  \item See Petition for Writ of Certiorari, \textit{supra} note 26, at 14–16 (indicating the Second, Ninth, and Eleventh Circuits’ reliance on the Supreme Court’s decision in McNally).
  \item \textit{See supra} Part 1.B.1 (discussing the Second and Ninth Circuits’ strict textual interpretation of the definition of the term “to defraud” used in McNally to require a direct misrepresentation be made to the intended victim of a scheme to defraud).
  \item See Rakoff, \textit{supra} note 9, at 779 (“[The mail fraud statute] generated no congressional debate or other legislative history explaining its origins and purpose.”); \textit{see also} Beale, \textit{supra} note 13 (“[The mail fraud statute] evoked almost no discussion in Congress, so there is little legislative history to provide guidance to the courts.”).
\end{itemize}
three sources to try to delineate congressional intent: (1) the historical context in which the statute was written; (2) the language of the statute itself; and (3) Congress’s reaction to judicial treatment of the statute.

1. Historical Context

The years immediately following the Civil War comprised a period of significant economic growth for the country that was met with a convergence of interstate frauds and swindles that sparked a public outcry. Many statutes, including “the Sherman Act [of 1890], the civil rights legislation [of 1866], and the mail fraud statute [of 1872] 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.” The fast-paced ingenuity in devising new fraud schemes offers one explanation for the ambiguity in the language of the mail fraud statute and indicates that Congress wanted to give prosecutors flexibility to keep pace with inventive swindlers.

2. Language of the Statute

At the time the mail fraud statute was drafted, however, it was unclear how much constitutional power Congress had to extend its authority over criminal provisions traditionally left to the states. Congress may have relied on specific language linking use of the mails for illicit purposes to the offense in the original mail fraud statute to ensure that the statute was constitutional. It

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158. BIEGELMAN, supra note 32, at 1.
159. McNally, 483 U.S. at 372–73 (Stevens, J., dissenting).
160. See Rakoff, supra note 9, at 771 (stating that the flexibility in the mail fraud statute is still important 138 years after the Civil War).
161. See Rakoff, supra note 9, at 781 (stating that although some doubted even the states’ power to regulate what was placed in the mails, it was widely accepted that Congress lacked the power to regulate what was in the mails). Additionally, “[t]he more than two percent of the criminal prosecutions brought in the United States are in the federal system.” PODGOR & ISRAEL, supra note 18, at 6. It is now well accepted that some mail fraud that is perpetrated locally may still be prosecuted federally because of Congress’s postal powers. See id. at 4–7 (discussing Congress’s statutory basis for prosecuting criminal conduct that violates both federal and state codes). Additionally, “the several courts that have been called upon to decide the question are uniformly of the opinion that the fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute.” United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979) (citing United States v. McNeive, 536 F.2d 1245, 1247 & n.2 (8th Cir. 1976); United States v. Keane, 522 F.2d 534, 544 (7th Cir. 1975); United States v. States, 488 F.2d 761, 767 (8th Cir. 1973); United States v. Edwards, 458 F.2d 875, 880 (5th Cir. 1972)).
162. The statute linked the mail fraud offense to the mails in four places: (1) the scheme to defraud “must be . . . effected by opening mail communication” with another person; (2) “a letter or packet must be mailed”; (3) the misdemeanor offense is based on use of the mails; and (4) the punishment is proportioned to the extent the mails are used in furtherance of the scheme. See LOW & HOFFMAN, supra note 15, at 163.
appears that Congress intended the "mail-emphasizing" language in the original mail fraud statute to be nothing more than a jurisdictional hook linking congressional power to regulate the postal system with the statute's power to prevent frauds. However, some courts relied on a strict textual interpretation of the statute, which "required that the mail be central to the perpetration of the fraud and limited the kinds of schemes to which the statute applied." The 1889 amendment elaborated on the types of schemes and places of the mailings covered under the statute. Some courts viewed the congressional action as vindication for limiting the reach of the statute, interpreting the amendment to be indicative of Congress's intent that the statute not reach beyond the types of schemes specified in the language. However, the amendment embraced the broad holding of United States v. Jones, in which the court found a counterfeiting scheme within the scope of the statute notwithstanding the possibility of successful application of the scheme without use of the mails.

The Supreme Court finally entered the fray with its 1896 decision in Durland v. United States and found "[t]he [mail fraud] statute [to be] broader than it is claimed." The Court looked "beyond the letter of the statute" to find that it "include[d] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." The Court went on the say that "[i]t was with the purpose of protecting the public against all such intentional efforts to despoil . . . that this statute was passed; and it would strip it of value to confine it to such cases as disclose on actual misrepresentation as to some existing fact." Congress then decided to amend the mail fraud statute more dramatically based on the Court's strict textual interpretations, which were thwarting the effectiveness of the statute. The 1909 amendment eliminated a majority of the "mail-emphasizing" language and specifically codified the broad language used in the Durland decision.

163. See Rakoff, supra note 9, at 781 ("The mere fact that Congress was forbidden to employ such means as opening sealed letters did not mean that Congress lacked the power to prosecute those who were discovered, through legitimate means of detection, to have used the federal mails for illicit purposes."); see also U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . . to establish Post Offices and Post Roads . . .").
164. LOW & HOFFMAN, supra note 15, at 168; see also supra note 37.
165. See supra note 37 and accompanying text.
166. Supra note 38 and accompanying text.
167. See supra note 36 and accompanying text.
169. Id.
170. Id. at 314.
171. LOW & HOFFMAN, supra note 15, at 172–73.
172. See supra notes 42–47 and accompanying text (discussing the Durland holding and the codification of the specific language used in that decision).
The history tracing the language of the statute indicates that Congress intended a broad application in its initial codification of the mail fraud statute. In addition to the evolution of the statutes' language, Congress's modern intent can be shown through its frequent amendments to emphasize a broad interpretation in response to each judicial attempt to limit the language's application.

3. Congressional Action and Reaction

In McNally, Justice Stevens, writing in dissent, reasoned that "[t]he general language in the mail fraud statute has repeatedly been construed to cover novel species of fraud, and Congress has repeatedly amended the statute in ways that support a broad interpretation of its basic thrust." This reaction began only seventeen years after the enactment of the original mail fraud statute; seemingly in response to the Supreme Court's silence regarding the dispute between the lower courts surrounding the type of frauds to which the mail fraud statute should apply, Congress expanded the statute to include a list of specific schemes in 1889. However, the narrowing nature of an enumerated list of schemes fueled the debate between the courts.

The broad-sweeping language used by the Supreme Court in Durland should have been enough to settle the disagreements between the lower courts regarding the scope of the statute. However, some courts read Durland as applicable only to the types of fraud to which the statute should be applied. If Congress intended the broad Durland language to apply only to the "scheme to defraud" language in the statute, it need not have acted because the Durland...
decision was clear on that point. Thirteen years after *Durland* was handed down, however, Congress acted again by amending the mail fraud statute in a way that applied the broad-reaching language to the entire scope of the statute.

Almost one hundred years after *Durland*, the Supreme Court again tried to limit the statute's reach to tangible property rights in *McNally*. The *McNally* Court expressed concern with the ambiguity in the language of the statute because it provided prosecutors with the power to decide when and to whom the statute applied. However, Congress quickly enacted 18 U.S.C. § 1346 to overrule *McNally*.

Congress's continual acquiescence to liberal interpretation and application of the statute and its action in amending the statute to further generalize its language in response to narrow interpretations of the statute make clear that Congress intends the mail and wire fraud statutes to be applied liberally in both reach and scope.

**B. Interpreting McNally Too Literally: Defining the Term "To Defraud"**

By requiring a showing of a direct misrepresentation to the intended victim of a scheme to defraud, the Second and Ninth Circuits relied on the specific definition of the term "defraud" used by the Supreme Court in *McNally*. In *Lew*, the Ninth Circuit dismissed the government's attempts to keep *McNally* within a box concerning merely the substance of the property rights at issue and, instead, read the *McNally* language defining "fraud" to add a layer of

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180. *See supra* note 44 (demonstrating that although *Durland* employed broad language that encompassed the broad constructionist views, its more narrow holding did not directly address the entire scope of the mail fraud statute).

181. *See supra* notes 47–48 and accompanying text.

182. *See supra* note 67 and accompanying text (discussing the Supreme Court's assessment that it had not been Congress's intent to extend the reach of the mail fraud statute to intangible property rights).


184. *See LOW & HOFFMAN, supra* note 15, at 198 ("[W]ith one stroke of the congressional pen, *McNally* was overruled.").

185. *See supra* notes 78–80 and accompanying text (discussing the steps the Second Circuit took in breaking down the textual definition of "defraud" used in *McNally*); *see also supra* notes 89–91 and accompanying text (discussing the Ninth Circuit's understanding and application of *McNally* regarding the intent requirement under the mail fraud statute). The Eleventh Circuit never analyzed the issue of whether a showing of direct misrepresentation must be made to sustain a conviction for mail fraud but accepted the standard laid out by the Ninth Circuit as correct. *See supra* notes 99–100 and accompanying text. Although *McNally* did define the term "to defraud," it did so only to prove Congress's intent that the term be limited to money or property. *See McNally*, 483 U.S. at 357–59 (providing the definition of the term "to defraud," offered by the Supreme Court in *Hammerschmidt v. United States*, as explicit evidence that the mail fraud statute be applied to only money and property rights).
evidentiary proof required to establish a mail fraud violation. But nowhere in McNally did the Supreme Court characterize its analysis as requiring an additional element. To the contrary, the Supreme Court recognized the statute's intent to protect those against frauds in its broadest sense when money or property is involved. In Evans, the Second Circuit also relied on McNally's textual analysis of the term "to defraud" as support for its discussion regarding the misrepresentation issue. The Evans court also failed to consider the totality of McNally's analysis because it narrowly focused on the specific language of the "fraud" definition.

Holdings that rely on such a specific definition of the term "defraud" incorrectly limit the mail and wire fraud statutes' broader intent. It is counterintuitive to rely on Supreme Court dictum, which was overruled by congressional action because it was too narrow, and then narrowly construe that same term to require proof of a direct misrepresentation to the intended victim of a scheme.

186. See supra notes 88–91 and accompanying text (discussing the opposing arguments and the court's decision in Lew).

187. See infra note 188 and accompanying text.

188. McNally, 483 U.S. at 356 ("[T]he phrase ["scheme to defraud"] is to be interpreted broadly insofar as property rights are concerned . . ."). The Ninth Circuit missed the general gist of the Supreme Court's broader purpose in defining the term "to defraud" because it narrowly focused on the specific language of the definition. See supra note 96 and accompanying text (discussing how the Ninth Circuit found McNally to clearly require that money or property be received from "the one who is deceived" by relying on the specific words "wronging one in his property rights" (emphasis added)). But McNally relied on this definition of the term "to defraud" as an indication that the term was intended to be limited to "property rights." McNally, 483 U.S. at 358. As later discussed by the same Supreme Court in United States v. Carpenter, McNally did not distinguish whose property rights were to be affected. See Carpenter v. United States, 484 U.S. 19, 25 (1987) (describing the holding in McNally as “limit[ing the mail fraud statute] in scope to the protection of property rights”).

189. See supra notes 78–80 and accompanying text (noting that Evans acknowledged that McNally's discussion concerning the definition of "defraud" was dicta, but nevertheless relied on this discussion in finding that Congress may have intended the statute to be read to require deprivation to the deceived party).

190. See United States v. Evans, 844 F.2d 36, 40 (2d Cir. 1988). As the Second Circuit noted,

the case before us today does not require us to decide this general question. As already quoted, the Supreme Court has made clear that “any benefit which the Government derives from the [wire or mail fraud] statute[s] must be limited to the Government's interest as property-holder.” This is enough for this case.

Id. (alteration in original) (quoting McNally, 483 U.S. at 359 n.8).

191. See McNally, 483 U.S. at 366 (Stevens, J., dissenting) ("Given Congress' [sic] 'broad purpose,' I 'find it difficult to believe, absent some indication in the statute itself or the legislative history, that Congress would have undercut sharply that purpose by hobbling federal prosecutors in their effort to combat' use of the mails for fraudulent schemes." (citation omitted)).
C. "Right Dealing in Business Society"

The mail fraud statute "puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play, and right dealing in the general and business life of members of society.'"\(^{192}\) According to this standard, and in consideration of the totality of the circumstances involved, a defendant who obtains his victims' trust through fraudulent associations to appear as though he has their best interests in mind should not be acquitted on the basis of the identity of the person to whom he made his misrepresentations.\(^{193}\) The mail and wire fraud statutes do not require a misrepresentation to be made at all; they require only the existence of a scheme and a mailing or the use of the wires sufficiently related to the scheme.\(^{194}\)

The basis of the fraud perpetrated against Arthur and Thomas Walker was the concealment of a material fact that may have been pertinent to their decision to trust Newmark's agent and subsequently invest with his brokerage firm.\(^{195}\) Newmark and his agent disregarded the adequacy of the recommended investment in an attempt to defraud the Walkers of the large commissions that accompanied a $3.5 million dollar account.\(^{196}\) The fax sent to Morgan Stanley, fraudulent in its own right because it contained a statement that blatantly disregarded the truth, was the vehicle used to carry out the scheme, and therefore, was sufficiently related to the scheme to establish the required nexus between the use of the wires and the scheme.

\(^{192}\) Blackly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (quoting Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)).

\(^{193}\) See Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941) (stating that "[a] scheme to get money unfairly by obtaining and then betraying the confidence of another . . . [is] a scheme to defraud though no lies were told," and it is within the prohibition of the mail fraud statute if the mails are used in connection therewith), overruled by United States v. Cruz, 478 F.2d 408, 412 n.8 (5th Cir. 1973); see also supra notes 137–48 and accompanying text (discussing Newmark's scheme to defraud Arthur and Thomas Walker by betraying their confidence).

\(^{194}\) See supra note 17 and accompanying text (setting out the elements needed to prove mail or wire fraud). The existence of a misrepresentation is circumstantial evidence sufficient to prove the existence of a scheme to defraud. See United States v. Newmark, 374 F. App'x 279, 282 (3d Cir. 2010) (finding that misrepresentations made to the Morgan Stanley compliance officer were circumstantial evidence as to whether Newmark devised or participated in a scheme to defraud but were sufficient for a jury to rely on in finding him guilty). Therefore, a scheme to defraud can exist even absent a misrepresentation, let alone a direct misrepresentation. See United States v. Halbert, 640 F.2d 1000, 1007 (9th Cir. 1981) ("A defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved.").

\(^{195}\) See supra note 142 and accompanying text (discussing how Newmark gained the Walkers' confidence by holding himself out to be an attorney).

\(^{196}\) See supra note 146 and accompanying text.
IV. CONCLUSION

A defendant’s activities should be considered a scheme to defraud even if no misrepresentations have been made, let alone a specific misrepresentation to the party being defrauded. Interpreting the statute to require a direct misrepresentation to the alleged victim to prove a “scheme to defraud” limits the statute’s reach. Although there is some danger in construing such a liberal interpretation of the broad language in the mail and wire fraud statutes, the Supreme Court should have confidence in the abilities of judges and juries to differentiate between fraudulent intent and mere distasteful tactics. When fraudulent intent is clearly shown, behavior should not be excused because a scheme involves only indirect misrepresentation. As relevant schemes have evolved and expanded throughout history, so, too, have the mail and wire fraud statutes.

With the evolution of modern technology comes more sophisticated schemes involving greater complexity in scope and execution. Limiting the mail and wire fraud statutes to cover only the simplest and most direct misrepresentations is contrary to the manifest purpose of the statutes.

197. See supra note 13 and accompanying text (discussing the constitutional concept of fair notice in criminal prosecutions).

198. See Rakoff, supra note 9, at 772. As one commentator has observed, the mail fraud statute . . . has been characterized as the “first line of defense” against virtually every new area of fraud to develop in the United States . . . . . . . . [B]oth Congress and the Supreme Court have repeatedly placed their stamps of approval on expansive use of the mail fraud statute. Indeed, each of the . . . legislative revisions of the statute has served to enlarge its coverage.

Id.